Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 184 of 2010

Dated: 07th Sept. 2011

Present:Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Hon'ble Mr. V.J. Talwar,Technical Member,

In The Matter Of

M/s Adani Power Limited.
9th Floor, Shikhar,
Mithakhali Six Roads,
Navrangpura, Ahemedabad
Gujarat-380 009

... Appellant

Versus

1. Gujarat Electricity Regulatory Commission,
1st Floor, Neptune Tower,
Opp. Nehru Bridge,
Ashram Road,
Ahmedabad-380 009

2. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Bhawan,
Race Course Circle,
Vadodara-390 007

3. Consumer Education and Research Society,
"Suraksha Sankool",
Sakkhej-Gandhinagar Highway,
Thaltej, Ahmedabad,
Gujarat-380 054

4. Mr. Amar Singh Chavda,
127, Heritage Bunglows,
Opposite Science City,
Ahemedabad,
Gujarat-380 060

5. Mr. Sunil B. Oza,
S/O Mr. Balkrishna Oza,
405, Sector-1 C,
Gandhinagar,
Gujarat

....Respondent(s)

Counsel for Appellant(s): Mr.C.S Vaidyanathan,
Sr.Adv.
Mr.Amit Kapur,
Ms. Sugandha Somani,
Ms. Poonam Verma,
Mr. Vikram Nankani
Mr. Malav Deliwala,
Mr. Abhishek Munot,

Counsel for Respondent(s): Mr. P.P.Malhotra,
Sr.Advocate(ASG)
Mr. M.G. Ramachandran,
Ms. Ranjitha,
Mr.P.J Jain (Rep for GUVNL)
Ms. Shika Ohri (for GERC)
Mr. Anand,

Ms. Hemantika Wahi,
Ms. Nupur Kanungo,
Ms. Sneha V.
Mr. Sunil Sharma,
Mr. Sanjay Sen,
Ms. Surbhi Sharma,
Mr. K.P Zangid,
Mr. S.R Pandey,
Mr. Amar Singh,
Mr. K.J. Macwan,
Mr.Anand K. Ganeshan,

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. M/s. Adani Power Limited is the Appellant.

2. The Gujarat Electricity Regulatory Commission (State Commission) is the 1st Respondent. Gujarat Urja Vikas Nigam Ltd. (Gujarat Holding Company) is the 2nd Respondent. Consumer Education and Research Society is the 3rd Respondent. The 4th and 5th Respondents are parties who are interveners impleaded during the course of the proceedings.

3. Challenging the termination notice issued by the Appellant terminating the Power Purchase Agreement (PPA) entered into between the 2nd Respondent Gujarat Holding Company and the Appellant, the 2nd Respondent Gujarat Holding Company filed a Petition before the State Commission praying for setting aside the said termination notice as illegal and seeking for the consequential relief. Accordingly, the State Commission through its impugned order dated 31.8.2010 set aside the termination notice sent by the Appellant to the 2nd Respondent and directed the Appellant to supply power to the 2nd Respondent as per PPA. Aggrieved by this order, the Appellant has filed this Appeal.

4. The short facts are as follows:-

(i) The Appellant is a generating Company. The 2nd Respondent is Gujarat Urja Vikas Nigam Ltd (Gujarat Holding Company) situated in the State

of Gujarat. It indulges in the business of Bulk Purchase from the generators and Bulk Supply to the Distribution Companies in the State of Gujarat.

(ii) On 1.2.2006, the 2nd Respondent, Gujarat Holding Company initiated the process of bidding by issuing a Request for Qualification ("RfQ") for the selection of competent parties for Supply of Power on long term basis. Advertisements in newspapers were issued. It invited three separate bids for Purchase of Power in accordance with Section 63 of the Electricity Act 2003. Each of these three bids envisaged purchase of power to a maximum of 2000 MW each. This was followed by a Request for Proposal (RfP) on 24.11.2006.

(iii) On 2.1.2007, the price bids submitted by the Bidders under Bid No.2 was opened by the 2nd

Respondent. On 4.1.2007, the Appellant was selected as a successful bidder.

(iv) Consequently, on 11.1.2007, Gujarat Holding Company (R-2) issued a letter of intent under Bid No.2 to the Appellant for supplying 1000 MW of power to Gujarat Holding Company (R-2) at the rate of Rs.2.35 Kwh

(v) On 2.2.2007, the Power Purchase Agreement was entered into between the 2nd Respondent, Gujarat Holding Company and M/S. Adani Power Limited (Appellant) for the purchase and sale of 1000 MW power from the Appellant's Power Project at Korba, Chhatisgarh at the delivery point Nani Khakhr in the state of Gujarat.

(vi) On 6.2.2007, the Power Purchase Agreement was executed by the Appellant with Gujarat Holding Company (R-2) in respect of Bid No.1 based on

the imported coal for supply of power at Rs.2.89 per unit

(vii) On 12.2.2007, the Appellant proposed to the 2nd Respondent, Gujarat Holding Company to supply power under PPA from its Mundra Project in Gujarat instead of Chhattisgarh Project.

(viii) On 20.2.2007, the Appellant informed the 2nd Respondent, Gujarat Holding Company about its decision to supply power against Bid No. 2 from its Mundra Power Project.

(ix) Thereupon, a supplemental PPA was entered into between the Appellant and 2nd Respondent on 18.4.2007 to off take the Contracted Capacity of 1000MW against Bid No. 2 from bus bar of Mundra Power Project.

(x) On 21.5.2007, the Appellant wrote to the Government of Gujarat stating that the Gujarat

Mineral Corporation had agreed in principle for supply of 4 million tonnes of coal for 1000 MW Thermal Power Project of the Appellant and since a dispute had arisen between these two parties with regard to the rate for supply of power to 2nd Respondent, the Appellant requested the Government of Gujarat to find out a solution as there was no possibility of any other domestic coal supply being made available.

(xi) On 26.2.2008, the Appellant submitted reports to Gujarat Holding Company Limited (R-2) for a period from December, 2007 to January, 2008 wherein it was indicated that the Fuel Supply Agreement(FSA) was yet to be finalized.

(xii) On 1.5.2008, the M/s. Adani Enterprises Limited submitted to the Government of Gujarat a complete background of the domestic coal allocation from coal mines allotted to Gujarat

Mineral Corporation and requested the Government of Gujarat to consider allocation of coal linkage from domestic coal blocks allocated to Gujarat Mineral Corporation so that its power project would commence on time.

(xiii) Gujarat Holding Company (R-2) having waited upto June, 2008 wrote a letter to the Appellant stating that in spite of its number of letters, the Appellant had not submitted the pending documents and had not fulfilled the condition subsequent as requested. Through this letter, Gujarat Holding Company (R-2), requested the Appellant to furnish additional performance bank guarantee.

(xiv) On 17.1.2009, the Appellant again wrote to Gujarat Holding Company reiterating its inability to supply contracted capacity of power to Gujarat Holding Company in the absence of Fuel Supply

Agreement(FSA) with the Gujarat Mineral Corporation and hence it had no other option except to terminate the PPA.

(xv) On 27.2.2009, the Government of Gujarat wrote to the Gujarat Mineral Corporation for allowing coal allotment from Morga-II block to KSK Energy Ventures Private Limited. In this letter Government of Gujarat suggested to Gujarat Mineral Corporation to consider allocation of 50% of coal from Naini block to Adani Power Ltd., the Appellant.

(xvi) On 24.3.2009, Gujarat Mineral Corporation confirmed allocation of 50% of the coal from Naini block to Adani Power Ltd and requested the Appellant to execute Fuel Supply Agreement (FSA).

(xvii) The Appellant sent a letter dated 3.4.2009 to the Gujarat Mineral Corporation requesting to

supply the draft FSA as well as the details/parameters of Naini Coal Block for necessary studies enabling the Appellant to take further action.

(xviii) On 28.4.2009, the Appellant wrote to Gujarat Holding Company reiterating that the bid for supply of 1000 MW to Gujarat Holding Company was based on Gujarat Mineral Corporation's commitment to supply coal to the Appellant from Morga II coal block and use of imported coal was only for blending with Morga-II coal to ensure optimum parameters. It also informed that MoUs with M/s Coal Orbis Trading and M/s Kowa Company Limited for supply of imported coal had been expired. Through this letter, the Appellant also informed the 2nd Respondent that notices dated 15.11.2008 and 17.1.2009 may be treated in abeyance till matter of coal supply is resolved.

(xix) Large number of correspondence were exchanged during May, 2009 to December, 2009 between Government of Gujarat, 2nd Respondent and the Appellant with regard to fuel supply and PPA.

(xx) Ultimately, on 28.12.2009, the Appellant issued a termination notice to the Gujarat Holding Company for termination of PPA with effect from 04.01.2010.

(xxi) On 30.12.2009, the Gujarat Holding Company requested Government of Gujarat to impress upon the Appellant to withdraw its termination notice dated 28.12.2009 and also to impress upon Gujarat Mineral Corporation for execution of the FSA with the Appellant. The 2nd Respondent, Gujarat Holding Company sent letter to the Appellant also on 5.1.2010 to keep the notice of termination dated 28.12.2009 in abeyance for at least 30 days.

(xxii) On 6.1.2010, the Appellant wrote back to Gujarat Holding Company that since the period of termination has already expired, the PPA stood terminated from 6.1.2010. The Appellant also deposited with the 2nd Respondent remaining Rs.25 Crores towards liquidated damages in addition to over and above performance of bank guarantee of Rs.75 Crores which had already been furnished.

(xxiii) On 13.1.2010, the 2nd Respondent, Gujarat Holding Company sent a letter to the Appellant returning Rs 25 Crores and called upon him to withdraw the termination notice failing which appropriate action would be taken. There was no response. Therefore, the 2nd Respondent, Gujarat Holding Company on 1.2.2010 filed a petition before the Gujarat State Commission praying for adjudication of the dispute over the

termination of the PPA by the Appellant by declaring the termination notice dated 28.12.2009 as illegal and seeking for the grant of the consequential relief by specific performance.

5. After hearing both the parties at length, the State Commission framed four issues. They are as follows:-

Issue (1): Whether the Power Purchase Agreement dated 02.02.2007 executed between the Petitioner and the Respondent was dependent on supply of coal to the Respondent by Gujarat Mineral Corporation?
Issue (2): Whether the Respondent had an obligation to arrange coal from sources other than Gujarat Mineral Corporation in order to fulfil its obligation under the Power Purchase Agreement dated 02.02.2007 with the Petitioner?

Issue (3): What is the effect of the disclosures made by the Respondent relating to execution of a Fuel Supply Agreement with Adani Enterprises Ltd. in its Annual Reports, Director's Report and the Prospectus filed with SEBI?

Issue (4): Whether the Respondent generating company can terminate the Power Purchase Agreement dated 02.02.2007 on the basis of its

failure to execute a Fuel Supply Agreement and, therefore, be relieved of its obligations to supply power to the Petitioner under the said Power Purchase Agreement?

6. The findings of the State Commission in the impugned order on the above issues are summarized as given below:

(i) The Power Purchase Agreement entered into between the 2nd Respondent, Gujarat Holding Company and the Adani power Ltd. (Appellant) is not dependant on supply of fuel by the Gujarat Mineral Development Corporation or any other particular source. Hence, the Adani Power Ltd. (the Appellant), is required to obtain coal from other authorized sources and to supply the power to the 2nd Respondent, Gujarat Holding Company.

(ii) The Adani Power Ltd. (the Appellant), executed a fuel supply agreement with Adani Enterprises

Limited for supply of coal for Mundra Phase-III power plant for which it had executed a power purchase agreement with the 2nd Respondent Gujarat Holding Company. The sequence of events which were discovered from the application made by the Adani Power Limited before SEBI was never disclosed to the Commission. The Adani Power Ltd. (the Appellant) has not filed the Fuel Supply Agreement as amended from time to time. It is not the case of the Appellant that the FSA dated 24.3.2008 entered into with the Adani Enterprises Limited has been terminated. Therefore, it is difficult to accept that it did not have the ability to execute a FSA for supply of fuel for the Mundra Phase-III Project. It is strange that the Appellant, Adani Power Ltd has made representation before the SEBI about the existence of FSA but now the Appellant is

making a contrary statement before the Commission. There is no explanation as to why it is taking a stand different from what has been taken before the SEBI.

(iii) On a combined reading of Article 3.1.2 and Article 3.4.2, there is no occasion to hold that it could be the intention of the parties that in the event of failure of the Seller to fulfill conditions stipulated in Article 3.1.2, the Seller by its own unilateral election can terminate the contract.

(iv) The ability of either party to terminate the PPA under Article 3.4.2 will arise only if both the parties will mutually accept the happening of events contemplated under Article 3.4.2 (i) and (ii). Therefore, the termination by the seller is possible only if both the parties agree to the happening of events contemplated therein. In the present case, the right to terminate will only be

(v) available to the Procurer under Article 14.1. The failure on the part of the Seller to execute a Fuel Supply Agreement is a disputed issue. Therefore, the seller cannot take advantage of his own wrong/default. Therefore, the seller cannot terminate the PPA dated 2.2.22007 on the basis of its not having executed the FSA with the Gujarat Mineral Development Corporation, which is a seller's default.

(vi) The termination notice is not legal. Hence, the Appellant cannot be relieved of its obligation to supply power to the Gujarat Holding Company under the PPA. Accordingly, Adani is directed to supply power to the Gujarat Holding Company in accordance with the PPA.

7. Challenging these findings rendered by the State Commission, Mr.C.S. Vaidyanathan, the Learned Sr. Counsel for the Appellant has urged the following grounds:-

(i) PPA between 2nd Respondent, Gujarat Holding Company and the Appellant, M/S. Adani Power Limited was a conditional one and dependent on the supply of the coal from Gujarat Mineral Corporation Limited only.

(ii) Article 3.4.2 of the Draft PPA issued with RfQ/RfP was different from Article 3.4.2 of the PPA. In the Draft PPA under Article 3.4.2, the right was provided to terminate the PPA only to the Procurer. But, Article 3.4.2 of the signed PPA provided the right to terminate the PPA to the Seller as well as to the Procurer. The right to terminate the PPA given to the Seller as per the signed PPA even on the failure on the part of the seller itself cannot now be rendered otiose.

(iii) Even assuming that the termination notice is not valid, the specific performance of the contract cannot be granted when the specific amount of

liquidated damages is contemplated in the PPA by the parties as genuine and reasonable pre-estimated damages and as such the direction with regard to the specific performance of the PPA is not warranted as per the provisions of the Specific Relief Act, 1963.

8. The Learned Senior Counsel for the Appellant has cited the various decisions in order to substantiate his plea that the clauses of an agreement cannot be read in isolation and these must be read harmoniously to gather the true intention of the parties to the agreement and as such, the quasi-judicial/ administrative authority must ascertain the intention of the parties to the contract as a whole. The decisions are as under:

(i) Khardah Company Ltd. Vs. Raymon & Co. (India) Pvt. Ltd: AIR 1962 SC 1810 (Para 18);

(ii) Modi and Co. Vs. Union of India: AIR 1969 SC 9 (Para 8);

(iii) Amravati District Central Cooperative Bank Ltd. Vs. United India Fire and General Insurance Co. Ltd: (2010) 5 SCC 294 (Para 13);

(iv) Delta International Ltd. Vs. Shyam Sundar Ganeriwalla and Another: (1999) 4 SCC 545 (para 17);

(v) General Assurance Society Ltd. Vs. Chandmull Jain: AIR 1966 SC 1644 (para 11);

(vi) Polymat India (P) Ltd. and Another Vs. National Insurance Co. Ltd and Others: (2005) 9 SCC 174 (Para 21);

(vii) Strachey Vs. Ramage: (2008) EWCA Civ 384 (para 29);

(viii) Ganga Saran Vs Ram Charan Ram Gopal: AIR 1952 SC 9 (Para 9);

(ix) State Bank of India Vs Mula Sahakari Sakhar Karkhana Ltd: (2006) 6 SCC 293 (Para 22,23 and 32);

(x) Her Highness Maharani Shanti Devi P. Gaikwad Vs. Savjibhai Haribhai Patel & Others (2001) 5 SCC 101 (Para 56);

(xi) Classic Motors Limited Vs. Maruti Udyog Limited: 65 (1977) DLT 166 (para 70,71);

9. On the basis of these decisions, the Learned Senior Counsel for the Appellant has highlighted the following aspects:

(a) The Appellant, Adani Power Limited has the unilateral right to terminate the PPA.

(b) The Appellant, Adani Power Limited cannot be forced to continue with the obligations of PPA on the ground that it can terminate the PPA only when there is a breach on the part of 2nd Respondent, Gujarat Holding Company or when the Parties to the PPA mutually agree for the termination under Article 3.4.2.

(c) The purpose of inserting amended Article 3.4.2 is to give right to terminate to both the Seller (Appellant herein) as well as the Procurer (2nd Respondent herein), which cannot be curtailed by 2nd Respondent, Gujarat Holding Company on the basis of vague allegations.

10. The Learned Senior Counsel for the Appellant further submitted without prejudice to the above grounds that even assuming that the termination notice is bad in law, the same would amount to a mere breach of contract under section 14 (1)(c)(d) of the Specific Relief Act, 1963; and that when the agreement provides for liquidated damages, then the court cannot compel the specific performance of the agreement in the event of termination of the agreement. In support of this submission, the Learned Senior Counsel for the Appellant has cited the judgment of Hon'ble Supreme Court in Indian Oil Corporation Ltd vs. Amritsar Gas Services Ltd & Ors [(1991) 1 SCC 533].

11. Refuting these grounds, Mr. P.P. Malhotra(ASG), the Learned Senior Counsel for the Respondent pointed out various reasonings given by the State Commission in the impugned order for finding that

the termination notice was not legal and the 2nd Respondent would be entitled to the consequential relief and thereby directing the Appellant to perform its contractual obligation to supply power to the Gujarat Holding Company as per the PPA.

12. In justification of the impugned order passed by the State Commission, the Learned Senior Counsel for the Respondent has cited the following judgements in order to show that the admissions made by the Appellant as the best evidence from the various letters produced by the parties before the Commission under section 58 of the Evidence Act and from the said admissions, it is clear that the same is against the plea of the Appellant:

(i) Narayan V. Gopal AIR 1960 SC 100;

(ii) Nagindas Ramdas v. Dalptram Ichharam alias Brijram (1974) 1 SCC 242;

(iii) Avtar Singh v. Gurdial Singh (2006) 12 SCC 552;

(iv) Shreedhar Govind Kamerkar v. Yeshwant Govind kamerkar (2006) 13 SCC 481;

(v) Thiru John v. Returning Officer AIR 1977 SC 1724;

(vi) Ramji Dayawala v. Invest Improt AIR 1981 SC 2085.

13. He has also cited various decisions to establish that a party to contract cannot terminate the contract because of his own breach as they cannot rely upon their wrong liability of contract. The following are the decisions:

(i) UP SEB v. Shi Mohan Singh, (2004) 8 SCC 402;

(ii) Union of India Vs. Major General Madan Lal yadav [1996 (4) SCC Pg 127];

(iii) B.M Malani Vs. Commissioner of Income Tax and Anr 2008 (10) SCC;

(iv) Kushweshwar Prasad Singh Vs. State of Bihar (2007) 11 SCC;

(v) Nirmala Anand v. Advent Corporation (P) Ltd (2002) 5 SCC 481;

(vi) Ashok Kapil Vs. Sana Ullah (1996) 6 SCC 342;

(vii) Eureka Forbes V. Allahabad Bank (2010) 6 SCC 193;

(viii) Panchanan Dhara v. Monmatha Nath Maity (Dead) through LRs. (2006) 5 SCC 340;

(ix) Samina Venkata Sureswara Sarma v. Meesala Kota Muvullayya AIR 1996 AP 440.

14. The Learned Senior Counsel for the Respondent while elaborating Section 23 of the Specific Relief Act 1963 has cited other authorities to substantiate his plea that the provision for liquidated damages in the agreement is not a bar to specific performance. He has cited the following judgements:

(i) P D'Souza v. Shondrilo Naidu (2004) 6 SCC 649;

(ii) Prakash Chandra v. Angadlal and Ors (1979) 4 SCC 393;

(iii) M L Devender Singh v. Syed Khaja (1973) 2 SCC 515;

(iv) Manzoor Ahmed Margray v. Gulam Hassan Aram (199) 7 SCC 703;

(v) Prakash Chandra vs Angadlal 1979 (4) SCC 393;

(vi) M. S Madhusoodhanan & Anr. Vs Kerala Kaumudi (P) Ltd & Ors. 2004 (9) SCC 204;

15. The Learned Senior Counsel for both the parties, on the above grounds have argued at length on several hearings and cited various authorities in support of their respective pleas as mentioned above.

16. In the light of the above rival contentions urged by the parties, the following questions may arise for consideration in the present Appeal:

(i) Whether Adani Power Ltd., the Appellant (Seller) had the right to elect to terminate the PPA under Article 3.4.2 of the PPA on his own default at a stage prior to the commercial operation of the Plant?

(ii) If the answer for the above question is in affirmative, then further question which would arise as to whether the Appellant has validly terminated the PPA in terms of its termination notice dated 28.12.2009 in the facts and circumstance of the case?

(iii) Whether the State Commission is correct in directing the Appellant, Adani Power Limited by way of specific performance to perform its contractual obligation and to supply the power to Gujarat Holding Company under the PPA as remedy for the alleged wrongful termination in view of the explicit clauses of the PPA, the provisions of the Electricity Act, 2003 and Specific Relief Act 1963.

17. We have heard the elaborate submissions made by both the learned Senior Counsel for the parties on the above issues. We have also given our anxious consideration to those submissions.

18. Let us discuss over the above **issues one by one.**

19. **In respect of the 1st issue relating to the right to terminate the PPA in terms of Article 3.4.2 of the signed PPA,** it is submitted by the Appellant that

either party i.e. Appellant as well as the 2nd Respondent had the right to terminate the PPA and as such the Appellant has exercised its right. It is also contended that on a conjoint reading of the Article 2.1.1, 2.2.1, 3.1.2, 3.4.1, 3.4.2, 18.13 and 18.17 of the PPA, it is clear that the Appellant (Seller) has unfettered right to terminate the PPA on failure to sign the FSA with Gujarat Mineral Development Corporation, provided that it makes payment of liquidated damages to the tune of Rs.100 Crores to the 2nd Respondent, Gujarat Holding Company.

20. On the other hand, it is contended by the 2nd Respondent that there is no basis for termination of PPA by any party under Article 3.4.2; the Appellant duly fulfilled the condition subsequent and there is no default or failure on the Gujarat Holding Company, Article 3.4.2 does not give any right to Adani Power Ltd. to terminate the PPA especially

when Adani Power Ltd. was at fault; and that the Article 2.2.1 provides that the PPA can be terminated before its expiry date only if either party, the Procurer or the Seller exercises its right to terminate in accordance with the Article 3 of the PPA.

21. Let us now **examine this issue relating to the right of the Seller to terminate the PPA**.

22. Article 3 of the PPA deals with conditions subsequent to be satisfied by the Seller (the Appellant) and the procurer (the 2nd Respondent). Article 3.1 deals with conditions subsequent to be satisfied by the Appellant. Article 3.1.1 provide for performance guarantee of Rs 7.5 Lakh/Mw to be provided by the Appellant to the 2nd Respondent. Article 3.1.2 provides that the Appellant (Seller), shall comply with the eight <u>conditions subsequent</u> including:

(i) …

(ii) execution of Fuel Supply Agreement and supplying copy of the same to the Procurer

(iii) ….

23. Articles 3.2 & 3.3 are regarding joint responsibilities of the procurer and the seller and submission of progress reports on the progress made in satisfying the conditions in Articles 3.1.2 & 3.2.

24. Article 3.4 deals with consequence of non-fulfillment of conditions under Article 3.1. Article 3.4.1 provides that in case any of the conditions subsequent specified in Article 3.1.2 is not fulfilled by the Appellant after the expiry of 17 months from the issuance of the letter of Intent, additional weekly performance guarantee of Rs.0.375 Lacs per MW of the Contracted Capacity was to be furnished by the Appellant.

25. Article 3.4.2 provides that on failure of the Appellant to fulfill its obligation as specified in Article 3.1.2 and 3.4.1 beyond a period of 8 months specified in Article 3.1.2, either party i.e. Adani Power Ltd. or Gujarat Holding Company has the right to terminate the PPA. Article 3.4.2 is quoted below.

"3.4.2 Subject to Article 3.4.3, if:

(i) Fulfillment of any of the conditions specified in Article 3.1.2 is delayed beyond the period of three (3) months and the Seller fails to furnish any additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof; or

(ii) The Seller furnishes additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof but fails to fulfil the conditions specified in Article 3.1.2 for a period of eight (8) months beyond the period specified therein

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

If the Procurer or the Seller elects to terminate this Agreement in the event specified in the preceding paragraph of this Article 3.4.2, the Seller shall be liable to pay to the Procurer an amount equivalent to Rupees 10.00 lacs per MW of the Contracted Capacity as liquidated damages. The Procurer shall be entitled to recover this amount of damages by invoking the Performance Guarantee to the extent of an amount equivalent to Rupees 10.00 lacs per MW of the Contracted Capacity and shall then return the balance Performance Guarantee, if any, to the Seller. If the Procurer is unable to recover the said amount or any part thereof from the Performance Guarantee the amount not recovered from the Performance Guarantee, if any, shall be payable by the Seller to the Procurer within ten (10) days from the end of eight (8) Months period from the due date of completion of conditions subsequent. It is clarified for removal of doubt that this Article shall survive the termination of this Agreement".

26. The right to elect to terminate the PPA under Article 3.4.2. can arise in either of the following two scenarios:

(a) When the seller delays fulfillment of any condition specified in Article 3.1.2 beyond a period of 17 months (14 months from date of LoI plus 3 months under Article 3.4.1)

and fails to submit any additional performance guarantee under the Article 3.4.1.

(b) When the seller furnishes additional guarantee and fails to fulfill the condition under Article 3.1.2 for a period of 08 months beyond the original period of 14 months under Article 3.1.2.

27. Article 3.4.2 provides a situation under which the Power Purchase Agreement can be terminated either by the Procurer or by the Seller, when the events provided in Article 3.4.2 (i) and (ii) would arise or occur. Although, Article 3.4.2 appears to provide a right to both the parties to terminate the contract on happening of events, the same has to be read and interpreted along with other Articles of the PPA. Article 3.4.2 provides that the Seller shall be liable to pay the procurer an amount of Rs.100 Crores as

liquidated damages, if the procurer or the seller elects to terminate the agreement on happening of certain events specified in the earlier part of the Article 3.4.2. In other words, from the reading of the said Article, it is clear that either party can terminate the Power Purchase Agreement if the events specified in Article 3.4.2 (i) and (ii) would arise or occur. In case of termination of either party, the seller alone has the obligation to pay liquidated damages equivalent to Rs 100 Crores. There is no such obligation on the part of the Procurer. Thus happening of such an event would have to be agreed to by both the parties. Accordingly, the availability of right of either party to terminate the PPA under Article 3.4.2 will arise only if both parties mutually accept the happening of events referred to above. Therefore, the right of termination is provided to the Seller under Article 3.4.2 would arise when both parties agree to the happening of the certain events contemplated therein and the

seller is willing to pay liquidated damages specified therein. Therefore, it has to be concluded that seller has got the right to terminate when both parties mutually accept happening of the events contemplated under Article 3.4.2 (i) and (ii). The first question is answered accordingly.

28. The **2nd question** relates to validity of the termination notice dated 28.12.2009.

29. According to the Appellant, under Article 3.4.1 of the original bid document, only the procurer had right to terminate the PPA in the event of default by the seller but this Article was revised before bidding to provide for a right to the Seller to terminate the PPA in addition to the Procurer's right. This was a change specifically made from the initial draft which gave the right to terminate to the Procurer only. Such a change was made to recognize the unconditional option to the Seller to terminate the PPA when the

conditions subsequent is not satisfied for default or failure on the part of the Seller itself. In short, the case of the Appellant is, in terms of the Article 3.4.2 of the PPA, even the Appellant has the right to terminate the PPA even on his default subject to payment of liquidated damages as specified in the said Article and accordingly, the payment of liquidated charges was made and as such, the termination of the PPA by the Appellant, is valid.

30. According to the 2nd Respondent, the right of seller to terminate was incorporated in the subsequent PPA in the context of corresponding changes made in Article 3.1.2 dealing with non satisfaction of conditions subsequent due to the procurer's failure to comply with its obligations under the Agreement of Force majeure.

31. Now let us see as to what are the conditions subsequent specified in Article 3.1.2 and whether the

conditions subsequent, specified under Article 3.1.2 were satisfied.

32. It cannot be disputed that the applicability of Article 3.4.2 would arise only when the condition subsequent mentioned in Article 3.1.2 are not satisfied. The opening Para of Article 3.1.2 reads as under:

> *"The Seller agrees and undertakes to duly perform and complete the following activities within (i) Twelve (12) months from the Effective Date or (ii) Fourteen (14) months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the Procurer's failure to comply with its obligations under this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurer".*
>
> *I. …*
>
> *II. The Seller shall have executed Fuel Supply Agreement and provided the copies of the same to the Procurer".*
>
> *Iii …*

33. As per this Article, it was for the Appellant to fulfill the conditions subsequent in regard to Fuel Supply

Agreement and the action of the Appellant in pleading non satisfaction of the conditions subsequent is a breach of the PPA.

34. Even assuming that the Appellant had taken proper steps for fulfillment of the conditions subsequent, conditions subsequent may not have fulfilled due to the following reasons.

(i) For reasons attributable to Gujarat Holding Company i.e. due to the Procurer's failure to comply with its obligation; or

(ii) *Any Force majeure event; or*

(iii) for extraneous reason neither attributable to Adani nor attributable to Gujarat Holding Company

35. Article 3.4.2 of the PPA refers to 3.1.2 of the PPA. Article 3.1.2 also talks of obligation of the Seller, to perform certain activity within the time frame unless he is unable to comply due to the reasons that the completion is affected due to the Procurer's failure or

by any force majeure even or such activity are waived by the Procurer.

36. In the event that there is a default by the Procurer which prevents the fulfilment of the obligation under Article 3.1.2 or there is an event of Force Majeure occurred or there is a waiver, then the Seller is not required to fulfil the conditions mentioned in Article 3.1.2. In that situation, Article 3.4.2 gives the right to the Seller to terminate the agreement. In other words, the Seller has no right to terminate the agreement if there is no default on the part of the Procurer as mentioned in Article 3.1.2.

37. Article 14.1 specifically provides for Event of Default on the part of the Seller, the right to terminate is only of the Procurer and not of the Seller. Article 14.1 deals with the Seller Event of Default. The same is as follows:

"14.1 ***Seller Event of Default***

The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by Procurer of their obligations under this Agreement, shall constitute a Seller Event of Default:

38. Article 14.3 deals with the procedure for cases of Seller Event of Default which is as follows:

"14.3 Procedure for cases of Seller Event of Default

14.3.1 Upon the occurrence and continuation of any Seller Event of Default under Article 14.1, the Procurer shall have the right to deliver to the Seller a Procurer Preliminary Default Notice, which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice".

39. Thus in the case of Seller's Event of Default, the right to terminate is only with the Procurer. The right in such cases cannot be of the Appellant (Seller) which is the defaulting party. Article 14.2 deals with the Procurer's Event of Default which is as follows:

"14.2 Procurer Event of Default

The Occurrence and the continuation of any of the following events, unless such events occurs as a

result of a Force Majeure Event or a breach by the Seller of its obligations under this agreement, shall constitute the Event of Default on the part of the Procurer".

40. Article 14.4 provides for termination of Procurer's event of Default. The same is as follows:

"14.4 Termination for Procurer Events of Default

14.4.1 Upon the occurrence and continuation of any Procurer Event of Default pursuant to Article 14.2 (i), the Seller shall follow the remedies provided under Articles 11.5.2".

41. These provisions clearly indicate that the Procurer cannot terminate when the Procurer is in breach. Similarly, the Seller cannot terminate when the Seller is in breach

42. According to the 2nd Respondent, the Appellant is taking advantage of its own wrongful act of not communicating due satisfaction of conditions subsequent relating to Fuel Supply Agreement which was already entered into.

43. There is a difference in the bidding documents originally circulated in February, 2006 and the bidding documents based on which the final bid was given. In the original documents, there was no reference to non fulfillment of conditions subsequent on account of reasons attributable to the Procurer and consequently the termination provision for non fulfillment of conditions subsequent gave only to the Procurer the right to terminate. But in the amended bidding documents, Article 3.1.2 provided for an event of non-fulfillment of conditions subsequent due to Procurer's failure to comply with its obligations. Consequently, the Article 3.4.2 recognized the right of the Seller also. This shows that the right of the Seller (Appellant) was to terminate the agreement on grounds of non-fulfillment of the conditions subsequent when there is no failure on its part and

when the failure is attributable only to (Procurer) Gujarat Holding Company (R-2).

44. Initial draft in Article 3.1.2 dealt with absolute obligation on the part of the Seller to fulfill the conditions subsequent with no reference to any other aspect leading to non fulfillment of the conditions subsequent. The final draft recognized three specific aspects, namely, completion of conditions subsequent being affected due to (a) Procurer's failure to comply with its obligations under the PPA; (b) Force majeure event; and (c) if any of the activities is specifically waived in writing by the Procurer. In the event of these conditions subsequent being not fulfilled for reasons not attributable to the Seller, then there would be a right for the Seller to terminate the PPA. In the above context, Article 3.4.2 provides for a right to terminate to the Seller as otherwise it would be unfair that the Seller should suffer even

when there is failure on the part of the procurer or force majeure.

45. According to the Appellant, the coal supplied from Gujarat Mineral Corporation was the basic condition of the PPA dated 2.2.2007 and the PPA was entered into solely on the basis of the availability of the coal from Gujarat Mineral Corporation.

46. It is noticed that it was the Adani Enterprises Ltd which had represented that it had tied-up with the Gujarat Mineral Corporation for supply of Coal. Adani Enterprises Ltd also represented that it had tied-up with supply of imported coal with various Companies in Germany and Japan. The 2nd Respondent, Gujarat Holding Company had nothing to do with the sources of the fuel supply or locations of the plant of any bidder or seller. All bidders bidding for supply of electricity to Gujarat Holding Company were free to

choose the location and the source of procurement of fuel. Gujarat Holding Company did not make any representation to any person of availability of power from Gujarat Mineral Corporation under the PPA. The absence of any reference to Gujarat Mineral Corporation in the bidding documents itself establishes that there was no pre-condition of availability of fuel to any Bidder including the Appellant for implementation of the PPA.

47. On the date of bidding, the Appellant did not have a firm agreement with Gujarat Mineral Corporation for supply of fuel. Appellant was required to execute a detailed agreement with Gujarat Mineral Corporation within two months but no such agreement was ever executed.

48. On the contrary, the Appellant had a Memorandum of Undertaking (MOU) with other Companies. Despite

the same, the Appellant did not enter into any agreement with any of the Coal suppliers.

49. The Claim made by the Appellant that fuel supply from Gujarat Mineral Corporation was the only source for implementation of the PPA is patently wrong. There was no such stipulation either in the bid documents or in the PPA. The condition subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply Agreement was duly satisfied with firming up of the coal supply from Adani Enterprises Ltd/Indonesian Mines as per the admissions of the Appellant.

50. The State Commission while placing reliance on the terms of the pending documents and the PPA entered between the parties has held that since the Appellant was under obligation to arrange fuel, it was the duty of the Appellant to make other alternative

arrangements for the fuel if its arrangements with Gujarat Mineral Corporation failed.

51. As per the PPA, there is obligation on the part of the Appellant to arrange fuel from sources other than Gujarat Mineral Corporation in order to fulfill its contractual obligation. Once it is established that the obligation to arrange fuel is with the Appellant, then the necessary consequence is that it's incumbent on the part of the Appellant to arrange fuel from other sources if its arrangement with Gujarat Mineral Corporation does not get through.

52. Admittedly, the Appellant executed MOU with two Foreign Companies for supply of significant quantum of imported coal. The quantum that was agreed to under the MOU was certainly more than what was required for the purpose of blending with the indigenous coal. In any event, the Appellant had option to arrange other sources of indigenous coal or

imported coal so that its contractual obligations under the PPA can be fulfilled. The PPA does not indicate that it is dependent on supply of fuel to the project from any particular source i.e. Gujarat Mineral Corporation or otherwise.

53. According to the Appellant, the condition subsequent were not fulfilled. There are three basic flaws in this contention:

(i) The Appellant is invoking Article 3.4.2 of the PPA dated 2.2.2007 on the basis of the non fulfillment of the condition subsequent even though the condition subsequent stands fulfilled.

(ii) Appellant's contention that Article 3.4.2 provides for an exit clause – a clause for termination at will by the Appellant at any time by offering Rs.100 Crores to the Gujarat Holding Company and even in the situation of an event of default

on the part of the Appellant. Article 3.4.2 is not an exit clause as claimed by the Appellant.

(iii) The Appellant's contention is that even if it is a breach of PPA conditions on the default of the Appellant, the Appellant has the right to terminate the PPA by offering the liquidated damages. This is also misconceived because the breach is on the part of the Appellant, which amounts to an event of default and in such a case, Article 14 would apply and if it is so, the right to terminate rests only with the Procurer and not with the Appellant as provided in Article 14.3.

54. It is to be reiterated that Article 3.4.2 would indicate that the said Article would apply only when any of the conditions subsequent, specified in Article 3.1.2 are not fulfilled. The Article 3.4.2 begins with the expression "if fulfillment of any of the conditions

specified in Article 3.1.2 is delayed….". From this, it is clear that if the conditions subsequent are fulfilled, there cannot be any application of Article 3.4.2.

55. In the present case, only aspect of satisfaction of conditions subsequent to be considered is whether the Appellant had executed the Fuel Supply Agreement i.e. an agreement for purchase, transportation and handling of fuel for the Power Station. No other condition subsequent is in issue.

56. According to the 2nd Respondent, even as per the documents filed by the Appellant, it is clear that the conditions subsequent of Fuel Supply Agreement stands duly fulfilled. The relevant documents are three in Nos:

(i) Prospectus dated 24.3.2008;
(ii) Annual reports of 2007-08 dated 17.5.2008;
(iii) Annual reports of 2008-09 dated 19.5.2009

57. As a matter of fact, it is specific case of the 2nd Respondent in the reply that *"Conditions subsequent specified in Article 3.1.2 (ii) was duly satisfied with firming up of coal supply with Adani Enterprises Limited/Indonesian Mines as per the admission of Adani itself and, therefore, there is no basis for the termination of PPA by any party as the conditions subsequent specified in Article 3.1.2 were fulfilled".* To this specific contention of the 2nd Respondent as contained in his reply, there is no specific denial by the Appellant in their written submissions.

58. On the face of the admitted documents of the annual reports and prospects and other materials which have not been disputed, it is clear that the condition subsequent stood duly satisfied. Therefore, clause 3.4.2 of PPA will have no application.

59. Apart from the above, clause 3.4.2 cannot be read in isolation. It has to be read along the relevant clauses

of the PPA including the termination clause under Article 14. This clause deals with the termination of the agreement only by the 2nd Respondent, Gujarat Holding Company in the case of event of default on the part of the Seller (Appellant) to fulfill the condition subsequent.

60. In other words, in the event of breach on the part of the Appellant seller, which is an event of default on the part of the Appellant, the right to terminate the PPA is with the Procurer only and not with the Seller. In this regard Article 14.3 may again be referred which is as follows:

> ***"14.3 Procedure for cases of Seller Event of Default***
>
> *14.3.1 Upon the occurrence and continuation of any Seller Event of Default under Article 14.1, the Procurer shall have the right to deliver to the Seller a Procurer Preliminary Default Notice, which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice".*

61. In view of the above, the Appellant's contention that even when there is a default on the part of the Appellant, the Appellant has got a right to terminate is untenable. It is the specific case of the 2nd Respondent that the condition subsequent got duly fulfilled by the Appellant with the signing of the FSA with Adani Enterprises Limited. The Appellant has not chosen to deal with this contention. The only contention is that the condition subsequent such as clearance from the Ministry of Environment was not satisfied. That is not the issue relating to the condition subsequent. As a matter of fact, the condition subsequent other than the Fuel Supply Agreement was not the issue. As indicated earlier, Article 3.4.2 will have an application only when the condition subsequent is not fulfilled. In the present case admittedly, the FSA was entered into with Adani Enterprises as such there was fulfillment of the condition subsequent.

62. Let us now refer to the various terms of bid documents and the Power Purchase Agreement. Clause 2.2.4 of the Request for Qualification (RfQ) provides as follows:

> *"2.2.4. The Bidder shall submit a comfort letter from a fuel supplier for fuel linkage or a proof of captive fuel sources at the time of submission of proposal in response to RFP.*

63. As per this clause, the Bidder (the Appellant) has to furnish a comfort letter from a Fuel Supplier for the proof of Captive Fuel Source. Now let us see clause 3.1.3 of RfP for perusal which provides as follows:

> *"3.1.3. The size and location of the Power Station/(s) and the source of fuel & technology shall be decided by the Seller. The Seller shall assume full responsibility to tie-up the fuel linkage and to set up the infrastructure requirements for fuel transportation and its storage".*

64. This clause provides that the source of fuel shall be decided by the Seller only and the Seller is responsible to tie-up the fuel linkage and to set-up infrastructural requirements for storage.

65. Clause 4.1.1 (8) of the RfP provides as follows:

> *""4.1.1 (8)* ***proof of Fuel Arrangement*** *- Bidder needs to indicate the progress/proof of fuel arrangement through submission of copies of any one or more of the following:*
>
> *(a) Linkage Letter from Fuel Supplier;*
>
> *(b) Fuel Supply Agreement between Bidder and Fuel Supplier;*
>
> *(c) Coal Block Allocation Letter/In Principal Approval for Allocation of Captive Block from Ministry of Coal.*
>
> *(d) Other details submitted by the Bidder subject to being accepted by GUVNL as a sufficient proof for demonstration of ability".*

66. As per this clause, the Bidder has to provide various details to the procurer for establishing sufficient proof for demonstration of ability.

67. From the above provisions, it is clear that the procurer did not propose to provide for any arrangements for fuel for the project and the Seller alone had to provide details of the same at the time of submissions of bid documents. That apart, the bid documents did not envisage any conditional bid

which linked to availability of fuel from an identified source.

68. Let us now refer to the Power Purchase Agreement. Article 1.1 of the PPA defines the Fuel. 'Fuel' means the primary fuel used to generate the electricity namely gas/ coal/lignite (as applicable). There is a definition of "Fuel Supply Agreement". This term is defined as "The agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of Fuel required for the operation of the Power Stations".

69. As mentioned above, Article 3.1.2 of the PPA provides a list of obligation that are to be duly performed by the Seller within 12 months from the effective date or 14 months from the date of issue of Letter of Intend whichever is later. Article 3.1.2 (ii) provides that the Seller shall execute the FSA and provide copy of the same to the procurer.

70. Admittedly, the Seller, the Appellant mentioned in the bid documents that *"Adani Enterprises Limited has tied-up indigenous coal requirements of the project with the Gujarat Mineral Development Corporation, who has been allocated Morga-II Block in the State of Chhatisgarh".* The Appellant has also mentioned in the bid documents that with a view to ensure the supply of fuel, they have tied-up supply of imported coal with two foreign Companies and accordingly executed separate Memorandum of Understanding with them dated 9.9.2006 and 21.12.2006.

71. So from the reading of various Articles of the PPA, it is evident that obligation for executing the Fuel Supply Agreement is with the Appellant namely the Seller. The Seller after executing the FSA within a stipulated time frame has to provide a copy of the same to the Procurer. Admittedly, the Procurer had never stated that he would undertake any responsibility

to arrange coal on behalf of the Seller. The Appellant was aware that the bids were invited under Case-1 bidding process and as such there was no question of either specifying the land or ensuring the availability of the Fuel for the project by the Procurer. It cannot be disputed that the bid documents under the PPA were accordingly amended to expressly exclude any obligation on the part of the Procurer to arrange/identify either land or fuel for the project. Under those circumstances, it can not be held that there is any obligation on the part of the Procurer (the 2nd Respondent) to arrange coal for the project.

72. The Seller's arrangements with Gujarat Mineral Development Corporation were an internal matter between the Seller and the Corporation. In other words, the obligation of the Seller under PPA is not co-terminus with its arrangement for supply of Fuel by Gujarat Mineral Corporation.

73. As a matter of fact, the bid document provides that the primary fuel for the project can be gas/coal/lignite as applicable. The Seller has obligation to provide the Fuel Supply Agreement only after execution of the Power Purchase Agreement within the specified period as per the Article 3.1.2 of the PPA. Such being the case, the Appellant cannot contend that the PPA dated 2.2.2007 executed between the Procurer and the Seller was dependent on supply of coal by the GMDC to the Appellant.

74. Once it is found that the obligation to arrange fuel is the responsibility of the Appellant, it automatically becomes incumbent on the part of the Appellant to arrange fuel from some other source once its arrangement with GMDC does not get materialized. This contention has been accepted and admitted by the Appellant himself in the bid document, i.e. in Para 1.3 where it is stated as follows:

"Alternatively, we are evaluating Mundra as an alternate project site with blended/imported/washed coal, however, the quoted tariff inclusive of transmission charges, losses and all other costs will remain the same".

75. It is important to note in this context that in the bid documents, the Appellant had mentioned indigenous/blended /washed coal as primary fuel for Chhattisgarh Project. The Appellant also mentioned blended/ imported/washed coal as primary fuel for 'alternate project' at Mundra.

76. So, from this it is clear that even at the stage of bidding, the Appellant was considering alternative site for the power plant which could be operated with blended/imported/ washed coal. This statement made by the Appellant confirms that the alternative site will not in any manner affect the tariff. So in the light of the admission in the bid documents coupled with the statements made by the Appellant, it has to be held that the Appellant had an obligation to

arrange fuel from alternative sources if its arrangements with GMDC do not get fructified. In such circumstances, it is to be concluded that the Procurer was not concerned with source of fuel as long as the Fuel Supply Agreement was executed and provided to the Procurer in terms of Article 3.1.2 of the Power Purchase Agreement. As mentioned earlier, the Seller, the Appellant has already executed Memorandum of Understanding with two foreign Companies for supply of significant quantum of imported coal. In any event, as per the bid documents of the PPA, the Appellant had an obligation to explore other source of indigenous imported coal so that its contractual obligations under the Power Purchase Agreement can be fulfilled, in the light of the fact, the Power Purchase Agreement is not dependent on supply of fuel to the project from any identified source.

77. The Appellant has relied upon the letters written by the Procurer to the Principal Secretary, Energy & Petrochemicals Department, Government of India dated 30.12.2009, letter dated 27.2.2009 issued by the Deputy Secretary, Industries and Mines Department to the Managing Director GMDC and the letter dated 24.3.2009 sent by the GMDC to the Appellant and another letter dated 6.7.2009 sent by the Corporation to the Appellant in order to establish that the PPA is dependent on supply of fuel to the project by the GMDC. These letters relied upon by the Appellant is internal correspondence between the parties only after the completion of the bid process and execution of the PPA. These letters can not be taken to be the basis for interpretation of the terms of bid documents as well as the PPA.

78. There might have been some understanding between the parties that supply of power from the

Appellant's project is conditional on supply of coal from the GMDC. But this is not reflected in the bid documents or the PPA. As indicated above, these are all subsequent communication within the various Govt agencies which would not help the Appellant to give different interpretation for the terms contained in bid documents and PPA.

79. The 2nd Respondent pointed out that the Appellant in the Director's Report and Annual Report as well as the prospectus filed with the SEBI on 5.8.2009 has stated that it has executed agreement dated 24.3.2008 with Adani Enterprises Ltd for obtaining supply of coal for Mundra Phase-III Power project for a period of 15 years from the commissioning of the plant and in that agreement, the Appellant admitted that in the event Adani Enterprises Limited fail to supply coal, the Adani Power Limited is entitled to liquidated damages of an amount equivalent to the

amount paid to Adani Power Limited under the Power Purchase Agreement dated 2.2.2007 entered into with the Procurer. Through this is not disputed, this was not disclosed by the Appellant before the Commission. From the above documents, it is clear that Adani Power Limited, the Appellant executed FSA with the Adani Enterprises Ltd for supply of coal for Mundra Phase-III project for which it also executed a Power Purchase Agreement with the procurer. Admittedly, the sequence of events as referred above was never disclosed to the Commission in his reply filed before the Commission. Further, the Appellant did not file the FSA dated 24.3.2008 which was subsequently entered into with Adani Enterprises Ltd. Admittedly, there is no material to show that such agreement has been terminated. Similarly, there is no proof of payment of such amount towards liquidated damages

by Adani Enterprises Ltd. to Appellant for such termination of the FSA.

80. In the above circumstances, the Appellant cannot contend that it did not have the ability to execute FSA for the supply of Fuel for the Mundra Phase-III Project. In fact, the Appellant itself has made the statement before the SEBI as well as before and Registrar of Companies, which is contrary to the present plea. There is no explanation as to why the Appellant had to take a different stand before the Commission which is contrary to the stand taken before the SEBI.

81. Let us again refer to Article 3.4 which deals with the consequence of non fulfillment of conditions under Article 3.1 and the Article 14 which relates to the events of Default and Termination:

> *"**Article 3.4: Consequences of non-fulfilment of conditions under Article 3.1***

3.4.2 Subject to Article 3.4.3, if:

(i) fulfillment of any of the conditions specified in Article 3.1.2 is delayed beyond the period of three (3) Months and the Seller fails to furnish any additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof; or

(ii) The Seller furnishes additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof but fails to fulfill the conditions specified in Article 3.1.2 for a period of eight (8) months beyond the period specified therein.

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

If the Procurer or the Seller elects to terminate this Agreement in the event specified in the preceding paragraph of this Article 3.4.2, the Seller shall be liable to pay to the Procurer an amount equivalent to Rupees 10.00 lakhs per MW of the Contracted Capacity as liquidated damages. The Procurer shall be entitled to recover this amount of damages by invoking the Performance Guarantee to the extent of an amount equivalent to Rupees 10.00 lakhs per MW of the Contracted Capacity and shall then return the balance Performance Guarantee, if any, to the Seller. If the procurer is unable to recover the said amount or any part thereof from the Performance Guarantee the amount not recovered from the Performance Guarantee, if any, shall be payable by the Seller to the Procurer within ten (10) days from the end of eight (8) months period from the due date of completion of conditions subsequent.

It is clarified for removal of, doubt that this Article shall survive the termination of this Agreement.

82. These clauses would indicate that the Procurer or the Seller shall have a right to terminate this agreement in the event specified in Article 3.1.2. In case of inability of the Seller to fulfill the conditions due to Force Majeure event, the Agreement may be terminated by Procurer or the Seller by giving a notice.

83. On the strength of Article 3.4.2, the Appellant wrote a letter dated 28.12.2009 to the Procurer intimating his intention to terminate the Power Purchase Agreement. The relevant portion of the letter is as follows:

"We further note that vide its above referred letters dated November, 15, 2008, January 17, 2009, April 28, 2009, May 22, 2009 and June 29, 2009, APL has communicated to GUVNL that despite all best endeavours by APL, GMDC has not executed the aforementioned FSA with APL for supply of Coal from Morga II coal block to the Mundra Project. In

anticipation of FSA with GMDC, any alternate fuel supply arrangement/FSA was also not made within the stipulated time period in the PPA for fulfilling the Condition Subsequent.

We are well aware that despite of our continual endeavours, GMDC has neither provided the vital information sought by us regarding Naini Coal Block nor executed FSA for supply of coal, as committed, even after lapse of 9 months from the date of the letter received from GMDC intimating therein allocation of coal supplies from Naini Coal Block in place of Morga II Coal Block.

Therefore, since FSA neither with GMDC nor with any other fuel supplier has been executed within the stipulated time period for supply of coal to the Mundra Project (the same being a Condition Subsequent to the PPA), APL is entitled to terminate the PPA, pursuant to Article 3.4 thereof by giving at least 7 (seven) days' notice to that effect in writing to GUVNL.

Accordingly, APL hereby, gives this notice of termination to GUVNL for termination of the PPA dated February 2, 2007 entered into with GUVNL with effect from 4th January, 2010 i.e. seven days from the date of this letter pursuant to Article 3.4 of the PPA. APL, shall, upon the expiry of 7 (seven) days from the date hereof, treat the PPA as terminated. Please take notice that we shall not be responsible for carrying out the terms of the aforesaid PPA hereafter".

84. This letter shows that the Appellant intimated to the Procurer that the FSA has not been executed with the Gujarat Mineral Corporation or with any other fuel supplier within the stipulated time and so the Appellant is entitled to terminate the PPA pursuant to Article 3.4.2 and accordingly, the PPA is terminated w.e.f. 4.1.2010.

85. The perusal of Article 3.1.2 of the PPA would make it clear that the Appellant undertook to perform the condition subsequent to the execution of the Power Purchase Agreement. The Seller's right to terminate the Power Purchase Agreement as mentioned above can only arises upon the Procurer's default in complying with its obligation under Article 3.1.2. The exit clause referred to by the Appellant namely Article 3.4.2 has to be read in the context of other clauses. It cannot be interpreted in isolation. This clause was intended to provide for a situation where a project

was unlikely to come-up because of the conditions prescribed under Article 3.1.2 would not be complied with. A party to a contract is discharged from its obligation only for the reasons of supervening impossibility or illegality of the Act. Therefore, the party to a contract cannot be permitted to take advantage of its own wrong.

86. Admittedly, the Appellant Company issued first notice of termination on 15.11.2008 in spite of having completed FSA for Phase –III of the Mundra Project with Adani Enterprises Ltd. This fact is admitted by the Appellant in the Draft Red Herring Prospectus as well as the final Prospectus filed with the SEBI, the Annual Reports and the Director's Report.

87. The Appellant relied upon Article 3.4.2 of the Article to submit that the Power Purchase Agreement does not restrict the right of the Seller to terminate the agreement in case of its inability to set-up the Power

Plant especially when in the present case, the Power Purchase Agreement executed by the parties clearly empowers both the parties to terminate the contract in case the Supplier fails to comply with the conditions mentioned in Article 3.4.2.

88. There is no dispute in the present case with reference to the formation of the Contract i.e. the PPA between the parties. The dispute is limited to the issue as to whether the Appellant's obligation of performance under the PPA stood discharged due to certain events which are contemplated in the PPA itself. So, in this context, the issue has to be analyzed in the light of the following two issues that may arise:

(i) Whether the terms of the contract permits one party to seek termination of contract on the ground that it cannot comply with certain conditions that are subsequent to execution of the agreement?

(ii) Whether the said conditions have actually arisen to allow the Appellant to seek termination of the Agreement?

89. For considering these issues, we have to make a proper interpretation of the Agreement in entirety. Every Agreement has to be considered with reference to its objects and whole of its terms and conditions. Accordingly, the whole context must be considered in order to collect the intention of the parties. If this principle is applied to the present case, then it is clear the stand taken by the Appellant is not in accordance with the law in the light of the following circumstances:

(i) Article 3.1.2 of the Power Purchase Agreement provides certain conditions that are required to be fulfilled by the Seller. Execution of a FSA is a condition i.e. expressly provided in Article 3.1.2 of the Power Purchase Agreement. It is not in dispute

that the Appellant participated in the bid on the basis that it has a fuel supply arrangement. The Representations made by the Appellant in Annexure 3 of the bid submitted by the Appellant are as follows:

> **"1.2 Fuel:**
>
> *The lead member, Adani Enterprises' Ltd. has tied up the indigenous coal requirement of the Project with GMDC, who has been allocated Morga II Coal Block in the State of Chhatisgarh. Further, with a view to ensure supply of fuel with optimum techno commercial parameters, we have also tied up supply of imported coal with M/S. Coal Orbis Trading GMBH, Germany and M/s. Kowa Company Ltd. and accordingly executed separate MoUs with them dated 9th Sept, 2006 and 21 Dec, 2006 respectively"*

Only on the basis of this representation, the Appellant has been selected as a successful bidder for supply of power. Further, since the Bid was under Case I route (in terms of the Guidelines for Competitive Bidding issued by the Central

Government), the Appellant was aware of his obligation to arrange fuel for the project.

(ii) Article 3.4.2 provides for payment of additional performance guarantee in case of failure on the part of the Seller to fulfill conditions within the stipulated time frame. This shows if a particular condition is not fulfilled, then in order to ensure that the Seller takes adequate steps for compliance, a financial burden had been imposed. On a combined reading of Article 3.1.2 and Article 3.4.2, it is clear that it cannot be the intention of the parties that in the event of the failure of the Seller to fulfill the conditions stipulated in Article 3.1.2, the Seller by its own unilateral election can straightway terminate the agreement.

(iii) Article 3.4.2 provides a situation under which the Power Purchase Agreement can be terminated either by the Procurer or by the Seller only when

the events provided in Article 3.4.2 (i) and (ii) arise or occur. Although Article 3.4.2 appears to provide a right to both the parties to terminate the PPA on happening of such events specified in Article 3.4.2 (i) and (ii), the same has to be read and interpreted along with the other Articles of the PPA. Article 3.4.2 further provides that the Seller shall be liable to pay the Procurer an amount of Rs.10 Lakhs per MW as liquidated damages if the Procurer or the Seller elects terminate the agreement on happening of events specified in the earlier part of the Article 3.4.2 . From the reading of the said Article 3.4.2, it is clear that either party can terminate the PPA, if the events specified in Article 3.4.2 (i) and (ii) occur and in case of such termination by either party, the Seller alone has the obligation to pay liquidated damages.

(iv) Article 14 of the PPA covers the events of default and termination of the PPA on the Sellers event of default. This provides that in case the Seller fails to fulfill the condition specified in Article 3.1.2, the right to terminate under Article 3.4.2 is invoked by the Procurer. Article 14.1 does not give any right to the Seller to terminate the contract on the ground of failure or default on the part of the Seller to execute the Fuel Supply Agreement. Since Article 14.1 specifically deals with the Seller's events of default, it cannot be said that Article 3.4.2 gives independent right to Seller to unilaterally terminate the PPA on the ground of his own default.

(v) If there is an event of default, Article 14 becomes relevant. In case of default on the part of the Seller, Article 14 and 14.1 will take over and govern the contract. Article 3.4.2 provides that if

either the Procurer or seller terminate the PPA on happening of the events specified in Article 3.4.2 (i) and (ii), the liquidated damages in terms thereof, shall become payable. In such circumstances, it has to be held that termination of the PPA and payment of liquidated damages under Article 3.4.2 are not based on any event of default of either party but on happening of certain events which are specified.

(vi) Articles 14.1 (xi) recognized the Seller's event of default. If the seller fails to fulfill the conditions specified in Article 3.1.2, the right to terminate under Article 3.4.2 is invoked by the Procurer. Similarly, the ability of either party to terminate the PPA under Article 3.4.2 will arise only if both the parties accept happening of events specified under Article 3.4.2 (i) and (ii). In other words, the termination by the Seller under Article 3.4.2 is

possible if both the parties agree to the happening of the events contemplated there in and the Seller is willing to pay the liquidated damages if a dispute arises regarding the event of termination. This recourse under Article 3.4.2 is not available to the party in default. In other words, the right to terminate will be available to the procurer under Article 14.1. The failure on the part of the Seller to execute FSA which is a disputed issue falls for consideration under Article 14.1. This interpretation is in consonance with the principles laid down by the Hon'ble Supreme Court to the effect that the Agreement has to be read as a whole so as to reconcile the contradictions and give effect to all its terms in an equitable manner. Therefore, the Appellant cannot terminate the PPA on the basis of its not having executed the FSA with Gujarat Mineral Corporation as the Appellant cannot be relieved of this obligation from supply of

power to the Gujarat Holding Company (Procurer) especially in view of the conclusion that in the events contemplated under Article 3.4.2 which allow the Appellant to terminate the PPA have not actually arisen in the present case.

90. Let us now refer to the documents to analyse the question as to whether supply from Gujarat Mineral Corporation was the basic premise and conditions of the PPA dated 2.2.2007 apart from PPA as discussed above, three documents required to be considered.

91. The **1st** document is the letter dated 12.2.2007. In the said letter, the Appellant proposed that it may supply electricity to Gujarat Holding Company under the PPA from Mundra Project in Gujarat instead of Chattisgarh Project. Relevant extract of the Appellant's letter dated 12.2.2007 is reproduced below for ready reference:

"As regards supply of another 1000 MW power against GUVNL Bid No. 02, we have given two options i.e. either at Chattisgarh or at Mundra Power Project, in our offer and accordingly suitable provision has been made in the Power Purchase Agreement. Even this power is to be delivered at Gujarat STU. ***Keeping in view the state pressing requirement of the power to meet the load demand and looking to a few other uncertainties related to setting up of project at Chattisgarh, we are of the view that there is every likelihood that 1000 MW power under Bid 02 might have to be supplied from Mundra power station.****"*

92. The **next letter** is dated 20.2.2007. Through this letter, the Appellant has informed the 2nd Respondent that the Appellant had decided to supply the power from Mundra Power Project so as to meet the State's emergent load demand. The relevant portion of the Appellant's letter dated 20.2.2007 read as under:

"We write in continuation to our letter No. AEL/PT/GUVNL/120207 dated 12.02.2007 giving therein details of the actions taken by us for implementation of 1000 MW power station at Mundra under GUVNL Bid No. 01. Since then we

have also ***taken a review for supply of another 1000 MW power against GUVNL Bid No. 02 and we have decided to supply this power from Mundra power project so as to meet the state emergent load demand at the earliest and also within the agreed contract schedule.*** *However, you will agree with us that for timely utilization of APPL power, availability of adequate and robust state transmission network is absolutely essential. On the subject, we draw your attention on the following:"*

"We further, assure you, even under changed situation*, we would supply power, as per terms and conditions including tariff stream as agreed upon in the Power Purchase Agreements."*

93. **Next document** is a supplementary agreement dated 18.4.2007 entered into between the parties confirming the change of location to Mundra Project and dealing with changes in the delivery point of electricity.

94. The perusal of these three documents would indicate that in none of these three documents there was any reservation that the change in location shall be subject to coal being available from Gujarat Mineral

Development Corporation. In other words, the Appellant did not stipulate that though the project from where 1000 MW capacity has been shifted from Chhatisgarh to Mundra (Gujarat), the same shall be subject to availability of coal from Gujarat Mineral Corporation.

95. In terms of above, neither in the case of Chhatisgarh Power Project nor in case of Mundra Power Project, the purchase of coal from Gujarat Mineral Corporation was the basic premise for the PPA as referred to earlier, the Fuel supply was the responsibility of the Seller and only the Seller must decide the type and source of fuel. The PPA did not make availability of fuel from Gujarat Mineral Corporation as the basic condition. The Appellant is fully entitled to source fuel from any source of its choice that is any type of fuel indigenous or imported. Therefore, it cannot be interpreted that the coal

supply from Gujarat Mineral Corporation was envisaged as the only source.

96. The claim of the Appellant that the Condition specified in Article 3.1.2 (ii) of the PPA dealing with the FSA was not satisfied cannot be accepted in the light of the material available on record. The condition subsequent dealing with FSA was duly satisfied with firming up of coal supply from Adani Enterprises Limited/Indonesian Mines even as per the admissions of the Appellant itself.

97. As a matter of fact, the FSA for imported fuel finalized with Advani Enterprises Ltd on 24.3.2008 as admitted in the prospectus of Adani Power issued to raise more than Rs.3000 Crores for public.

> *The primary fuel for the power project will be coal, which we propose to source from AEL. The expected consumption of coal for the Mundra Phase III Power Project is 4.06 MTPA with a GCV of 5,200 kcal per kg at 85.0% PLF. As described above, for our Mundra Power Projects. AEL proposes to procure the*

coal from the mines in Bunyu island, Indonesia. ***Under the coal supply agreement dated March 24, 2008. AEL has committed to supply 4.04 MTPA of coal with an average GCV of 5,200 Kcal/kg, as firm quantity, annually for a period of 15 years from the date of commissioning at US$ 36 PER TON (CIF Mundra)****, adjusted for coal quality, with an escalation at the end of every five years from the commencement of operations of the power project. Further, AEL shall supply optional quantity which shall be 5% of the contracted capacity. Additionally, AEL shall, if requested by the Company, use best endeavours to sell an amount of coal not exceeding 5% of the firm quantity each contract year during the contract period. For further details, see "Description of Certain Key Contracts" on page 87 of this Prospectus."*

98. The Annual Report for the year 2007-08 dated 17.5.2008 also specifies the FSA finalized for Mundra Project with reference to 1000 MW power to be supplied to Gujarat Holding Company. In this report, it has been specifically mentioned that with regard to Fuel Supply Agreement with the Adani Enterprises Limited have been executed for all the four phases for the total coal requirements. Similarly, the Annual

Report for the year 2008-09 dated 19.5.2009, also specifies the Fuel linkage finalization with reference to supply of electricity to Gujarat Holding Company. The relevant extract of Annual Report for the year 2007-08 specifying fuel supply arrangement finalized for Mundra Project is reproduced below:

Extracts of Annual Report for the year 2007-08

"I. Power Project at Mundra

The company is setting up coal based 4620 MW power plant in 4 phases comprising Phase I: 660 (2 x 330) MW, Phase II: 660 (2 x 330) MW, Phase III : 1320 (2x 660) MW, Phase IV : 1980 (3 x 660) MW at a total estimated cost of Rs. 191060.00 million.

.....

Fuel: Agreements with Adani Enterprises Ltd., holding company have been executed for all the four phases for the total coal requirement. Adani Enterprises Ltd., through its subsidiary company in Indonesia has acquired exclusive mining rights in three coal blocks."

Off Take Arrangement: *By two separate agreements of 1000 MW each the company has secured power purchase agreements with Gujarat Urja Vikas Nigam Limited for total supply of 2000 MW."*

Extracts of Annual Report for the year 2008-09

"I. POWER PROJECTS AT MUNDRA PHASE I, II, III and IV 4620MW

The company is setting up Coal based Power Projects at Mundra as per the details given below:

Project Name Location	***Installed Capacity and Technology***	***Procurement Status***	***Fuel Supply Status***	***Off-take Arrangement Status***
Mundra I and II, Mundra Gujarat	*1,320 MW coal fired, sub-critical*	*BTG and BoP contracts entered*	*Coal Supply Agreement entered with Adani Enterprises Limited (AEL)*	*Long term Power Purchase Agreement for 1,000 MW entered with Gujarat Urja Vikas Nigam Ltd. (GUVNL)*
Mundra III, Mundra Gujarat	***1,320 MW coal fired, super-critical***	***EPC contracts entered***	***Coal Supply Agreement entered with Adani Enterprises Limited***	***Long Term Power Purchase Agreement for 1,000 MW***

			(AEL)	***entered with Gujarat Urja Vikas Nigam Ltd. (GUVNL).*** ***Agreement for merchant sale of up to 221 MW of surplus power entered with Adani Enterprises Ltd. (AEL)***
Mundra IV, Mundra Gujarat	*1,980 MW coal fired, super critical*	*EPC contracts entered*	*Coal Supply Agreement entered with Adani Enterprises Limited (AEL) Coal linkage of 1,366 MW recommended and LoI awaited*	*Long term Power Purchase Agreement for 1,424 MW entered with Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL).*

99. The prospectus dated 5.8.2009 issued by the Appellant would also specify the coal linkage for supply of power to Gujarat Holding Company being imported coal. The relevant portion of the prospectus is as follows:

> ***"Mundra Power Projects:*** *Our Mundra power projects are located along the coast and will utilize imported coal as primary fuel for its oprations. We have entered into long-term coal supply arrangements for coal with AEL for our Mundra Power Projects. PT Adani Global, a wholly owned subsidiary of AEL, has entered into agreements with holders of long-term exploitation licenses to exclusively mine coal in Bunyu island, Indonesia. For Mundra Power Projects, AEL proposes to procure the coal from these mines in Indonesia".*

100. The letter dated 5.2.2008 would show that Kowa Company, Japan terminating the MOU by notice to Appellant for failure on the part of the Appellant to finalize the fuel supply arrangements. This shows the Appellant did not take effective steps to finalize its agreement with Kowa Japan during the above period from December, 2006 and allowed the termination of

the MOU obviously because of conclusion of FSA with Adani Enterprises Ltd.

101. Similarly, the German Company also by their letter dated 18.3.2008 terminated the MOU again with Appellant for the failure on the part of Appellant to finalize the FSA. This also says the Appellant did not take steps to finalize the agreement with the German Company during above period from September, 2006 because the Appellant has already formed-up agreements for the entire requirement of fuel as per above fuel supply agreement entered into with Adani Enterprises Limited.

102. Another document of relevance is the letter dated 31.3.2009. This letter was sent by the Government of Gujarat. The relevant portion of the letter is as follows:

"In this regard, it may be mentioned that in the document of Power Purchase Agreement, M/S. Adani Enterprises Limited has mentioned that:-

> *'Alternatively, we are evaluating Mundra as an alternate project site with blended/imported/ washed coal, however, the quoted tariff inclusive of transmission charges, losses and all other costs will remain the same'*

Since M/s. Adani Energy Ltd., has specifically mentioned in the document of PPA that alternatively they will go for blended/imported/washed coal, they should not wait for the execution of FSA between them and GMDC. Even without allocation of coal from Morga II Coal Block, they are liable to supply 1000 MW of Power at levelazied tariff of Rs.2.35 Paise per unit as agreed upon".

This also shows that the Appellant's source of Fuel for the PPA is imported Fuel also.

103. Next document is letter dated 6.1.2009 sent by Gujart Holding Company to the Appellant refuting that Gujarat Mineral Corporation is only source and pointing out the source of fuel as imported under the PPA. The relevant portion of the letter is as follows:

" In this regard, it is pertinent to mention here that M/s. Adani has also submitted in the bid documents that power will be supplied to GUVNL at the same tariff rate, alternatively by using imported coal. M/s. Adani Power Ltd has also submitted the copy of MoU signed with Coal Orbis Trading GMBH as proof of tie-up of imported coal in the Bid documents".

104. These documents would make it clear that the FSA was duly finalized by the Appellant namely for import of coal with reference to supply of electricity of the contracted capacity of 1000 MW under the PPA dated 2.2.2007. In addition to that, as referred to above, the two Annual reports and prospectus are clear admissions on the part of the Appellant that the FSA stands finalized with reference to supply as per the PPA dated 2.2.2007.

105. The difference in the description of coal with reference to the two projects formed the part of the bid. For Chattisgarh, the nature of fuel is indigenous coal or washed coal or blended coal. For Mundra, the

terms used is blended or imported or washed. The term indigenous is used for Chhattisgarh project but the same is not used for Mundra project. Similarly the term imported was not used for Chhattisgarh project but the same is used for Mundra project.

106. As indicated above in the letter dated 12.2.2007, the Appellant itself states that it is proposing to shift the supply to Mundra because of uncertainties involved in Chhattisgarh project. Further, in its letter dated 20.2.2007, the Appellant informed the 2nd Respondent about its decision to shift the supply to Mundra project.

107. During the course of arguments, the learned Counsel for the Appellant relied upon the changes made in the termination clause namely Article 3.4.2 consequent upon the non satisfaction of the consequent subsequent from the initial draft of PPA on which the bidding was done. It was contended that while the

initial draft gave the right to terminate only to Gujarat Holding Company (Procurer), the subsequent draft on which the bidding was done gave the right to terminate to both the Seller and the Procurer.

108. In the initial draft letter dated 1.2.2006 under Article 3.3.3, the right has been given to the Procurer only to terminate the agreement and in that case the Seller is to pay the liquidated damages. But in the subsequent draft dated 24.11.2006, the right has been given to both the Seller and the Procurer. The relevant Clause 3.4.2 which is again quoted below:-

"3.4.2 Subject to Article 3.4.3, if:

(iii) Fulfillment of any of the conditions specified in Article 3.1.2 is delayed beyond the period of three (3) months and the Seller fails to furnish any additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof; or

(iv) The Seller furnishes additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof but fails to fulfil the conditions specified in Article 3.1.2 for a period of eight (8) months beyond the period specified therein

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

If the Procurer or the Seller elects to terminate this Agreement in the event specified in the preceding paragraph of this Article 3.4.2, the Seller shall be liable to pay to the Procurer an amount equivalent to Rupees 10.00 lacs per MW of the Contracted Capacity as liquidated damages. The Procurer shall be entitled to recover this amount of damages by invoking the Performance Guarantee to the extent of an amount equivalent to Rupees 10.00 lacs per MW of the Contracted Capacity and shall then return the balance Performance Guarantee, if any, to the Seller. If the Procurer is unable to recover the said amount or any part thereof from the Performance Guarantee the amount not recovered from the Performance Guarantee, if any, shall be payable by the Seller to the Procurer within ten (10) days from the end of eight (8) Months period from the due date of completion of conditions subsequent. It is clarified for removal of doubt that this Article shall survive the termination of this Agreement".

109. While the initial draft in Article 3.1.2 dealt with an absolute obligation on the part of the seller to fulfill the conditions subsequent with no reference to any other aspect leading to non-fulfillment of the conditions subsequent, the final draft recognized three specific aspects, namely, completion of conditions subsequent being affected due to (a) Procurer's failure to comply with its obligations under the PPA; (b) force majeure event; and (c) if any of the activities is specifically waived in writing by the Procurer. In the event of conditions subsequent being not fulfilled for reasons not attributable to the Seller, there should be a right in the Seller to terminate the PPA. Thus, there is a difference in the bidding documents circulated in February, 2006 and the bidding documents based on which the final bid was given. In the amended bidding documents, Article 3.1.2 provided for an event of non fulfillment of conditions subsequent due to the Procurer's failure to

comply with its obligations. Consequently, as explained above the termination clause , Article 3.4.2 recognized the right of the Seller also but the said right of Seller to terminate the agreement on grounds of non fulfillment of the condition subsequent is only when there is no failure on its part and when the failure is attributable to Gujarat Holding Company only.

110. In view of our detailed discussion, it is to be concluded that there is no default on the part of the Gujarat Holding Company but on the other hand, there is a default on the part of the Appellant to supply power to the R-2, Gujarat Holding Company. The Appellant cannot take advantage of its own wrongful act of non-communicating due satisfaction of conditions subsequent relating to fuel supply agreement. It is well settled principle that no person can take advantage of its own wrong. Let us refer to some of the judgements wherein this principle has been made:

(i) Three Bench Judges of the Hon'ble Supreme Court in Union of India vs. Major General Madan Lal Yadav [1996 (4) SCC Pg.127] at page 142 para 28 observed as under:

"the maximum nullus commodum capere potest de injuria sua propria – meaning no man can take

advantage of his own wrong – squarely stands in the way of avoidance by the respondent and he is stopped to plead bar limitation contained in Section 132 (2). In Broom's Legal Maxim (10th Edition) at Pg. 191 it is stated;

'.....it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.'

(ii) In B.M. Malani Vs. Commissioner of Income Tax and Anr. 2008 (10) SCC Pg.617, the Hon'ble Supreme Court observed in Para 18 as under:

"For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case".

(iii) In Kushweshwar Prasad Singh Vs. State of Bihar (2007) 11 SCC Pg. 14:

"In this connection, our attention has been invited by the Learned Counsel for the Appellant to a decision of this Court in Mrutunjay Pani and Anr. Vs. Narmade Bala Sasmal and Anr. [1962 (1) SCR Pg.290], wherein it was held by this Court that

where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim 'Commodum ex injuria sua nemo habere debet' (No party can take undue advantage of his own wrong)."

(iv) Nirmala Anand Vs Advent Corporation (P) Ltd (2002) 5 SCC 481:

"The Appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The Appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The Respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the Appellant".

(v) Ashok Kapil Vs. Sana Ullah (1996) 6 SCC 342 (Compilation Pages 160-167):

"7.....The maxim "Nulls commode copier potest de injuries sua propriety" (No one can take advantage of his own wrong) is one of the salient tenets of equity. Hence, in the normal course, respondent cannot secure the assistance of a court of law for enjoying the fruit of his own wrong.

.....

12……We are inclined to afford such a liberal interpretation to prevent a wrong doer from taking advantage of his own wrong" (Para 71 and 12)

(vi) Eureka Forbes Vs. Allahabad Bank (2010) 6 SCC 193 (Compilation Pages 167-195)

"Maximum Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case, Respondent Nos. 2 & 3 and the Appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon Respondent Nos. 2 &3 and in any case on the Appellant".

(vii) Panchanan Dhara Vs. Monmatha Nath Maity (Dead) through LRs. (2006) 5 SCC 340 (Compilation Pages 196-208)

"Performance of a contract may be dependent upon several factors including grant of permission by the statutory authority in appropriate cases. If a certain statutory formality is required to be complied with or permission is required to be obtained, a deed of sale cannot be registered till the said requirements are complied with. In a given situation, the vendor may not be permitted to take advantage of his own wrong in not taking

steps for complying the statutory provisions and then to raise a plea of limitations" (Para 27).

111. In the light of the above judgements of Hon'ble Supreme Court, it is to be held that the Appellant cannot take advantage of its own wrong contending that the condition subsequent specified under Article 3.1.2 have not been duly satisfied especially when it has been satisfied which was not disclosed before the Commission.

112. It is an admitted fact as mentioned earlier that the Appellant had finalized the FSA, with the Adani Enterprises Limited thereby the condition subsequent have been fulfilled. Therefore, it is to be concluded that termination notice terminating the Power Purchase Agreement issued by the Appellant is not a valid one as it has not been validly terminated and as such it has to be held that the State Commission correctly set aside the same. Thus, 2nd question is answered accordingly.

113. The **next** Question is as to whether the State Commission is correct in directing the Appellant to supply power to the Gujarat Holding Company under the PPA as a remedy for wrongful termination when the PPA has provided for liquidated damages? According to the Appellant, when PPA has provided for liquidated damages, the specific performance of the PPA can not be allowed. On the other hand, plea of the Respondent is that the provision for liquidated damages in the PPA has not in any manner affected the right of Gujarat Holding Company to seek specific performance of the PPA, especially when conditions subsequent are fulfilled.

114. The Appellant has cited the following authorities to establish that when an agreement provides for liquidated damages, then the court cannot compel the specific performance of the agreement:

(i) *AIR 2001 5 SCC 101 Her Highness Maharani Shanti Devi P. Gaikwad Vs. Savji Bhai Hari Bhai Patel and Others;*

(ii) AIR *2000 Del 450 Rajasthan Breweries Ltd. Vs. Stroh Brewery Company;*

(iii) *AIR* 1991 *1 SCC 533 Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others;*

(iv) *AIR 2008 12 SCC 145 Bal Krishna and Anr. V. Bhagwan Das and Others*

115. On the side of the Respondent, the following judgements have been cited to contend that the specific performance is the appropriate remedy and such a relief is fully in consistent with the provisions of Sec 20 of the Special Relief Act, 1963 and in fact, none of provisions of the Special Relief Act, 1963 bars such specific enforcements:

(i) Prakash Chandra Vs. Angadlal 1979 (4) SCC 393

(ii) P.D'Souza Vs. Shondrilo Naidu 2004 (6) SCC 649

(iii) M L Devender Singh Vs. Syed Khaja 1973 (2) SCC 515

(iv) M.S Madhusoodhanan & Anr Vs. Kerala Kaumudi (P) Ltd. & Ors 2004 (9) SCC 204

116. We have gone through the above decisions cited by both of the parties. At the outset, it shall be stated that Article 3.4.2 of the PPA has no application in the present case as conditions subsequent mentioned in Article 3.1.2 stood satisfied. Accordingly, there can be no case of termination of the PPA pursuant to Article 3.4.2 as held above. Consequently, there can be no question of considering alternative of liquidated damages instead of specific performance.

117. It is a settled law that the provision of liquidated damages in the PPA does not imply that there cannot be any specific enforcement of performance. In this context Section 23 of the Special Relief Act, 1963 has to be referred to which is as follows:

"23. Liquidation of damages not a bar to specific performance

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving, to the party in default an option of paying money in lieu of specific performance;

(2) When enforcing specific performance under this Section, the court shall not also decree payment of the sum so named in the contract"

118. So, the above provisions would make it clear that the specific performance is an appropriate remedy and such a relief is fully in consistent with the provisions of Section 63 of the Electricity Act. The contention of the Appellant that the provision of the Specific Relief Act, 1963 bar the remedy of specific performance in the present case is misplaced. Section 10 of the Specific Relief Act, 1963 provides that the contracts

may be specifically enforced in the Act agreed to be done as such the compensation in money for non performance would not afford adequate relief.

119. According to 2nd Respondent, Gujarat Holding Company, it has to get the supply of the electricity to be procured from the Appellant as per the PPA in their plants for future, and it cannot procure from others by allowing Adani Power Ltd. to terminate the agreement or by claiming compensation only . If the Agreement is allowed to be terminated, the Procurer will have to invite fresh tenders and the whole projections of supply of electricity at reasonable rates to the consumer will be delayed by at least 5 years and in that event, the procurer may not get the power at the same price and the consumers will be adversely affected. It is contended by the Respondent that Gujarat Holding Company the non defaulting party is keen only on specific

performance of the contract rather than the liquidated damages. We find force in this submission. Permitting the termination of contract would give unfair and undue advantage to the Appellant as the Appellant is proposing to sell the contracted capacity at a much higher rate to the total disadvantage and to the prejudice of Gujarat State and for unlawful gain to the Adani Power Ltd. In this context we would refer to Section 14 of the Specific Relief Act, 1963 which refers to various types of contracts that cannot be specifically enforced. The provision reads as under:

"***Section 14 of the Specific Relief Act, 1963:***

The following contacts cannot be specifically enforced, namely-

(a) A contract for the non-performance of which compensation in money is an adequate relief;

(b) A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such,

that the court cannot enforce specific performance of its material terms;

(c) A contract which is in its nature determinable'

(d) A contract the performance of which involves the performance of a continuous duty which the court cannot supervise".

120. The above section cannot be read in isolation. It has to be read with Section 23 and other related provisions of the said Act. In the present case, none of the above clauses have any application. As mentioned above, the monetary compensation cannot be an adequate relief. The nature of the contract necessarily required specific performance and not mere payment of money compensation.

121. The PPA is not a contract dependent on the personal qualifications or volition of the parties or such nature that the implementation cannot be enforced. The contract is for 25 years. There is no termination except by non defaulting party for breach of the other party. The Appellant entered into the PPA with the

object of performing the agreement for 25 years. Therefore, the Appellant cannot claim any prolonged, unforeseen or undeserved hardship. If the specific performance is not granted, it would cause great hardship to the Gujarat Holding Company. The equitable situation for the specific performance of the PPA in the present case is totally and completely in favour of the Gujarat Holding Company and not in favour of the Appellant. Further more, once it is held that the termination is not valid and as such, the PPA is to be restored, then the consequential relieve would be direct to the Appellant to supply power in compliance with the provision of the PPA.

122. Let us now refer to the judgements rendered by Honble Supreme Court cited by the Respondent on this aspect:

(A) Prakash Chandra Vs. Angadlal 1979 (4) SCC 393:

This is a three judges Bench of the Hon'ble Supreme Court while dealing with Section 22 of the Specific Relief Act and now Section 23 had observed as under*:*

……

"9. The ordinary rule that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the present case, the conduct of the appellant has not been such as to disentitle him to the relief of specific performance. He has acted fairly throughout, and there is nothing to show that by any act of omission or commission he encouraged Mohsinali and Qurban Hussain to enter into the sale with the first and second respondents. There is no evidence that the Appellant secured an unfair advantage over Mohsinali and Qurban Hussain when he entered into the agreement.

10. It is urged by Learned counsel for the first and second respondents that the contract for sale contains a clause for payment of damages in case of breach of the contract and that, therefore, damages should be awarded instead of specific performance. A perusal of the terms of the contract indicates that the stipulation for damages was made only for the purpose of securing performance of the contract and not for the purpose of giving an

option of Mohsinali and Qurban Hussain of paying money in lieu of specific performance. Even if a sum has been named in the contract for sale as the amount to be paid in case of a breach, the appellant is entitled in law to the enforcement of the agreement".

(B) P.D.'Souza Vs. Shondrilo Naidu 2004 (4) SCC 649:

"39. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was a landlord of the plaintiff. He had accepted part payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August, 1981, i.e., just two months prior to the institution of suit, he had accepted Rs.20,000/-from the Plaintiff. It is, therefore too late for the Appellant now to suggest that having regard to the escalation in price, the Respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20".

(C) M.L Devender Singh Vs. Syed Khaja 1973 (2) SCC 515:

"14. It may be mentioned here that the principles contained in Sec 20 of the old Act are re-enacted in Sec 23 of the Act of 1963 in language which makes it clear that a case where an option is given by a contract to a party either to pay or to carry out the other terms of the contract falls outside the purview of Section 20 of the old Act, but, mere specification of a sum of money to be paid for a breach in order to compel the performance of the contract to transfer property will not do. Section 23 of the Act of 1963 may be advantageously cited here. It runs as follows:

> *"23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.*
>
> *(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract".*

(D) M.S. Madhsoodhanan & Anr. Vs. Kerala Kaumudi (P) Ltd. & Ors. 2004 (9) SCC 204:

"141.....The Section provides that specific performance of such contracts may be enforced when there exists no standard for ascertaining the actual damage caused by the non performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. In the case of a contract to transfer movable property, normally specific performance is not granted except in circumstances specified in the Explanation to Section 10. One of the exceptions is where the property is "of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market". It has been held by a long line of authority that shares in a private limited company would come within the phrase "not easily obtainable in the market".

123. In view of the above judgements of Hon'ble Supreme Court, it is clear that it is a settled law that merely because contract for sale contains a clause for payment of damages in case of breach of contract, it cannot be said that the damages alone should be awarded and not specific performance.

124. The judgements cited by the Appellant in support of his contention that the PPA should not be specifically enforced would not be applicable to the present facts of the case as in those cases, there was no public interest involved and the agreement in those cases is of a completely different nature. 2001 5 SCC 101 Her Highness Maharani Shanti Devi P. Gaikwad Vs. Savji Bhai Hari Bhai Patel and Others would not relate to the supply of power which is in public interest. In AIR 2000 Del 450 Rajasthan Breweries Ltd Vs. Stroh Brewery Company, it would deal with the private commercial transactions. In the present case the contract is for purchase of electricity and there is no supply of electricity which affects the consumers in the whole State of Gujarat. In AIR 1991 1 SCC 533 Indian Oil Corporation Ltd Vs. Amrtsar Gas Service and Others case, the court rejected grant of specific performance on the basis of the clause providing for termination of the contract as the grant

would be infructuous if the parties can terminate the contract by notice. In the present case, there is no such a clause providing for termination of the contract. In AIR 2008 12 SCC 145 Bal Krishna and Anr Vs. Bhagwan Das and Others, the Hon'ble Supreme Court has held that specific performance cannot be granted in the absence of the plaintiff has the willingness and readiness to perform on the part of the contract. But in the present case, the stand of the Gujarat Holding Company is that it has been ready and willing to perform terms of the contract. Therefore, the above case is also not applicable.

125. Further, it is also well settled Rule that when the property is of a special value or consists of goods which are not easily available in the market, the damages would not be adequate remedy and in those cases, specific performance of the contract should be granted. In this case, there is no doubt that the

Electricity is not an ordinary Article of commerce. The electricity has a special value and of great interest to the procurer for the welfare of the society at large and is not easily obtainable in the market.

126. The Gujarat Holding Company had entered into the PPA for purchase of power at the agreed price for the eventual benefit of consumers at large i.e. the public in the State of Gujarat particularly for 25 years in the light of the following circumstances:

(a) The Electricity is required for supply to consumers/public at large at reasonable rates in public interest.

(b) The agreement is for 25 years;

(c) The electricity project would require a gestation period of 4 to 5 years.

(d) After Gujarat Holding Company had included the electricity to be procured in the PPA in their

perspective plans for future, Gujarat Holding Company cannot procure power from others by allowing Adani to terminate the agreement or by claiming compensation only or in the alternative allowing higher rates to Adani Power.

(e) If the agreement is allowed to be terminated, the Procurer will have to invite fresh tenders and the whole project of supply of electricity at reasonable rates to the Consumer will be delayed by at least 5 years the procurer may not get the power at the same price and the consumer will be adversely affected.

(f) Rise in price of electricity will have a cascading effect on the price of other commodities which is not in the national interest.

(g) Liquidated damage is not an adequate relief and it may be pointed out that the Gujarat

Holding Company, the non defaulting party is keen on the specific performance of the contract rather than liquidated damages.

127. As mentioned above, if specific performance is not granted by ensuring the restoration of the PPA the Procurer will have to wait for another 5-6 years to get the electricity by furnishing fresh tenders. It will definitely cause immense loss to the public. The Appellant contended that even assuming it has committed a breach and has not performed the contract and accepted its default but still it has the right to terminate the PPA by offering liquidated damages. This submission does not sound well. A defaulter can not be allowed to dictate the terms as to how the matter is to be dealt with and how it should be allowed to be released from specific performance by payment of liquidated damages.

128. Therefore, the direction issued by the State Commission to the Appellant to supply power as per the PPA in our view is in consonance with the law laid down. That apart, the direction for specific performance is a consequential order in pursuance of the finding of the State Commission that the termination notice is illegal and PPA is to be restored.

129. <u>Summary of Our Findings</u>

i) **Article 3.4.2 provides a situation under which the Power Purchase Agreement can be terminated either by the Procurer or by the Seller, when the events provided in Article 3.4.2 (i) and (ii) would arise or occur. Although, Article 3.4.2 appears to provide a right to both the parties to terminate the contract on happening of events, the same has to be read and interpreted along with other Articles of the PPA. Article 3.4.2 provides that the Seller shall**

be liable to pay the procurer an amount of Rs.100 Crores as liquidated damages, if the procurer or the seller elects to terminate the agreement on happening of certain events specified in the earlier part of the Article 3.4.2. Thus, it is clear that either party can terminate the Power Purchase Agreement if the events specified in Article 3.4.2 (i) and (ii) would arise or occur. However, happening of such an event would have to be agreed to by both the parties. Accordingly, the availability of right of either party to terminate the PPA under Article 3.4.2 will arise only if both parties mutually accept the happening of events contemplated therein and the seller is willing to pay liquidated damages specified therein.

ii) **PPA dated 2.2.2007 was not based on the premise of availability of coal from Gujarat Mineral**

Corporation only. It was for the Appellant to arrange the coal from any source. It was Adani Enterprises Limited which had represented that it had tied-up with Gujarat Mineral Corporation for supply of Coal. It also represented that it had tied-up for supply of imported coal with various Companies in Germany and Japan as source of fuel supply. Therefore, it is for the Appellant to make arrangements for fuel from any source. The conditions subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply Agreement was duly satisfied with firming-up of coal supply from Adani Enterprises/ Indonesian mines as per the admissions of the Appellant itself through various documents. Since subsequent were duly satisfied as per Article 3.1.2 (ii), there was no basis for invoking Article 3.4.2 of the PPA to terminate the PPA in as much as Article 3.4.2

has no obligation. Hence, the termination notice is not a valid one and as such the PPA has not been validly terminated.

iii) **The provision for liquidated damages in the PPA does not in any manner affect the right of the Gujarat Holding Company to seek specific performance of the PPA particularly when conditions subsequent are fulfilled. There was no bar on the Special Relief Act to give a direction for specific performance. In the present case, the PPA has been entered by both the Appellant and the Respondent for 25 years in order to meet the electricity requirements of the public at large of Gujarat on long term basis on economical price. The specific performance is, therefore, an appropriate remedy. Such a relief is fully consistent with the provisions of the Section 23 of the Special Relief Act.**

Therefore, the directions issued by the State Commission to the Appellant to supply the power as per the PPA is perfectly legal.

130. In view of our above findings, we do not find any merit in this Appeal as there is no infirmity in the impugned order of Gujarat Electricity Regulatory Commission dated 31.8.2010 which is in our view is perfectly justified.

131. Hence, the Appeal is dismissed as devoid of merits. However, there is no order as to cost.

132. Before parting with this case we deem it appropriate to record our heartfelt appreciation for the in-depth preparation, inspiring presentation and incisive persuasion made by both the learned Senior Counsel i.e. Mr. C.S. Vaidyanathan, learned Senior Counsel appearing for the Appellant and Mr. P.P. Malhotra, the Senior Advocate(ASG) appearing for the

Respondent-2 which enabled this Tribunal to arrive at the above conclusion.

133. Pronounced in the open court today the 07th September, 2011.

(V.J. Talwar) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

Dated: 07th Sept, 2011

✓

REPORTABLE/~~NON-REPORTABALE~~