APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 365 of 2018 & IA NO. 1627 OF 2018

Dated : 01st May 2019

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Lalitpur Power Generation Company Limited
B-10, Sector -3,
Jamnalal Bajaj Marg,
Noida – 201301 (U.P)

....Appellant

VERSUS

1. Uttar Pradesh Electricity Regulatory Commission
   Vidyut Niyamak Bhawan
   Vibhuti Khand, Gomti Nagar,
   Lucknow

2. Uttar Pradesh Power Corporation Ltd.
   Shakti Bhawan, 14- Ashok Marg
   Lucknow

…Respondents

Counsel for the Appellant **:** Mr. C.S. Vaidyanathan, Sr.Adv.
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Upendra Prasad
Mr. Sanjeev Kumar Singh
Mr. Brij Mohan

Counsel for the Respondent(s) **:** Mr. C.K.Rai
Mr. Sachin Dubey for R-1

Mr. Hemant Sahai
Ms.Puja Priyadarshini
Mr.Nived V.
Mr. Rajiv Srivastava for UPPCL/R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The Appellant, herein questioning the legality, validity and propriety of the Impugned Order dated 21.09.2016, passed in Petition No. 1101 of 2016 and the Order dated 17.10.2018 passed in Review Petition No. 1190 of 2017 by the State Commission on the file of Uttar Pradesh Electricity Regulatory Commission (hereinafter "**State Commission"**) filed the instant Appeal under Section 111 of the Electricity Act, 2003 and felt necessitated to present this Appeal.

1.1 The Appellant, Lalitpur Power Generation Company Ltd., is a power generator having set up 3x660 MW power plant in villages Burogaon and Mirchwara, Tehsil Mehroni, in the District Lalitpur (U.P.), through MOU Route.

1.2 The Respondent No. 1 is the State Commission discharging its functions under the provisions of the Electricity Act, 2003.

1.3 The Respondent No.2 – UPPCL is the company responsible for electricity transmission and distribution within the state of Uttar Pradesh.

1.4 UPPCL had entered into a Power Purchase Agreement dated 10.12.2010 with the Appellant, on behalf of its subsidiary distribution companies for purchase of power from the 3x660 MW thermal power

project of the Appellant. The said PPA is governed by the UPERC (Terms and Conditions of Determination of Tariff) Regulations, 2014.

2. RELIEFS SOUGHT IN THE APPEAL

The Appellant has sought following reliefs in the instant Appeal :-

2.1 Allow the appeal and set aside the impugned order 21.09.2016 passed in Petition No. 1101 of 2016 and Order dated 17.10.2018 passed in Review Petition No. 1190 of 2017 by the State Commission to the extent challenged in the present appeal.

2.2 Declare the interim agreement dated 04.11.2015 to be void and as a consequence, direct UPPCL to make payment of availability based tariff (ABT) to the Appellant as per PPA dated 10.12.2010/Regulations for the period for which the interim agreement dated 04.11.2015 was allegedly kept operative by UPPCL;

2.3 Direct UPPCL to make the payments pertaining to RoE in accordance with the PPA dated 10.12.2010 and the relevant Regulations;

3. QUESTIONS OF LAW:

The Appellant has raised following questions of law for our consideration:-

3.1 Whether the State Commission has discharged its duties and performed its statutory functions as contemplated under the Electricity Act, 2003 while deciding Petition No. 1101 of 2016 and Review Petition 1190 of 2017?

3.2 Whether the State Commission has followed the principles of transparency enshrined in Section 86 (3) of the Electricity Act, 2003 in passing the various orders?

3.3 Whether the State Commission, being the court of first instance, can ignore the case pleaded on affidavit by one party, namely, that he has been made to enter into an Illegal Agreement under undue influence/ duress / coercion and decide the very same issue to the prejudice of the very same part in a circuitous manner?

3.4 Whether parties can incorporate terms in a bilateral Agreement which are against the provisions of the Statutory Regulations framed by the State Commission, namely the UPERC Generation Tariff Regulations, UPERC Grid Code and CERC IEGC Regulations?

3.5 Whether the statutory regulations once framed are not binding on the State Commission who framed such Regulations?

3.6 Whether the State Commission having held that the parties ought to have approached it for prior approval in case any changes are made to the PPA dated 10.12.2010, can still hold that the Agreement dated 04.11.2015 would be valid merely because the parties have acted on it?

3.7 Whether the State Commission can proceed in a mechanical manner in the matter of approval of an agreement which is to the grave prejudice to the rights of one party and which, such party, claims to have been entered into under duress/undue influence?

3.8 Whether the State Commission can introduce peculiar procedure by upholding the Agreement dated 04.11.2015 on the basis that this was a contractual relationship and between the Appellant and UPPCL, and

then adding a condition that no ROE would be payable to the Appellant for the period of the Agreement?

3.9 Whether the State Commission can even give a finding on the issue of ROE which is against its own Tariff Regulations in a petition which seeks the State Commission to only decide on the validity of the Agreement dated 04.11.2015?

3.10 Whether the State Commission can ignore the conduct of UPPCL in not approving a COD which was achieved twice over by the Appellant in terms of the provisions of the PPA and using the same to coerce the Appellant to sign the Agreement dated 04.11.2015 which Agreement stipulates illegal terms and has nothing to do with declaration of COD?

3.11 Whether the State Commission is bound by the contracts entered into between the parties and has no right to examine whether the same are in accordance with law and whether they have been entered into by free will and without any duress or undue influence?

3.12 Whether the State Commission can decide the main petition in the garb of deciding an interim application without even hearing the parties on the main petition?

4. Brief Facts of the Case in nutshell :-

4.1 The Appellant is an MOU route power generator having set up its 3x660 MW power project in Lalitpur in the State of Uttar Pradesh. Respondent No.2 and the Appellant have entered into Power Purchase Agreement dated 10.12.2010 read with Supplementary Power Purchase Agreement dated 15.06.2011(SPPA) to supply 100% power

to the RESPONDENT NO.2 acting on behalf of other procurers. The said PPAs have been duly approved by UPERC before execution.

4.2 In terms of the PPA, the Appellant was required to set up the power project and RESPONDENT NO.2 was required to purchase 100% of the power Tariff was to be determined by the State Commission. The Appellant synchronised its Unit # 1 of 660MW capacity on 09.06.2015 on 220 kV transmission system, and after giving notice for carrying out commissioning test on 05.06.2015, which was approved by Respondent No.2 vide letter dated 26.06.2015, when it appointed Mr. R.K. Jain as independent engineer to monitor and conduct the commissioning test. The Commissioning test was conducted from 26.08.2015 to 31.08.2015 and Respondent No.2 was informed of the same on 02.09.2015 along with performance test results / reports duly verified by the Independent Engineer (Mr.R.K. Jain).

4.3 Respondent No.2 however, did not accept the commissioning test and vide letter dated 04.09.2015 appointed another engineering consulting firm, namely, E-Gateway India Limited to re-conduct the performance test. Again the performance test was carried out during 21-25.09.2015 and results thereof were conveyed to Respondent No.2 on 30.09.2015 with a request to approve COD from 01.10.2015.

4.4 The dispute arose at this juncture. Respondent No.2 did not give approval of commissioning test forthwith and the Appellant was constrained to remind it vide letter dated 05.10.2015. The Appellant's officers kept continuously meeting the officers of Respondent No.2 during 05.10.2015 to 14.10.2015 to resolve the issue.

4.5 The 765 KV Power evacuation system was not available and the entire performance test was conducted on 2x220 kV transmission system, which by its own averment of RESPONDENT NO.2 was capable to evacuate between 400-500 MW of power.

4.6 Thereafter, vide letter dated 15.10.2015, the Appellant agreed to a draft agreement incorporating the terms, which were against the settled terms and against the Regulatory Provisions. The said terms were consented to by the Appellant and the agreement was executed by the Appellant on 04.11.2015. On the same day, RESPONDENT NO.2 approved the COD of the Unit # 1 of the Appellant and scheduling started. However, vide order of the State Load Dispatch Centre dated 14.11.2015, the unit was ordered to be shut down citing low demand in the State.

4.7 In terms of Article 4.2(a) of the PPA, Respondent No.2 was responsible for providing the interconnection and Transmission Facilities to enable the power station to be connected to the Grid System not later than the Scheduled Connection Date, which Respondent No.2 could not do in time. Appellant on the other hand was required to comply with certain conditions subsequent, one of which the Appellant could not fulfil was the condition subsequent contained in Article 3.1.2(ii), which required the Appellant (seller) to obtain coal linkage from Standing Linkage Committee (Long-Term), Ministry of Coal, GOI within a period of 18 months from the effective date, which is the date of the signing of the PPA by all the parties or within 18 months from 10.12.2010. These deficiencies on the part of both the parties were duly recorded in the preamble to the agreement dated 04.11.2015.

4.8 The crux and substratum of the agreement dated 04.11.2015 was to treat the declared capacity of the appellant equal to its scheduled capacity till completion of 765 kV evacuation system or till obtaining of coal linkage, whichever was earlier.

4.9 The Appellant, later, filed Petition no. 1101 of 2016 on 01.03.2016 before the Commission and prayed for declaration of the clauses 16 and 17 of the said agreement dated 04.11.2015 as void.

4.10 In the meantime, the policy of allotment of coal under the presidential directive, under which the Appellant was procuring coal with prior approval of Respondent No.2 and the Commission, ceased with effect from 30.06.2016 and the same was replaced by another policy whereby the Appellant could procure coal under the system of e-forward auction. Since under Article 6.5 of the PPA, the Appellant was required to obtain consent of Respondent No.2 and the Commission for procuring coal from any source other than through coal linkage, the Appellant filed an interim application in the Petition No. 1101 of 2016 seeking permission for procuring coal under the e-forward auction.

4.11 As per records of the pleadings and the orders, the Commission heard the Appellant and Respondent No.2 on the issue with respect to the interim application as well as on the main Petition No. 1101 of 2016. During the hearing, Respondent No.2 vide its written submissions pleaded that since the condition subsequent contained in Article 3.1.2(ii) of the PPA relating to obtaining of coal linkage was an essential condition, the Appellant should not be allowed Return on Equity till it obtains the coal linkage.

4.12 The Commission accepted the averment of Respondent No.2 and while allowing the Appellant procurement of coal under the e-forward auction, accepting the admission of the Appellant, restricted the coal price to the reserve price of the mine, limited the freight equal to the rail freight between the Amrapali mines till the captive railway siding of the Appellant (Numerical Code: LPGU) and also did not allow any road transportation charges. It further observed that since obtaining coal linkage by the Appellant was an essential condition subsequent, the Appellant would not be allowed Return on Equity during the period of commercial arrangement vide agreement dated 04.11.2015. The Commission further disposed of the interim application as well as the main petition no. 1101 of 2016 vide its order dated 21.09.2016 without giving any reasoned order on the main petition. The Commission in its order dated 21.09.2016, ordered:

> "*23. With above the application for interim relief as well as the petition no. 1101 of 2016 are disposed of*".

4.13 Aggrieved by this, the Appellant filed a review petition no. 1155 of 2016 before the Commission. Wherein it prayed:

> "*Wherefore, it is respectfully prayed that the order dated 21.09.2016 passed in Petition No. 1101/2016 be reviewed/corrected/ suitably amended to its original number and be decided on its merits and the defects pointed out in the order dated 21.09.2016 under review through this petition be suitably amended and the errors and defects be removed*".

4.14 After filing of the Petition No. 1101 of 2016 by the Appellant, Respondent No.2 also filed a petition no. 1115 of 2016 seeking approval of a draft Supplementary Power Purchase Agreement based on the impugned agreement dated 04.11.2015.

4.15 The Commission vide its order dated 14.02.2017 disposed of Respondent No.2's Petition No. 1115 approving the second time and third time extensions in obtaining coal linkage, however, it left the matter of approval of draft Supplementary Power Purchase Agreement based on the agreement dated 04.11.2015 undecided. Respondent No.2 thereafter preferred a review petition no. 1190 of 2017 before the Commission.

4.16 The Commission heard together the review Petition nos. 1155 of 2017 and 1190 of 2017 filed by the Appellant and Respondent No.2 respectively and disposed the same of vide its order dated 17.10.2018.

4.17 The Commission summed up its decision in Para 39 of its order dated 17.10.2018 in petition nos. 1155 of 2017 and 1190 of 2017 as follows:

> "*39. In view of the factual-legal matrix discussed above, the Commission*
>
> *i. Does not allow Return on Equity (RoE) to M/s LPGCL prior to obtaining long term coal linkage primarily on the grounds of non-maintainability of review petition on this issue and also on merits.*
>
> *ii. holds review on the issue of transportation charge from mine head to rail head as maintainable and make transportation charges from mine-head to rail head admissible to M/s LPGCL, subject to the ceiling of rail freight between Amrapali mines to captive rail siding of the project. No other road transportation charges shall be admissible.*
>
> *iii. accepts the review of RESPONDENT NO.2 regarding approval of supplementary PPA dated 4th November, 2015 as maintainable and accordingly supplementary PPA dated 4th November, 2015 is approved for period mentioned above in the order*".

4.18 While giving the final order dated 17.10.2018 in Petition nos. 1155 of 2017 and 1190 of 2017, the Commission completely ignored the prayer of the Appellant in petition no. 1155 to restore the original Petition No. 1101 of 2016 wherein the Appellant had prayed inter-alia to "Set aside/not to approve the conditions stipulated under Paras – 16 and 17 of the agreement dated 04.11.2015 without prejudice to the approval for 3rd time extension with respect to coal linkage condition by UPERC on filing of supplementary PPA by Respondent No.2". The Order dated 17.10.2018 recorded that the Commission heard on the pleadings and arguments made by the parties elaborately including those forming the text and prayers of Petition No. 1101 of 2016 and recorded the pleadings as well as the written submissions as well, which virtually is tantamount to hearing on petition no. 1101 of 2016, but while giving orders, restricted itself to the scope of revision as enshrined in Order XLVIII of the Code of Civil Procedure, 1908 and the principles decided in case laws on the subject to review.

4.19 The Appellant being aggrieved by the impugned orders dated 21.09.2016 and 17.10.2018 respectively on the file of the first Respondent/State Commission presented this Appeal.

5. Ms. Swapna Seshadri, the learned counsel appearing for the Appellant has filed the written submissions for our consideration as follows:-

5.1 The case of the Appellant in brief, is that –

(i) The Agreement dated 04.11.2015 was forced upon the Appellant only to cover the defaults of UPPCL and not of the Appellant;

(ii) The Appellant is entitled to the fixed charges and Return on Equity as per the UPERC Generation Tariff Regulations, 2014 and the PPA;

(iii) The Appellant has the right to use alternate coal under the PPA itself and could not get the coal linkage not due to its default but because there was no Policy of Government of India for coal linkage to private generators at the relevant time;

(iv) The time extension for fulfillment of condition subsequent relating to coal linkage under Article 3.1.2(ii) of the PPA and declaration of COD is a right of the Appellant and is not linked in any manner to the evacuation facilities of UPPCL.

5.2 The main allegation of the Appellant is that the provisions of the Agreement dated 04.11.2015 and the impugned order dated 21.09.2016 are against the provisions of the UPERC Tariff Regulations, 2014 both on the aspects of Fixed Charges and Return on Equity and also against the provisions of PPA dated 10.12.2010.

5.3 The basic premise of the appeal is the manner in which the State Commission has approved an amendment to a contract which is against the provisions of its own Tariff Regulations. The State Commission has instead of penalizing, chosen to reward the unfair and coercive conduct of UPPCL in dealing with the Appellant under the Power Purchase Agreement dated 10.12.2010 (PPA) and the validity of the Agreement dated 04.11.2015 which the Appellant was forced to enter into and which, was signed under coercion, undue influence and duress exercised by UPPCL. Despite the detailed pleadings on this

aspect placed by the Appellant before the State Commission, it has failed to deal with the matter as an independent regulator.

5.4 The said agreement dated 04.11.2015 was challenged by the Appellant in Petition No. 1101 of 2016 wherein the Impugned Order dated 21.09.2016 was passed. The issue of the agreement dated 04.11.2015 not being valid as it being against the Regulations of the State Commission and due to undue influence / duress did not form part of orders dated 21.09.2016 or 17.10.2018 despite elaborate pleadings and arguments on those issues. Instead, the State Commission erroneously disallowed the Return on Equity to the Appellant which was not even a part of the Agreement dated 04.11.2015.

5.5 The prayer of the Appellant in the main Petition No. 1101 of 2016 was as under –

"

a. *Admit the petition;*

b. *Set aside/not to approve the conditions stipulated under Paras – 16 and 17 of the agreement dated 04.11.2015 without prejudice to the approval for 3rd time extension with respect to coal linkage condition by Hon'ble UPERC on filing of supplementary PPA by UPPCL.*

c. *Direct UPPCL for payment of declared availability based fixed charges in accordance with PPA provision subsequent to COD of machine.*

d. *The respondent may be directed for early completion of 765 kv system.*

e. To condone any inadvertent omission / error/shortcomings / delay and permit the applicant to add/change/modify/alter this petition and make further submissions as may be required."

5.6 The prayer in the Interim application was as under –

"Wherefore, it is respectfully prayed that subject to the petitioner agreeing to the conditions mentioned in paragraph 13, this Hon'ble Commission may be pleased to allow the petitioner to purchase coal for generation of electricity under the prevalent policy of the Government of India for supply of coal to power generators, which may be treated as sufficient compliance of the condition provided under Article 3.1.2 (ii) of the approved PPA"

5.7 Though the scope of the prayers in the Main Petition No. 1101 of 2016 and the Interim Application were different, the State Commission vide the Order dated 21.09.2016 has disposed them off together. The findings of the State Commission in the Order dated 21.09.2016 are as under –

"15. Now the latest situation that has emerged, is that the transmission evacuation system have come and LPGCL is all geared up to run its Unit No. 1 at full capacity. Accordingly, the arrangement of Agreement of 04.11.2015 is to be replaced by some other arrangement for which the present interim petition has been filed.

16. In view of the stand taken by both the parties during the course of hearing and also keeping in view the principle of natural justice, the Commission decides on an interim basis that after the commissioning of 765 kV transmission system for evacuation of power from the Lalitpur TPS the petitioner would charge the coal price at the notified price of coal for the concerned mine and the transportation charges will be allowed on monthly weighted average basis subject to a ceiling of transportation charges computed for distance between Amrapali mines to plant's captive railway siding (numerical code: LPGU).

No road transportation charges will be admissible to the petitioner. With this arrangement the petitioner would not be penalized in the matter of availability of the plant. This arrangement will be an interim arrangement to facilitate the running of the plant to augment the availability of the power to the state.

17. Regarding admissibility of Return on equity the Commission is of the view that compliance of condition subsequent as given in Clause 3.1.2(ii) is an essential element to claim any return on equity and since this important condition subsequent has not been complied with, the petitioner will not be entitled to RoE during this interim arrangement.

18. As far as our observation on terms of agreement dated 04.11.2015 under petition no.1101 of 2016 is concerned, Clause 17 regarding availability of coal linkage will be dealt with as per the interim order as mentioned hereinabove. Clause 16 regarding availability of transmission system has lost its relevance as the system is going to be commissioned soon. However approval of supplementary PPA as filed with petition No. 1115 of 2016 will be dealt with separately.

19. After the commissioning of 765 kV transmission system the seller would retake the performance test for full capacity of unit no. 1 as per relevant clauses of PPA.

20. These interim orders will be applicable from the date of commissioning of the evacuation system of 765 kV and will continue until the long term linkage is obtained by the Seller.

21. This arrangement is being made primarily in the interest of consumers without compromising on the cost to the procurers rather this arrangement will have a lowering effect on the cost.

22. UPPCL while signing the agreement dated 4th November, 2015 had taken the post facto approval of the competent authority in the State Government therefore it will be in the

fitness of things that UPPCL obtains the approval of the competent authority on this interim arrangement also.

23. With above, the application for interim relief as well as the petition No. 1101 of 2016 are disposed of. "

Admittedly, the 765 kV transmission system was not available during the entire period of dispute. In spite of this, the State Commission chose to ignore this important fact and gave clean chit to UPPCL concluding that it was not relevant because it will be soon available in future as stated in Para 18 above.

5.8 Aggrieved by the order of the State Commission, the Appellant had preferred a review petition being Petition No. 1155 of 2016 before the State Commission seeking review of the Order dated 21.09.2016 on the following errors apparent on the face of record –

a. the main issue raised in the petition regarding the Agreement dated 04.11.2015 having been entered into under undue influence was although pleaded for by the Appellant before the State Commission and the State Commission had also heard both the parties on the issue but failed to take into consideration while passing the impugned orders;

b. The State Commission failed to appreciate the fact that the agreement under challenge is ex-facie contrary to their own regulations and thus, does not survive;

c. disposing off the main petition despite hearing the same, alongwith the interim application in it, which (interim application) was to address a situation of change in law wholly caused by a policy

change related to coal allocation, despite the fact there were elaborate pleadings and arguments on the main petition;

d. Disallowance of Return on Equity (ROE) which had nothing to do with Agreement dated 04.11.2015;The impugned order being against the provisions of the Statutory Regulations which are framed under Section 181 & 182 of the Electricity Act, 2003;

5.9 UPPCL had also filed a review petition being Petition No. 1190 of 2017 against another Order dated 14.02.2017 passed in Petition No. 1115 of 2016 which was filed by UPPCL for seeking approval of the the draft SPPA (which was not agreed to by the Appellant) based on the interim agreement dated 04.11.2015. The State Commission heard Review Petitions 1155 of 2016 and 1190 of 2017 together and decided them vide the Impugned order dated 17.10.2018.

5.10 In Petition No. 1115 of 2016, the prayer of UPPCL was as under –

"In view of the forgoing paragraphs, the Commission is requested to approve the following:-

i. Draft supplementary PPA (drawn in compliance of GoUP order dated 26.02.2016) as reproduced below:-
(Not reproduced herein to make things precise)

ii. Third time extension upto 30.09.2016 subject to the interim commercial arrangement as described in the aforementioned SPPA.

iii. COD of unit#1 of LPGCL w.e.f. 01.10.2015 subject to the interim commercial arrangement as described in the aforementioned SPPA.

5.11 Vide Order dated 14.02.2017, the State Commission held as under –

"11. The Commission vide its Order dated January 9, 2017, decided to consider all three time extensions (i.e. Second, Third and Fourth time extension) together on the basis UPPCL's undertaking that they will soon file petition for Fourth time extension. As the plant is operational, and UPPCL has not been able to file application for approval of fourth time extension, the Commission considers it appropriate to decide the approvals of second as well as third time extension.

12. UPPCL filed rejoinder on 13.01.2017, vide which it has refuted all the contentions raised by LPGCL and submitted that it has acted in conformity of the commission's Order dated 21.09.2016 in petition no. 1101 of 2016.

13. UPPCL has filed a petition No. 1158 of 2017 on which the Commission has passed orders on 18.01.2017 and has approved the revised arrangement.

14. During the hearing on January 31, 2017, UPPCL submitted that all the issues have been settled before the Commission, which have come out in the Order dated September 21, 2016and the order dated 18.01.2017of the Commission.

15. The Commission finds that the conditions stipulated in the Govt. order dated 9.12.2013 have the bearing in determination of tariff and hence should be considered with the tariff determination. In the matter of agreement dated 4.11.2015, which is a part of SPPA submitted for approval of third time extension, the Commission has passed orders on 21.09.2016 and on 18.01.2017. Therefore, the Commission does not find any reason to again deal with the issues already decided in the above said orders. The Commission has further observed that despite the directions vide Order dated 21. 09.2016, the performance test for full capacity of Unit No. 1 as per relevant clauses of PPA has not been done by the developer, hence the Commission directs to complete it by the end of February 2017.

16. With above, the Commission approves the Second time extension i.e. upto 31.03.2015 and Third time extension i.e. upto 30.09.2016.

17. The Petition is disposed of."

5.12 Thus, in the Order dated 14.02.2017 the State Commission had not approved the draft SPPA (which was not agreed to by the Appellant) based on the agreement dated 04.11.2015. UPPCL filed review Petition No. 1190 of 2017on 13.04.2017 seeking a review on this aspect and praying as under:-

"Wherefore, it is humbly prayed, that this Hon'ble commission may kindly be pleased to pass:

(i) an order whereby the present Review Petition is allowed by approving the SPPA, incorporating the agreement between UPPCL and LPGCL dated 04.11.2015, having been filed along with petition for third party extension upto 30.09.2016.

(ii) an order to the effect that SPPA, incorporating the agreement dated 04.11.2015 between UPPCL and LPGCL, would govern the legal relationship between UPPCL and LPGCL after 30.09.2016 till this Hon'ble commission is pleased to pass an order on the petition for fourth time extension.

(iii) any order which this Hon'ble commission may deem, just and proper in the facts and circumstances of the case.

5.13 The State Commission heard Review Petitions 1155 of 2016 and 1190 of 2017 together and decided them vide the Impugned order dated 17.10.2018. The State Commission has erroneously allowed the Review petition filed by UPPCL on the issue of approval of Illegal Agreement dated 04.11.2015 in contravention of its own Tariff Regulations, Grid Code Regulations and findings in its own previous Orders on the issue, which has caused grave prejudice to the Appellant.

5.14 The findings in the Impugned Order dated 17.10.2018 are as under –

"38. It is undisputed that UPPCL allowed COD on the 1st unit of LPGCL on 1st October, 2015 on the basis of agreement dated 4th November, 2015. Further, it is also indisputable that the second time extension of completing conditions subsequent for LPGCL came to an end on 31st March, 2015. It is also beyond doubt that the Commission granted the 3rd time extension to LPGCL from 1st April, 2015 to 30th September, 2016, which had agreement dated 4th November, 2015 in its genesis. In absence of this agreement neither the COD of 1st unit nor the third time extension could have survived as both these events were contingent upon the agreement dated 4th November, 2015. Therefore, granting 3rd extension of LPGCL to complete conditions subsequent without approving the SPPA dated 4th November, 2015 containing the aforesaid agreement was not possible. Hence, it is an error apparent on the face of record that the Commission did allow the 3rd time extension but somehow approval of SPPA dated 4th November, 2015 got overlooked.

The Commission is also duty-bound to deal with legitimacy of supplementary PPA dated 4th November, 2015 as filed by UPPCL, as it will govern the legal relationship between UPPCL and M/s LPGCL from the COD of the first unit i.e. 1st December, 2015, which was allowed with the conditions of the agreement dated 4th November, 2015 to the date of implementation of supplementary PPA dated 4th January, 2017.

There is no dispute that the agreement entered into between UPPCL and M/s LPGCL on 4th November, 2015 will govern the legal relationship between the two parties from 1st December, 2015 to 21st September, 2016 i.e. the date on which Commission gave a dispensation, which was at slight variance from the arrangement of UPPCL. Situation changed with Commission's order dated 21stSeptember, 2016, in which Commission gave a

slightly differed dispensation but again Commission refers the matter before the State Government for obtaining the approval of government, as stated in point no. 33(b) of the order and which is reproduced below:

"UPPCL while signing the agreement dated 4th November, 2015 had taken the post facto approval of the competent authority in the State government therefore it will be in the fitness of things that UPPCL obtains the approval of the competent authority on this interim arrangement also"

Therefore, the Commission itself had accepted that the State Government was competent authority to approve the agreement. Certain new conditionalities were attached to make the dispensation of the Commission applicable on single 765kV line, which was approved by the State Government and subsequently the arrangement was also allowed by the Commission on 18th January, 2017. Therefore, the period between 1st October, 2015 and prior to approval of supplementary PPA dated 4th January, 2017 cannot be left in lurch without defining the legal status. Since, the approval of its own arrangement from the State Government was referred by the Commission itself, it is prudent that supplementary PPA dated 4th November, 2015 be approved and be treated for defining the legal relationship between the two parties post 1st October, 2015 and prior to date when supplementary PPA dated 4th January, 2017 was allowed and become effective.

39. *In view of factual-legal matrix discussed above the Commission*

    i. *does not allow Return on Equity (RoE) to M/s LPGCL prior to obtaining long term coal linkage primarily on the grounds of non-maintainability of review petition on this issue and also on merits.*

    ii. *holds review on the issue of transportation charges from mine-head to rail-head admissible to M/s LPGCL subject to the ceiling of rail freight between Amrapali mines captive rail siding of the project. No other road transportation charges shall be admissible.*

iv. accepts the review of UPPCL regarding approval of supplementary PPA dated 4th November, 2015 as maintainable and accordingly supplementary PPA dated 4th November, 2015 is approved for period mentioned above in the order."

5.15 Just to complete the narration, for the period from January 2017 onwards, there was another Agreement dated 04.01.2017 between the Appellant and UPPCL.

Submissions of the Appellant are as follows:-

5.16 The main duty statutorily cast upon the State Commission is to determine tariff as per the provisions of sections 61, 62 & 64 of the Electricity Act, 2003. Further, the State Commission also approved the entire power purchase including through agreements under Section 86 (1) (b) of the Electricity Act, 2003. If a PPA is approved by the State Commission, any changes / amendments to the said PPA also need to be approved by the State Commission. This statutory duty of the State Commission cannot be divested on in any manner delegated by the State Commission to any person, including the State Government.

5.17 With regard to the PPA entered into between the parties, there is a specific provision as to how an amendment is to take place –

"ARTICLE 18 : MISCELLANEOUS PROVISIONS

18.1 *Amendment*

This Agreement may only be amended or supplemented by a written agreement between the parties and after duly obtaining the approval of the Appropriate Commission, where necessary.

18.3 No Waiver

A valid waiver by a party shall be in writing and executed by an authorized representative of that party, Neither the failure by any to insist on the performance of the terms, conditions, and provisions of this Agreement not time or other indulgence granted by any party to the other parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.

18.4 Entirety

18.4.1This Agreement and the Schedules are intended by the parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their agreement.

18.4.2Except as provided in this Agreement, all prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement or the sale or purchase or Electrical Output and Contracted Capacity under this Agreement to the procurers by the Seller shall stand superseded and abrogated."

5.18 Further, Schedule 6 and 7 of the PPA detail as to how the availability from the project is to be determined and how the tariff and capacity charges will be paid.

5.19 Further, the PPA has the following provisions for declaration of Commercial Operation –

*"6.3 **Commercial Operation***

6.3.1 Unit shall be Commissioned on the day after the date when all the Procurers receive a Final Test Certificate of the Independent Engineer stating that:

(a) the Commissioning Tests have been carried out in accordance with Schedule 5 :- and are acceptable to him; and the

(b) the results of the Performance Test show that the Unit's Tested Capacity, is not less than ninety five (95) percent of its Installed Capacity (as existing on the Effective Date).

6.3.2 If Unit fails a Commissioning Test, the Seller may retake the relevant test, within a reasonable period after the end of the previous test, with three (3) day's prior written notice to the Procurers and the Independent Engineer. Provided however, the Procurers shall have a right to require deferment of any such re-tests for a period not exceeding fifteen (15) days, without incurring any liability for such deferment, if the Procurers are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the Procurers or due to reasons outside the reasonable control of the Procurers or due to inadequate demand in the Grid.

6.3.3 The Seller may retake the Performance Test by giving at least fifteen (15) days advance notice in writing to the Procurers, up to eight (8) times, during a period of one hundred and eighty (180) days ("Initial Performance Retest Period") from a Unit's COD in order to demonstrate an increased Tested Capacity over and above as provided in Article 6.3.1 (b). Provided however, the Procurers shall have a right to require deferment of any such re-test for a period not exceeding fifteen (15) days, without incurring any liability for such deferment, if the Procurers are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the Procurers or due to inadequate demand in the Grid.

6.3.4 (i) If Unit's Tested Capacity after the most recent Performance Test mentioned in Article 6.3.3 has been conducted, is less than its Installed Capacity (as existing on the Effective Date) the Unit shall be de-rated with following consequences in each case with effect from the date of completion of such most recent test:

a) the Unit's Installed Capacity shall be reduced to its Tested Capacity, as existing at the most recent Performance Test referred to in Article 6.3.3 and Capacity Charges shall be paid with respect to such reduced Contracted Capacity;

b) Not used

c) the Seller shall not be permitted to declare the Available Capacity of the Unit at a level greater than its Tested Capacity;

d) the Availability Factor of the derated Unit shall be calculated by reference to the reduced Installed Capacity; and

e) the Capital Cost and each element of the Capital Structure shall be reduced in proportion to the reduction in the Installed Capacity of the Power Station as a result of that derating (taking into account the contracted capacity of any Unit which has yet to be commissioned)

(ii) If at the end of Initial Performance Retest Period or the date of the eighth Performance Test mentioned in Article 6.3.3, whichever is earlier,, the Tested Capacity is less than the Installed Capacity (as existing on the Effective Date) the consequences mentioned in Article 8.2.2 shall apply for a period of one year. Provided that such consequences shall apply with respect to the Tested Capacity existing at the end of Initial Performance Retest Period or the date of the eighth Performance Test mentioned in Article 6.3.3, whichever is earlier.

6.3.5 If unit's Tested Capacity as at the end of the Initial Performance Retest Period or the date of the eighth Performance Test mentioned in Article 6.3.3, whichever is earlier, is found to be more than it's Installed Capacity (as existing on the Effective Date), the Tested Capacity shall be deemed to be the Unit's Installed Capacity. if any Procurer/s agree and intimates the same Seller within thirty (30) days of receipt of the results of the last Performance Test to purchase ninety percent (90%) of such excess Tested Capacity and also provide to the Seller additional Letter of Credit and Collateral Arrangement (if applicable) for

payments in respect of ninety percent (90%) of such excess Tested Capacity, the Seller shall be free to sell such excess Tested Capacity to any third party and the Unit's Contracted Capacity shall remain unchanged, notwithstanding that the Tested Capacity exceeded the Installed Capacity.

Provided that in all the above events, the Seller shall be liable to obtain/ maintain all the necessary consents (including Initial Consents), permits and approval including those required under the environmental laws for generation of such excess Tested Capacity."

5.20 Schedule 9 of the PPA provides as under:

"*The Power Generated at 3x660 MW Lalitpur Thermal Power Project shall be evacuated from the Power Station Switch Yard Bus at 765 KV through 2 nos. single circuit transmission lines to be constructed by the Procurer*."

5.21 Further, Article 6.5 of the PPA permits the Appellant to use alternative Fuel as under –

"6.5 ***Fuel***

The responsibility for arrangement of Fuel shall be with the Developer who shall procure the Fuel under coal linkage granted to the Seller by the Central Government on the recommendations of GOUP. In case of any short supply, procurement of fuel indigenous / imported preferable through long term contract or on spot purchase / Short term contract / E-auction basis from domestic and /or international suppliers / traders shall be within or outside India. The Seller shall obtain the prior consent of the Lead procurer about procurement of coal from any source other than coal linkage. In case the permission is not granted by the Lead Procurer within 7 working days from the date of receiving the application it would be considered as deemed permission and if rejected when it would be considered as procurer's inability to procure which would make conditions of clause 4.4.3 of the agreed PPA applicable and loss of availability due to rejected fuel quantity shall be taken into account while computing availability and fixed charges."

5.22 Therefore, in so far as the Appellant is concerned, if coal linkage is not available, it would have used alternative fuel and in case of refusal by UPPCL, the Appellant would still be entitled to fixed charges and also have the right to sell the power generated to third parties.

5.23 It is clear from a perusal of the above that the issue of COD is not linked in any manner to the achievement of conditions subsequent under Article 3.1.2 relating to obtaining of coal linkage. The courses to be followed for both these aspects are different.

5.24 The State Commission has framed the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014. The Tariff Regulations, 2014.Regulation 2 (4) & (5) of the UPERC Generation Tariff Regulations, 2014 provide as under –

> *(2) These regulations shall not apply for determination of tariff in case of the following:*
>
> *……*
>
> *(4) In case of any conflict between provisions of these regulations and a power purchase agreement signed between a generating company and distribution licensee(s)/beneficiary (ies), the provisions of these regulations shall prevail.*
>
> *Provided that in case of projects where parameters have been agreed to in the Power Purchase Agreement or determined through an earlier Regulation prior to 1.4.2014, for any hardship due to discrepancy/inconsistency with parameters given in these Regulations, the Commission may be approached and parameters in such cases may be determined by the Commission at the time of tariff determination of respective generating station.*
>
> *(5) Availability Based Tariff (ABT) in the State of Uttar Pradesh shall be implemented as per Orders passed by Uttar Pradesh*

Electricity Regulatory Commission read with orders of Central Electricity Regulatory Commission."

5.25 Further, the Regulations also provide the following on the aspect of mismatch between the COD of the generating station and the transmission system -

"*21. Controllable and Uncontrollable factors :*

The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project:

……

Provided further that if the generating station is not commissioned on the SCOD of the associated transmission system, the generating company shall bear the IDC or transmission charges if the transmission system is declared under commercial operation;

Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned."

5.26 Regulation 7 provides as under for 'Date of Commercial Operation' -

"***7. Date of Commercial Operation****:*

The date of commercial operation of a generating station or unit or block thereof shall be determined as under:

(1) Date of commercial operation in case of a generating unit or block of the thermal generating station shall mean the date declared by the generating company after demonstrating the maximum continuous rating (MCR) or the installed capacity (IC) through a successful trial run after notice to the beneficiaries, if any, and in case of the generating station as a whole, the date of commercial operation of the last generating unit or block of the generating station:

Provided that

(i) Where the beneficiaries have been tied up for purchasing power from the generating station, the trial run shall commence after seven days' notice by the generating company to the beneficiaries and scheduling shall commence from 0000 hr after completion of the trial run;

(ii) The generating company shall certify to the effect that the generating station meets the key provisions of the technical standards of Central Electricity Authority (Technical Standards for Construction of Electrical plants and electric lines) Regulations, 2010 and the Grid Code;

(iii) The certificate shall be signed by CMD/CEO/MD of the company subsequent to its approval by the Board of Directors and a copy of the certificate shall be submitted to the SLDC before declaration of COD.

(2) ……

Provided that

(i) Where beneficiaries have been tied up for purchasing power from generating station, scheduling process for a generating unit of the generating station or demonstration of peaking capability corresponding to installed capacity of the generating station through a successful trial run shall commence after seven days' notice by the generating company to the beneficiaries and scheduling shall commence from 0000 hrs after completion of trial run;

(ii) The generating company shall certify to the effect that the generating station meets key provisions of the technical standards of Central Electricity Authority(Technical Standards for Construction of Electrical plants and electric lines)Regulations, 2010 and the Grid code;

(iii) The certificate shall be signed by CMD/CEO/MD of the company subsequent to its approval by the Board of Directors and a copy of the certificate shall be submitted to the SLDC before declaration of COD.

……..

(3) *Trial Run in relation to generating station or unit thereof shall mean the successful running of the generating station or unit*

thereof at maximum continuous rating or installed capacity for continuous period of 72 hours in case of a thermal generating station or unit thereof and 12 hours in case of a hydro generating station or unit thereof:

Provided that where beneficiaries have been tied up for purchasing power from the generating station, the trial run shall commence after giving seven days' notice by the generating company. "

5.27 Against all of the above, the Illegal Agreement dated 04.11.2015 reads as under –

"

1. *The state government has declared Energy Policy 2009 (as amended from time to time), envisaging development of Independent Power Plants (IPPs) under various routes including MOU Route, in order to set up create required power generation capacity for meeting power demand of the State, within the State various places identified by the State and/or the private Developers.*

2. *In further of the aforesaid Policy the State Nominated Agency namely UP Power Corporation Limited (herein after referred to as UPPCL) had Plant ("Project") under a SPV namely Lalitpur Power Generation Company Limited ("LPGCL")*

3. *The State Government and Bajaj Hindustan Limited, leading the consortium signed a MOU for setting up aforesaid Project on 22nd April, 2010 ("the said MOU") and according to the provision of which 90% of the saleable Energy generated by the Project is to be sold by the company to procurers, which was subsequently modified to 100% as per the understanding reached between the parties after taking due approval of UPERC.*

4. *Pursuant to the said MOU, the SPV namely Lalitpur Power Generation Company Limited ("herein after referred to as LPGCL") was transferred on 10.12.2010 by UPPCL to Bajaj Hindustan Limited (BHL) led consortium, which proceeded with setting up of the aforesaid Thermal Power Plant.*

5. *PPA was signed between UPPCL and LPGCL on 10-12-2010.*

6. *765 kV transmission system which was required to be developed by UPPTCL for evacuation of power to be generated through (3x660 MW)*

Lalitpur Thermal Power Plant still not ready and in absence of readiness of 765 kV transmission system it was decided to provide start-up power and evacuate the power generated from (660 MW) unit -1 of (Lalitpur – Jhansi (Dhunara) lines & double circuit 132 KvKalyanpur – Rhonda (Lalitpur)-Hasari Lines.

7. *Within the limitation of the 220 Kv transmission system, performance test for declaring 1st unit under commercial operation was conducted and performance certificate has been issued by Independent agency for the 1st Unit of Lalitpur Thermal Power Plant after carrying out ramp up, ramp down test as well as test on supercritical parameters.*

8. *Arranging long term coal linkage from Government of India for the operation of units subsequent to COD is the responsibility of M/s LPGCL.*

9. *M/S LPGCL was allocated coal under presidential directive on 17-07-2013 for the purpose of trail run, performing COD and further operation of units of LPGCL for FY 2015-16 i.e. March 2016. The cost of coal under presidential directive is at 40% premium.*

10. *The petition for determination of provisional tariff based on coal under presidential directive is filed and under process before the commission.*

11. *Obtaining long term coal linkage, is one of the items classified as "condition Subsequent" to be fulfilled by generator under PPA.*

12. *Condition subsequent was envisaged to be fulfilled within period of 18 months from the date of signing of PPA. Subsequent to it, on account of force majeure condition, two consecutive extensions of 18 months each were given for fulfilling these conditions. The above said period lapsed on 31-03-2015.*

13. *M/s LPGCL has synchronized its first unit to grid and its 2nd& 3rd units are also in different stages of readiness. Further, since coal under presidential directive has also been allocated to LPGCL, it is considered expedient and justified to further extend the time frame to fulfil conditions subsequent in case of LPGCL, for another 18 months so that the State and public at large can avail the benefit of energy generated from LPGCL.*

14. *The supply of energy from unit -1 of LPGCL is available to the procurer in a supply shortage scenario but at the same time there are*

issues such as use of presidential directive coal at premium and truncated capacity of evacuation, due to non- availability of 765 Kv transmission system therefore, it is imperative for both procurer and supplier, in public interest, to devise a commercial mechanism under which while generation of LPGCL becomes available for the purpose of serving consumers of the state in accordance with the existing demand but at the same time cost effectiveness of such generation is ensured at every step till long term coal linkage is obtained by the generated and 765 Kv transmission evacuation system is also in place to evacuate the unit fully within commercial norms.

15. With the above objective mind, parties to the PPA viz LPGCL and UPPCL on behalf of procurers such as PUVVNL, PVVNL, MNNVL and DVVNL resolve to adhere to following commercial arrangement till the twin conditions of obtaining of Long term Coal linkage and commissioning of 765 Kv transmission evacuation system are effectively met.

16. In view of above backdrop and events both parties viz LPGCL (Generator) & UPPCL on behalf of Discoms (procurer) resolve to agree as under:

Arrangement up to obtaining of Long term coal linkage:-

a. *M/s LPGCL will declare tentative day ahead capacity to SLDC for its units, SLDC, depending upon requirement of UPPCL as well as capability of evacuation system, will finalise the schedule for M/s LPGCL. The schedule given by SLDC shall be treated as declared capacity on a given day for M/s LPGCL and it will be paid fixed charges on actual implemented schedule.*

b. *Energy charges will be paid to M/s LPGCL on its implemented schedule.*

c. *No deemed availability benefit shall be admissible to M/S LPGCL under above arrangement.*

Arrangement up to the availability of 765 Kv Transmission system in case materialisation of long term linkage coal happens prior to it.

a. *M/s LPGCL will declare tentative day ahead capacity to SLDC for the its units, SLDC, depending upon requirement of UPPCL as well as capability of evacuation system, will finalise the schedule*

for M/S LPGCL. The schedule given by SLDC shall be treated as declared capacity on a given day for M/s LPGCL and it will be paid fixed charges on actual implemented schedule.

b. Energy charges will be paid to M/s LPGCL on its implemented schedule.

c. If transmission failure of existing 220 Kv evacuation system is of less than 72 hours, no deemed availability shall be paid.

d. However, if existing 220 Kv transmission evacuation system is not available for more than 72 hours, deemed availability, shall be given upto the level of technical minimum of machine (i.e. upto the level to which it can be backed down) for period beyond 72 hours.

17. This interim agreement shall become effective w.e.f. 01.10.2015 and will remain effective till attainment of long term coal linkage for Lalitpur TPS & completion of 765 Kv transmission line for evacuation of energy from Lalitpur TPS.

18. This agreement in it's entirely shall become part of the supplementary PPA, which is to be filed before UPERC for 3rd time extension (i.e. upto Sept 2016) for fulfilling condition subsequent.

5.28 The above agreement was never placed by UPPCL before the State Commission for approval prior to forcing the Appellant to sign it. It was the Appellant who challenged the above Agreement before the State Commission by filing Petition No. 1101 of 2016 on 01.03.2016. Thereafter, as a counter blast, UPPCL filed Petition No. 1115 of 2016 on 13.05.2016 seeking approval of a draft SPPA based on the said illegal Agreement dated 04.11.2015.

5.29 The action of the Appellant of preferring a Petition (No. 1101 of 2016) itself is sufficient evidence that the Appellant having found the agreement being illegal challenged its validity. The State Commission as a regulator despite having examined the legality ought to have

atleast commented in its order whether such contract is in accordance with law as well as its own Regulations.

5.30 The effect of the Orders passed by the State Commission is such that the basic prayer made by the Appellant on the illegality of the Agreement dated 04.11.2015 although considered and even heard by the State Commission, did not factor at all in the orders of the State Commission dated 21.09.2016.

5.31 The State Commission has indirectly legalized the grossly illegal action of UPPCL, firstly to treat the Scheduled capacity as declared capacity and of adding fixed cost with variable cost pushing the Appellant so low in the MOD that its unit could not be scheduled and secondly, by ordering shutting down of the plant.

5.32 The right of the Appellant to get the capacity charges flows from the UPERC Tariff Regulations, 2014 as under –

"Regulation 18 (1) (a)

18. Norms of Operation:

(i) Target Availability(NAPAF) for recovery of full Capacity (Fixed) charges

(a) All thermal power generating stations, except those covered under clause (b) below - 85%

Provided that in view of shortage of coal and uncertainty of assured coal supply on sustained basis experienced by the generating stations, the target availability for recovery of fixed charges may be reduced to 83% based on the submissions made by the generating station and approval of the Commission.

……

Regulation 25

"The capacity charges shall be computed on the following basis and their recovery shall be related to target availability in case of all existing as well as new generating stations.

Provided full capacity charges shall be recoverable at target availability specified in Regulation 18. Recovery of capacity (fixed) charges below the level of target availability shall be on pro rata basis. At zero availability, no capacity charges shall be payable.

Provided the payment of capacity charges shall be on monthly basis in proportion to the allocated capacity."

5.33 The duty of the Appellant is to make the electricity available and as long as it is made available, the Appellant is entitled to receive the capacity charges. It is not open to UPPCL to insert terms in an agreement contrary to the provisions of the UPERC Tariff Regulations, 2014 disentitling the Appellant of its capacity charges. The illegal Agreement dated 04.11.2015 being contrary to the above Regulations ought not to have been approved by the State Commission on the face of it.

5.34 However, the State Commission has legalized the "extortion" by UPPCL by approving the SPPA based on the illegal Agreement dated 04.11.2015 depriving the Appellant from fixed charges and further by denying the Appellant of its RoE wrongly attributing it to the Appellant citing not fulfillment of the condition subsequent relating to obtaining of coal linkage, despite the fact that RoE is the cardinal principle of any tariff and without even realizing that the RoE is the only return that a generator gets in exchange of putting its equity into the project and giving personal guarantees to the lenders for the huge loans extended by them.

5.35 The issue of conditions subsequent have been provided for in Article 3.1.2 of the PPA as under –

"3.1.2 The Seller agrees and undertakes to duly perform and complete the following activities within eighteen [18] Effective Date unless such completion is affected due to the Procurers' failure to comply with their obligations under Article 3.1.2A of this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurers jointly:

……..

ii) the Seller shall have obtained coal linkage from Standing Linkage Committee (Long Term), GOI and provided the copies of the same to the Procurers;

5.36 The PPA provides a different set of consequences with regard to achievement and non-achievement of conditions subsequent and a different set of provisions for dealing with commercial operation. These two issues are not at all related. However, the State Commission by approving the SPPA based on the Illegal Agreement dated 04.11.2015 has mixed up the two aspects to the grave prejudice of the Appellant.

SUBMISSIONS QUA THE ORDER DATED 21.09.2016 –

On the aspect of validity of Agreement dated 04.11.2015 / Recovery of Capacity Charges based on declared capacity-

5.37 The State Commission has not at all acted in a transparent manner in passing the Order dated 21.09.2016 in as much as the State Commission despite going through the trouble of examining the elaborate pleadings made by both the parties and despite hearing them in detail on the main prayer in Petition No. 1101 of 2016 which was to set aside the conditions stipulated in the Agreement dated 04.11.2015, which conditions, according to the Appellant were agreed by the Appellant under undue influence, were coercive and also

against law and which had been forced upon the Appellant by UPPCL by not accepting the COD of Unit 1 of the generating plant.

5.38 The State Commission for reasons best known to it separated the disposal of Petitions No. 1101 of 2016 filed by the Appellant and Petition No. 1115 of 2016 filed by UPPCL. While Petition No. 1101 of 2016 had been filed praying for setting aside the Agreement dated 04.11.2015 as having been entered into under duress and undue-influence, Petition No.1115 of 2016 had been filed by UPPCL seeking approval of the SPPA based on the very same Agreement dated 04.11.2015. This was the core issue to be decided by the State Commission and both petitions had to be heard together since the substantive issue was the same, namely the validity of the Agreement dated 04.11.2015. Instead of deciding this issue, the State Commission has proceeded in a circuitous manner to the grave prejudice of the Appellant.

5.39 The State Commission has failed to exercise its jurisdiction as a regulator under Section 86(1)(b) and as an independent adjudicator under Section 86(1)(f) of the Act. The purpose with which the State Commission has been formed and vested with powers as an independent regulator i.e to ensure the growth of the Electricity Sector has been completely negated by the manner in which the State Commission has dealt with the matter.

5.40 The State Commission itself in Paras 12 & 13 of the Order dated 21.09.2016 has recorded that the parties had no right to enter into the Agreement dated 04.11.2015 tweaking the provisions of the original PPA without prior approval of the State Commission. This being the case, there is a clear morbidity/ error in the Order of the

State Commission treating the Agreement dated 04.11.2015 as a *fait accompli* even though the same was objected to by the Appellant.

5.41 The State Commission has misunderstood its role as a statutory authority. The State Commission is not bound by the contracts entered into between the parties and has the right to examine whether the same are in accordance with law and whether these have been entered into by free will and without any duress or undue influence. The State Commission in Para 15 of the Order dated 21.09.2016 has also stated that the Agreement dated 04.11.2015 needs to be replaced by another arrangement in future but despite hearing the parties in detail, did not choose to record even the arguments made by the Parties to the effect whether the Agreement dated 04.11.2015 is valid at all or not.

5.42 The State Commission failed to appreciate that the terms of the Agreement dated 04.11.2015 are ex-facie against the express provisions of the PPA, namely, Article 1.2.16, Article 18.1 Schedule 6, Schedule 7 and was imposed by UPPCL on the Appellant nothing but through undue influence, coercion and duress.

5.43 The State Commission has by its actions rendered Article 18.1 of the PPA meaningless which clearly states that any amendment to the PPA can only take effect pursuant to the prior approval of the State Commission. The State Commission has noted this aspect in the Impugned Order but failed to appreciate that this was not a situation of fait accompli.

On the aspect of ROE

5.44 The State Commission further decided that the Appellant would not be entitled to Return on Equity (ROE). The Petition No. 1101 of 2016 and Petition No. 1115 of 2016 were only for deciding the validity of the Agreement dated 04.11.2015 and had nothing to do with tariff elements such as ROE.

5.45 The tariff is to be determined by the State Commission in terms of its Tariff Regulations and in exercise of its statutory powers under section 61, 62, 64 and 86 (1) (b) of the Electricity Act, 2003. This is a separate power and cannot made an additional condition in the Agreement dated 04.11.2015 when the validity of the Agreement dated 04.11.2015 itself was in question before the State Commission.

5.46 The State Commission's approach is totally inconsistent as in Para 13 of the Order dated 21.09.2016, the State Commission proceeds on the basis that the parties have already acted on the Agreement dated 04.11.2015 as a contractual relationship and then suddenly introduced a new term by stating that no ROE would be paid during the subsistence of this contractual relationship.

5.47 The State Commission as a regulator has the power to add or modify the contracts entered into by the parties and also to set aside the contracts either fully or partly. However, the State Commission cannot follow peculiar procedure by treating the contract between parties as a fait accompli and still adding terms to the said contract and holding that the Appellant would not be entitled to ROE.The State Commission has not appreciated that in case of any conflict between a PPA and the Regulations, the Regulations would have the overriding effect on PPA

(Regulation 2 (4) & (5) of the UPERC Generation Tariff Regulations, 2014).

5.48 The UPERC Tariff Regulations and the Statement of Objects and Reasons for the same provide as under with respect to the ROE –

> ***"(iii) Return on Equity****:*
> *Return on equity shall be computed in rupee terms on the equity base determined in accordance with Regulation 24@ 15.5% per annum;*
> *……*

Statement of Reasons and Objects:

2.6. Return on Equity (RoE)
Background
To provide returns on investments made by Generating Companies and to incentivise capacity addition in the sector providing a sound return on equity is important. In this context, the Tariff Policy stipulates:

"a) Return on Investment
Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity. The rate of return should be such that it allows generation of reasonable surplus for growth of the sector."

……..

Commission's view

The Commission after considering the views of different stakeholders and the provisions of the CERC Tariff Regulations, 2014 in this regard proposes to continue with the existing base rate of return on equity of 15.50% with an additional 0.50% return on equity as an incentive for timely completion of projects and in case the project is not completed within the stipulated timeline for any reasons whatsoever the provision of providing additional return shall not be admissible.

5.49 The State Commission having framed the Regulations is also bound by the same. It is well settled that Regulations are in the nature of

delegated legislation and once framed and placed before the State Legislature in accordance with Section 181 & 182 of the Electricity Act, 2003 cannot be modified except by following the very same procedure. Therefore, incorporating of terms in a bilateral Agreement which are contrary to the Regulations makes such an Agreement void ab-initio. Mere approval by the State Government (though without any jurisdiction)to such an Agreement also cannot make it valid, if it is otherwise in the teeth of the provisions of the Regulations.

5.50 The State Commission by holding that the Appellant would not get the ROE has acted against the express terms of the PPA which require the State Commission to determine tariff as per its Regulations. Further, the issue of ROE is not related to the fulfillment of Article 3.1.2(ii) relating to coal linkage at all since the Appellant had arranged for alternate coal and was itself bearing the incremental fuel cost towards alternate coal arrangements vis-à-vis the linkage coal which, by the own observation of the State Commission was ***putting the procurers in the same position in which they would have been had the linkage been obtained***.The adverse impact of not obtaining such coal linkage (which was for the reasons beyond the control of the Appellant) was fully absorbed by the Appellant and therefore, it is beyond comprehension that how could the ROE of the Appellant be disallowed by the State Commission.

SUBMISSIONS QUA THE ORDER DATED 17.10.2018 -

5.51 The State Commission has wrongly allowed the Review Petition No. 1190 of 2017 which petition was filed by UPPCL seeking review of the Order dated 14.02.2017 in Petition No. 1115 of 2016.

5.52 The State Commission has acted in an extreme unjust and illogical manner as indicated below–

(i) The issue that the Agreement dated 04.11.2015 was signed under duress and undue influence, for which pleadings and arguments both were made, did not find mention in the order of the State Commission in Petition No. 1101 of 2016 filed by the Appellant;

(ii) The State Commission wrongly disposed of Petition No. 1101 of 2016 vide the Order dated 21.09.2016 while it was only deciding the interim application of the Appellant;

(iii) The State Commission, at the above stage kept the Petition No. 1115 of 2016 filed by UPPCL for approval of the Agreement dated 04.11.2015 pending;

(iv) On 14.02.2017, the State Commission decided Petition No. 1115 of 2016 and noted that there was no need to take any decision on the validity of the Agreement dated 04.11.2015 by it;

(v) Suddenly, vide the Order dated 17.10.2018, the State Commission has allowed the review against the Order dated 14.02.2017 and approved the SPPA based on the illegal Agreement dated 04.11.2015,unilaterally drafted by UPPCL, for the first time thus deciding after due examination the issue raised by the Appellant but without commenting on any of the averments or evidence placed on record by the Appellant in all the proceedings so far;

5.53 The actions of the State Commission are anything but transparent. The State Commission has deliberately proceeded in a circuitous manner to avoid dealing with the case of the Appellant that the Agreement dated 04.11.2015 was entered into on the basis of undue influence and is not a valid contract at all.

5.54 Even assuming without however admitting the same, the review petition which had questioned the validity of the agreement dated 04.11.2015 was not to be considered, the State Commission while exercising its power as a regulator for approving the Supplementary PPA ought to have considered the validity thereof particularly when the agreement dated 04.11.2015 was entered under coercion and was apparently contrary to the statutory regulations. The submissions of the Appellant on these aspects were not even mentioned in the order. As a result, there is serious miscarriage of Justice rendering the project of the Appellant financially unviable.

5.55 The State Commission erred in holding that the review petition filed by the Appellant being Review Petition No. 1155 of 2016 is not maintainable on the issues of not deciding the validity of the agreement dated 04.11.2015 and return on equity. If the State Commission was applying the test of error apparent on these aspects, the test ought to have been equally applied to Review Petition No. 1190 of 2017 filed by UPPCL and the same also ought not to have been maintainable.

SUBMISSIONS ON THE ASPECT OF COERCION AND UNDUE INFLUENCE

5.56 The wrongful conduct of UPPCL is writ large from the fact that while the earlier two requests of the Appellant for approving the extension of time for compliance of Article 3.1.2 (ii) of the PPA (condition subsequent relating to long term coal linkage) were approved by

UPPCL within a reasonable time frame, UPPCL took a different position during the third extension of time –

No of Time Extension	**Appellant applied on**	**Approved by UPPCL on**	**SCOD extended till**
First Time extension	30.05.2012	10.06.2012	18 months till 10.12.2013
Second Time extension	11.11.2013	11.12.2013	18 months till 31.03.2015
Third Time extension	28.04.2015	No response was given by UPPCL and UPPCL simply sat on this request for more than 7 months. Ultimately, on 13.05.2016, UPPCL filed Petition No. 1115 of 2016 asking the State Commission to approve the Third Time Extension linking the same with the approval of the Illegal Agreement dated 04.11.2015	Was granted by the State Commission vide another Order dated 14.02.2017

5.57 The Agreement dated 04.11.2015 has terms contrary to the established Regulations especially treating schedule given by SLDC as declared capacity for payment of fixed charges instead of available (day-ahead) capacity declared the Appellant and disentitling the Appellant of ABT, by deliberately withholding the approval of COD of the plant of the Appellant.

5.58 The State Commission, being the court of first instance and having the adjudicatory powers of the Civil Court under Section 86 (1) (f) of the Act as well as plenary regulatory power has failed to record any finding on the above conduct of UPPCL in coercing the Appellant to sign the Agreement dated 04.11.2015 on the dotted line and instead disposing off the main petition under the garb of deciding an interim application in

the said petition. Thus, the State Commission failed to exercise its jurisdiction as vested in it.

5.59 The following relevant aspects have not been considered by the State Commission –

a. Upon signing of the Agreement dated 04.11.2015, UPPCL accepted the COD of the plant on the same day with effect from 01.10.2015.

b. After a few days and on 14.11.2015 on the instructions of Director, SLDC, the plant was ordered to be shut down without assigning any reasons whatsoever effective midnight of 14.11.2015.

c. It was further given to understand that the demand had crashed down in the State due to cold weather conditions and the Appellant being very low in the MOD Stack was not eligible for scheduling.

d. Even though the above reason was given initially, from the day ahead schedule issued by SLDC, it became clear that the plant was not being scheduled due to the Agreement dated 04.11.2015.

e. This was a complete shock to the Appellant since the Agreement dated 04.11.2015 had nothing to do with scheduling of the plant. Rather Article 14 of the said agreement provided that ***"…*** *it is imperative for both procurer and supplier, in the public interest to devise a commercial mechanism under which while generation of LPGCL becomes available …..*".Even the bills raised by the Appellant were not processed by UPPCL.

f. The above conduct of UPPCL had put the Appellant in serious financial prejudice. In the meanwhile, synchronization and COD of other two units were also in the pipeline and policy on coal linkage was still not forthcoming. Also, in the meanwhile, the evacuation system was being set up by UPPCL.

g. On 21.12.2015, the Appellant wrote to UPPCL intimating the performance test for Unit No. 2 to be conducted soon. On 22.12.2015, UPPCL demanded the Appellant to give affidavit that the COD of 2nd Unit shall also be subject to Illegal Agreement dated 04.11.2015.

5.60 However, the Appellant had been pushed to a corner and UPPCL further kept on pressurizing the Appellant by not scheduling the power, forcibly shutting down the plant, returning the bills raised by the Appellant and also tried to take away the legal right of the Appellant to challenge the illegality of the Agreement dated 04.11.2015.

5.61 The following circumstances in which the Appellant entered into the Agreement dated 04.11.2015 clearly show coercion and undue influence –

i. On 09.06.2015, Unit No. 1 of 660 MW power plant was synchronized with the 220 KV system of UPPCL;

ii. On 26.06.2015, the Appellant approached UPPCL for appointing an independent engineer for verifying.

iii. the performance testing and UPPCL appointed Sri R.K Jain;

iv. From 26.08.2015 to 31.08.2015, the Commissioning test was carried out in which the machine achieved maximum capacity of 420 MW but more than 390 MW could not be evacuated due to inadequate transmission capacity;

v. On 31.08.2015, the Independent Engineer declared the COD of Unit No. 1;

vi. On 02.09.2015., the results of the performance tests were communicated to UPPCL but UPPCL did not respond to the same;

vii. On 03.09.2015, UPPCL did not accept the COD declaration by Mr. R.K. Jain and appointed another engineering consulting firm M/s E-Gate Way India;

viii. From 21.09.2015 to 25.09.2015, commissioning tests were conducted by M/s E-Gate Way India. In this test, all parameters were achieved by Unit No. 1 for 660 MW but the issue of transmission constraint remained the same;

ix. On 30.09.2015, the test results were submitted to UPPCL and COD was requested to be accepted from 01.10.2015. UPPCL, however, did not accept the declaration of COD and did not give any reasons for such non-acceptance;

x. On 05.10.2015, the Appellant wrote to UPPCL conveying the COD test results and requested UPPCL to accept COD. It was also stated that if the COD is not accepted, the required coal

would not be made available to the Appellant and the unit would again have to be shut down;

xi. Between 05.10.2015 & 14.10.2015, the Appellant's officers continuously met with UPPCL's officers to resolve the issues and requested umpteen number of times not to link the COD of unit No. 1 which was a right of the Appellant under the PPA and which had been achieved not once but twice by the Appellant by following all the terms and conditions of the PPA to the issues of long term coal linkage which was to be dealt with under Article 3.1.2 (ii) of the PPA.

xii. However, the officers of the Appellants were subjected to complete harassment and UPPCL saw it fit to use this as an opportunity to force the Appellant to agree to penalties even for the defaults of UPPCL of not arranging the 765 KV evacuation system in time.

xiii. The officers of the Appellant also endeavoured to explain to UPPCL that accepting the COD of 01.10.2015 amounted to early commissioning as compared to the SCOD of 24.12.2015 which would ensure reduced capitalization of IDC to the extent of Rs.108 crores (approximately). This would be a substantial saving for UPPCL and the consumers in the State of UP since the tariff would be determined based on capital cost under Section 62 of Electricity Act, 2003.

xiv. However, UPPCL was not willing to accept any of the submissions of the Appellant and was still insisting that the Appellant should agree to each of the illegal terms stipulated by UPPCL in lieu of UPPCL approving the COD of Unit No. 1. In

fact, the UPPCL forced the Appellant to agree to the same illegal terms even for Unit No. 2 and Unit No. 3.

xv. UPPCL did not respond and unreasonably withheld its approval of COD which was in fact a right of the Appellant under the PPA since all the terms of the PPA for declaration of COD had been followed by the Appellant not once but twice;

xvi. It was under these circumstances that the Appellant consented to the terms stipulated by UPPCL on 15.10.2015 and the letter dated 02.11.2015 is not a negotiation as being contended by UPPCL and it rather is a proof of coercion and undue influence exerted by UPPCL on the Appellant.;

xvii. The Agreement dated 04.11.2015 was entered into in the above almost illegal manner and on the very same day i.e. on 04.11.2015, UPPCL accepted CoD of Unit No. 1 with effect from 01.10.2015;

xviii. Thereafter, on 01.03.2016, the Appellant filed Petition No. 1101 of 2016 for setting aside of the Agreement dated 04.11.2015;

5.62 The undue influence is clear from the fact that the third time extension applied by the Appellant on 28.04.2015, on which UPPCL sat upon for more than seven months and finally filed Petition No. 1115 of 2016 on 13.05.2016 before the State Commission seeking approval of the same. This was done by UPPCL primarily to give legal sanctity to the illegal agreement dated 04.11.2015 which is apparent from the fact that the said petition for approval of the impugned agreement was filed by UPPCL after the Appellant filed Petition No. 1101 before the State

Commission seeking declaration of the Agreement as void to the extent as it was prayed for.

5.63 The delay in extension of time for compliance of Article 3.1.2(ii) relating to coal linkage, which was due to force majeure circumstances was used by UPPCL to coerce the Appellant in signing the impugned agreement, whereby the Appellant sacrificed almost the entire revenue which would have come to it.

5.64 The impugned clauses in the Agreement dated 04.11.2015 also suffer from the element of coercion since these are completely one sided. The Appellant was coerced by the financial losses it would face as a consequence of UPPCL by firstly not accepting the results of 1st COD test and secondly by delaying approval of the second COD test thereafter.

5.65 UPPCL's exercise of coercion and undue influence upon the Appellant was not limited to mere getting the impugned agreement signed but it further caused SLDC to order shut down the plant of the unit with effect from 14.11.2015 and the Appellant was given to understand that the Appellant's plant being ranked low in MOD stack was not eligible for scheduling, whereas scheduling continued for the power plants having higher variable cost. It is pertinent to note that UPPCL caused non-scheduling despite agreeing to schedule power in the impugned agreement.

5.66 The conduct of UPPCL is so gross that on the one hand, it stated that the Agreement dated 04.11.2015 is being entered into for operating the plant and getting supply to the consumers and thereafter on

14.11.2015 simply shut down the plant by stopping the scheduling through the SLDC.

5.67 The impugned agreement is without any consideration flowing to the Appellant, which is a direct evidence of exercise of coercion and undue influence by UPPCL on Appellant. No reciprocal benefit accrues to the Appellant in consideration of it agreeing to treat scheduled capacity as declared capacity and sacrificing ABT. The impugned Agreement only benefits UPPCL giving it a premium for delaying the transmission system and penalizing the Appellant in the form of Declared Capacity being equal to implemented schedule and paying fixed charges accordingly.

5.68 UPPCL's contention that the Appellant got the third time extension of Article 3.1.2 (ii) by signing the Impugned Agreement is no consideration at all. The delay occurred due to circumstances beyond control of the Appellant primarily caused by the legal impossibility that the Standing Committee (Long-term) on coal linkage was not deciding any longer on coal linkage to any generator in private sector. The Appellant's coal allocation, subsequent to the policy change even for commissioning of its units, was included in the Presidential Directive issued by the Ministry of Coal based on CCEA decision wherein it was directed that coal may be supplied to certain projects having a total generating capacity of 4660 MW. List of 4660 MW projects also included the units of the Appellant. Based on this CIL had issued letters to their subsidiaries for supply of coal under MoU route. Therefore, the Appellants received coal supply under the MOU route till 30.06.2016, when the Presidential Directive was replaced with e-forward auction scheme. Thus, the Appellant had adequate coal

available with it for the plant consistent with the applicable policy of the government. The policy of coal linkage was temporarily kept in abeyance and the mechanism of MOU route was devised by the government to meet the coal requirement of certain specific generators, including appellant, which were affected by policy change.

5.69 Therefore, non-enforcement of an impossible act is no consideration at all. It is also pertinent to note that achieving COD also cannot form a valid consideration because COD is the right of the Appellant under PPA. The agreement is therefore void due to it being without consideration, which is a clear evidence of exercise of duress by UPPCL upon the Appellant.

5.70 The UPPCL started coercing/ exercising undue influence over the Appellant ever since it saw that the start of the plant was in near sight. That this coercion/ exercise of undue influence started first in the shape of change of stand from force majeure/ change in law condition in complying with Article 3.1.2(ii) relating to coal linkage to it becoming "**an essential condition for claiming RoE**", then it changed its stand again vide its letter dated 04.09.2015, rejecting the performance test by the firm R.K. Jain and instead appointing E-Gateway India, thus forcing the Appellant once again to go through the performance test. This exercise of coercion/ undue influence was further aggravated, when it did not accept even the second time performance test communicated by the said M/s E-Gateway India after carrying out the same during 21.09.2015 to 25.09.2015 and upon the Appellant raising its concern on the same, got the illegal agreement dated 04.11.2015 signed from the Appellant under coercion/ undue influence.

5.71 UPPCL's contention that the Impugned Agreement was entered into at the behest of the Appellant since the Appellant got its COD approved is incorrect and without any merit. It is submitted that getting the COD approved was a right of the Appellant under the PPA which should have been granted by UPPCL without the Appellanthaving to sign the impugned Agreement. In fact, UPPCL withheld the grant of COD to coerce the Appellant into signing the said Agreement dated 04.11.2015. This contention of the Appellant has been overlooked by the State Commission at all.

Additional submissions of the learned counsel appearing for the Appellant are as follows:-

5.72 Without prejudice to all of the above submissions, it is submitted that even if the clauses of Agreement dated 04.11.2015 are held to be implementable, the day ahead capacity was to be declared as per the capability of the transmission system which was 500 MW made available by UPPCL itself. This being the case, UPPCL at least should have paid the fixed charges for 500 MW.

5.73 However, the conduct of UPPCL is so inequitable that after signing the Agreement dated 04.11.2015, UPPCL only allowed the plant to run for 10 days and vide a communication on 14.11.2015 through SLDC, the plant was ordered to be shut down with immediate effect and without assigning any reasons.

5.74 This was also against the express terms of the Agreement dated 04.11.2015 which was being made to run and operate the plant. However, if the plant was being shut down after 10 days, the very basis of the Agreement dated 04.11.2015 would go away and the

Agreement becomes unenforceable. UPPCL cannot then rely on the Agreement dated 04.11.2015 for its benefit.

5.75 The above also shows the conduct of UPPCL, namely that the Agreement dated 04.11.2015 was only to cover up the default of UPPCL in not setting up the requisite transmission evacuation for offtake of power from the Appellants' generating station. After coercing the Appellant to sign the Agreement dated 04.11.2015 and realizing that still 500 MW of power could be evacuated on the alternative transmission line, UPPCL simply stopped giving schedule to the plant of the Appellant from 14.11.2015 onwards. This clearly means that even after getting the Agreement signed, UPPCL still did not want the plant to run. The basis of the Agreement dated 04.11.2015, namely to 'run the plant' itself was not followed by UPPCL and therefore, the Agreement has no validity.

Rejoinder to the points raised by the counsel appearing for the UPPCL during course of the hearing

5.76 The submissions of UPPCL are based on a fundamentally erroneous premise as if the commercial contract namely the impugned agreement dated 04.11.2015 is a purely bilateral agreement in the nature of a commercial contract arrived at after negotiation between the two parties. The Appellant submits that the Power Purchase Agreements are in the nature of statutory contracts which have to be approved (in advance, i. e., prior to execution) by the State Commission in exercise of the regulatory power under Section 86(1)(b) of the Electricity Act, 2003. Similarly, any agreement effecting any amendment to such PPAs also have to be approved by the State Commission.

5.77 It is the Appellant's submission that the State Commission is obliged and statutorily mandated to examine whether such Power Purchase Agreements are in accordance with and not contrary to the Regulations framed by the State Commission and are not in conflict with the principles contained in Section 61 of the Act which mandate recovery of the cost of the electricity in a reasonable manner, that the generation is conducted on commercial principles and that the factors which would encourage optimum investment and level playing field are taken into account.

5.78 The principles of Section 15 and 16 of the Contract Act and the decisions thereon which are relied upon are in the context of bilateral commercial contracts which do not require the regulator's approval and are challenged in a Civil Court when the test laid down in those cases have to be applied.

5.79 It is the submission of the Appellant that the admission by UPPCL that there was '*commercial pressure / economic duress'* applied by them on the Appellant that they will accept declaration of COD only if the Appellant gave up the claim to capacity charges is sufficient for the State Commission to disapprove the said clauses since the generator of electricity cannot be deprived of being paid the tariff as per the Regulations especially, when the Appellant had filed a Petition challenging the said agreement dated 04.11.2015.

5.80 Article 11.1 of the PPA mandates the procurer to pay to the seller the monthly tariff determined in accordance with Article 11 and Schedule 7 of the PPA from the COD of the unit. This provision is not subject to any other provision of the Contract and in particular is not conditional on fulfillment of Article 3.1.2 (ii). In particular Clauses 7.1.1, 7.3.1 and

7.3.6 in "Schedule 7-Tariff" are material provisions, which are duly supported by the Regulations. There has not been any waiver (in terms of Article 18.3 of the PPA) of these mandatory provisions under Article 11.1 or Schedule 7 by the Appellant. The State Commission is obliged to ensure compliance with the said provisions and to further examine whether or not the impugned agreement is consistent with the Regulations, which are Regulations 18(1) (e) & 25 (Capacity Charges) and Regulation 25 (iii) (Return on Equity) of the UPERC Tariff Regulations.

5.81 Further, the declaration of C.O.D. is a concluded fact and the provisions of Article 11 and Schedule 7 cannot thereafter be derailed by relying on Article 3.1.2(ii). Once COD is declared Article 11.1 will take effect and Article 3.1.2 (ii) relied upon by UPPCL cannot be used to deprive the Appellant of the capacity charges or return on equity. That is to say, neither the PPA nor any of the Regulations provide that the COD is subject to compliance of Article 3.1.2(ii) relating to fulfillment of condition subsequent of obtaining of coal linkage within a specified time.

5.82 The factual submission made that the coal was being purchased, at 40% additional cost in the absence of coal linkage, has to be considered along with the fact that the Appellant had agreed to bear this additional cost so that the consumers do not suffer the burden of the additional cost of coal. This fact is ignored. What is further ignored is that the alternate source of supply has been approved and therefore there is no occasion for the Appellant to invoke Article 4.2 or 4.4.3 read with Article 6.5 of the PPA. The right of the Appellant to sell to third parties would have arisen only if UPPCL had not approved the

sourcing of alternate coal and also not taken the power itself. To the contrary, UPPCL decided to take the electricity and even recorded so in the Agreement dated 04.11.2015.

5.83 The Appellant is challenging the approval granted to the Illegal Agreement dated 04.11.2015. The recitals in the supplementary PPA dated 04.01.2017 which refer to the earlier Supplementary PPA dated 04.11.2015 do not have to be challenged.

5.84 The State Commission also seems to be under the erroneous impression that once the Government has approved the supplementary Power Purchase Agreement it has no role. (Para 38 last sub-para of the Order dated 17.10.2018.) On the other hand the very judgment of the Hon'ble Supreme Court in A.P. Transco Vs. Sai Renewable 2011 11 SCC 34 relied on by UPPCL in Paras 97 and 102 set out the role of the Regulatory Commission and the statutory function it has to discharge to fix the tariff and is not to be fettered away by any decision of the Government.

5.85 Further, the UPERC Tariff Regulations, 2014 itself provide in Regulation 2(4) that "*in case of any conflict between provisions of these regulations and a power purchase agreement signed between a generating company and distribution licensee(s)/beneficiary (ies), the provisions of these regulations shall prevail*". Accordingly, anyclause in a PPA which is contrary to the provisions of the Tariff Regulations, 2009 will have no application and the Regulations will prevail. This is a specific departure from the UPERC Tariff Regulations, 2009 and has also been mirrored in the PPA. Therefore, the State Commission's powers is in no manner circumscribed by either the contract entered

into between the parties or any so called action of the State Government approving such a contract.

5.86 The contention of UPPCL that the Appellant challenged the Agreement dated 04.11.2015 after four months of signing the same has no merit. The Appellant's challenge was prior to the petition filed by UPPCL for seeking approval of the SPPA based on the impugned Agreement dated 04.11.2015 before the State Commission. Further, the conduct of UPPCL in stopping the plant on 14.11.2015 and returning the bills of the Appellant made the Appellant realise that UPPCL even after getting the Appellant to agree to the Agreement dated 04.11.2015 had no intention of honoring the Agreement and only wanted to avoid paying fixed charges to the Appellant and cover up its default of not establishing the transmission evacuation line.

5.87 The very fact that the Agreement dated 04.11.2015 has clauses in deviation of the Tariff Regulations, 2014 is evidence of coercion and undue influence being applied by UPPCL. The State Commission should have at least examined the matter instead of simply treating the matter as a '*fait accomplis'.*

5.88 Another submission of UPPCL is that the Agreement dated 04.11.2015 is not against the Tariff Regulations and only a voluntary act on the part of the Appellant to give up part of its claim. This is absolutely incorrect. The right of the Appellant to receive the capacity charges and tariff including ROE starts right from COD which was properly achieved by the Appellant. This right is there both under the PPA and the Tariff Regulations, 2014. This Hon'ble Tribunal in **Power Company of Karnataka Limited** v **Udupi Power Corporation Limited**

(Judgment dated 15.05.2015 in Appeal No. 108 of 2014 & batch) has clearly held that if there is any conflict in a PPA and the Tariff Regulations, only the Tariff Regulations will prevail. Therefore, the very fact that the Agreement dated 04.11.2015 takes away a right granted under the Tariff Regulations, 2014 and the PPA shows that it is not voluntary but under coercion.

5.89 During the hearing on 10.04.2019, the learned counsel of UPPCL pleaded that the State Commission had allowed deemed availability to the Appellant in the impugned order dated 21.09.2016 but taken away the ROE. It was argued that this was a trade off by which the charges for deemed availability were paid but the ROE was taken away. This is a misleading and incorrect submission. The fact is that from 04.11.2015 till January 2017, the Appellant has neither received the charges for deemed availability nor the ROE. If UPPCL's case is to the contrary, the Appellant respectfully submits that, without prejudice to the rights of the Appellant, this statement of the learned Counsel of UPPCL may be recorded and UPPCL be directed to make payment of capacity charges to the Appellant for the relevant period accordingly.

5.90 The judgments cited by UPPCL are completely distinguishable and the Appellant has categorically elucidated to distinguish the said Judgments as under:

S.No.	**Judgment**	**Distinguishing Features**
1.	Krishna Bahadur v Purnea Theatre &Ors (2004) 8 SCC 229	RESPONDENT NO.2 is citing this judgment to state that it is possible to waive a right under a contract and also a statutory right. It is stated that there is no waiver by the Appellant of any of its rights unless the same is under Article 18.3 of the PPA (**Page 160**). Further, there is no waiver since the Appellant challenged the Illegal Agreement dated 04.11.2015 before the State Commission before RESPONDENT NO.2 filed for approval of the said Agreement.
2.	All India Power Engineer Federation v	This judgment supports the Appellant.in Para 31, the Hon'ble Supreme Court specifically holds that even if a waiver is claimed by one of the parties to a PPA, the same has to pass muster of the State Commission. In the present case, the State Commission has

	Sasan Power Ltd (2017) 1 SCC 487	not considered at all the validity of the Illegal A
3.	APTRANSCO v Sai Renewable (2011) 11 SCC 34	The finding of the Hon'ble Supreme Court that coercion has to be specifically pleaded and proved stands satisfied in the present case since this was the specific pleading of the Appellant but never considered by the State Commission. Further, in Paras 97 and 102, the Hon'ble Supreme Court has set out the role of the Regulatory Commission and the statutory function it has to discharge to fix the tariff and not to be fettered by any decision of the Government.
4.	SK Jain v State of Haryana (2009) 4 SCC 357	The observations of the Hon'ble Supreme Court are in the context of a purely commercial contract without any approval of any regulator. Further, the party in this case wished to read a discretionary clause as mandatory in the contract with the State. Unlike the same, the Appellant's case is that RESPONDENT NO.2 being a State forced it to agree to conditions against the provisions of the Tariff Regulations which is permissible.
5.	Central Inland Water Transport Corp v BrojoNath&Ors (1986) 3 SCC 156	This judgment clearly explains the cases where one party / the State is in an unequal bargaining power. The principles laid down fully support the Appellant in the present case.
6.	State of Kerala &Anr v M.A. Mathai (2007) 10 SCC 195	The Hon'ble Supreme Court has held that for a plea of coercion, pleadings and particulars are necessary. The Appellant has clearly satisfied this test in the present case. The Appellant has pleaded this very case before the State Commission but the State Commission has not considered the same.
7.	Subhas Chandra Das Mushib v Ganga Prasad Das Mushib AIR 1967 SC 878	Same as above.
8.	ONGC Mangalore v ANS Construction &Anr (2018) 3 SCC 373	In this judgment, the Hon'ble Supreme Court on the specific facts of this case held that the contractor issued the final bill and gave no dues certificate and thereafter pleaded that the same was under financial duress. As against this case, the Appellant has clearly pointed out the circumstances in which the Appellant had to sign the Agreement dated 04.11.2015. The very fact that the Agreement was against the Regulations and original PPA and no prior approval was obtained from the State Commission show the evidence of coercion and undue influence.
9.	RN Gosain v YashpalDhir (1992) 4 SCC 683	This judgment is on approbation and reprobation. RESPONDENT NO.2's contention that Appellant gained under the Agreement dated 04.11.2015 by getting COD and Coal Linkage is completely incorrect. COD if the right of the Appellant and Article 3.1.2 (coal linkage) has nothing to do with receiving fixed charges and ROE. Therefore, the only consideration was to RESPONDENT NO.2 who covered its default of not establishing the transmission line. It was the conduct of RESPONDENT NO.2 in stopping the plant on 14.11.2015 and returning the bills of the Appellant which made the Appellant realise that RESPONDENT NO.2 even after getting the Appellant to agree to the Agreement dated 04.11.2015 had no intention of honoring the Agreement and only wanted to avoid paying fixed charges to the Appellant and cover up its default of not establishing the transmission evacuation line. There is no question of approbation and reprobation in such circumstances.

10.	Islamic Academy of Education &Anr v State of Karnataka & Anr (2003) 6 SCC 697	It is not clear as to what portion of this Judgment is being relied on by RESPONDENT NO.2. The Appellant craves to distinguish this judgment upon understanding its context

5.91 The only other argument of UPPCL that the State Commission has no power to set aside the contracts if vitiated by undue influence and the only option for the Appellant is to go to a civil court under Section 19A of the Contract Act, 1872. According to UPPCL, the Hon'ble Supreme Court in ***Nahar Industrial Enterprises Limited*** ***v*** ***Hong Kong and Shanghai Banking Corporation*** (2009) 8 SCC 646 has held that Debt Recovery Tribunals are not civil courts. This submission is misconceived and without merit. The Judgment of the Hon'ble Supreme Court is not a declaration of law on the jurisdiction of all Tribunals and Commissions but restricted to the Debt Recovery Tribunals only.

5.92 The Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited*** *v* ***Essar Power Limited*** (2008) 4 SCC 755 has specifically held that the State Commission is the only adjudicating authority for disputes between generating companies and licensees. Further, the Hon'ble Supreme Court in ***State of Gujarat*** *v* ***Utility Users Welfare Association*** (2018) SCC Online SC 368 has held as under –

> ***93.*** *A perusal of these provisions would show that apart from their definition, even otherwise, these are powers of a civil court under the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'). Powers such as summoning, enforcement of attendance of any person and examination on oath, discovery and production of documents, receiving affidavit of evidence, requisitioning of public records, etc., all form part of Section 94. In terms of Section 95, all such proceedings before the State*

Commission would be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 and the commission would be a civil court for purposes of Sections 345 & 346 of the Code of Criminal Procedure, 1973. Not only that, Section 96 confers the extreme power of entry and seizure in respect of any building and place where the Commission has reason to believe that any document relating to the subject matter of enquiry may be found and may be seized. The power is conferred on the Commission under Section 129 for securing compliances of orders and under Sections 142 & 146 for punishment for non-compliance of orders and directions. This, thus, leaves no manner of doubt that the ***State Commission, though defined as a 'Commission' has all the 'trappings of the Court'****.*

…*……*

99. *Once we find that the tribunal has the trappings of the court in respect of its functions, we turn to the effect of the same.*

5.93 This Hon'ble Tribunal has approved the Orders of the State Commission setting aside one sided Agreements as having been entered into under undue influence. This Hon'ble Tribunal has also set aside the contracts between generating companies and licensees on the basis that there has been exercise of undue influence. Therefore, there is no basis for UPPCL to contend that the State Commission has no power to set aside the Agreements entered into under undue influence. The Judgments relied on by the Appellant on this issue are summarized in as under:-

- RE: On the power of the Regulator and Regulations

  a). PTC India v. Central Electricity Regulatory Commission (2010) 4 SCC 603

  b). All India Power Engineer Federation and Others v Sasan Power Limited & Ors (2017) 1 SCC 487

  c). Power Company of Karnataka Limited v Udupi Power Corporation Limited (Judgment dated 15.05.2015 in Appeal No. 108 of 2014 & batch)

- RE: On the aspect of coercion / undue influence

  a). National *Insurance Co. Ltd v/s. M/S. Boghara Polyfab Pvt. Ltd.* 2009 SCC 267

- RE: On the aspect of unequal bargaining power of Distribution Licensee and Generator

  a). GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd. (Judgment dated 06.12.2018 in Appeal No. 209 of 2015)

  b). Indian Wind Power Association (Maharashtra State Council) v. Maharashtra Electricity Regulatory Commission &Anr (Judgment dated 26.02.2016 in Appeal No. 210 of 2014)

5.94 The additional contention of the State Commission is that one cannot approbate and reprobate at the same time or to say that the Appellant having taken a benefit under the Agreement dated 04.11.2015 cannot challenge the same. It is respectfully submitted that the Appellant has not taken any benefit under the Agreement dated 04.11.2015. COD is a right of the Appellant under the PPA and non-fulfillment of Condition Subsequent under Article 3.1.2 has to be dealt with in a different manner. The only benefit which has flown is to UPPCL for not constructing its evacuation system in time and not paying any deemed fixed charges to the Appellant even when the Appellant's plant was ready and the coal had been arranged by the Appellant offsetting the financial impact of the additional cost of coal on UPPCL.

5.95 In view of the above, the Appeal deserves to be allowed. The impugned orders dated 21.09.2016 and 17.10.2018 passed by the State Commission may kindly be set aside to the extent challenged in the Appeal. Further, Agreement dated 04.11.2015 deserves to be declared void ab-initio as prayed for in the Appeal and the Appellant be declared entitled to receive capacity charges including RoE.

6. Shri Hemant Sahai, the learned counsel appearing for the Respondent, No. 2/UPPCL has filed the written submissions for our consideration as follows:-

Re: Coercion/Duress and Undue Influence

6.1 An allegation of such nature as in the present case, needs to be supported by:

(I) Facts; and

(II) Law.

(I) Factual:

6.2 The SPPA dated 04.11.2015 was signed for the benefit of LPGCL. In this regard, the language used in the said SPPA dated 04.11.2015 is self-explanatory.

6.3 LPGCL's conduct in the present case is self-evident and contrary to the allegations raised by it. Having taken the advantage under the SPPA dated 04.11.2015, LPGCL is seeking to approbate and reprobate. It is a well settled principle of law that a party cannot be allowed to approbate and reprobate.

6.4 The SPPA dated 04.11.2015 was a mutually negotiated and agreed upon agreement between the parties. In this regard it is pertinent to note that LPGCL in its letter dated 15.10.2015 itself stated as follows:

> *"In continuation to our earlier letter dated 09.10.2015, it is to state that after giving out expectance to the evolved draft, a meeting was again called on 12.10.2015 in which Director (Finance), Director (Commercial), UPPCL and Managing Director (Bajaj Power venture) participated. After detailed discussion,the initially arrived draft was amended, which is reproduced below:-*

…

After evolving of above interim arrangement, again a meeting was held between officers of UPPCL and that of LPGCL and finally the consensus emerged on following arrangement.

….

We give our consent to above draft so that COD may be declared."

[Emphasis Supplied]

A bare perusal of the contents of the aforesaid letter make it abundantly clear that the SPPA dated 04.11.2015 was a mutually negotiated agreement between the parties.

6.5 It is also noteworthy that the SPPA dated 04.11.2015 was challenged after a lapse of 4 months i.e. on 01.03.2016.If LPGCL's thought that the agreement was coercive then it could have refused to sign it and approached the Commission or challenged it immediately without any delay.

(II) Legal:

6.6 The ingredients of Coercion and Duress are spelt out under Section 15 of the Indian Contract Act, 1872. The relevant extracts are reproduced herein below for ready reference:

"15. "Coercion" defined.—"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (XLV of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code (XLV of 1860), is or is not in force in the place where the coercion is employed".

LPGCL in the present case has casually used the term coercion without properly appreciating the facts and circumstances which would constitute "coercion".

6.7 Further, the ingredients of Undue Influence are spelt out under Section 16 of the Indian Contract Act, 1872. The relevant extracts are reproduced herein below for ready reference:

> ***"16. "Undue influence" defined**.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*
>
> *(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—*
>
> > *(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or*
> >
> > *(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.*
>
> *(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.*
>
> *Nothing in this sub-section shall affect the provision of Section 111 of the Indian Evidence Act, 1872 (I of 1872)".*
>
> (Emphasis supplied)

LPGCL in the present case has failed to provide any evidence to support its allegations of undue influence.

6.8 Further, the concept of duress/ undue influence is unknown in commercial contracts. In this regard it is pertinent to note that the Hon'ble Supreme Court in the case of ***ONGC Mangalore Petrochemicals Ltd. v. ANS Constructions Ltd.*, (2018) 3 SCC 373** held as follows:

> ***"25.*** *When we refer to discharge of a contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable. But in case the party is not able to establish such a claim or appears to be lacking in credibility, then it is not open to the courts to refer the dispute to arbitration at all.*
>
> ***26.*** *In support of the claim of duress and coercion while issuing the said certificate, the learned counsel for the contractee company has taken us through a decision of this Court in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.[National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] wherein it was held as under: (SCC pp. 284 & 294-96, paras 24 & 50-52)*
>
> > *52 (v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the*

accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration."

(Emphasis supplied)

Assuming but not admitting that LPGCL was under "economic duress" it was still its "free choice".

6.9 The Hon'ble Supreme Court in the case of ***Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*****, (1986) 3 SCC 156** has held under Para 89 that:

> ***"89.*** *This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."*
>
> [Emphasis Supplied]

6.10 It is noteworthy that the principle as held in the abovementioned case was reiterated by the Hon'ble Supreme Court in the case of ***S.K. Jain v. State of Haryana*****, (2009) 4 SCC 357**wherein it was held that:

> *"**8.** It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] . The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts."*

6.11 It is a settled principle of law that the pleadings for duress have to be specific and not vague. In this regard, the Hon'ble Supreme Court in the case of ***State of Kerala v. M.A. Mathai*, (2007) 10 SCC 195 (Para Nos.6,7 & 8)**has held that:

> ***"****8. In the instant case, both the trial court and the High Court have without any basis come to hold that the supplemental agreement was due to coercion, etc. For coming to such conclusion, material had to be placed, evidence had to be led. Mere assertion by the plaintiff without any material to support the said stand should not have been accepted by the trial court and the High Court."*
>
> *(Emphasis supplied)*

6.12 Further, the Hon'ble Supreme Court in the case of ***Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib*, (1967) 1 SCR 331**held as follows:

> ***"10.*** *Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6 Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal [(1964) 1 SCR 270 at 300] above referred to. In that case it was observed (at p. 295):*
>
> > *"A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other.""*

6.13 The Hon'ble Supreme Court in the case of ***A.P. TRANSCO v. Sai Renewable Power (P) Ltd.*, (2011) 11 SCC 34**has held that:

> ***"89.*** *Now, we will proceed to examine the merits or otherwise of the findings recorded by the Tribunal that the PPAs executed by*

the parties were result of some duress and thus, it will not vest the authorities with the power to review the tariff and other granted incentives. PPAs were executed prior and subsequent to the issuance of the order dated 20-6-2001. Different persons executed the contracts at different times in full awareness of the terms and conditions of such PPAs. To frustrate a contract on the ground of duress or coercion, there have to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically.

90. *From the record before us, nothing was brought to our notice to state the plea of duress and to prove the alleged facts which constituted duress, so as to vitiate and/or even partially reduce the effect of the PPAs. On the one hand, the Tribunal appears to have doubted the binding nature of the contracts stating that they contained unilateral conditions introduced by virtue of order and approval of the Regulatory Commission, while on the other hand, in para 53 of the order, it proceeded on the presumption that PPAs are final and binding and still drew the conclusion that the Regulatory Commission could not revise the tariff. Even in the order, no facts have been pointed out which, in the opinion of the Tribunal, constituted duress within the meaning of the Contract Act so as to render the contract voidable.*

91. *Another aspect of the entire controversy is that none of the generators had challenged the agreements and in fact, except in arguments before the Tribunal no case was made out for the purposes of vitality of the contract or any part thereof. On the contrary, all the generators under all the branches of non-conventional energies, have accepted the contract and proceeded on the basis that the said contracts are binding and still the Regulatory Commission does not have any power or jurisdiction to revise the tariff or deal with the concessions. If the contracts are a result of duress and cannot be given effect, the results could be disastrous for both the sides. If a contract suffers from the defect of undue influence or duress, as the case may be then the consequences in law should follow."*

6.14 Further, if an agreement is purportedly signed under duress, the aggrieved party must resile immediately and challenge it without delay. The Hon'ble Supreme Court in the case of ***ONGC Mangalore Petrochemicals Ltd. v. ANS Constructions Ltd.*, (2018) 3 SCC 373** further held that:

> ***"31.*** *Admittedly, no-dues certificate was submitted by the contractee company on 21-9-2012 and on their request completion certificate was issued by the appellant contractor. The contractee, after a gap of one month, that is, on 24-10-2012, withdrew the no-dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12-1-2013 i.e. after a gap of 3½ (three-and-a-half) months whereas the final bill was settled on 10-10-2012. When the contractee accepted the final payment in full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting final bills that too in the absence of exercising duress or coercion on the contractee by the appellant contractor. In our considered view, the plea raised by the contractee company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not, therefore, justified in exercising power under Section 11 of the Act."*
>
> (Emphasis supplied)

6.15 It is a settled principle of law that a party cannot be allowed to approbate and reprobate. LPGCL having obtained substantial benefits from the SPPA dated 04.11.2015 cannot at this belated stage be allowed to resile from the same. The Hon'ble Supreme Court in the case of ***R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683** held as follows:

> *"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See : Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. [(1921) 2 KB 608, 612 (CA)] , Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)"*

(Emphasis supplied)

6.16 The UPERC upon appreciation of the submissions made by the parties, rightly concluded that that the SPPA dated 04.11.2015 was entered into as a product of the mutual consensus between the parties and had been acted upon.

6.17 Further, UPERC under Para 38 of the Order dated 17.10.2018 has rightly concluded that the SPPA dated 04.11.2015 was for the benefit of LPGCL.

Re: SPPA dated 04.11.2015 is contrary to the Generation Tariff Regulations, 2014.

6.18 At the outset, it is humbly submitted that the Generation Tariff Regulations, 2014 are limited to tariff determination and do not cover the entire commercial relationship between the parties. There is no conflict between the PPA and the Tariff Regulations, 2014 in the present case. In this regard, it is pertinent to note that the Hon'ble Supreme Court in the case of ***India Thermal Power Ltd. v. State of M.P.*****, (2000) 3 SCC 379** held as follows:

"Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory."

[Emphasis Supplied]

6.19 Clause 3.1.2(ii) of the PPA states that:

"***ARTICLE 3 : CONDITIONS SUBSEQUENT TO BE SATISFIED BY THE SELLER AND THE PROCURERS***

3.1 Satisfaction of conditions subsequent by the Seller and the Procurers

…

3.1.2 The Seller agrees and undertakes to duly perform and complete the following activities within eighteen [18] Months from the Effective Date unless such completion is affected due to the Procurers' failure to comply with their obligations under Article 3.1.2A of this Agreement or by any Force Majeure event or if any of the activates is specifically waived in writing by the Procurers jointly:

…

ii) the Seller shall have obtained coal linkage from Standing Linkage Committee (Long Term), GOI and provided the copies of the same to the Procurer;"

A bare perusal of Clause 3.1.2 (ii) of the PPA clearly establishes that

(a) Clause 3.1.2 (ii) is a standalone and material provision of the PPA.

(b) CoD is a distinct requirement and does not dilute or negate the material condition prescribed under Clause 3.1.2 (ii) of the PPA.

(c) The SPPA dated 04.11.2015 clearly sets out the circumstances in which it was entered into and that Clause 3.1.2 (ii) is a material condition.

Hence, the inescapable conclusion is that both CoD and coal linkage were separate material conditions which were required to be complied with.

6.20 It is pertinent to note that the extensions accorded under various SPPAs to LPGCL are for the fulfilment of the material condition to procure the coal linkage as mandated by Clause 3.1.2 (ii) of the PPA. The Generation Tariff Regulations, 2014 only determine the methodology for calculation of the tariff but do not determine the modus/modality as to when the tariff would become payable or other conditions applicable to such payment. The SPPA dated 04.11.2015 provides for the commercial arrangement as to the quantum of the tariff payable until the material condition under Clause 3.1.2 (ii) is fulfilled. Once the material conditions i.e. CoD(which has already been declared on 01.10.2015 for Unit-I) **and** Clause 3.1.2 (ii) i.e. coal linkage are fulfilled, the Generation Tariff Regulations, 2014 would become applicable.

6.21 The requirement of coal linkage being a condition subsequent under Clause 3.1.2 (ii) of the PPA could not have been waived by UPPCL as the same would be prejudicial to the public interest. In this regard it is pertinent to note that the Hon'ble Supreme Court in the case of ***All***

***India Power Engineers Federation v. Sasan Power Ltd.*, (2017) 1 SCC 487**has held that:

> ***"21.*** *Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.*
>
> …
>
> ***25.*** *It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest."*

6.22 It is further submitted that, on the other hand individual rights whether under the contract or under a statute,such as RoE in the present case, can be waived off. The Hon'ble Supreme Court in the case of ***Krishna Bahadur v. Purna Theatre*, (2004) 8 SCC 229**has held that:

> ***"9.*** *The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.*
>
> *10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."*

6.23 It is noteworthy that UPERC, in the Impugned Order dated 17.10.2018,concluded as follows with regards to RoE:

> *"35…The Commission has disallowed RoE just because of the fact that one of the main condition subsequent i.e. obtaining long term coal linkage has not been complied by M/s LPGCL. When, M/s LPGCL itself has failed to abide by the condition of the PPA then how can it lay its claim of RoE under PPA? Any claim on the basis of PPA can only kick in when the party to PPA has completed its own commitments stipulated under the PPA. As far as the provision on Return on Equity under Tariff Regulations is concerned, it must be understood that norms provided under Tariff Regulations are ceiling norms and parties can always claim/agree for more efficient and economical norms in public interest.UPPCL & its DISCOMS for years, in their ARR filings, did not claim any RoE although RoE is permissible to State Government DISCOMS also.In the present case, undertaking to the effect of sacrifice of RoEhas been given by none other than M/s LPGCL themselves, which formed the basis of supplementary PPA dated 4th January, 2017, which was also eventually allowed by the Commission on 18th January, 2017. Therefore, now there is no occasion for M/s LPGCL to lay its claim on RoE based on PPA or Tariff Regulations.*
>
> *Further, as far as M/s LPGCL averment regarding illegality of disallowing RoE while dealing with interim petition is concerned, it must be stated that disallowing RoE is not something, which was totally beyond the treatment of interim petition rather it was a consequential action of protecting consumer interest, a mandate which has been cast upon the regulatory under Electricity Act, 2003, while ensuring that the generator is also not penalized in terms of availability and also upholding the sanctimony of responsibilities conferred upon the parties under PPA. Therefore, the disallowance of RoE was not an alien element to interim application rather it was a consequential effect of dealing with the entire matter, while safeguarding the interest of all stakeholders in general and that of public at large in particular, which is an essential function of the Commission"*

Re: General conduct of LPGCL:

6.24 It is an indisputable fact that LPGCL derived benefit from the SPPA dated 04.11.2015 to obtain confirmation of CoD and eventually procure coal. The same is discernible from Coal India Limited's letters dated 26.08.2014 and 13.04.2016 read with Office Memorandum dated 30.06.2015 referred to in Coal India Limited's letter dated 13.04.2016. The relevant extracts of the above-mentioned letters are reproduced herein below for ready reference:

Letter dated 26.08.2014:

"Central Electricity Authority vide letter no CEA/Plg/OM/1/1/2014/ 1186-94dated 30th July, 2014 addressed to Chairman, CIL with copy to GM(S&M), CCL amongst others informed that the above unit is expected to be commissioned in December, 2014 and to facilitate commissioning, the unit may be allocated and supplied 2,00,000 tonnes of coal from CCL."

[Emphasis Supplied]

Office Memorandum dated 30.06.2015

"CCEA had decided in its meeting held on 21.06.2013 to direct Coal India Limited to sign Fuel Supply Agreements for supply of coal to TPPs of about 78000 MW capacity commissioned or to be commissioned during the period from 01.04.2009 to 31.03.2015"

[Emphasis Supplied]

Letter dated 13.04.2016

"1. Vide OM of even number dated 30.06.2015 coal supplies to 4660 MW capacity and similarly placed power plants that do not have fuel linkage, was continued on MoU best effort basis till 31.03.2016 or until a policy is formulated, whichever is earlier. Similarly, coal supplied through Mou route were also continued for plants having erstwhile tapering linkages (24 units-part of 78,000 MW category) till 31.03.2016 or until a policy is formulated, whichever is earlier. In both the above cases, the plants commissioned

or to be commissioned in 2015-16 and having long term PPAs were eligible to get coal"

6.25 It is pertinent to note that after getting a confirmation of its CoD and thus, becoming eligible for future coal linkages, as applicable under CIL's letters quoted above, LPGCL started resiling from the SPPA dated 04.11.2015 and chose to challenge the same as a complete afterthought 4 months later.

6.26 Pertinently, as recorded in the Impugned Order dated 17.10.2018, till as late as 07.12.2016 LPGCL had maintained its stand that it would not claim any RoE and even submitted an undertaking to such effect.

6.27 Further, it is noteworthy that even under the SPPA dated 04.01.2017 (which has not been challenged by LPGCL) it has agreed that it would not claim any RoE.

Re: LPGCL's contention that UPERC disposed of the Main Petition along with I.A./UPERC traversed beyond the pleadings of the parties:

6.28 LPGCL's main contention is that, in Petition No. 1101/2016, it had challenged the SPPA dated 04.11.2015 before UPERC on the grounds that the same was coercive. However, UPERC while adjudicating the I.A filed by LPGCL disposed of its entire petition without considering its main prayers. Further, LPGCL has submitted that the UPERC has given a finding on RoE when the issue was never raised either by LPGCL or UPPCL before the UPERC in

6.29 In this regard, it is noteworthy to refer to the prayers sought by LPGCL in its petition titled as Petition No. 1101 of 2016 filed before UPERC. The relevant extracts of the prayers sought by LPGCL

before UPERC in its Petition 1101 of 2016 is reproduced herein below for ready reference:

"*Prayer*

Under the circumstances and facts narrated above the Hon'ble commission is requested to:-

a) Admit the petition

b) Set aside/Not to approve the conditions stipulated under Paras-16& 17 of the agreement dated – 4.11.2015 without prejudice to the approval for 3rd time extension with respect to coal linkage condition by Hon'ble UPERC on filing of supplementary PPA by UPPCL.

c) Direct UPPCL for payment of declared availability based fixed charges in accordance with PPA provision subsequent to COD of machine.

d) The respondent may be directed for early completion of 765 KV system.

e) To condone any inadvertent omission/error/ shortcomings/delay and permit the applicant to add/change/modify/alter this petition and make further submissions as may be required.

f) Pass suitable order as deemed fit"

6.30 Further, it is noteworthy that LPGCL in its I.A. in Petition 1101 of 2016 sought the following prayers:

"PRAYER

Wherefore, it is respectfully prayed that subject to the petitioner agreeing to the conditions mentioned in paragraph 13 this Hon'ble Commission may be pleased to allow the petitioner to purchase coal for generation of electricity, under the prevalent policy of the Government

of India for supply of coal to power generators which may be treated as sufficient compliance of the condition provided under Article 3.1.2 (ii) of the approved PPA."

6.31 At the outset, it is imperative to note that the prayers in the I.A. are in the nature of final relief which could not have been granted. Even otherwise, it is noteworthy that while the petition no. 1101 of 2016 was initially filed for setting aside the SPPA dated 04.11.2015, the stand of LPGCL changed during the course of hearing and LPGCL was agreeable for the UPERC to devise an interim arrangement to make the contract between the parties workable. The daily order dated 19.08.2016 in Petition No. 1101 of 2016 would demonstrate the change in stand of LPGCL and to demonstrate that LPGCL was given sufficient opportunity to make submission on the RoE aspect.

LPGCL itself did not press in its I.A. or the main petition but instead requested that it be allowed to procure coal as per the conditions specified in its interim application till such time the policy on coal linkages is finalized by the Govt. of India. Further, as evident from para 15 above, LPGCL was given sufficient opportunity to file its responses to the RoE issue, which in fact, it did and has been recorded in the Order dated 21.09.2016.

6.32 Further, it is incorrect on the part of LPGCL to aver that its prayers regarding validity of the SPPA dated 04.11.2015 and its assertions regarding coercion were not deliberated upon by the UPERC. A bare perusal of the Order dated 21.09.2016 reveals that the UPERC came to a considered conclusion that-

(a) The SPPA dated 04.11.2015 was a product of mutual agreement between the parties;

(b) SPPA dated 04.11.2015 had been acted upon the parties;

(c) SPPA dated 04.11.2015 has been agreed upon in the public interest; and

(c) Prayers in the main petition were dealt with and/or lost its relevance with the change in circumstances.

As such, the plea of coercion was negated by the UPERC in the Order dated 21.09.2016. A perusal of the order makes it abundantly clear that UPERC was justified in disposing of the main petition. UPERC has effectively upheld the SPPA dated 04.11.2015 which is further reiterated in its Order dated 14.02.2017.

6.33 The Hon'ble Supreme Court in the case of ***Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697** has held that

> *"**Interpretation of a judgment***
>
> ***139.** A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. (See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721] .)*
>
> ***143.** It will not, therefore, be correct to contend, as has been contended by Mr Nariman, that answers to the questions would be the ratio to a judgment. The answers to the questions are merely conclusions. They have to be interpreted, in a case of doubt or dispute with the reasons assigned in support thereof in the body of the judgment, wherefor, it would be essential to read the other paragraphs of the judgment also. It is also permissible for this purpose (albeit only in certain cases and if there exist*

strong and cogent reasons) to look to the pleadings of the parties."

Hence, merely by reading the title of the Impugned Order dated 21.09.2016 in isolation it cannot be contended that the entire petition was dismissed while hearing the interim application.

6.34 It is further clarified that by way of the order dated 21.09.2016, UPERC was of the opinion that the arrangement under the SPPA dated 04.11.2015 has to be replaced by a new arrangement. It is trite law that a Court cannot re-write the terms of the contract. Hence, it was imperative that the UPERC directs UPPCL to seek the confirmation of the State Government in this regard as the SPPA dated 04.11.2015 was also approved by the State Government. Further, such direction was necessary to ensure that the Government's support to the Project is maintained during the operation of the new/modified arrangement as well.

Re: Proper forum for challenge to the SPPA dated 04.11.2015

6.35 At the outset, it is humbly submitted that UPPCL does have any cavil with the settled legal proposition that the SERCs are empowered to deal will all disputes arising out of agreements between the generators and distribution licensees. However, if the substratum i.e. the validity of the agreement itself is sought to be challenged on grounds of coercion, undue influence, etc. the proper forum is the civil court.

6.36 Section 19A of the Indian Contract Act, 1872 provides that:

> ***"19-A. Power to set aside contract induced by undue influence****.—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.*

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to ***the Court*** *may seem just.*

Illustrations

(a) A's son has forged B's name to a promissory note. A, under threat of prosecuting A's son obtains bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender advances Rs. 100 to B, an agriculturist and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay Rs. 100 with such interest as may seem just."

.....[Emphasis Supplied]

Hence, a perusal of the above would reveal that only a "court" would be the appropriate forum with proper jurisdiction to set aside the agreement.

6.37 Section 3 of the Code of Civil Procedure, 1908 provides that:

> ***"3. Subordination of Courts****.—For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."*

A bare perusal of the above would reveal that quasi-judicial forums such as the State Electricity Regulatory Commission do not fall under the definition of "Courts" as contemplated by the Contract Act, 1872.

6.38 In this regard it is pertinent to refer to the decision of the Hon'ble Supreme Court in the case of ***Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*****, (2009) 8 SCC 646**read with the order of the Hon'ble Punjab and Haryana High Court in the said matter. While the Hon'ble Punjab & Haryana High Court held that

the Debts Recovery Tribunal ("**DRT**") had the power to adjudicate upon validity of contracts assailed on the grounds of fraud, coercion, undue influence and misrepresentation, it is pertinent to note that the Hon'ble Supreme Court in appeal from the above mentioned order set aside the order of the Hon'ble Punjab & Haryana High Court.

The Hon'ble Supreme Court in the case of ***Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*****, (2009) 8 SCC 646** held that:

> *"**Whether tribunal is a civil court***
>
> ***Conclusion***
>
> ***96.** The Tribunal was constituted with a specific purpose as is evident from its Statement of Objects. The Preamble of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, it did not even have any power to entertain a claim of setoff or counterclaim. No independent proceedings can be initiated before it by a debtor.*
>
> ***97.** A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The civil court, therefore, will continue to have jurisdiction.*
>
> ***…***
>
> ***The Tribunal, therefore, would not be a civil court".***

6.39 The Electricity Act, 2003 itself provides that:

> *"Section 174. (Act to have overriding effect):*
>
> *Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or*

in any instrument having effect by virtue of any law other than this Act.

Section 175. (Provisions of this Act to be in addition to and not in derogation of other laws):

The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."

Further Section 145 which excludes the jurisdiction expressly provides that:

"Section 145. (Civil courts not to have jurisdiction):

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate authority referred to in section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

A bare perusal of the above makes it abundantly clear that the jurisdiction of civil courts are excluded only in specific cases.

6.40 Hence, in light of the judgement of the Hon'ble Supreme Court in ***Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*****, (2009) 8 SCC 646,** the proper judicial forum to challenge the validity of the SPPA dated 04.11.2015 on grounds of coercion, undue influence and misrepresentation is the civil court.

6.41 Learned counsel appearing for the Respondent/UPPCL *inter alia* vehemently contended that the present Appeal filed by the Appellant may kindly be dismissed as devoid of merits and the order passed by the first Respondent/UPERC be upheld in the interest of justice and equity.

7. Shri C.K.Rai, the learned counsel appearing for the Respondent No. 1 / UPERC has filed the written submissions for our consideration as follows:-

A. Whether the state commission could have decided the petition no. 1101 of 2016 in the garb of deciding the interim application

OR

Whether the state commission decided the Petition No. 1101 of 2016 without hearing the parties:-

7.1 The Appellant has been changing its stand as per its convenience and taking different stand at different times. It is submitted that Petition no. 1101 of 2016 against the SPPA dated 4.11.2015 was filed after about 4 months i.e on 1.3.2016 of signing the Agreement on 4.11.2015. The agreement itself was signed as an interim arrangement applicable till long term coal linkage obtained by the Appellant in compliance to clause 3.1.2(ii) of the main PPA dated 10.12.2010 and also till the completion of 765kv transmission system for evacuation of power.

7.2 While the above Petition challenging the interim arrangement in under the SPPA dated 4.11.2015 was pending adjudication, Appellant filed another interim Application in Petition no 1101 of 2016, *wherein LPGCL requested the State Commission to consider the obtainment of coal through E auction as sufficient compliance of the 3.1.2(ii) till long term coal linkage obtained by the Appellant.* It is submitted that both the petitions were filed by the Appellant for interim period i.e. till obtainment of the long term coal linkage by the LPGCL, in accordance with clause 3.1.2(ii) of the PPA dated 10.12.2010 and thus both petitions were in the nature of interim arrangement and therefore the submission of the appellant that Commission ought not to have disposed the main petition while disposing the interim petition is *an after thought* and liable to be rejected. The paragraph no. 13 of the

interim petition wherein it has been stated that arrangement proposed therein was till the obtaining of long term coal linkage is reproduced hereunder:-

> "*13. That in case this Hon'ble Commission is pleased to allow the present application in terms of the averments made in the preceding paragraphs, the petitioner agrees till the new coal policy for long term coal linkage of the Central Government is notified, for the followings:-*
> *i) To charge variable cost as per weighted landed price of coal based on notified price by the coal India Ltd……"*
>
> *(Emphasis Supplied)*

7.3 Thus, though the first petition was filed with respect to claim of fixed charges, the second(interim) petition was also filed with respect to charges (including fixed) till obtainment of long term coal linkage. In the second/interim petition the appellant revised its stand with respect to coal procurement and the same has also been noted by the State Commission in Para 14 of the 1st impugned order:-

> *"14.After the filing of Petition No. 1101 of 2016 the petitioner revised its stand and has agreed that they are ready to charge the coal price at the notified price and bear the additional cost themselves....."*

7.4 While the issues were deliberated before the State Commission both the parties sought time to place a mutually agreed solution of the problem and the State Commission also recorded the same in the order dated 20.06.2016 as follows:-

> *" …….The Commission decides to allow them some time to apprise the Commission that whether they could reach a mutually agreed solution of the problem.."*

7.5 Subsequent to above granting of time by the State Commission, the Appellant filed the above mentioned interim application, revising its stand taken in the main petition. Further, after filing of the interim application on 1.8.16 the UPPCL filed additional written submission

before the State Commission , which the Commission recorded in its order dated 19.8.2016. The relevant portion of the order dated 19.8.16 is reproduced hereunder:-

"12. During the hearing UPPCL also made an additional written submission having following points:

i. LPGCL has been given third time extension for accomplishing conditions subsequent upto 30th September 2016 on the basis of agreement dated 4.11.2015. CoD of first unit has also been allowed in view of agreement dated 4.11.2015. Besides this, a negotiation process between LPGCL and UPPCL is also on for amicable solution of issues. Therefore, the prayer should be decided in the overall backdrop of events.

ii. If any departure from agreement dated 4.11.2015 is carved out, outgoes the agreement along with the third time extension as well as CoD of first Unit. As an outcome the PPA would be deemed to be expired with second extension i.e. 30.03.2015. UPPCL has emphasized that survival of PPA , as on date, is directly attached to the existence of agreement dated 4.11.2015.

iii. The developer was well aware about the status of coal linkage policy at the time of signing of PPA i.e.10.12.2010.

iv. No interim arrangement can be judged as rational, purely on consideration of consumer interest, if it allows return on equity to developer.

v.

vi. *……*

13. The Representative of the UPPCL submitted that the coal made available to LPGCL with certain conditions is to meet an exigent situation and is a stop gap arrangement till the finalization of coal linkage policy and such an arrangement cannot substitute what is mandated under Article 3.1.2(ii) of the PPA. He further submitted that the Petitioner may continue to procure the coal under the present arrangement till the finalization of the coal linkage policy by absorbing, in its own resources, the differential cost of procurement of coal under the present arrangement and that which would have been applicable under the coal linkage from the GoI. He further submitted that Petitioner should also forego return on equity and the differential transportation charges related to coal procured

through e-auction till the time it fulfils the conditions of the PPA for its proposal to be considered.

14. The representative of the Petitioner submitted that till such time the policy on coal linkages is finalized by the Govt. of India the Petitioner may be allowed to procure coal as per the conditions specified in its interim application. He further submitted that the differential cost of transportation of coal under the e-auction mechanism and that which would have been applicable under the long term coal linkage from the GoI can be absorbed in its own resources by the Petitioner. The petitioner further stated that in a way UPPCL is avoiding the liabilities which may occur under ABT mechanism.

15. The Commission after hearing the submissions directed LPGCL to submit its reply on the points raised in the counter affidavit and written statement of UPPCL i.e. surrendering RoE, absorbing the differential cost of transportation of coal and other issues within seven days of this hearing and the UPPCL to reply on the same within fifteen days of receipt of the reply of UPPCL.

…(Emphasis Supplied)

7.6 Thus both the petitions filed by the Appellant were in **respect of interim arrangement till obtaining of the long term coal linkage by the appellant**. The appellant after filing the petition no. 1101 of 2016 decided to revise its stand and filed an interim application which after detail hearing Commission disposed of as a mechanism to mitigate the grievance of the procurers due to non-compliance of Clause 3.1.2(ii) for the interim stage till the obtainment of coal linkage.

7.7 The reading of the impugned order along with the order dated 19.8.2016 would show that the issue was heard in detail and after hearing the submissions of the parties, the Commission passed the impugned order in ***overall back drop of events*** . Thus it is submitted that parties were well aware of, that by way of interim order entire case/ petition no. 1101/16 was to be disposed of and accordingly they

made their submissions for final end of the dispute and therefore the Commission passed the 1st impugned order dated 21.9.2016 after considering the submissions of the parties in over all back drop of events and for final end of the dispute.

7.8 The Review Petition was filed by the appellant after about 3 months of the order dated 23.9.16 i.e. on 20.12.16 and in meanwhile the Appellant acted upon the impugned order by giving undertaking to UPPCL on 7.12.2016 and also entered in to a SPPA on 4.1.2017 by giving up its claim on Return on Equity (ROE).

7.9 The State Commission in the 2nd impugned order dated 17.10.2018 while dealing with the submission of the Appellant, that ROE was beyond the scope of Main Petition observed as under:-

> *" …..Therefore, the disallowance of ROE was not an alien element to interim application rather it was consequential effect of dealing with the entire matter, while safe guarding the interest of all stake holders in general and that of public at large in particular, which is an essential function of the Commission…"*

7.10 The issue raised by the appellant is *after thought* i.e after taking full advantage of the SPPA dated 4.11.15 and obtaining coal linkage and COD of the plant and entering in to another agreement dated 4.1.2017 the appellant now wants to wriggle out from the SPPA dated 4.11.2015 after taking due advantage of it. Hence the contention of the Appellant that State Commission decided the Petition no. 1101 of 2016 in the garb of deciding the interim application filed by the Appellant and order was passed without hearing the parties on the main petition is devoid of merit and liable to be rejected.

B. Whether the issue of return on equity was beyond the scope of the proceeding in Petition No. 1101/2016 filed before the state commission:-

7.11 With respect to RoE, there was detail discussion on the issue by the parties in the pleadings as well as during hearing before the State Commission and this has been noted by the State Commission in both the impugned orders. The relevant portions of the orders are reproduced hereunder:-

From Impugned order dated 21.9.2016:-

"7. During the hearing UPPCL also made an additional written submission having following points:-

…….

.iv. The arrangement offered by the Petitioner is grossly inadequate, if viewed from the perspective of consumer interest. No interim arrangement can be judged as rational, purely on consideration of consumers interest, if it allows return on equity to developers.

8. UPPCL submitted that the coal made available to LPGCL with certain conditions is to meet an exigent situation and is a stop gap arrangement till the finalization of coal linkage policy……He further submitted that Petitioner should also forego return on equity and the differential transportation charges related to coal procured through e-auction till the time it fulfils the conditions of the PPA for its proposal to be considered.

……

9. The Commission after hearing the submissions, vide order dated 19.08.2016, directed LPGCL to submit its reply on the points raised in the counter affidavit and written statement of UPPCl i.e., surrendering RoE, absorbing the differential cost of transportation of coal and other issues within seven days of this hearing and the UPPCL to reply on the same with in fifteen days of receipt of the reply of UPPCL.

10.LPGCL made its submissions on 21.08.2016/31.08.2016…….

i…..ii As regards the issue of foregoing of RoE is concerned, in view of absorption of the differential cost and cap on the

transportation charges, it would be grossly unfair and unjustified on part of the UPPCL to ask them to forgo the RoE. It would be jeopardize the viability of the project. Hence not accepted.

11. UPPCL has filed reply on 31.08.2016 in response to LPGCL submissions as follows:-

i. The interlocutory application is completely incongruent with the original petition.
ii. …
iv. It is indeed expansive on the part of LPGCL to claim ROE despite non fulfilling conditions subsequent in verbatim."
(Emphasis Supplied)

7.12 Hence, the finding of the Commission with respect to ROE at Para 17 of the Order dated 21.9.2016 was based on detailed discussions in the previous paragraphs of the order which were reproduced at Para B.1. The relevant finding is also reproduced hereunder:-

17.Regarding admissibility of Return on Equity the Commission is of the view that compliance of the condition subsequent as given in Clause 3.1.2(ii) is an essential element to claim any return on equity and since this important condition subsequent has not been complied with the petitioner will not be entitled to RoE during this interim arrangement."

7.13 Thus from the above it is clear that the State Commission vide 1st impugned order clearly stated that compliance of the condition mentioned in clause 3.1.2(ii) is essential condition for claiming RoE and since the appellant has not fulfilled the above condition subsequent to signing of the PPA the Appellant shall not be entitle to ROE for the period they failed to obtain the long term coal linkage.

7.14 Further, in compliance of the 1st impugned order Appellant gave undertaking on 7.12.2016 that they will not claim RoE for the interim period that was approved by the Govt of U.P. by way of G.O. dated

27.12.2016 and also signed an agreement dated 4.1. 2017 for giving its claim of RoE which was allowed by the Commission vide order dated 18.1.2017 and the order dated 18.1.2017 reached finality. These facts were also noted by the State Commission while deciding the review petition vide order dated 17.10.2018. The Relevant portion of the 2nd Impugned order dated 17.10.2018 is reproduced hereunder:-

> *"33b. Then M/s LPGCL gave an undertaking to UPPCL to not claim any RoE and few other concession, as mentioned in point no. 32 of this order under the subject heading " Regarding UPERC order dated 21.9.2016 against petition no. 1101 of 2016 filed by M/s LPGCL". Obviously, the undertaking to not to claim any RoE was not only restricted to the period of evacuation on single line rather it was in reference to implementing the Commission's order dated 21st September, 2016 in totality….*
>
> *"35.....In present case, undertaking to the effect sacrifice of RoE has been given by none other than M/s LPGCL themselves, which formed the basis of supplementary PPA dated 4th January, 2017, which was also allowed by the Commission on 18th January, 2017. Therefore, now there is no occasion for M/s LPGCL to lay its claim on PPA or Tariff Regulations. Further, as far as M/s LPGCL averment regarding illegality of disallowing RoE while dealing with interim petition is concerned, it must be stated that disallowing RoE is not something, which was totally beyond the treatment of interim petition rather it was a consequential action of protecting consumer interest, a mandated which has been cast upon the regulator under Electricity Act, 2003, which ensuring that the generator is also not penalized in terms of availability and also upholding the sanctimony of responsibilities conferred upon parties under the PPA. Therefore, the disallowance of RoE was not an alien element to interim application rather it was a consequential effect of dealing with the entire matter, while safeguarding the interest of all stakeholders in general and that of public at large in particular, which is an essential function of the Commission.*
>
> ***….(Emphasis Supplied)***

7.15 In view of the submissions made herein above it is submitted that the issue of ROE was well deliberated during the proceeding of Petition no. 1101 of 2016 before the State Commission and the issue has been

dealt in the entire back drop of the events and in the over all interest of all stake holders /public at large and consumers. Thus, the contention of the appellant that the issue of ROE was beyond the scope of the Petition no. 1101/2016 is therefore not tenable and liable to be rejected.

C. Whether the Appellant was correct in relying on the para 38 last sub-para of the order dated 17.10.2018 to contend that State Commission has failed to discharge its functions under the Electricity Act, 2003:-

7.16 The Appellant has raised the above issue regarding the functioning of the State Commission by misconstruing the part of para 38 of the 2nd impugned order dated 17.10.2018, the para is reproduced hereunder:-

'….*Therefore, the Commission itself had accepted that the State Government was competent authority to approve the agreement.'*

7.17 However, to understand the meaning of the above statement the entire paragraph is to be read which is as under:-

> *"There is no dispute that the agreement entered in to between UPPCL and M/s LPGCL on 4th November, 2015 will govern the legal relationship between the two parties from 1st December (October), 2015 to 21st September, 2016 i.e. the date on which Commission gave a dispensation, which was at slight variance from the arrangement of UPPCL. Situation changed with Commission's order dated 21st September, 2016, in which Commission gave a slightly different dispensation but again Commission refers the matter before the State Government for obtaining the approval of government, as stated in point no. 33(b) of above order and which is reproduced below:-*
>
> > *" UPPCL while signing the agreement dated 4th November, 2015 had taken the post facto approval of the competent authority in the State Government therefore it will be in the fitness of things that UPPCL obtains the approval of the competent authority on this interim arrangement also."*

Therefore, the Commission itself had accepted that the State Government was competent authority to approve the agreement. Certain new conditionalities were attached to make the dispensation of the Commission applicable on single 765 kv line, which was approved by the State Government and subsequently the arrangement was allowed by the Commission on 18.1.2017. Therefore the period between 1st October 2015 and prior to approval of supplementary PPA dated 4.1.2017 cannot be left in lurch without defining the legal status. Since, the approval of its own arrangement from the State Government was referred by the Commission itself, it is prudent that Supplementary PPA dated 4th November,2015 be approved and be treated for defining the legal relationship between the two parties post 1st October, 2015 and prior to dated when supplementary PPA dated 4th January, 2017 was allowed and became effective."

7.18 The UPPCL is a nominated agency of State Government and the original Memorandum of Understanding (MOU) dated 22.04.2010 was signed between the State Government of U.P. and M/s Bajaj Hindustan Limited (lead member of consortium) consequence to which the Power Purchase Agreement (PPA) dated 10.12.2010 was entered upon by UPPCL and the Appellant. Therefore it is submitted that UPPCL being a Government Company and as a nominated agency of the Government had earlier taken approval of the Government with respect to SPPA dated 04.11.2015. Since there was slight different dispensation in the order dated 21.9.2016 with respect to evacuation of power through 765 KV line instead of 220 KV line (as agreed in the SPPA dated 4.11.2016) and the said dispensation was accepted by both the parties, Commission in the order dated 21.9.2016 at Para 22 directed UPPCL to take approval of the Government with respect to evacuation through 765 KV transmission line also. The UPPCL took approval of the Government in compliance of the order dated 21.9.16, wherein M/s LPGCL/Appellant and the Government/UPPCL agreed to apply the different dispensation of

evacuation of power through 765 KV transmission line on single 765 KV system vide G.O dated 27th December, 2016 with certain conditions.

7.19 Evidently, the approval mentioned in the above mentioned paragraph 38 last sub-para of the order dated 17.10.2018 is with respect to internal approval on the procurer/UPPCL side which in any case procurer has been taking from the Government as a nominated agency of the Government under the MOU dated 22.4.2010 entered upon by the State Government and the Lead consortium M/s Bajaj Hindustan Limited. The direction of the State Commission to take approval of the Government is to be read in the context that UPPCL entered in to PPA dated 10.12.2010*as nominated agency* of the Government and as such it has been taking the approval of the Government with respect to all SPPAs and interim arrangements before filing the same for approval in the State Commission.

7.20 Hence, the Appellant has completely misconstrued the above paragraph of the order dated 17.10.2018 in reaching conclusion that State Commission is under erroneous impression that once the Government has approved the SPPA it has no role. It is further submitted that such contention is against the record of the proceeding which would show that the Commission has passed the impugned order after due examination of applicable laws and the interest of all the stake holders including the Generators and the Consumers.

D. CASE LAW RELIED UPON:-

7.21 State Commission further relies on the Judgment reported in (2010) 10 SCC 165 {***ShyamTelelink Limited Now Sistema Shyam Teleservices Ltd. Vs. Union of India***} Para 22, 23, 25 and 28, the relevant paragraphs are reproduced hereunder:-

"22. Although the appellant had sought waiver of the liquidated damages yet upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the Migration Package. Allowing the appellant at this stage to question the demand raised under the Migration Package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate.

23.The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

24. In Ambu Nair v. Kelu NairAIR 1933 PC 167 the doctrine was explained thus:

"Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, Their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well- accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honyman, J. in Smith v. Baker (1878) LR 8 CP 350 at p. 357 `at the

same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage'."

25. View taken in the above decision has been reiterated by this Court in City Montessori School v. State of Uttar Pradesh and Ors. (2009) 14 SCC 253. To the same effect is the decision of this Court in New Bihar Biri Leaves Co. v. State of Bihar 1981 (1) SCC 537 where this Court said :

"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.)"….

28. For the reasons set out by us hereinabove, we have no hesitation in holding that the appellant was not entitled to question the terms of the Migration Package after unconditionally accepting and acting upon the same."

7.22 Since the Appellant has acted upon the SPPA dated 4.11.2015 which subsequently approved by the State Commission vide order dated 14.2.2017 which has reached finality**(not challenged by either of the parties)**. Similarly, since the appellant has acted upon the order dated 21.9.2016 by giving an undertaking dated 7.12.2016 to not to claim ROE and based on the said order entered in to another SPPA dated 4.1.2017 which was also subsequently approved by the State Commission in Petition no. 1158 of 2017 vide order dated 18.1.2017

and this order also reached finality **(not challenged)**, the appellant is now estopped from questioning the said SPPA dated 4.11.2016 and the order dated 21.9.2016 and doing so shall be hit by the above mentioned doctrine of *qui approbat non reprobat (one who approbates cannot reprobate)*and thus it is submitted that the present Appeal filed by the Appellant is devoid of merit liable to be rejected.

8. We have heard Mr. C.S. Vaidyanathan, learned senior counsel appearing for the Appellant, Mr. C.K. Rai, learned counsel appearing for Respondent No1 and Mr. Hemant Sahai, learned counsel appearing for the Respondent No.2 at considerable length of time and we have gone through carefully their written submissions and also considered the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-

Issue No.1: Whether the Agreement dated 04.11.2015 has any validity in view of the same being contrary to Regulations, being without reciprocal consideration and also it being entered into under coercion, undue influence and duress?

Issue No.2: Whether the State Commission can deny the Appellant for payment of declared capacity charges contrary to the UPERC Generation Tariff Regulations 2014 and the PPA?

Issue No.3: Whether the State Commission can deny the Return on Equity to the Appellant for it not fulfilling condition subsequent as stipulated in Article 3.1.2(ii) of the PPA against its own Tariff Regulations when the

same was not an issue in the petition before the State Commission?

9. Before taking into consideration the Issue Nos. 1 to 3, as stated supra, we deem fit to examine the jurisdiction of this Tribunal with respect to instant Appeal, as submitted by the learned counsel appearing for the Respondent No.2 that the matter relating to declaring any agreement or provisions contained in the agreement as void can only be exercised by a civil court and thus, these are outside the jurisdiction of this Tribunal.

9.1 Citing principles stated in various case laws, the Learned counsel of Respondent No.2 submitted that this Tribunal was not a court within the meaning of Code of Civil Procedure, 1908 and hence cannot exercise its jurisdiction with respect to declaration of any agreement as void on the grounds of undue influence and duress. According to the counsel of Respondent No.2, the Hon'ble Supreme Court in ***Nahar Industrial Enterprises Limited v Hong Kong and Shanghai Banking Corporation*** (2009) 8 SCC 646 has held that Debt Recovery Tribunals are not civil courts.

9.2 Learned Counsel for Respondent No.2 further contended that any case relating to any dispute with respect to any agreement can be filed only in a civil court. It was also submitted by the Counsel that this Tribunal was not a court and hence, it cannot examine the validity of the impugned agreement.

9.3 Refuting the above submissions of learned counsel appearing for Respondent No.2, the Learned counsel for the Appellant stated that this submission was misconceived and without merit. The Judgment of

the Hon'ble Supreme Court is not a declaration of law on the jurisdiction of all Tribunals and Commissions but restricted to the Debt Recovery Tribunals only.

9.4 Learned Counsel for the Appellant further vehemently contended that the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited*** *v* ***Essar Power Limited*** (2008) 4 SCC 755 has specifically held that the State Commission is the only adjudicating authority for disputes between generating companies and licensees.

9.5 Attention of this Tribunal was specifically drawn to the decision of Hon'ble***Supreme*** Court in ***State of Gujarat*** *v* ***Utility Users Welfare Association*** (2018) SCC Online SC 368 wherein it has held as under-

> ***"93.*** *A perusal of these provisions would show that apart from their definition, even otherwise, these are powers of a civil court under the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'). Powers such as summoning, enforcement of attendance of any person and examination on oath, discovery and production of documents, receiving affidavit of evidence, requisitioning of public records, etc., all form part of Section 94. In terms of Section 95, all such proceedings before the State Commission would be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 and the commission would be a civil court for purposes of Sections 345 & 346 of the Code of Criminal Procedure, 1973. Not only that, Section 96 confers the extreme power of entry and seizure in respect of any building and place where the Commission has reason to believe that any document relating to the subject matter of enquiry may be found and may be seized. The power is conferred on the Commission under Section 129 for securing compliances of orders and under Sections 142 & 146 for punishment for non-compliance of orders and directions. This, thus, leaves no manner of doubt that the State Commission, though defined as a 'Commission' has all the 'trappings of the Court'.*
>
> *……*

99. Once we find that the tribunal has the trappings of the court in respect of its functions, we turn to the effect of the same".

9.6 As per the Appellant's counsel, this Tribunal has, in the past,adjudicated upon the matters relating to agreements/ certain clauses of agreements being declared void on the grounds of coercion and exercise of undue influence. Especially in the matter of ***Indian Wind Power Association v MERC and Others***, in Appeal No. 210 of 2014, its order dated 26.02.2011,this Tribunal set aside certain clauses of an Energy Purchase Agreement on the grounds inter-alia of coercion and exercise of undue influence.

9.7 As per the provisions of the Electricity Act, 2003 this Tribunal has been vested with powers of a civil court within the meaning of Code of Civil Procedure, 1908.

9.8 From the above considerations and judgments, we hold beyond doubt that not only this Tribunal but the Regulatory Commissions as well, have the jurisdiction to adjudicate and try the subject matters forming part of instant Appeal.

Our Consideration & Analysis on main issues:-

Issue No.1: Whether the Agreement dated 04.11.2015 has any validity in view of the same being contrary to Regulations, being without reciprocal consideration and also, it being entered into under coercion, undue influence and duress?

10. The Learned counsel for the Appellant has categorically contended that, the agreement dated 04.11.2015, through which the Appellant was deprived of the capacity charges by treating declared capacity equal to the scheduled capacity till the Appellant obtains coal linkage or till the 765kv evacuation system was in place, whichever is later, is

void on three grounds, firstly for it being contrary to regulations, secondly, for it being devoid of any reciprocal consideration and thirdly, for it being entered into by the Appellant under coercion, undue influence and duress. Let us now consider these grounds as under:-

10.1 First ground: the agreement is contrary to the regulations: The Appellant learned counsel submitted that the right of the Appellant to get the capacity charges flows from the UPERC Tariff Regulations, 2014 (The Tariff Regulations) namely Regulation 18(1) (a) and Regulation 25 (reproduced supra) .

10.2 The Learned counsel for the Appellant further submitted that the impugned agreement dated 04.11.2015is contrary to the above regulations which clearly provide that full capacity charges shall be recoverable at target availability specified in Regulation 18 of the Tariff Regulations and are not to be restricted to the level of scheduled availability as stipulated in said agreement dated 04.11.2015. He further contended that nowhere in the Regulations or the PPA, right of Appellant to claim the capacity charges have been linked to coal linkage or availability of transmission system.

10.3 It has been further emphasized by the counsel for the Appellant that Regulation 2(4) of the Tariff Regulations provide that "*in case of any conflict between provisions of these regulations and a power purchase agreement signed between a generating company and distribution licensee(s)/beneficiary (ies), the provisions of these regulations shall prevail*". He further submitted that this provision was a specific departure from the Tariff Regulations of 2009, which did not contain the above provisions. In fact, these provisions contained in Regulation

2(4) of the Tariff Regulations will override the provisions in PPA if those contained in PPA are in conflict with it.

10.4 Learned counsel further submitted that the above provisions clearly prove beyond doubt that the terms contained in the clauses 16 and 17 of the impugned agreement dated 04.11.2015 are contrary to the Regulations and are thus void.

10.5 Learned counsel for the Appellant brought to our notice the procedure of enforcing any amendment to the PPA. The provisions of Article 18.1 provide that:

> "*18.1 Amendment*
>
> *This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary.*"

10.6 The PPA therefore clearly provides two pre-conditions of amending it. These are: (1) amendment or supplement to be by an agreement in writing and (2) after duly obtaining approval of the Appropriate Commission. The Agreement dated 04.11.2015 thus also suffers the procedural perversity because it was implemented even before the Commission approved the same. The said agreement, even if it was valid, could not therefore be implemented before it was approved by the Commission.

10.7 ***Per contra***, the learned counsel for the Respondent No.2 responded only to the contents of para 6 of the Application No. 1627 of 2018 in the instant Appeal and stated in para 9 of its counter affidavit that "*At the outset, it is submitted that the Interim Arrangement/ Supplementary PPA is not violative of Article 1.2.6, Schedule 6 and 7 of the PPA or*

against the Tariff Regulations". The said counter affidavit further reproduced clause 21 of the impugned order dated 21.09.2016, which reads as "*21. This arrangement is being made primarily in the interest of consumers without compromising on the cost to the procurers. Rather this arrangement will have a lowering effect on the cost*".

10.8 However, vide para 8 of the Counter Affidavit, learned counsel for the Respondent No.2 has drawn attention of this Tribunal to the proviso to Regulation 2(4) of the Tariff Regulations, which reads as "*Provided that in case of projects where parameters have been agreed to in the Power Purchase Agreement or determined through an earlier Regulation prior to 1.4.2014, for any hardship due to discrepancy/inconsistency with parameters given in these Regulations, the Commission may be approached and parameters in such cases may be determined by the Commission at the time of tariff determination of respective generating station*".

10.9 We are of the view that the contents of the said proviso to Regulation 2(4) of the Tariff Regulations are not relevant in the instant case because Article 7 of the PPA specifically provides that "*The parties shall comply with the provisions of the applicable Law including, in particular, Grid Code as amended from time to time regarding operation and maintenance of the Power Station and the matters relating thereto……*". This clause is thus sufficient to show that the operating parameters prevailing at the time of operation shall apply to the Appellant and thus, the proviso to regulation 2(4) of Tariff Regulations become inapplicable in the instant case. We are of the considered opinion that the impugned agreement dated 04.11.2015 is contrary to the prevailing Regulations of the State Commission.

10.10 Second ground: The agreement dated 04.11.2015 is without reciprocal consideration.

10.11 The learned counsel for the Appellant submitted that the impugned agreement dated 04.11.2015 is one sided only and is without any reciprocal consideration flowing from Respondent No.2 to it. Thus, the Agreement is without consideration and hence, void.

10.12 Learned counsel for the Respondent No.2 on the other hand, claims that the said agreement was entered with the Appellant as a pre-condition for approving COD of the Unit # 1 of its generating station, was, firstly, in public interest, Secondly, it gave a commercial mechanism to run the plant, thirdly, it formed the basis of granting third time extension to the Appellant in complying with the condition subsequent no. 3.1.2(ii) relating to obtaining coal linkage and enabled the Appellant to procure further coal under the Presidential directive as well as enabled it to apply for coal linkage, which were the sufficient considerations for the agreement.

10.13 The learned counsel for the Appellant refuted the claim of Respondent No.2 and contended that the above matters could not even form valid and valuable considerations at all. He stated that the delay in obtaining coal linkage and thus not complying with the condition subsequent as stated in Article 3.1.2(ii) of the PPA occurred due to circumstances beyond control of the Appellant primarily caused by the legal impossibility that the Standing Committee (Long-term) on coal linkage of Ministry of Coal, GOI was not deciding any longer on coal linkage to any generator in private sector. He submitted that excusing enforcement of a legal impossibility could not form a consideration at

all. Thus, the conclusion that the impugned agreement gave a basis for third time extension to the Petitioner in complying with the condition subsequent relating to coal linkage in terms of Article 2.1.2(ii) of the PPA is also wrong.

10.14 On the issue of the said agreement being a commercial mechanism to run the plant, the learned counsel for the Appellant argued that the commercial mechanism to run the plant already existed in the PPA, the Tariff Regulations and the Grid Code and it needed no other mechanism, specifically the one like that described in the impugned agreement, which was at a fundamental departure to the Regulations and PPA.

10.15 Regarding approval of the COD on the basis of the impugned agreement the learned counsel stated that COD, which merely required a declaration in terms of the PPA was its right and no approval thereof was required from Respondent No.2. Interestingly, Respondent No.2 did not automatically forward the COD to SLDC and instead, waited for it till the Appellant signed the impugned agreement, which was yet another fault of Respondent No.2.

10.16 Regarding the argument of Learned counsel for the Respondent No.2 that approval of COD enabled the Appellant to procure further coal under the presidential directive, the Appellant's counsel stated that Respondent No.2 had already approved procurement of coal under presidential directive for coal carpeting, trial runs and even for operations and thus, the said agreement dated 04.11.2015 even failed on this count.

10.17 Regarding the submission of learned counsel for the Respondent No.2 that due to the approval of COD, the Appellant became eligible to apply for coal linkage, the counsel for the Appellant stated that COD in question happened on 01.10.2015 whereas coal linkage under SHAKTI Scheme was notified as late as in May 2017 and this could not have a relationship with the approval of COD of Unit # 1 of the Appellant. It was further contented by the Appellant's counsel that in fact coal linkage from the Standing Committee (Long Term) was applied by it even prior to entering into the PPA, when the Appellant was still a subsidiary of Respondent No.2. Since the said policy was replaced by SHAKTI Scheme, the Appellant applied for coal linkage afresh under that Scheme. The counsel for the Appellant further stated that the COD, which happened on 01.10.2015 for its Unit # 1 only could hardly be associated with application of the Applicant under SHAKTI Scheme, which started in May 2017 only, that is even after the period when the entire generating station of the Appellant had already achieved COD and even the transmission system was in place.

10.18 Regarding consideration, Section 25 of the Indian Contract Act, 1872 provides that agreements without consideration are void. About definition of consideration section 2(d) of the said Act provides:

> "*2d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise*;"

10.19 It is a settled principle of law that consideration has to be real and valuable and not illusory. Further any promise to do impossible thing is void. Agreements without consideration are also void. The learned counsel for the Appellant also submitted with great stress that 765 kV

transmission line or the evacuation system not being available was due to the own fault of Respondent No.2. Our attention has specifically been drawn to the provisions of Article 4.2(a) of the PPA, which categorically provides that the "*procurers (Respondent No.2) shall be responsible for providing the interconnection and transmission facilities to enable the power station to be connected to the grid system not later than the scheduled connection date*". Thus the clause no. 6 of the impugned agreement dated 04.11.2015, which is basically one of the preambles to the operative clauses no. 16 and 17 of the said agreement, cannot form a consideration. In nutshell, Respondent No.2 cannot even claim that in absence of the regular 765 kV transmission system as stipulated in the PPA, it allowed the plant to run on 2x220 kV transmission line. Respondent No.2, in fact was duty bound in terms of second proviso to Regulation 21(2) to provide an alternate transmission system. The said proviso reads as under:

> "*Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned*".

10.20 It is significant to note that by touching the evacuation system as described in the impugned agreement, Respondent No.2 has simply tried to cover its fault and it cannot take advantage out of its own fault.

10.21 Coming to the principle of public interest, whereas Respondent No.2 has claimed that the said agreement was done in public interest since it enabled cheaper power to the public, the learned counsel for the Appellant however contended that since more than 70% of its project cost is met by borrowings from public sector banks, there was wider public interest involved in it also. Further, the counsel stated that the

facilities and concessions provided by the State Government and Central Government to the project would go waste if the plant was not allowed to run and hence, the public interest involved with the Appellant's plant was no less than that shown by Respondent No.2.

10.22 With the above mentioned settled principles of law and in light of the facts and circumstances of the case, we hold that the impugned agreement dated 04.11.2015 is without any consideration flowing from the Respondent No.2 to the Appellant. All the claims of Respondent No.2 that the said agreement benefitted the Appellant in some or the other way are devoid of any merits.

Third ground: The impugned agreement dated 04.11.2015 was entered under coercion, undue influence and duress:

10.23 The learned counsel for the Appellant vehemently submitted that Respondent No.2 started coercing/ exercising undue influence over the Appellant ever since it saw that the start of the plant was in near sight. This coercion/ exercise of undue influence started first in the shape of change of stand from force majeure/ change in law condition in complying with Article 3.1.2(ii) relating to coal linkage to it becoming "**an essential condition for claiming RoE**", then it changed its stand again vide its letter dated 04.09.2015, rejecting the performance tests successfully conducted by the firm R.K. Jain and instead, appointing E-Gateway India, thus forcing the Appellant once again to go through the performance tests. This exercise of coercion/ undue influence was further aggravated, when it did not accept even the second time performance test communicated by the said M/s E-Gateway India after carrying out the same during 21.09.2015 to 25.09.2015 and upon the Appellant raising its concern on the same, got the illegal agreement

dated 04.11.2015 signed from the Appellant under coercion/ undue influence. In fact, the Appellant was left with no choice but to sign the agreement under duress for getting COD accepted.

10.24 He further submitted that with the declaration of COD and the non-approval thereof and the resultant non-scheduling, stopped the funds inflow of the Appellant. The terms of the financing arrangement and repayment schedule of the Appellant were known to Respondent No.2 which very well knew that from the date of COD, the capitalisation of interest will stop and also the interest and instalment on the term loans will start, which will cause great financial loss to the Appellant. The Appellant was eager to get out of this loss and thus had no alternative but to bow down to the wishes of Respondent No.2.

10.25 The learned counsel for the Appellant advancing his arguments further submitted that after execution of agreement dated 04.11.2015 the plant of petitioner was allowed to run, but only for a period of 10 days and vide order dated 14.11.2015, State Load Dispatch Centre (SLDC) shut down the plant effective 00.00 hours stating low demand in the State. He quick to submit that Respondent No.2 while giving merit order to SLDC had clubbed the capacity charges of the Appellant to the variable charges, pushing the Appellant very low in the merit order stack due to which, its scheduling could not take place, while during the same time, Respondent No.2 kept purchasing power from other generators whose variable cost was higher than that of the Appellant. The counsel further submitted that this action of Respondent No.2 showed as if it had no intention even to honour the spirit of the impugned agreement dated 04.11.2015.

10.26 It is, therefore, clear from the above that the purpose of the said agreement was primarily to make power generated by the Appellant's plant available in the interest of the consumers in a supply shortage scenario. However, Respondent No.2 caused it to shut down on 14.11.2015 by wrongly creating MOD. It is, therefore, evident that Respondent No.2 had, in fact, no intention to honour the agreement dated 04.11.2015. It executed the impugned agreement and forced it on the Appellant merely to deprive the Appellant of capacity charges.

10.27 ***Per contra,*** learned counsel for the Respondent No.2 however claimed in its counter affidavit that the alleged case of the Appellant qua coercion by Respondent No.2 was not only unsustainable, untenable and devoid of any merits but is outright perverse inter-alia for the following reasons:

(a) The agreement dated 04.11.2015 was entered into at the behest of the Appellant and the same is undisputable since the resulting effect of the interim arrangement benefits the Petitioner for achieving the COD of its Plant which in turn enabled the Appellant to obtain coal linkage from Coal India Limited.

(b) The Appellant was under no legal obligation or commercial compulsion to execute the interim arrangement.

(c) The Appellant on its website has made claims which refute the argument of coercion, since by its own admission on the website, the Appellant doesn't appear to be a novice.

(d) The reason for execution of interim arrangement is delay of the Appellant in obtaining coal linkage, due to which the Appellant

was purchasing coal from market at 40% premium. Another reason was also delay in construction of 765 kV line for evacuation of power.

(e) The interim arrangement has been entered into to contain and counter balance the impact of higher capacity charges in public interest and was intended to contain higher variable charge in view of higher cost of coal and higher fixed cost as well as to address the transmission constraints. Clauses 14-18 of the agreement demonstrate this. The agreement is a commercial mechanism and is result of a mutual resolve and has not been entered through exercise of coercion, undue influence and duress.

(f) The Appellant through its letter dated 15.10.2015 referred to meeting held with Respondent No.2 on 12.10.2015 agreeing to the amended draft of the agreement and the said letter conveyed its unequivocal acceptance specifying "*We give our consent to above draft so that COD may be declared*." This makes it clear that the alleged claims of the Appellant are legally untenable, devoid of merit and misleading. Moreover, the Appellant did not reach the Commission if it was aggrieved with the said terms/ conditions.

(g) The Appellant has declared COD and applied for coal linkage. Hence, there was no coercion etc. It now wants to wriggle out of the agreement. Respondent No.2 had all times, liberty to act in accordance with Article 3.3 and could have terminated the PPA.

(h) Respondent No.2 had always given extensions comply with condition subsequent relating to obtaining of coal linkage in good faith.

(i) The Appellant has always been changing its stands. In Petition No. 1101 of 2016, it merely insisted on "setting aside/ not to approve the conditions stipulated under paras 16 and 17 of the Agreement. In that Petition it did not allege coercion. Then the Appellant improved its stand in reply to rejoinder affidavit. In the instant Appeal, the Appellant has prayed for declaring the entire interim arranged dated 04.11.2015 to be void and demanded ABT.

(j) The Appellant has availed benefits under the agreement. So it cannot escape form the obligations under the agreement. The doctrine of "*qui approbat non reprobate*" apply on the Appellant choosing a path of eternal convenience, trying to pick and choose what benefits it the most.

(k) The Appellant entered the interim arrangement through open eyes and chose to dispute the same as per his own convenient time.

10.28 During the proceedings, learned counsel for the Respondent No.2 submitted its case against exercise of coercion in length as under-:

10.29 Section 15 of the Indian Contract Act, 1872 defines a coercion as under:

"*15. "Coercion" defined.—"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code*

(45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

10.30 Exercise of any act forbidden by the Indian Penal Code, 1860 has neither been pleaded nor been replied. However, what Respondent No.2 has done through the impugned agreement is that it has "unlawfully detained or threatened to detain property" of the Appellant. This unlawful detention, in the view of the parties is "COD", which the Appellant claimed that it was its right under the PPA and Respondent No.2 has time and again stressed that it was valuable for the Appellant. This detention of approving COD is thus sufficient property as settled between the parties.

10.31 During the course of submissions, Respondent No.2's counsel argued that coercion has to be pleaded at the first instance, which the Appellant has not contested. In the original petition no. 1101 of 2016 also, the Appellant has pleaded only undue influence and not coercion. Even duress, which is a term under the English Law for economic coercion is basically a species of coercion and the fundamental principle of coercion that it is required to be pleaded at the first instance itself deserves no further consideration in law.

10.32 Section 16 of the Indian Contract Act, 1872 defines undue influence as under:

"16. "Undue influence" defined.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to

dominate the will of another— (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)".

Our Findings:

10.33 We have thoughtfully considered the rival contentions of the learned counsel for the Appellant and learned counsel for the Respondent Nos. 1 & 2 and also taken note of the judgments relied upon by them. It is obvious that Respondent No.2 is the only buyer of the Appellant and the Appellant had only source of income from Respondent No.2 only. The fear of not scheduling the power coupled with the economic situation that the Appellant would have faced in the shape of accrual of financial obligations and also due to the huge investment made by the Appellant, which would start junking if the en-passe created by Respondent No.2 was not redressed, put the Appellant in a dire situation, taking advantage of which Respondent No.2, which already is in a higher pedestal than the Appellant, was able to dominate the will of the Appellant and was able to get the impugned agreement executed. The post agreement conduct also conveys the bullying tendencies of Respondent No.2, which implemented the agreement even before it was approved by the Commission and stopped scheduling of its plant within a period of 10 days on the pretext of low

demand. The Appellant has however pleaded that even in the case of low demand, Respondent No.2 kept buying power from the generators having higher variable cost. The Appellant further pleaded that Respondent No.2 clubbed its fixed cost with its variable cost with the sole aim of putting it low in the MOD Stack. These all events indicate that Respondent No.2 not only took advantage of its dominant position to influence the Appellant to enter into the agreement but also harmed it through its conduct in the manner just discussed above. Using this position, it withheld the approval of COD by over a month and finally approved the same only when the Appellant signed the impugned agreement dated 04.11.2015 sacrificing its revenue due to treating its declared capacity equal to scheduled capacity.

10.34 We do not find force in the stand of Respondent No.2 that the impugned agreement dated 04.11.2015 was signed at the behest of the Appellant and the same benefitted it. In fact, huge sacrifice was made by the Appellant and the agreement was one sided. It has already been established that the said agreement was without consideration also.

10.35 We are unable to accept the submissions of the learned counsel for Respondent No.2 that the Appellant has been changing its stands. In fact in its rejoinder affidavit, the Appellant has categorically denied the change of stand and has instead alleged Respondent No.2 of changing stands to which Respondent No.2 has not submitted any further arguments. The Appellant has specifically stated that it was in fact Respondent No.2 which kept changing its stand and the allegation by Respondent No.2 that firstly the Appellant prayed for declaration of clauses 16 and 17 of the impugned agreement as void and then shifted

its stand to declare entire agreement as void. The Appellant stressed that clauses 16 and 17 formed the entire substratum and operating portion of the impugned agreement dated 04.11.2015 and in case the said clauses 16 and 17 are declared void, the entire agreement shall be rendered void. Thus the allegation of the Respondent No.2 about shifting the stand by the Appellant is meaningless.

10.36 It is well settled law that absence of or insufficiency of consideration is in itself, an evidence of coercion/ undue influence. In fact note below the illustration to Section 25 of the Indian Contract Act, 1872 reads as under:

> "*The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A"s consent was freely given*."

10.37 It is relevant to note that there was no reciprocal consideration which flew in the instant case to the Appellant from Respondent No.2. This was also sufficient proof for showing that the consent of the Appellant to the said agreement dated 04.11.2015 was not given out of its free will. Further about the consequences of agreement without free consent, section 18 of the Indian Contract Act, 1872 provides:

> "***18. Voidability of agreements without free consent.—****When consent to an agreement is caused by coercion, 1 *** fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

10.38 Therefore, the contract without the free consent are voidable at the option of the party whose consent was so sought. In the instant case, the Appellant challenged the agreement within a period of four months, which has the effect of repudiating the agreement impliedly. Because an agreement can be terminated expressly or implied, the action of the Appellant to challenge the agreement within a period of four months has the effect of terminating the same. Therefore, in our opinion, the agreement dated 04.11.2015 was rendered void on the ground of it being entered without the free will and under compulsion.

10.39 Thus our findings on issue no. 1 may be summed up as having been proven beyond doubt that the said agreement dated 04.11.2015 was not in accordance with law and thus, void ab-initio due to (a) it being contrary to the Tariff Regulations, (b) it being without any reciprocal consideration falling to the Appellant, and (c) it being entered without the free will of the Appellant, the Appellant repudiating the same impliedly by filing petition seeking orders for declaring the same as void. Further, in view of the conduct of Respondent No.2 of having executed the Agreement dated 04.11.2015 and then simply stopping the plant from running on 14.11.2015, vitiates the Agreement dated 04.11.2015 itself.

ISSUE NO. 2: Whether the State Commission can deny the Appellant for payment of declared capacity charges contrary to the UPERC Generation Tariff Regulations 2014 and the PPA?

11. Learned counsel for the Appellant submitted that the primary duty of the Appellant is to make electricity available and as long as it is made available, the Appellant is entitled to receive the capacity charges as per UPERC (terms & conditions of generation tariff) Regulations, 2014. He further contended that it is not open to Respondent/UPPCL to insert terms in an agreement contrary to the provisions of Regulations dis-entitling the Appellant to its legitimate capacity charges. As such, the impugned agreement dated 04.11.2015 being contrary to the Regulations of the State Commission ought not to have been approved by the Commission on the face of it. Learned counsel alleged that the State Commission has legalised the **extortion** by UPPCL by approving SPPA depriving the Appellant from fixed charges for declared capacity.

11.1 Learned counsel for the Appellant further contended that the PPA provides a different set of consequences with regard to the achievement and non-achieving of conditions subsequent and a different set of provisions for dealing with commercial operation. These two issues are distinguished from each other and not at all related. However, the State Commission by approving the SPPA has mixed up the two aspects to the grave pre-judice to the Appellant. Learned counsel quick to submit that the State Commission itself in Paras' 12 & 13 of the order dated 21.09.2016 has recorded that the parties had no right to enter into the agreement dated 04.11.2015 tweaking the provisions of the original PPA without prior approval of the State Commission. This being the case there is a clear morbidity

in the order of the State Commission treating the agreement dated 04.11.2015 as the *feit accomplie* even though the same was objected to by the Appellant.

11.2 The State Commission having framed the Regulations under the Act is also bound by the same as held by a host of judgments of apex court. It is well settled that Regulations are in nature of delegated legislation and once framed and placed before the State Legislature in accordance with Section 181 & 182 of the Act, cannot be modified except by following the very same procedure. Learned counsel emphasised that, therefore, incorporating of terms in a bilateral agreement which are contrary to the Regulations makes such an agreement void *ab initio*.

11.3 ***Per contra*****,** learned counsel for the Respondent No.2/UPPCL vehemently submitted that COD is an distinct requirement and does not dilute and negate the material condition prescribed under Clause 3.1.2 (ii) of the PPA. He contended that the extensions accorded to the Appellant are for fulfilment of the condition subsequent namely to obtain coal linkage. Learned counsel further submitted that the Tariff Regulations of the State Commission only determine the methodology for calculation of tariff but do not determine the modus/modalities as to when the tariff would become payable or other conditions applicable to such payments. He was quick to submit that the requirement of coal linkage being a condition subsequent under Clause 3.1.2(ii) of the PPA could not have been waived by UPPCL as the same would be pre-judicial to the public interest. To support his contentions, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of All India Powers Engineers Federation vs. Sasan Power Ltd. (2017) (1) SCC 487. Learned counsel for the Respondents reiterated that

pending fulfilment of conditions subsequent as per PPA relating to coal linkage, the Appellant cannot be entitled for the full capacity charges based on declared availability.

Our Findings:-

11.4 We have analysed the rival contentions of the learned counsel for the Appellant and learned counsel for Respondent No.1 & 2 and also taken note of the Tariff Regulations, 2014 of the State Commission. While Regulation 18(1)(a) defines the norms of operation, target availability for recovery of capacity charges etc., the Regulation 25 specifies the computations of the capacity charges and their recovery relating to target availability etc.. It is relevant to note that once COD of the plant/unit has been achieved and fuel as per Article 6.5 of the PPA is available, the Appellant is duly entitled for the capacity charges in lieu of the declared capacity.

11.5 We do not find any substance in the contentions of the learned counsel for the Respondent Nos. 1 & 2 to treat the scheduled capacity as the declared capacity and adding the fixed cost with variable cost to decide the merit order despatch (MOD) to the utter disadvantage of the Appellant. In fact, the right of the Appellant to get the capacity charges for the declared capacity flows from the UPERC Tariff Regulations, 2014 which otherwise cannot be altered or denied by inserting any additional terms in an agreement contrary to the Regulations as has been done in the instant case. It is significant and also ruled by various judgments of the Apex court that the State Commission itself is bound by its Regulations and cannot deny the generator the payment of capacity charges contrary to the Tariff

Regulations. Thus, the impugned order(s) suffer from legal infirmity and perversity.

ISSUE NO. 3: Whether the State Commission can deny the Return on Equity to the Appellant for it not fulfilling condition subsequent as stipulated in Article 3.1.2(ii) of the PPA against its own Tariff Regulations when the same was not an issue at all in the petition before the State Commission?

12. Learned counsel for the Appellant submitted that Return on equity has been a contentious issue between the Appellant and RESPONDENT NO.2. The dispute started with the fact that while considering the Interim application filed by the Appellant in Petition No. 1101 of 2016, in which the Appellant had prayed that:

> *"Wherefore, it is respectfully prayed that subject to the petitioner agreeing to the conditions mentioned in paragraph 13, this Hon'ble Commission may be pleased to allow the petitioner to purchase coal for generation of electricity under the prevalent policy of the Government of India for supply of coal to power generators, which may be treated as sufficient compliance of the condition provided under Article 3.1.2 (ii) of the approved PPA"*

12.1 The counsel further submitted that the Commission in its order dated 21.09.2016 observed:

> "*17. Regarding admissibility of Return on equity the Commission is of the view that compliance of condition subsequent as given in Clause 3.1.2(ii) is an essential element to claim any return on equity and since this important condition subsequent has not been complied with, the petitioner will not be entitled to RoE during this interim arrangement."*

12.2 The Appellant thereafter filed a review petition being no. 1155 of 2017, wherein it reiterated inter-alia the following error apparent on the face of it:

"*Disallowance of Return on Equity (ROE) which had nothing to do with Agreement dated 04.11.2015; The impugned order being against the provisions of the Statutory Regulations which are framed under Section 181 & 182 of the Electricity Act, 2003*;"

12.3 Vide order dated 17.10.2018, the Commission ordered, inter-alia that:

"*39. In view of the factual legal matrix discussed above the Commission*

i. does not allow Return on Equity (RoE) to M/s LPGCL prior to obtaining long term coal linkage primarily on the grounds of non-maintainability of review petition on this issue and also on merits."

12.4 The Tariff Regulations provide as under:

"25(iii) Return on Equity:

Return on equity shall be computed in rupee terms on the equity base determined in accordance with Regulation 24@ 15.5% per annum;

Provided that in case of projects commissioned on or after 1st April, 2014, if such projects are completed within the timeline specified in Appendix IV an additional return of 0.5%, shall be allowed;"

12.5 The PPA provides as under:

"Schedule 7: Tariff

7.3.6 Return on Equity

Return on equity shall be computed on the equity base determined in accordance with UPERC Regulations @ 15.50% per annum. Provided that in case the Unit(s) of the Seller is commissioned within the timelines as specified in UPERC Regulations, the Seller shall also be entitled to an additional return of 0.5%.

Provided that equity invested in foreign currency shall be allowed a return up to the prescribed limit in the same currency and the

payment on this account shall be made in Indian rupees based on the exchange rate prevailing on the Due Date."

12.6 The Appellant's counsel contended that it is therefore clear that Return on equity has been provided specifically in the Tariff Regulations as well as in the PPA. It being a part of Tariff Regulations, cannot be done away with. During the submissions, the Appellant's counsel reiterated that RoE being the only return that the Appellant is entitled to and also that the entitlement of RoE does not have any connection with coal linkage. He further drew attention of this Tribunal to the contents of Para 14 of the order dated 21.09.2016, which reads:

"*14. After filing of the Petition No, 1101 of 2016, the petitioner has revised its stand and has agreed that they are ready to charge the coal price at the notified price and bear the additional ost themselves. They have also agreed to charge the coal transportation cost on the basis of weighted average of freight applicable for transportation from Amrapali Mines to the plant's captive railway siding (numerical code: LPGU). The petitioner's offer has an impact of reducing the variable cost of the power. This commitment of the petitioner virtually puts the procurers in the same position in which they would have been had the linkage been obtained. It may be clarified that this concession by the Seller does not mean that the compliance of Clause 3.1.2(ii) has been made. This cannot even be treated as substantial compliance of the provisions of 3.1.2(ii). This is only a mechanism to mitigate the grievance of the procurers due to non-compliance of clause 3.1.2(ii)"*

12.7 The Appellant's counsel has termed the contradictory findings of the Commission as perverse, since on the one hand the Commission has observed that the discounts granted by the Appellant have virtually put Respondent No.2 in the same situation in which it would have been had linkage been obtained, on the other hand it states that this cannot even be treated substantial compliance of Article 3.1.2(ii) of the PPA. The PPA in Article 6.5 provides that "*the responsibility for arrangement*

of fuel shall *be with the Developer who shall procure the fuel under coal linkage granted to the seller by the Central Government on the recommendation of GoUP*". It further states that in case of any short supply, procurement of fuel may be made with prior consent of Respondent No.2.

12.8 The Appellant had been obtaining coal under the Presidential directive with approval of Respondent No.2, which was allowed to it even for operation of the plant. Forward-e-auction mechanism also permitted procurement of coal by the Appellant till coal linkage was granted. In the meantime, the Appellant even equated the cost of coal to the linkage coal absorbing the burden of entire premium on itself. Respondent No.2 on the other hand linked the issue of RoE to obtaining of coal linkage. It argued that condition subsequent relating to obtaining of coal linkage contained in Article 3.1.2(ii) of the PPA was an essential condition for grant of RoE. It was further argued that this condition subsequent was never waived by Respondent No.2.

12.9 The Appellant's counsel also submitted that neither in the counter affidavit of Respondent No.2 in Petition no. 1101 nor in the reply to the interim application therein had Respondent No.2 raised the issue of RoE. In fact, the issue of RoE was raised by Respondent No.2 through the written submissions and not through proper pleadings, which were allowed by the Commission. The Appellant had still denied sacrificing of RoE in the manner asked for, however, the Commission allowed the same to Respondent No.2.

12.10 ***Per contra,*** learned counsel for the Respondents submitted that there was detailed discussions on the issue of RoE by the parties in the pleadings as well as during hearing before the State Commission

and this has been noticed by the Commission in both the impugned orders dated 21.09.2016 as well as dated 17.10.2018. On the perusal of the orders, it is relevant to note that the State Commission after hearing the submissions, directed LPGCL vide order dated 19.08.2018 to submit its reply on the points raised in the counter affidavit and written submissions of UPPCL i.e. surrendering ROE, absorbing the differential cost of transformation of coal and other issues within seven days of this hearing and UPPCL to reply on the same within 15 days. Accordingly, the LPGCL made its submissions on 21.08.2016 and 31.08.2016. Learned counsel further contended that the findings of the Commission with respect to RoE as Para 17 of the order dated 21.09.2016 was based on detailed discussions in the previous paragraphs of the order, the said para is reproduced as under:-

> *17.Regarding admissibility of Return on Equity the Commission is of the view that compliance of the condition subsequent as given in Clause 3.1.2(ii) is an essential element to claim any return on equity and since this important condition subsequent has not been complied with the petitioner will not be entitled to RoE during this interim arrangement.*"

12.11 Learned counsel vehemently submitted that from the above, it is crystal clear that the State Commission had clearly stated that compliance of conditions mentioned in Clause 3.1.2 (ii) is essential condition for claiming RoE and since the Appellant has not fulfilled the above conditions subsequent to signing of PPA, it is not entitled to claim RoE for the period it fails to obtain long term coal linkage. These facts were also noticed by the State Commission while deciding the review petition vide order dated 17.10.2018 and reiterated its earlier stand of non-allowing RoE. Learned counsel was quick to submit that the RoE issue has thus been dealt in the entire

backdrop of the events and in the overall interest of all the stakeholders of the public at large and consumers, RoE has not been allowed to the Appellant.

Our Findings:-

12.12 Learned counsel for the Appellant submitted that the State Commission has to determine the tariff in terms of its Tariff Regulations and in exercise of its statutory power under Section 61, 62 64 & 86 1(b) of the Electricity Act, 2003. He vehemently submitted that this is a specific dispensation and cannot be modified by putting an additional conditions in the agreement by virtue of which the generator is declared un-entitled for the Return on Equity (ROE). Learned counsel quick to point out that the State Commission's approach is totally inconsistent as in Para 13 of the order dated 21.09.2016 which proceeds on the basis that the parties have already acted on the agreement dated 04.11.2015 as a contractual relationship and suddenly introduced a new terms by stating that no ROE be paid during the subsistence of this contractual relationship. He pointed out that the State Commission has not appreciated that in case of any derogation between a PPA and the Regulations, the Regulations would have the overriding effect on PPA as per Regulation 2(4)(5) of the Tariff Regulations, 2014.

12.13 Learned counsel also drew our attention over the statement of objects and reasons of the Tariff Regulations on Return on Equity. Learned counsel further contended that the State Commission by holding that the Appellant would not get the ROE has acted against express terms of the PPA which require the State Commission to determine the Tariff as per its Regulations. Further, the issue of ROE is not related to the

fulfillment of Article 3.1.2(ii) relating to coal linkage at all since the Appellant had arranged for alternate coal and was itself bearing incremental fuel cost towards alternate coal the arrangement vis.a.vis. the linkage coal. The State Commission has itself observed on the same as "putting the procurers in same position in which they would have been had the linkage coal being obtained". We are unable to comprehend the decision of the Respondent Commission that how could ROE of the Appellant can be disallowed when alternate coal was arranged by the generator at same cost as that of linkage coal (absorbing the differential cost).

12.14 We, therefore, hold that the order of the Commission to the effect that the Appellant will not be entitled to ROE due to its non-fulfillment of the condition subsequent relating to coal linkage contained in Article 3.1.2 (ii) of the PPA suffers from legal infirmity and perversity as being against the settled principles of law and statutory regulations of the State Commission.

13. Summary of Our Findings:-

13.1 In view of the facts & circumstances of the case and our findings and analysis in the foregoing paragraphs, we are of the considered view that the impugned agreement being the agreement dated 04.11.2015 was executed by the Appellant under the coercion, undue influence and duress. Besides, the same is against the Regulations of the Commission and thus void ab-initio.

13.2 The Appellant is entitled to receive payment based on Availability Based Tariff (ABT) as per PPA dated 10.12.2010 and Regulations for

the period for which interim agreement dated 04.11.2015 was kept operative by UPPCL/Respondent No.2.

13.3 Having procured alternate coal and absorbing differential cost as well as virtually putting the Respondent No.2 in same situation in which it would have been had coal linkage been obtained, the Return on Equity (RoE) is payable to the Appellant in accordance with the Regulations of UPERC and the PPA dated 10.12.2010.

Hence, in light of the above, the Appeal deserves to be allowed and the impugned orders of the State Commission are liable to be set aside to the extent as brought out above.

ORDER

Having regard to the factual and legal aspects of the matter, as stated supra, the instant Appeal filed by the Appellant being Appeal No. 365 of 2018 is allowed. The issues raised in this Appeal answered in favour of the Appellant.

The Impugned Agreement dated 04.11.2015 is held void-ab-initio. The Order dated 21.09.2016 in Petition No. 1101 of 2016 and the Order dated 17.10.2018 in Review Petition No. 1190 of 2017 passed by Uttar Pradesh Electricity Regulatory Commission are set aside to the extent challenged in the Appeal.

The State Commission is directed to pass the consequential orders as per the above findings in Para Nos. 13.1 to 13.3 as expeditiously as possible

within a period of four months from the date of receipt of copy of this Judgment and order.

In view of the disposal of the Appeal, the relief sought in the IA No. 1627 of 2018 does not survive for consideration and accordingly stands disposed of.

No order as to costs.

Pronounced in the Open Court on this ***01st day of May, 2019***.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

Pr/kt