Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 261 of 2013

Dated : 22nd April, 2015

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Maharashtra State Electricity Distribution Co. Ltd.
Plot No. G-9, Prakashgad, Bandra (E),
Prof. Anant Kanekar Marg,
Mumbai – 400 051 **... Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
   Through its Secretary,
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath,
   New Delhi – 110 001 **... Respondent**

2. **Ratnagiri Gas and Power Pvt. Ltd.**
   2nd Floor, Block No.2
   IGL Complex, Plot No. 2B,
   Sector 126, Expressway,
   NOIDA – 210 3014, U.P. **... Respondent/Petitioner**

3. **Electricity Department**
   Through its Secretary
   Govt. of Goa, Panaji – 403 001

4. **Electricity Department**
   Through its Secretary

Administration of Daman & Diu,
Daman – 396 210

5. Electricity Department
Through its Secretary,
Administration of Dadar & Nagar
Haveli – 396 230 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Samir Malik,
Ms. Puja Priyadarshini,
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Mr. Atul Nanda, Sr. Adv.
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Ms. Poorva Sehgal
Ms. Ranjitha Ramachandran
Ms. Swagatika Sahoo
Mr. Avinash Menon
Mr. Anand K. Ganesan
Ms. Anushree Bardhan
Ms. Mandakini Ghosh
Mr. Deshmukh

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

The appellant, Maharashtra State Electricity Distribution Co. Ltd., (hereinafter referred to as MSEDCL), a distribution licensee has filed this appeal under section 111 of the Electricity Act, 2003 against the order dated 30.07.2013 (hereinafter referred to as the Impugned Order) passed by the Central Electricity Regulatory Commission (hereinafter referred to as 'Central Commission') in Petition No. 166/MP/2012 titled as Ratnagiri Gas and Power Pvt. Ltd. (hereinafter referred as 'RGPPL') a generating company, whereby the petition filed by the generating company, the respondent No.2 herein, under section 79 of the Electricity Act, 2003 has been allowed by the Central Commission.

2. The appellant is a distribution licensee. The respondent No.1 is Central Electricity Regulatory Commission which is empowered to discharge the functions under the Electricity Act, 2003. The respondent No.2, RGPPL is a power generating company and respondent Nos. 3 to 5 are the Secretaries to Electricity Department of Goa, Daman & Due and Dadar and Nagar Haveli.

3. The RGPPL (the petitioner) filed the Petition being Petition No.166/MP/2012 under section 79 of the Electricity Act, 2003 with the following prayers:

"*a) The Hon'ble Commission may be pleased to resolve the issues arising out of the non-availability of domestic gas of the required quantum and the reservations of beneficiaries to allow RGPPL to enter in to contracts for available alternate fuel i.e. RLNG and consequences thereof.*

b) Revise the "Normative Annual Plant Availability Factor" (NAPAF) for RGPPL for full fixed cost recovery at the actually achieved NAPAF level till fuel supply is restored to the allocated/ contracted quantity with consequential orders of the payment of fixed charges.

C) Direct beneficiaries to pay the fixed charges due to RGPPL;

d) Pass any other order in this regard as the Hon'ble Commission may find appropriate in the circumstances pleaded above."

4. The learned Central Commission, after hearing the parties, passed the impugned order dealing with the obligation of the appellant to pay the capacity charges and energy charges as per terms and conditions of the Power Purchase Agreement (PPA) dated 10.04.2007. By the impugned order, the appellant is required to pay the capacity charges as per the provisions of Article 5.2 read with Article 4.3 of the PPA if the appellant does

not schedule power based on declaration of availability of the power of Recycled Liquid Natural Gas (R-LNG). The learned Commission has also held that the provisions of Article 5.9 of the PPA, dealing with Gas Supply Agreement (GSA) and Gas Transportation Agreement (GTA) and the requirement of taking consent / approval of the appellant to the contracting terms and price related only to the energy charges specified in Article 5.3 of the PPA and it has no implication to the capacity charges payable as per Article 5.2 read with Article 4.3 of the PPA. The learned Central Commission, vide impugned order, has clearly held that the appellant is liable to pay capacity charges even when the appellant does not give consent to the GSA or GTA. The learned Central Commission has not accepted the contention of the appellant that the appellant cannot be made liable to pay the capacity charges because the appellant has not given consent or approval to the said GSA/GTA. The learned Central Commission has rejected this contention of the appellant that the implication of the impugned order would result in saddling the consumers of Maharashtra with an annual additional liability of Rs.7772 Crores.

5. The main grievances of the appellant against the impugned order are as under:

5.1) that the learned Central Commission, in gross derogation of the contractual and legal rights of the appellant, in the impugned order has erroneously started on the premise that there is no embargo on power generating company (RGPPL) under clause 4.3 of the PPA from making declared capacity declaration based on R-LNG.

5.2) that the learned Central Commission has failed to appreciate that the right of the appellant to approve the contracting terms and prices before entering into GSA/GTA would have application over both fixed (capacity charges) charges and variable energy charges because when power generating company chooses to adopt R-LNG as a source of fuel which impacts the quantum of declared capacity, then this automatically affects plant availability and becomes a matter of commercial implications within the meaning of clause 5.9 of the PPA thereby requiring prior approval and consent of the appellant, distribution licensee. Moreover, a plain conjoint reading of the definition of declared capacity along with clause 4.3 and 5.9 of the PPA reveals that the power generating company should obtain approval of the distribution licensee on contracting terms and prices before entering into any GSA/GTA with Gas Authority of India Ltd. (GAIL).

5.3) that the learned Central Commission, by implication has erroneously linked clause 5.9 of the PPA only to the second part of clause 4.3 dealing with secondary fuel i.e. liquid fuels and has erroneously interpreted the contract in a fashion which authorises RGPPL to declare capacity based on R-LNG without any prior approval / consent from the appellant / distribution licensee. Further, in the impugned order the learned Central Commission has also taken away the application of clause 21(1)(a), proviso of PPA which provides for a reduced capacity charge calculation where the plant availability factor achieved in the year is less than 70%.

5.4) that the learned Central Commission, vide impugned order, has erroneously re-written the terms and contract thereby disrupting the entire commercial understanding between the parties. The Central Commission, by allowing RGPPL to declare capacity based on R-LNG without prior approval of the appellant, has failed to consider that this would result in a significant tariff shock to all the consumers of the appellant and that the distribution licensee would be failing in its duty to provide the consumers with electricity at a reasonable rate/tariff as fixed by the Central Commission in its tariff order.

6. The relevant facts giving rise to this appeal are as under :

6.1) that the respondent No.2, a generating company was established as a Special Purpose Vehicle (SPV) to take over the generating station and related assets which were owned by the Dabol Power Company Ltd. (hereinafter called DPC), a private sector company promoted and established by erstwhile Enron Group.

6.2) that the then Maharashtra State Electricity Board (in short MSEB), now succeeded by the appellant, was the beneficiary of the power generated from the DPC as per the PPA and related agreements entered into by DPC and MSEB.

6.3) that DPC and its promoter Enron Group got into serious financial and other difficulties and they could not continue to operate the DPC. DPC and MSEB went into litigation which involved invocation of guarantees and counter guarantees given by Government of Maharashtra and Government of India for the project.

6.4) that operation of the DPC was eventually closed down in May 2001. Upon its closure, the DPC and all its assets were placed under the control of a Receiver appointed by Hon'ble Bombay High Court in Suit No. 875 of 2002. Consequently, the DPC was not in operation from May 2001 for almost five years

during which time the assets remained in the possession and control of the Court Receiver.

6.5) that the Government of India and the Government of Maharashtra tried to revive the Dabhol Power Project (DPC), considering the huge investments made in the project, the possibility of generating 2150 MW power from the project in the context of shortage of electricity in India as a whole and more particularly in the State of Maharashtra and also considering the larger public interest.

6.6) that finally it was decided that a SPV be formed for revival of DPC with the share holding of NTPC Ltd., GAIL (India) Ltd., financial institutions such as IDBI Ltd., ICICI Bank etc, and also the State Electricity utility in the State of Maharashtra (MSEB a holding company Ltd.). Thereafter, these constituents had extensive deliberations and discussions on the matters of revival of the said project. The main aspects decided in the said meetings were capacity, O&M costs, appropriate project cost at which the DPC with associated facilities is to be vested in a new company to enable revival. After great deliberations between the constituent bodies, a comprehensive scheme was worked out taking into account the peculiar and special features of the project and in larger public interest. According to which scheme 95% of capacity of

power station was allocated to MSEDCL, a distribution licensee and the remaining balance 5% power was allocated to the consumers outside Maharashtra after COD of respective power block(s)/station (5% was allocated by the Government of India to Goa, Daman and Diu & Dadra Nagar Haveli).

6.7) that in pursuance to the above, the respondent No.2 was formed a SPV to take over assets of Dabhol Power Project along with all the generating units as well as integrated Liquid Natural Gas (LNG) terminal and associated infrastructure facility for revival. On 22.09.2005, the Hon'ble Bombay High Court recorded the consent terms for the above takeover at a lump sum of Rs.8485.45 Crores as envisaged in the scheme worked out and approved by Government of India. The basic premise over which NTPC and GAIL agreed to be involved in the project and made financial and other commitments and also various other agencies had agreed to allocate 95% of the generating capacity of the power project to the appellant for purchase.

6.8) that in terms of the afore said arrangements and in accordance with established practice in power sector it is incumbent upon respondent No.2 a generating company to service the capacity charges / fixed charges.

6.9) that finally as per the above afore said scheme and in terms of the order dated 22.09.2005 of the Hon'ble Bombay High Court, the assets of DPC including the integrated LNG terminal and associated infrastructure facilities were taken over by respondent No.2 from the Court Receiver on 06.10.2005.

6.10) that thereafter, respondent No.2 entered into PPA dated 10.04.2007 with the appellant setting out terms and conditions of the sale of power from the above mentioned Gas power project in Ratnagiri.

6.11) that since September, 2011 supply of gas from RIL was progressively reduced and was completely stopped on 01.03.2013. There was no indication of it being restarted and/or continued in near future. In view of the said decline in supply of domestic gas, since September 2011 and in order to make for the consequential short fall in generation of power during 2011-12, the respondent No.2 in December 2011 entered into an arrangement with GAIL for supply of R-LNG under spot cargo on "take and pay" contract basis. According to the appellant, RGPPL had insisted on fuel supply of 7.6 MMSCMD from the KG D6 basin of RIL at par with fertilizer units in accordance with decision of Empowered Group of Ministers (hereinafter referred to as EGOM) on utilization of

gas arrived at its meeting, held on 28.04.2008, and accordingly, the RGPPL took up the issue of short supply of domestic gas with Central Government and then the matter was placed before the EGOM in its meeting held on 24.02.2012.

6.12) that the Central Commission vide tariff order dated 04.06.2009, in Petition No. 96 of 2007 filed jointly by generating company, Respondent No.2 and the distribution licensee, appellant respectively determined the tariff of Block-II & III of the generating station for 2150 MW Ratnagiri Power Project for the period from 01.09.2007 to 31.03.2009 in terms of the CERC (Terms and conditions of tariff) Regulation 2004. Block-I achieved COD only on 19.05.2009 due to certain mechanical failures which had to be rectified.

6.13) that the tariff order dated 04.06.2009 was challenged by RGPPL before this Appellate Tribunal in Appeal No. 130 of 2009 and this Appellate Tribunal vide its judgment dated 25.03.2011 allowed the appeal holding that the Central Commission had jurisdiction to relax norms in exceptional circumstances and while exercising the power to relax there should be sufficient reasons to justify the relaxation and non-exercise of discretion would cost hardship and injustice to the party or lead to unjust result. This Appellate Tribunal while

allowing the appeal, in respect of target availability and the operation and maintenance expenditure, remanded the matter to the Central Commission to re-determine the norms in respect of these factors only in exercise of its power to relax and re-determine tariff accordingly. This Appellate Tribunal further held that there was sufficient justification for the Central Commission to consider the relaxation in norms in the initial years of operation of RGPPL's power plant to give it an opportunity to stabilize.

6.14) that RGPPL further filed a Petition before Central Commission for approval of generation tariff for RGPPL for the period from 2009-10 to 2031-32 (Petition No. 283 of 2009). The Central Commission, vide order dated 18.08.2010 relaxed the norms for NAPAF for different years of the tariff period 2009-14 as a special case in the interest of viability of the project making it further clear that the relaxation in NAPEF is a one time dispensation and no further request for relaxation be entertained and consequences of any shortfall in performance shall be born by RGPPL.

6.15) that (without approval of the appellant and in complete derogation of the provisions of the PPA,) RGPPL entered into the gas tie up with GAIL for supply of R-LNG under spot cargo

on a reasonable endeavour basis under 'take and pay" contract.

6.16) that through communication dated 17.12.2011 and 18.12.2011 the respondent RGPPL stating reasons of shortage of supply of domestic gas had then been offering base capacity declarations based on availability of fuel i.e. gas and R-LNG.

6.17) that through communications dated 19.12.2011 and 23.12.2011, the appellant sent letters to RGPPL stating that if MSEDCL purchased power at high cost of Rs.7.05 per unit, then the consumers would un-necessarily be over burdened. As such the appellant refused to give consent to schedule such costly power pointing out that as per clause 5.9 of the PPA, the RGPPL is under obligation to obtain approval from MSEDCL on the contracting terms and price of the GSA/GTA. The unilateral decision of RGPPL to enter into GSA/GTA without prior approval of MSEDCL and the declaration of capacity in furtherance thereof was also objected to specifically.

6.18) that further, on various occasions, correspondences were exchanged between RGPPL and MSEDCL regarding the said issue wherein RGPPL continuously sought to declare capacity based on R-LNG and MSEDCL objected to the same.

6.19) that in the end RGPPL, who is respondent No.2 herein filed a Petition No. 166/MP/2012 before the learned Central Commission, which has been allowed by the impugned order dated 30.07.2013 by Central Commission as detailed above.

7. We have heard Mr. Atul Nanda, learned Sr. Advocate on behalf of the appellant. We have also heard Mr. M.G.Ramachandran, learned counsel for respondent No.2, generating company and Mr.K.S.Dhingra, learned counsel for respondent No.1. We have also gone through the written submissions filed on behalf of both the parties and perused the impugned order including the material available on record.

8. The following issues arise for our consideration in this appeal:

(i) Whether the impugned order is erroneous being based on incorrect reading of the provisions of PPA dated 10.04.2007 particularly clause 4.3 and 5.9?

(ii) Whether the appellant is required to pay capacity charge when the appellant does not give consent to GSA/GTA?

Since these issues are interwoven, we are taking up and deciding them together.

9. The contentions of the appellant on the said issues are as under:

9.1) that the fixed charges are payable by MSEDCL on the declared capacity of the plant. Declared capacity, under clause 4.3 of the PPA, can be declared on the basis of gas and / or R-LNG as a fuel source. It is only when such declaration is sought to be made on liquid fuel, then MSEDCL permission is required. Thus the learned Central Commission started on the wrong premises that there is no embargo on RGPPL under clause 4.3 from making declared capacity declarations based on R-LNG fuel basis.

9.2) that the learned Central Commission has wrongly concluded by stating that RGPPL would be within its right to make declarations of capacity based on R-LNG as per clause 4.3 of the PPA and the MSEDCL would be required to pay fixed charges based on such declarations.

9.3) that the learned Central Commission has wrongly put clause 4.3 and clause 5.9 of the PPA into separate compartments and independent of each other; one relating to fixed charges and the other relating to variable energy charges.

9.4) that clause 5 of the PPA deals with tariff, of which clause 5.2 deals with capacity charges and clause 5.3 deals with energy

charges. Clause 5.9 of the PPA is part of clause 5 and would apply in equal measure to the entirety of clause 5 of the PPA dealing with tariff. On a reading of structure of PPA there is no logic "to assign" clause 5.9 only to the energy charges contained in clause 5.3 and not to capacity charges in clause 5.2 as has been done in the impugned order. Hence, the impugned order based on the premises that the right of MSEDCL emanating from clause 5.9 if confined to variable charges is in itself a erroneous assumption. On a plain reading of the PPA the rights of MSEDCL under clause 5.9 would thus cover and apply over both fixed / capacity charges and variable energy charges.

9.5) that as per terms of clause 5.9 of the GSA / GTA, the total required gas / LNG is envisaged to be procured through short term contracts / long term contract through GAIL and through Government of India. Hence, RGPPL shall be required to obtain approval of MSEDCL on contract terms and price before entering into GSA / GTA contract. Hence, any condition having any commercial implications would automatically require the consent of MSEDCL under clause 5.9 – payment of fixed charges and any factor which leads to an increase in such fixed charges is clearly a matter of commercial implication to MSEDCL inviting application under clause 5.9 and hence a consent of MSEDCL in terms thereof.

9.6) That the plant availability, which is a commercial condition contemplated under clause 5.9 and requiring MSEDCL's consent is the average of daily declared capacity as a percentage of net capacity, would RGPPL choose to adopt R-LNG as a source of fuel which impacts the quantum of declared capacity, then this automatically affects "plant availability" and becomes a matter of commercial implications. That once it is found that there is an organic interlinking between clause 5.9, commercial implications, plant availability, declared capacity and declaration of capacity in terms of choices of fuel as provided in clause 4.3, then the sole logic employed by the Central Commission to grant relief when respondent generating company fails and the impugned order then requires to be set aside in this appeal.

9.7) that the Central Commission has erroneously compartmentalized clause 4.3 and clause 5.9 of the PPA dated 10.04.2007 to hold that clause 4.3 only deals with RGPPL's choice of fuel for making declarations of capacity and hence governing capacity charges, whereas the MSEDCL's power to hold back consent would come in only by operation of clause 5.9 which deals with energy charges.

9.8) that the interpretation of the PPA by Central Commission to the effect that clause 4.3 governs fixed charges and clause 5.9 deals only with energy charges is erroneous.

9.9) that by the impugned order, the Central Commission has also denied the appellant application of clause 21(1)(a) proviso which provides for a reduced capacity charge calculation where a plant availability factor achieved in the year is less than 70%.

9.10) that a conjoint reading of clause 4.3 and 5.9 of the GSA/GTA would show as under:

(a) At the time of entering into present PPA, a fuel being used by RGPPL was R-LNG being sourced from Petro Net LNG Ltd. under GSA.

(b) That PPA envisages that the conditions of GSA/GTA having commercial implications have to be signed separately by MSEDCL as a supplementary agreement.

(c) That RGPPL was required to obtain approval of MSEDCL on contract terms and price before entering into any GSA/GTA contract.

9.11) that it was incumbent on the RGPPL to obtain the approval of MSEDCL prior to entering into any GSA/GTA. Such approval is based on the consent of MSEDCL and cannot be forced upon by RGPPL approaching the Central Commission for direction.

9.12) that as per PPA, declared capacity is dependent on the availability of fuel. The availability of fuel (as specified by clause 43.) can only be secured by consenting of GSA/GTA as envisaged under clause 5.9. Further, the terms and conditions of GSA/GTA having commercial implications have to be signed by MSEDCL separately as a supplementary agreement. The provisions of PPA are un-ambiguous in this regard and interdependency of clause 4.3 and 5.9 cannot be debated.

9.13) that the Central Commission in its order dated 30.07.2013 by implication erroneously linked clause 5.9 only to the second part of clause 4.3 dealing with secondary fuel i.e. liquid fuel. It has wrongly been held that there are no restrictions on RGPPL to declare capacity based on primary fuel including R-LNG and for the same, no approval of MSEDCL is required.

9.14) that it was an established practice for RGPPL to approach MSEDCL and seek their consent before acting in variance of the GSA or making any changes to it that would have financial implications. In the past too, before entering into any arrangements for securing R-LNG (which is a primary fuel), RGPPL had approached MSEDCL and only after taking their consent by having duly entered into supplementary

agreement, RGPPL had gone ahead to declare capacity based on R-LNG.

9.15) that it is the duty of a DISCOM like the appellant, to procure power on behalf of consumers at the cheapest rate possible. In this back ground, the utility of clause 5.9 becomes explicit. Had clause 5.9 not been inserted in the contract or if it was restricted to only liquid fuel as mentioned in clause 4.3, then it would result in tariff shock to the consumers of Maharashtra.

9.16) that after having signed the PPA and further redefining the terms thereof by conduct by entering into supplementary agreement on various occasions, RGPPL cannot, at such a belated stage, take a u-turn and start giving a restrictive interpretation to clause 5.9 which renders redundant the entire purpose / intentions beyond signing a PPA under dispute.

9.17) that the Central Commission vide impugned order, had erroneously re-written the terms of contract which were clear between the contracting parties and disrupted an entire commercial understanding between the parties which constituted the foundation of the contract. It is also trite that neither a contract can be made nor unmade by a court of law, which is the exclusive prerogative of the parties thereto. For

the purpose of consideration of contract, the intention of the parties is to be gathered. Even if there was a latent ambiguity in the interpretation of availability of clause 5.9 i.e. whether it would be applicable to only primary fuels or both primary and secondary fuels, even then the mandate of clause 4.3 and 5.9 are unambiguous and intention of the parties to insulate consumers is explicit therein.

10. **Per contra** the contentions of respondent No.2, Ratnagiri Gas and Power Pvt. Ltd. are as under:

10.1) that the Central Commission has given detailed reasoning in the impugned order as to why the payment of capacity charges by the appellant to the respondent No.2 is not affected by the non-approval of the contractual terms contained in the GSA/GTA referred to in Article 5.9 of the PPA. The principle thrust of the contention of the appellant is that when the appellant refuses to give its consent for any GSA/GTA, the necessary consequences would be that the appellant is not required to pay the capacity charges also.

10.2) that the appellant is misconstruing the earlier decision dealing with relaxation of Normative Annual Plant Availability Factor (NAPAF) by the Central Commission in this tariff order dated 18.08.2010 for the period 2009-2014. In the impugned order,

the Central Commission has only considered the entitlement of respondent No.2 to the capacity charges when respondent No.2 is in a position to generate and supply electricity and accordingly has made necessary declaration of availability but the appellant had chosen not to schedule the quantum of electricity declared available. This aspect decided by the Central Commission has nothing to do with the relaxation of NAPAF for non-availability of gas decided by the Central Commission in the earlier order.

10.3) that contention of the appellant in regard to the non-payment of capacity charges is contrary to the basic scheme of tariff payment under the cost plus tariff determination as per section 62, read with sections 64 & 79 of the Electricity Act, 2003 and also as per the tariff regulations notified by the Central Commission.

10.4) that the basic concept of the tariff determination and tariff liability of a purchaser of electricity is that there is an obligation to pay the capacity charges so long as the generator has declared available capacity, notwithstanding that the purchaser of electricity schedules the capacity offered by the generator or not. The generator having made up front investment in establishing, operating and maintaining the generating station, the capital cost incurred needs to be

serviced during the life time of the generating station through the payment of annual fixed charges. Such annual fixed charges are determined with reference to the specific tariff elements as provided in the applicable Tariff Regulations namely, in the present case Tariff Regulations 2009 and have nothing to do with the quantum of actual energy generated by a generating company.

10.5) that the annual fixed charges are payable so long as the generator makes available the capacity by necessary declaration to the specified extent, namely to the required NAPAF. This scheme is for the payment of capacity charges not only in the case of respondent No.2 but universally in the case of all generating companies and this has been the consistent practice followed in the past many years. The same is recognized and provided for in the Tariff Regulations 2009. That the above principle of liability to pay the capacity charges has been incorporated in Article 5.2 read with Article 4.3 and the definition of declared capacity in the PPA.

10.6) that the provisions of PPA have the following implications:

(a) that the respondent No.2 is entitled to procure R-LNG as per terms of PPA and use the same for generation of

electricity, while respondent No.2 will make efforts to minimize the fuel cost.

(b) that if the appellant does not wish to take electricity based on R-LNG, the appellant is required to compensate respondent No.2 with capacity charges in relation to the quantum of electricity for total declaration availability made by respondent No.2 on gas and / or R-LNG.

(c) If the declaration of capacity is in accordance with Article 4.3 of the PPA, the capacity charges as specified in Article 5.2 of the PPA are payable without any other condition. In terms of Article 5.2 there is absolute obligation on the part of the appellant to pay the capacity charges as specified therein upon Declared Capacity (DC) being in accordance with Article 4.3 and 5.2 of the PPA.

(d) that as per clause 6.6 and 6.7, in case of any dispute, the appellant shall pay 95% of the disputed amount till the dispute is resolved and subsequently any excess or shortfall with respect to the said amount shall be paid / adjusted with 15% interest per annum from the date on which the amount is payable.

(e) that prior approval of the appellant under Article 5.9 of the PPA for the terms of GSA and GTA is required to be

taken when such agreements have financial implications on appellant in regard to take or pay provisions, penalty, liquidity damages etc. which the gas supplier or the gas transporter may levy in the event respondent No.2 does not avail the contracted value of the gas.

10.7) that as per PPA dated 10.04.2007, the fuel to be used are gas, LNG/R-LNG or liquid fuel. Article 4.3 of the PPA dealing with declared capacity deals with primary fuel as LNG / Natural Gas or R-LNG. In addition to the above, Article 4.3 deals with the use of liquid fuel which shall be as per the agreement or requisition by the appellant.

10.8) that in the circumstances, it is absolutely clear that LNG is a primary fuel to be used in the generation of electricity under the PPA dated 10.04.2007. In terms of Article 4.3 the consent of the appellant is necessary only when liquid fuel is proposed to be used and not R-LNG or LNG or Natural Gas i.e. the primary fuel. If the primary fuel is to be used, the declaration of capacity can be made without the consent of the appellant.

10.9) that the provisions of Article 4.3 of the PPA makes it abundantly clear that there is no pre-condition for respondent No.2 to declare the capacity on R-LNG, (primary fuel) and that it shall obtain the consent of the appellant. That

differentiation made in Article 4.3 of the PPA in regard to the use of primary fuel and use of liquid fuel as an alternative is also important. The parties had clearly indicated that respondent No.2 as a matter of right can use the primary fuel (R-LNG) for declaration of capacity and to that extent no approval or consent of the appellant is required.

10.10) that once the appellant approves the GSA & GTA, a supplementary agreement is signed between the appellant and respondent No.2, whereby the appellant agrees to pay the committed charges under the GSA & GTA. Such a supplementary agreement was entered into and signed by the appellant and respondent No.2 on 22.05.2009

10.11) that the appellant's stand is contrary to the scheme of cost plus determination of tariff including as provided for in the Tariff Regulations 2009. The interpretation by the appellant on a scope of Article 5.9 leading to non-payment of capacity charges is patently erroneous as Article 5.9 cannot be used by the appellant to protect itself from the obligation to meet the committed charges relating to energy charges as per GSA & GTA by refusing to approve the contractual terms of the GSA & GTA.

10.12) that the appellant's contention, that the consumers will be required to pay the capacity charges without the benefit of electricity, cannot be a ground for denying the annual fixed charge of respondent No.2. There are many instances where the capacity charges have been paid by the purchaser of electricity to the generating companies without the benefit of electricity being generated. These are all because of the purchasers' decision not to schedule electricity against the declared capacity because of higher energy charges payable.

10.13) that the appellant was fully aware that the primary fuel for the generation of electricity for the plant of the respondent No.2 is R-LNG. In terms of Article 5.3 of the PPA, the appellant has agreed to pay the energy charges as per the actual price of R-LNG paid by respondent No.2 to the Gas supplier and also transporter of R-LNG, if any.

10.14) The appellant having agreed to the above, cannot deny the implications of PPA, namely, either to schedule the generation based on declared capacity and pay the capacity charges and energy charges as per Article 5.2 and 5.3 of the PPA or not to schedule the generation and pay the capacity charges.

10.15) that the respondent No.2 is not asking for any committed amount towards energy charges on the ground that

respondent No.2 has to pay the same to the gas supplier. The arrangement entered into by the respondent No2 with the gas supplier is Take and Pay and not Take or Pay. In the event, respondent No.2 does not actually take the delivery of R-LNG, there is no obligation to pay the charges. The respondent No.2 has entered into the above agreement with the gas supplier in pursuance of the tender floated by respondent No.2. If and when the appellant requires the electricity through the use of R-LNG and the appellant accepts the terms and conditions contained in the contract entered into between respondent No.2 and gas supplier, there could be generation and supply of electricity by respondent No.2.

10.16) that it is a well settled principle of law that a mere difficulty or onerous circumstances to perform the obligations under the contract cannot be a ground to release the contracted parties from the various liabilities under the said agreement entered into, as held by the Hon'ble Supreme Court in *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh (1988) 3 SCC 82, Transmission Corporation of Andhra Pradesh Ltd. and Anr. Vs. Sai Renewable Power Pvt. Ltd. & Ors 2010 ELR (SC) 0697, Alopi Prasad Vs. Union of India (1960) 2 SCR 793, Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises (1999) 9 SCC 283 and Travancore Devaswom Board Vs. Thanth International (2004) 13 SCC 44*

and by Madras High Court in *Kula Sekara Perumal Vs. Patha Kutty AIR 1961 Madras 405*. The intention of the parties have to be gathered from the provisions of PPA as a whole and based on the surrounding circumstances as were in existence at the time of signing of PPA and not by what either of the parties allege after the disputes has arisen.

10.17) that the learned Central Commission has properly and harmoniously construed the provisions of clause 4.3 and 5.9 of the PPA keeping in view the intention of the parties at the time of entering into the contract i.e. to ensure the payment of the capacity charges to the respondent No.2 irrespective of scheduling of such power by the appellant.

10.18) that the respondent No.2 is incurring substantial amount in regard to the payment of money to the lenders and financial institutions, fuel suppliers, fuel transporters, operation and maintaining expenses etc. and in such situation the appellant cannot deviate from its responsibility by taking up frivolous ground. Thus the appellant cannot refuse to pay the fixed charges for the declaration made on R-LNG merely because it is financially not viable for it, even when the existence of respondent No.2 is already under threat.

10.19) that lastly, the contention of the appellant on infirm power is also without merit. Infirm power is the electricity generated

prior to commercial operation of the station. Thus there is no concept of infirm power once the power station has been duly commissioned. The obligation to pay the capacity charges throughout the term of the PPA exist independent of whether the appellant chooses to schedule electricity or not so long as respondent No.2 is in a position to operate the generating station. Respondent No.2 cannot be denied the capacity charges on account of the fact that the appellant chose not to schedule electricity considering the price of fuel to be high.

11. Our discussion and conclusion:

Now we proceed to decide whether appellant is liable to pay the capacity charges even if the appellant has not given consent or approval to the said GSA & GTA.

11.1) As stated above, Ratnagiri Gas and Power Pvt. Ltd., respondent No.2 / petitioner filed a Petition No. 166/MP/2012 under section 79 of The Electricity Act 2003 before the Central Commission praying for resolving the issue arising out of the non-availability of domestic gas of the required quantum and reservation of beneficiaries to allow the petitioner to enter into contract for available fuel i.e. R-LNG and consequences thereof and also for revising the Normative Fuel Plant Availability Factor (NFPAF) for the petitioner, power generating company for full fixed cost recovery at actually achieved NFPAF level till

the full supply is restored to the allocated/contracted quantity with consequential order for the payment of fixed charges / capacity charges and further for directing beneficiaries to pay fixed charges due to the power generating company. As stated above, the learned Central Commission, vide impugned order, dated 30.07.2013 has allowed the said Petition of the respondent No.2, a power generating company. By the impugned order, the appellant is required to pay the capacity charges as per the provisions of Article 5.2 read with Article 4.3 of the PPA even if the appellant does not schedule power based on declaration of power availability of R-LNG. The learned Central Commission, in the impugned order, has also held that the provisions of Article 5.9 of the PPA, dealing with Gas Supply Agreement and Gas Transportation Agreement and the requirement of taking consent / approval of the appellant to the contracting terms and price related only to the energy charges specified in Article 5.3 of the PPA and it has no implication to the capacity charges payable as per Article 5.2, read with Article 4.3 of the PPA. Thus the learned Central Commission by impugned order has clearly held that the appellant, who is a distribution licensee, is liable to pay capacity charges / fixed charges even when the appellant does not give consent to the GSA/GTA. Thus the Central Commission has not accepted the contention of the appellant that the appellant cannot be made liable to pay the capacity

charges only because the appellant has not given consent or approval to the said GSA/GTA. The learned Central Commission has rejected the contention of the appellant that the implementation or implication of the impugned order would result in over burdening the consumers of Maharashtra with an annual additional liability of Rs.7772 Crores.

11.2) For complete and effective consideration of the question involved before us in this appeal, it is necessary to quote the provisions of Article 4.3 and Article 5.9 of the PPA:

Article 4.3: Declared Capacity:

Primary fuel for RGPPL is LNG/Natural Gas and/or R-LNG. Normally capacity of the station shall be declared on gas and/or RLNG for all three power blocks. However, if agreed by MSEDCL, RGPPL shall make arrangements of Liquid fuel(s) for the quantum required by MSEDCL. In such a case, the capacity on liquid fuel shall also be taken into account for the purpose of Availability, Declared Capacity and PLF calculations till the time Liquid fuel(s) stock agreed / requisitioned by MSEDCL is available at site".

Article 5.9: Gas Supply Agreement(GSA) /Gas transportation Agreement (GTA)

Gas Supply Agreement is presently for 1.5 MMTPA R-LNG up to September 2009 being sourced through Petronet LNG Ltd. and re-gasified at their Dahaj terminal with supply through GAIL/Off-takers.

The conditions of GSA/GTA having commercial implications (for example bearing on Plant availability, contracted quantity, price components, Take or Pay provisions, penalties and damages etc.) shall be signed separately with MSEDCL as a supplementary agreement. The total required Gas/LNG is envisaged to be procured through short term contracts/long term contracts through GAIL and under the directions of GOI, the details of which shall be furnished in due course. RGPPL shall be required to obtain approval of MSEDCL on contracting terms and price before entering into the GSA/GTA contract."

Clause 21(1)(a):

Provides for a reduced capacity charge calculation where the plant availability factor achieved in the year is less than 70% in terms of the following:

AFC x (0.5+35/NAPAF) x (PAFY/70) (in Rupees)

Where AFC	=	*Annual fixed cost specified for the year*
NAPAF	=	*Normative annual plant availability factor in percentage*
PAFY	=	*Plant availability factor achieved during the year, in percentage*

11.3) The main thrust of the arguments of the appellant is that the learned Central Commission in the impugned order has wrongly held that there is no embargo of power generating company under clause 4.3 of the PPA from making declared capacity declaration based on R-LNG. The prior approval of the appellant before entering into GSA/GTA would apply to both fixed / capacity charges and variable energy charges

when the power generator chooses to adopt R-LNG as a source of fuel. A conjoint reading of clause 4.3 and 5.9 of the PPA reveals that a power generating company should obtain approval of the distribution licensee / appellant on contracting terms and prices before entering into any GSA/GTA with Gas Authority of India Ltd. And the Central Commission, by allowing RGPPL to declare capacity based on R-LNG without prior approval of the appellant has not considered that it would result in a tariff shock to all the consumes of the appellant. According to the appellant, the fixed charges are payable by distribution licensee/appellant on declared capacity of the plant and declared capacity under clause 4.3 of the PPA can be declared on the basis of gas and / or R-LNG as a fuel source and it is only when such declaration is sought to be made on liquid fuel, then MSEDCL's permission would be required.

12. In reply to the contentions of the appellant, the main submissions of the respondent No.2, power generating company are as under:

12.1) that the contention of the appellant, that when the appellant refused to give its consent for GSA/GTA, the appellant is not required to pay capacity charges also, is not tenable. The learned Central Commission vide impugned order has only

held entitlement of respondent No.2 to the capacity charges when the respondent No.2 is in a position to generate and supply electricity and make necessary declaration of availability but the appellant had chosen not to schedule quantum of electricity on declared availability.

12.2) that according to the basic concept of tariff determination and tariff liability in the purchase of electricity, there is an obligation on the distribution licensee to pay the capacity charges irrespective of whether the purchaser of electricity / DISCOM schedules the capacity offered by the generator or not and the annual fixed charges are payable to the generator so long that the generator makes available the capacity by necessary declaration to the required NAPAF.

13. We have thoroughly and deeply considered the main thrust of the arguments of the rival parties and we are unable to accept the contentions of the appellant, the distribution licensee. Article 4.3 of the PPA dealing with declared capacity clearly provides that the primary fuel for RGPPL is LNG/natural gas or R-LNG. Normally capacity of the station shall be declared on gas and/or R-LNG for all the three power blocks. However, if agreed by the distribution licensee, the power generating company i.e. respondent No.2 shall make arrangements of liquid fuels for the quantum required by a distribution

licensee, MSEDCL and in such a case the capacity of liquid fuel shall also be taken into account for the purpose of availability declared capacity and PLF calculation, till the time liquid fuel(s) stock agreed/requisition by the distribution licensee is available at the site. It is clear from the analysis of the provisions of Article 4.3 of the PPA that the primary fuel for the power generator, respondent No.2, is LNG, natural gas or R-LNG and the normal capacity of the generating station shall be declared on gas or R-LNG. The consent or agreement by a distribution licensee shall be required only in the case when the power generator shall make arrangements of liquid fuel(s) for the quantum required by MSEDCL. Thus Article 4.3 clearly provides that if the power generator has to arrange for liquid fuel(s) then only the agreement or consent or approval of MSEDCL shall be required. In the case in hand, the power generating company, as stated above, due to heavy scarcity of domestic gas had to change the nature of primary fuel namely LNG/natural gas to R-LNG. LNG or natural gas or R-LNG they are all covered by the definition of primary fuels. There is a shift only from one source of primary fuel, namely natural gas, to another fuel, namely R-LNG hence, we find that the consent or approval of the distribution licensee, appellant is not required to have been obtained prior to entering into the GSA/GTA between the respondent No.2 power generating company and gas supplier, namely GAIL. This is not a case of

change from LNG/natural gas or R-LNG to liquid fuel but it is a case of change of *inter se* primary fuel. Since LNG/natural gas or R-LNG all are primary fuels. The Article 4.3 of the PPA does not at all require the consent or approval of the distribution licensee to enable the power generating company, respondent No.2, to enter into a contract for GSA/GTA with gas supplier, namely GAIL. Since there was a heavy shortage of domestic gas at the relevant time and the appellant, distribution licensee was not agreeing to schedule power for the declared availability, the respondent No.2 was left with no other option except to enter into GSA/GTA with GAIL in order to generate electricity for which purpose the plant in question was set up after a lot of efforts between the State Government, the Government of India and different other institutions of the highest level to meet the requirements of electricity of the State as well as the centre.

14. We find that the Central Commission in the impugned order has given cogent and sufficient reasons to arrive at the said conclusion and the appellant has rightly been held liable to pay capacity charges even if it does not consent for a GSA/GTA to be entered between respondent No.2 power generating company and GAIL. The respondent No.2 has rightly been held entitled to the capacity charges when the respondent No.2 remains in a position to generate electricity

and accordingly has declared necessary availability of electricity when the appellant had chosen not to schedule quantum of electricity on the declared availability. We further note that this aspect decided by Central Commission in the impugned order has nothing to do with the relaxation of NAPAF for the non-availability of gas decided by the Central Commission in the earlier order. Thus the appellant / distribution licensee has rightly been held under the obligation to pay the capacity charges so long as the respondent No.2 generator has declared available capacity, irrespective of whether the distribution licensee schedules the capacity offered by generator or not. Since the generator had made upfront investment in establishing operating and maintaining the generating station, the capital cost incurred needs to be serviced during the life time of the generating station through the payment of annual fixed charges because such annual fixed charges are determined with respect to specific tariff elements provided therefore, namely, tariff Regulations 2009 in the present case. Thus the Central Commission in the impugned order has rightly refused to exonerate the appellant, distribution licensee from paying the capacity / fixed charges only because the distribution licensee has refused to give consent to the power generator to enter into GSA/GTA with the gas supplier. If the appellant does not wish to take electricity based on R-LNG, the appellant is required to

compensate respondent No,2 with capacity charges in relation to the quantum of electricity for total declared availability made by respondent No.2 on gas and/or R-LNG. Since the declared capacity is in accordance with Article 4.3 of the PPA the capacity charges as provided in Article 5.2 of the PPA are payable. We are totally unable to accept the contention of the appellant that prior approval of the appellant in terms of Article 5.9 of the PPA for entering into GSA/GTA was required to be taken because such agreements have financial implications on the appellant. In the present case the power generator has only shifted the fuel source from natural gas to R-LNG which are the primary fuels, no such consent or approval of the appellant was required. The contention of the appellant could have been accepted in case there was a change of primary fuel, namely from LNG/natural gas or R-LNG to the liquid fuel. In view of the above discussions we do not find any perversity or infirmity in any of the findings recorded in the impugned order by the Central Commission. We hereby approve the findings recorded in the impugned order as there is no reason to deviate from such findings.

15. Since there is agreement between the respondent No.2 and the gas supplier which is based on 'Take or Pay' principle. Hence, any charge on account of the principle of Take or Pay is not to

be passed on to the distribution licensee, appellant herein. This is not a case of gas supply agreement GSA based on the principle of Take and Pay. Hence, we do not find any infirmity in the impugned order.

16. Thus both the issues are decided against the appellant and the instant appeal is liable to be dismissed. We clearly hold that the appellant distribution licensee is required to pay capacity charges to the respondent No.2, power generating company even if the appellant does not given consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel.

ORDER:

This instant appeal i.e. Appeal No. 261 of 2013 is hereby dismissed and the impugned order dated 30th July, 2013 passed in Petition No. 166/MP/2012 is hereby upheld. Further, the appellant is under obligation to pay capacity charges to respondent No.2, power generating company, even if the appellant does not give consent to GSA/GTA because the

appellant in place of natural gas or fuel is using R-LNG (primary fuel)

There is no order as to costs.

Pronounced in the open court on this ***22nd day of April, 2015***.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔ **REPORTABLE / ~~NON-REPORTABLE~~**