

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	12.11.2019
Judgment pronounced on	27.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.338 of 2014

PTC India Ltd
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110 066

... Petitioner

Vs.

1.Tamil Nadu Electricity Board,
No.144, Anna Salai,
Chennai – 600 002.

2.The Hon'ble Justice K.Raviraja Pandian
No.4/358, 9th Street,
Kapaleeswara Nagar South,
Neelankarai,
Chennai.

... Respondents

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Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 26.12.2013 passed by the Arbitrator.

For Petitioner : M/s.Ravi Kishore
Mr.Guntur Promot Kumar for
M/s.Arun Karthick Mohan

For Respondents : Mr.P.H.Arvind Pandian
Additional Advocate General
Assisted by
Mr.V.Viswanathan for R-1.

ORDER

The claimant in the arbitration is the Petitioner before this Court. The dispute arises out of a Power Purchase Agreement dated 16.06.2008 (the PPA). The admitted position is that the PPA envisaged supply of power by the first Respondent to the Petitioner between June and September 2008. It is also the admitted position that two categories of supply was envisaged under the PPA, namely, firm power and power on "as and when available on day ahead basis". Although the PPA was executed on 16.06.2008, the effective date is specified as 01.06.2008. The PPA specified the approximate contracted quantity of both categories of power supply and, in terms of the PPA, the first Respondent made supplies to the Petitioner in the months of June and July 2008. However, the first Respondent did not meet its firm power supply commitments in the months of August and September 2008 on account of the alleged non-availability of power. The PPA contains a compensation clause, which is

triggered in case the first Respondent fails to declare availability of power of 80% of the contracted quantity. In such event, the first Respondent is required to pay compensation at Rs.2/- per kilowatt hour for the shortfall below 80%. The Petitioner resorted to this clause and computed and claimed compensation from the first Respondent. In response, the first Respondent took the position that the non-supply is on account of a force majeure event and that, therefore, the first Respondent is not liable and that the claim for compensation should be waived and withdrawn by the Petitioner. The said dispute could not be settled amicably and was, therefore, referred to Arbitration. In the Arbitration Proceeding, the Petitioner made claims for an aggregate sum of Rs.16,23,01,200/- with interest thereon at 15% per annum from 10.09.2008. Upon completion of pleadings, the Arbitral Tribunal framed 10 issues. Both parties adduced both oral and documentary evidence: the Petitioner relied on one witness and exhibited documents as Exhibit-A to Exhibit-TT; and the first Respondent, likewise, relied on one witness and exhibited documents as Exhibits R-1 to R-29. By Arbitral Award dated 26.12.2013 (the Award), the claims were rejected. The Award is impugned in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. I heard the learned counsel for the Petitioner, Mr. Ravi

Kishore, and the learned Additional Advocate General, Mr. P.H. Arvind Pandian, for the first Respondent. The learned counsel for the Petitioner opened his submissions by adverting to and outlining the nature of the trading business that is carried on by the Petitioner. In this regard, he pointed out that, as per Section 2 (71) of the Electricity Act, 2003, a trader is defined as a purchaser of electricity for re-sale. Therefore, he submitted that the object and purpose of the PPA was to purchase electricity from the first Respondent for purposes of re-sale to other electricity utilities. Consequently, he pointed out that the Petitioner had also reached out to buyer utilities while negotiating the contract with the first Respondent and that this is recognised and reflected in the PPA. In order to substantiate the submission, he referred to the letters dated 09.04.2008, 03.05.2008, 07.05.2008. He, thereafter, referred to the PPA and, in particular, to the fact that the PPA provides for two categories of power supply, namely, firm power and "as and when available on day ahead basis" power. He also pointed out that the PPA uses the expressions "its surplus power" (the PPA at p.88 of the typed set of papers) and "surplus power available with it" (the PPA at p.91 of the typed set of papers) so as to establish that surplus power was available when the PPA was executed. Moreover, he pointed out that the effective date of the PPA is 01.06.2008 although the PPA was executed on 16.06.2008. This fact was alluded to in order to establish that the first Respondent was already

aware about the power availability when the PPA was executed.

3. Consequently, he submitted that the PPA also provides for compensation for non-supply of not less than 80% of the contracted quantity of firm power whereas such compensation is not payable with regard to "as and when available" power. Besides, he pointed out that the first Respondent was acutely conscious of the fact that it was required to pay compensation for shortfall in supply and, therefore, requested the Petitioner, by letter dated 24.07.2008, to waive the compensation because the failure of monsoon is an "Act of God" and would, therefore, qualify as a force majeure event. In these facts and circumstances, he further pointed out that the Petitioner could not meet its re-sale obligations to the Punjab State Electricity Board (PSEB) and was called upon to pay compensation of Rs.6,11,74,344/- by the PSEB, by letter dated 30.08.2008, for failure by the Petitioner to re-sell the power, which should have been purchased from the first Respondent and re-sold to the PSEB. Therefore, he pointed out that the Petitioner was constrained to issue invoice dated 10.09.2008 to the first Respondent towards compensation for default in supply of not less than 80% of the contracted quantity of firm power between 01.08.2008 and 31.08.2008, which amounted to a sum of Rs.6,24,22,800./- In response, the first Respondent informed the Petitioner that it had requested PSEB to waive the compensation claimed from the Petitioner and, consequently, the Petitioner was requested to

withdraw the invoice. However, PSEB informed the Petitioner, by communication dated 19.09.2008, that it was deducting a sum of Rs.9,78,80,832/- from the bills of the Petitioner. He submitted that, therefore, the Petitioner was constrained to issue another invoice dated 01.10.2008 for a sum of Rs.9,98,78,400/- to the first Respondent in respect of default in supply in September 2008. In the aggregate, he pointed out that a demand was made on 14.11.2008 for a sum of Rs.16,23,01,200/- from the first Respondent as compensation for default in supply in September and October 2008 and that in response thereto, the first Respondent pointed out that there was no surplus power in the months of August and September 2008 and, therefore, the first Respondent could not declare availability of power to the extent of 80% of the contracted quantity. On that basis, the first Respondent contended that it was not in breach of the PPA and that it is not liable to pay the amount demanded or any other amount to the Petitioner. The learned counsel for the Petitioner contended that this was untenable in the context of the contractual commitment to pay compensation for failure to supply firm power.

4. In support of his submissions, the learned counsel for the Petitioner referred to and relied upon the following judgments:

(i) **PTC v. Uttarakhand Electricity Regulatory Commission and**

others, Appeal No. 168 of 2014, APTEL, Order dated 31st August 2016, wherein, at paragraph 17, the role of a trader was discussed and it was held that a trader is an intermediary and not a merchant trader and acts as a conduit between the generating company and the distribution licensee.

(ii) **ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 (the ONGC case)** and, in particular, Paragraphs 15, 28 and 55 thereof, for the proposition that an award that is contrary to the substantive provisions of law, or the Arbitration Act or the contract is patently illegal and that the expression "public policy" should be interpreted liberally and not narrowly.

(iii) **Roop Kumar v. Mohan Thedani (2003) 6 SCC 595 (the Roop Kumar case)**, wherein it was held, at paragraph 15 to 17, that once the understanding between parties is captured in an integrated agreement, in writing, all other evidence is excluded for the purpose of contradicting or altering the agreement.

(iv) **Alopi Parshad v. Union of India AIR 1960 SC 588**, wherein it was held, at paragraphs 21 and 22, that a party is not absolved from performing obligations under a contract merely because it is onerous to do so.

(v) **Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission 2019 SCC Online SC 819 (the Adani Power case)**, wherein, at paragraphs 17 to 19 and 22, the Hon'ble Supreme

Court examined the law on interpretation of contracts and held that the plain, literal meaning is to be adopted and that terms should not be implied in a contract unless the conditions that are specified in paragraph 22 thereof are satisfied.

(vi) **Transmission Corporation of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd. (2018) 3 SCC 716**, wherein, at paragraphs 20, 21, 24 and 26, the principles related to contractual interpretation were discussed and, in particular, it was held that a commercial document should not be interpreted to arrive at a conclusion at complete variance with that intended by the parties.

(vii) **Energy Watchdog v. Central Electricity Regulatory Commission (2017) 14 SCC 80 (the Energy Watchdog case)** wherein, at paragraphs 34 to 41, 45 and 47, the law on contingent contracts, frustration and force majeure was discussed and it was held that when alternative modes of performance, albeit at a higher price are available, the contract is not frustrated.

(viii) **Associate Builders v. DDA (2015) 3 SCC 49 (the Associate Builders case)**, and, in particular, paragraph 42.2 and 42.3 thereof, where it was held that an Arbitral Award, which is in contravention of substantive law, the Arbitration Act or the contract is patently illegal subject to the caveat that reasonable interpretation of the contract would not be interfered with.

5. After advertng to these judgments, the learned counsel for the Petitioner concluded his submissions by pointing out that the first Respondent did not enter into a contingent contract, as regards firm power, and, therefore, should have fulfilled its obligation to the Petitioner as it did with regard to its power swap obligation.

6. The learned AAG made submissions in response and to the contrary. His principal contention was that the PPA is a contingent contract both with regard to firm power and "as and when available" power. He commenced his submissions by advertng to the Award. In particular, he referred to paragraphs 23 to 25 of the Award wherein the correspondence that preceded the PPA was discussed. By referring to the said findings in the Award, he pointed out that the learned Arbitrator took into consideration the fact that there is repeated reference in the said correspondence to the fact that parties intended that the first Respondent would sell its surplus monsoon power and the Petitioner would buy the same. He also pointed out that the Arbitral Tribunal examined the PPA and concluded that when the PPA is construed contextually, it is clear that what was intended to be sold under the PPA is surplus monsoon power. He further pointed out as to how the Arbitral Tribunal closely examined the pre-PPA correspondence and the PPA before concluding that the contract

is contingent on the availability of surplus monsoon power. Consequently, he submitted that the Arbitral Tribunal fairly and reasonably interpreted the PPA, in the aforesaid context, and concluded that the first Respondent agreed to sell firm power from and out of the surplus, if available. In other words, the inference of the Arbitral Tribunal was that the obligation and liability of the first Respondent would arise under the PPA only if there is surplus monsoon power and that, therefore, the PPA and, in particular, clause 8 thereof, namely, the compensation clause, may be resorted to only if there is surplus monsoon power because the PPA is a contingent contract.

7. With regard to the contention that the first Respondent supplied power during the relevant period to the Haryana Power Generation Corporation Ltd (the HPGCL), he referred to the analysis and conclusion of the Arbitral Tribunal that this was done in fulfilment of an earlier obligation for the return of banked power that was supplied by HPGCL to the first Respondent under a swap agreement. Consequently, he contended that only if there is power availability after the fulfilment of prior obligations, it can be concluded that the first Respondent had surplus power. In this regard, he submitted that the power generation data relating to the previous year is not relevant in as much as it does not prove that there was surplus power in the relevant year. In specific, his

contention is that the obligation under the PPA is contingent on the availability of surplus power between June and September 2008. In response to a question as to whether the contingency is the monsoon and the associated rainfall or the availability of power, he submitted that the PPA is contingent on the availability of surplus power.

8. His next contention was that the failure of the monsoon is a force majeure event. In particular, he submitted that it constitutes an Act of God as per the force majeure clause in the PPA. Therefore, he submitted that the first Respondent was not liable for non-supply of at least 80% of the contracted quantity of firm power both on account of the non-occurrence of the contingency and in view of the force majeure event. In conclusion, he submitted that the Arbitral Tribunal fairly and reasonably appraised the evidence and interpreted the PPA. Consequently, interference with the Award is not warranted under Section 34 of the Arbitration Act.

9. By way of rejoinder, the learned counsel for the Petitioner submitted that the compensation clause provides for payment of compensation not only by the first Respondent but also by the Petitioner. The learned counsel also relied upon the judgment of the Bombay High Court in **Ranchhoddas v. Nathmal Hirachand (the Ranchhoddas**

case) AIR 1950 Bom.144 (DB) wherein, at internal page 148, the Division Bench of the Bombay High Court held that a contract for the supply of goods manufactured by a certain mill "as and when received" cannot be construed as a contingent contract by converting the words to "if and when received". Similarly, the learned counsel contended that the PPA specifies that surplus power is available and this cannot be read as "if available". The learned counsel also referred to the power swap agreement under which the first Respondent made supplies to HPGCL and pointed out that the said agreement provides for compensation at 691 p/kWh as opposed to a much lower compensation under the PPA and contended that this is the reason why the first Respondent reneged on its commitment under the PPA. As regards the force majeure clause, he pointed out that the alleged failure of monsoon is not a force majeure event as per the PPA and that, in any event, it was necessary, as per the force majeure clause in the PPA, to satisfy the counter party that there is a force majeure event whereas the said requirement was not satisfied in the instant case.

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10. The records were examined and the oral submissions of both sides were considered carefully. A preliminary issue that should be considered is whether the pre-PPA correspondence can be examined for the purpose of interpreting the PPA and, secondly, whether the pre-PPA

correspondence indicates that it is a contingent contract. The common law principle is that pre-contractual negotiations are not admissible in evidence for purposes of interpreting the contract. In this regard, the judgment of the Hon'ble Supreme Court, in the **Roop Kumar case**, which was cited by the learned counsel for the Petitioner, is apposite wherein it was held that extraneous evidence is inadmissible to interpret an integrated document in writing. In addition, the words of Lord Wilberforce in **Prenn v. Simmons [1971] 1 WLR 1381** are illuminating when he held as under:

"The reason for not admitting evidence of these exchanges is not a technical one or even mainly of convenience.... It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter are changing and until the final agreement, though converging, still different. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to."

11. The exception to this principle is with regard to representations that were relied upon by one of the parties to the

contract. In an action for misrepresentation, pre-contractual correspondence may be looked at so as to ascertain if representations were made and whether such representations were relied upon for the purpose of entering into the contract concerned. In this case, one is not dealing with representations. Instead, the contention of the first Respondent is that the pre-contractual correspondence discloses, without doubt, that the intention of the parties was to sell and buy the surplus power that is generated during the monsoon season. Given the fact that the case of the first Respondent is not based on representations that were made by the Petitioner and relied upon by the first Respondent for purposes of entering into a contract, I do not see any reason to depart from the common law principle, which is also the law in India, that pre-contractual negotiations are not admissible in evidence. In this case, the Arbitral Tribunal relied heavily on pre-contractual negotiations in order to conclude that it is a contingent contract. For reasons set out above, this approach of the Arbitral Tribunal is patently erroneous. In any event, on examining the pre-contractual correspondence, while it is clear that the parties envisaged the sale and purchase of the surplus power available during the monsoon season, the said correspondence does not lead to the inference that the contract is contingent. In this connection, it is relevant to bear in mind that parties decided to provide for two categories of power supply in the PPA: firm power and "as and when available" power. In

addition, parties specified the payment of compensation not only by the seller but also by the buyer in the event of default in making available or purchasing power, as the case may be. It is also pertinent to note that this compensation clause only applies to firm power. For the above reasons, it is concluded that the PPA cannot be said to be a contingent contract by relying on pre-contractual correspondence.

12. This leads to the question whether it can be said that the PPA is a contingent contract by examining the PPA and, if so, the consequential question is whether it is contingent on the rainfall during the monsoon period meeting estimates, in that regard, or on the availability of surplus power. The Arbitral Tribunal examined this question and concluded that the PPA is contingent upon the generation of surplus monsoon power during the monsoon period and that the compensation clause is enforceable only if the contingency happens (paragraph 33 of the Award). Therefore, it is necessary to consider whether this conclusion is in contravention of the Indian Contract Act, 1872 (the Contract Act) and the interpretation of the relevant provisions thereof and/or whether the interpretation of the PPA is unreasonable, implausible or perverse thereby warranting interference under Section 34 of the Arbitration Act. In order to answer these questions, it is necessary to examine the relevant provisions of the Contract Act. Sections 31 to 36 of the Contract Act deal with contingent contracts and in view of the assertion by the first

Respondent that the PPA is contingent on the happening of a future uncertain event, Section 32 is relevant and it reads, inter alia, as under:

"Enforcement of contracts contingent on an event happening-Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

13. In the **Ranchhoddas case**, a Division Bench of the Bombay High Court examined the contract in question, which used the expression "as and when received" and held that it is a contract that creates an absolute obligation and not a contingent obligation and should not be read as "if and when available". Therefore, the next stop, in the endeavour to ascertain if the PPA is a contingent contract, is the PPA. On examining the PPA, it is indubitable that the PPA does not use the expression contingent or any expression equivalent thereto either in connection with the liability to pay compensation or otherwise. Therefore, it is clear that the PPA does not contain an explicit expression of the intention of parties to create a contingent contract. However, the PPA does contain the term "surplus power" and the question to be examined is whether the use of this expression implies that the PPA is contingent on the availability of surplus power. This term is used in the recitals with the qualifier "its" surplus power. The expression is used in the operative

clauses of the PPA also. For instance, the PPA stipulates that "TNEB is agreeable to supply the surplus power available with it to PTC India Ltd for a period of four months from 01.06.2008 with the provision for review of this Agreement on mutually agreed terms and conditions after expiry of four months." In this regard, as contended by the learned counsel for the Petitioner, it should be noted that the PPA was executed on 16.06.2008 but was effective from 01.06.2008. When this aspect is looked at in conjunction with the stipulation "to supply the surplus power available with it", it leads to the reasonable inference that surplus power was available as on 16.06.2008. This is corroborated by the fact that supplies were made in June and July 2008. Therefore, on facts, even assuming that the PPA was contingent on the happening of a future uncertain event, i.e. either rainfall of not less than the threshold quantity or the availability of a certain quantity of total power thereby resulting in surplus power, these requirements were satisfied in June and July 2008 even according to the first Respondent.

14. Nonetheless, it remains to be considered whether the PPA could be considered as contingent on account of the use of the expression "surplus power" and whether it was unenforceable in August and September 2008 for that reason. For this purpose, other clauses of the PPA should also be examined. For instance, the clause that deals with

scheduling is pertinent and provides that "TNEB shall schedule this power except in case of technical constraints/force majeure". Once again, it is noticeable that the PPA does not make the supply of power contingent either on the availability of surplus power or on specific rainfall requirements in the monsoon season. Instead, the two riders are technical constraints and force majeure. Besides, if the contingency was the availability of surplus power, it would have been necessary to specify the total power requirements of the first Respondent and provide that if the power generation exceeds the stipulated requirements of the first Respondent, it would constitute surplus power. Likewise, if the contingency was rainfall of not less than the specified threshold, parties should have specified such threshold quantity in the PPA. In the absence of such details in the PPA, it is evident that the relevant benchmarks to ascertain if the alleged contingencies have happened or not is not available and this is also indicative of the fact that the PPA was not intended to be contingent on these events.

15. In order to draw definitive conclusions as to whether it is a contingent contract or not, it is also relevant to examine other clauses of the PPA. The recitals of the PPA recognise that "PTC shall invite Tenders from purchasing utilities/distribution companies for sale of above power". This is, once again, not indicative of the intention to form a contingent

contract. The implementation clause specifies that both parties shall obtain necessary approvals and consents from competent authorities for the sale and purchase of power. This clause also does not make the PPA contingent on the availability of surplus power or the quantum of rainfall during the monsoon. The PPA provides for a payment security mechanism by way of the provision of an irrevocable and revolving LC by the Petitioner for an amount equivalent to 18 days of 105% billing of contracted energy thereby indicating that the PPA is enforceable immediately upon execution and not on the occurrence of a future uncertain event or contingency.

16. The other clause of particular significance is the compensation clause which reads as under:

"For power with Compensation Clause

Without prejudice to the provisions of Force Majeure, if PTC fails to schedule to the extent of 80% in energy terms of the contracted quantum then PTC shall pay compensation at the rate of Rs.1.96/kWh for such short quantity below 80%. Similarly if TNEB fails to declare availability to the extent of 80% of the contracted quantity, TNEB shall pay compensation at Rs. 2/kWh for such short quantity below 80%. The above compensation shall be calculated on monthly basis. The above clause shall be applicable only for firm power."

17. When the above clause is examined, it is abundantly clear that there is no indication therein that it is contingent. Indeed, it would be

reasonable to infer that it militates against the inference that the PPA is contingent. Thus, on examination of the PPA holistically and in light of the admitted factual position that supplies were made both in June and July 2008, it is clear that it would be wholly unreasonable to conclude that the PPA is contingent either on the availability of surplus power or rainfall of not less than the threshold during the monsoon season.

18. Notwithstanding the above conclusion, the compensation clause is subject to the force majeure clause. Consequently, no compensation would be payable by either party if such party can establish that the non-fulfilment of the purchase or supply obligation, as the case may be, is on account of a force majeure event. From the pre-arbitration correspondence also, for instance, the letters dated 24.07.2008, 13.08.2008 and 29.08.2008, it appears that the main defence of the first Respondent was force majeure. Therefore, this issue needs to be considered separately and the force majeure clause is significant, in this regard, and reads as under:

"Both the parties shall ensure compliance of the terms and conditions of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this Agreement to the extent that such failure is due to force majeure events such as rebellion, mutiny, civil commotion, riot, strike, lockout, epidemic, plague, fire, explosion, flood, drought, cyclone, lightning, earthquake, war or other forces, accident or act of

God, terrorism, malicious act, landslide, sabotage, communal violence etc. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event (s). Transmission constraint as certified by RLDC and non availability of open access shall be considered as force majeure."

19.From the above, it is evident that the force majeure clause covers several events, including related events such as flood, cyclone and drought, but conspicuously the failure of monsoon or a fall in the quantum of rainfall during the monsoon period is not specifically referred to as a force majeure event. Particularly when viewed in the context of a PPA for supply of surplus power during June to September 2008 and a detailed force majeure clause wherein several force majeure events, including flood, cyclone and drought are specified, the absence of specific events relating to the failure of monsoon or a reduction in the quantum of rainfall during the monsoon season is significant and cannot be disregarded. The Hon'ble Supreme Court, in the **Energy Watchdog case**, examined the force majeure clause, in that PPA, and held, at paragraph 47, that it would not excuse non-performance when alternative modes of performance, albeit at a higher price, are available. In this case also, from the evidence on record that supplies were made to HPGCL, it is clear that alternative modes of supply were available. Moreover, I find that no credible evidence was adduced by the first Respondent to establish the

failure of monsoon and the only evidence (Petitioners' Ex-NN) showed that the wind power generation in 2008 was higher than in 2007 whereas it was the converse as regards hydro-power generation. But this does not constitute evidence of the failure of the monsoon and the variation in power generation cannot be construed as a force majeure event under the PPA. Thus, in light of the above analysis of the force majeure clause and the evidence on record, I am of the view that the conclusion of the Arbitral Tribunal, in paragraphs 26 and 41 of the Award, that the failure of monsoon is a force majeure event that would be covered by the generic term "Act of God" is an unreasonable and implausible conclusion that warrants interference.

20. Therefore, I conclude that the PPA is not a contingent contract. In this connection, it may be noted that the first Respondent was unclear as to whether the PPA is contingent on the availability of surplus power or on the quantum of rainfall during the monsoon season. As stated earlier, if the intention of the parties was to make the PPA contingent on the availability of surplus power, it stands to reason that the PPA would have specified the power requirement of the first Respondent and, consequently, the quantum of power that would be required to be generated so as to result in surplus power. There is no such indication in the PPA. As regards the quantum of rainfall being the contingent event,

once again, if that were the case, the parties would have specified the minimum quantum of rainfall that would be necessary to make the PPA effective. On examining the PPA, I do not find any such stipulation. In fact, if this was the contingency, the rainfall data from the preceding years could also be material to decide the issue. As discussed earlier, the compensation clause is made subject only to the force majeure clause. The force majeure clause does not specify the failure of the monsoon or a reduction in the quantum of rainfall during the monsoon season as a force majeure event. The contention of the first Respondent both in pre-arbitration correspondence and in the Arbitral Proceedings is that the failure of the monsoon qualifies as an Act of God. Given the fact that floods, drought and other similar eventualities have been expressly specified and keeping in mind the context, namely, that this is a PPA for supply of power during the months of June to September 2008, i.e. the south-west monsoon season, the exclusion cannot be disregarded. In effect, the only conclusion that can be drawn is that this was not intended by the parties to be a force majeure event.

21. In this regard, the judgment of the Hon'ble Supreme Court in the **Energy Watchdog case** to the effect that frustration cannot be cited when there is a force majeure clause is pertinent. In addition, in that case, the court examined the force majeure clause and concluded

that the event in question did not constitute a force majeure event. Similarly, the judgment in the **Adani Power case** with regard to the circumstances in which terms can be implied in a contract is also relevant to this case. The said judgment cited with approval the judgment in **B.P. Refinery (Westernport) Pty. Ltd. v. Shire of Hastings (1978) 52 A.L.J.R.**, wherein the following five conditions for implying terms in a contract were specified:

- (a) It must be reasonable and equitable;
- (b) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (c) it must be so obvious it goes without saying;
- (d) It must be capable of clear expression; and
- (e) It must not contradict any express term of the contract

22. In this case, it cannot be said that it is necessary to imply that the contract is contingent on the availability of surplus power. As stated in the **Adani Power case**, the test of business efficacy is a test of necessity and, therefore, the question to be considered and answered is whether the contract becomes unworkable without implying such a clause and the obvious answer is that it does not become unworkable, albeit performance may become relatively more commercially onerous. On the contrary, in view of the stipulation of compensation, without any

indication that it is subject to such contingency, both in the event of failure to make power available or purchase power, implying a term that the contract is contingent on the availability of surplus power would be in conflict with the compensation clause. Therefore, implying a term in this case would violate one of the five conditions that courts have specified so as to decide whether to imply a term and, in any event, such implication is not justifiable even by applying the business efficacy test as set out above.

23. Although, ordinarily, interpretation of a contract, by the Arbitral Tribunal, does not warrant interference under Section 34 of the Arbitration Act, this is a case wherein the Arbitral Tribunal implied terms that are not contained in the PPA, in a fact situation that did not warrant such implication and in a manner contrary to the established principles in that regard. Thus, it may be concluded that the conclusion of the Arbitral Tribunal that the PPA is contingent on the availability of surplus power by implying and reading non-existent terms into the PPA is perverse, implausible and unreasonable. This conclusion is also contrary to Sections 31 to 36 of the Contract Act, which deal with contingent contracts, as interpreted in judgments such as the **Ranchhoddas case**. Equally, the conclusion that the deficiency of monsoon qualifies as an "Act of God" is also patently erroneous in light of the force majeure clause. Moreover,

these errors are evident on the face of the Award and go to the root of the matter. To put it differently, the Arbitral Tribunal would have reached the conclusion that the first Respondent committed breach of the PPA but for the fact that the Arbitral Tribunal inferred that the PPA is contingent on the availability of surplus power. Hence, a case is made out for interference with the Award as per principles laid down in paragraphs 15 and 55 of the **ONGC case** and paragraphs 29, 31 and 42.1-42.3 of the **Associate Builders case**.

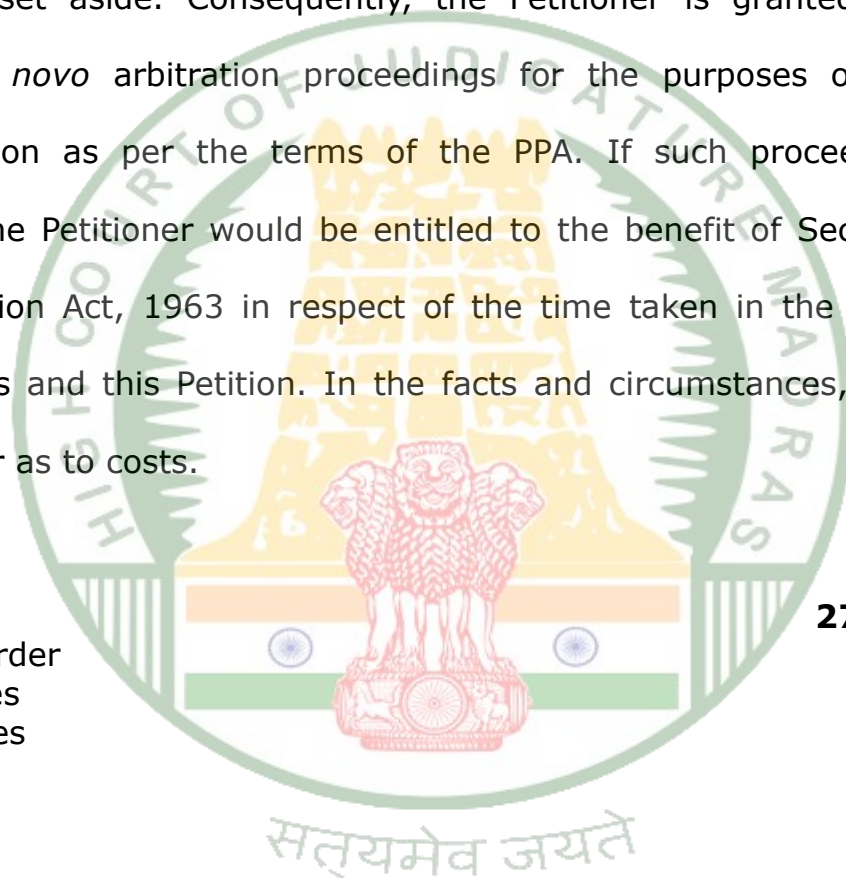
24. In fact, the conclusions with regard to the supply of power to PSEB and HPGCL by the first Respondent under swap agreements in August and September 2008 are also blatantly erroneous. The Arbitral Tribunal disregarded the fact that the first Respondent complied with its obligations to supply power to the aforesaid entities in spite of the alleged shortfall in the availability of power and concluded that such supply was not for monetary consideration and to fulfill prior obligations. This conclusion was reached on the specious reasoning that these transactions are distinguishable because they are swap agreements without monetary consideration, whereas they are barter or exchanges with difference in rates and, therefore, there is monetary consideration. Furthermore, the conclusion, at paragraph 42 of the Award, that the principle of estoppel does not apply to arbitral proceedings is also patently incorrect and

contrary to established principles in this regard.

25. For all these reasons, the Arbitral Award is liable to be and is hereby set aside. Consequently, the Petitioner is granted leave to initiate *de novo* arbitration proceedings for the purposes of claiming compensation as per the terms of the PPA. If such proceedings are initiated, the Petitioner would be entitled to the benefit of Section 14 of the Limitation Act, 1963 in respect of the time taken in the arbitration proceedings and this Petition. In the facts and circumstances, there will be no order as to costs.

Speaking order
Index: Yes
Internet: Yes
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27.11.2019



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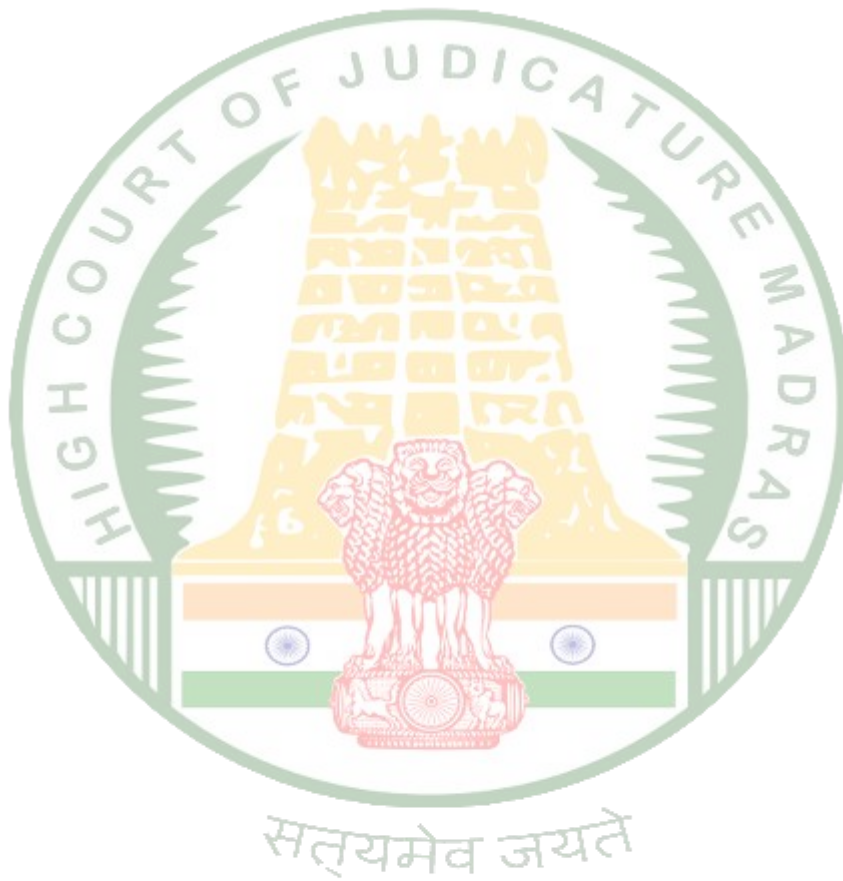
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