

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**LPA-767-2022 (O&M)
Date of decision:30.01.2023**

PUNJAB STATE POWER CORPORATION LTD

..... Appellant

Versus

TALWANDI SABO POWER LTD AND ORS

..... Respondents

LPA-770-2022 (O&M)

PUNJAB STATE POWER CORPORATION LTD

..... Appellant

Versus

NABHA POWER LIMITED AND OTHERS

..... Respondents

**CORAM : HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE ALOK JAIN**

**Present :- Mr.Ramachandran, Senior Advocate with
Mr.Abhilaksh Grover, Advocate
for the appellant(s)**

**Mr.Chetan Mittal, Senior Advocate with
Mr.Satyaveer Singh, Advocate
Mr.Kunal Mulwani, Advocate
Mr.Udit Garg, Advocate
Mr.Vikas Thakur, Advocate and
Mr.Daksh Uppal, Advocate
for respondent No.1 in LPA-767-2022**

**Mr.Akshay Bhan, Senior Advocate with
Mr.Amandeep Singh Talwar, Advocate
for respondent No.1/Caveator in LPA-770-2022**

**Mr.Satya Pal Jain, Additional Solicitor General of India
with Mr.Ajay Kalra, Central Government Counsel
with Mr.Ankit Chauhan, Advocate
for respondents No.2 and 4-UI**

Mr.Vishnav Gandhi, DAG Punjab for the State of Punjab

ALOK JAIN, J. :

This order shall dispose of aforesaid two Letter Patent Appeals arising out of a common order passed by the learned Single Judge on 04.07.2022 in connected writ petitions. The present appellant being one of the respondent therein has filed the present appeal being aggrieved by the said order.

At the outset, before the matter could be opened by learned counsel for the appellant, learned counsel for the respondents have raised a preliminary objection, that they since being on caveat, have received the copy where the Punjab State Transmission Corporation Limited is an appellant whereas the paper book showed that the present appeal is only on behalf of the Punjab State Power Corporation Limited (PSPCL). Learned counsel for the respondents/caveator have vehemently raised the issue that the present appeal is not maintainable and they do not have the correct copy of the appeal and even the averments in the appeal have been made on behalf of Punjab State Load Dispatch Centre as appellant No.3.

Faced with this situation, the assisting counsel for the appellant served the correct copy and then the matter was adjourned. Learned Senior counsel for the appellant has made a categorical statement that they do not wish to amend the appeal and would like to proceed with the appeal as such, despite the fact that the Power State Transmission Corporation Limited-SLDC had not preferred any appeal. In view of the categorical stand, the matter was proceeded with.

The brief facts of the case as narrated by the learned senior counsel for the appellant, on the controversy, revolve around the Power Purchase Agreements (PPA) executed on 01.09.2008 (Talwandi Sabo Power

Limited-TSPL) and agreement dated 18.01.2010 (Nabha Power Limited-NPL), whereby the agreements were executed between the appellant and the respondent for attaining the objective as detailed in the agreement.

(E) As envisaged in the Rfp, the parties have agreed to sign this Power Purchase Agreement setting out the terms and conditions for the construction, operation and maintenance of the Project, sale of Contracted Capacity and supply of electricity by the Seller to the Procurer.

Based on the said PPA, the parties were duly executing their obligations within the domain as enshrined therein, however, respondent No.4 i.e. Punjab State Power Corporation Limited, issued notices dated 29.03.2020 (TSPL) and 29.03.2020 (NPL) denying the respondents the payments in lieu of Capacity Charges under the PPA.

Aggrieved by the said notices, respondent TSPL and NPL filed writ petitions bearing CWP No.7519 of 2020 (TSPL) and CWP No.7715 of 2020 (NPL). The learned Single Judge, after hearing the parties in detail, was pleased to allow the writ petitions and passed the following order:

“xx xx xx xx

[81]. For the reasons recorded hereinabove, I am of the considered opinion that Punjab State Load Dispatch Centre has not performed its legal obligation as per mandate of the Electricity Act, 2003, Power Purchase Agreements and Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations, 2013. The inaction on behalf of Punjab State Load Dispatch Centre is liable to be deprecated. The impugned actions/notices are hereby quashed. However, Punjab State Load Dispatch Centre shall proceed to act in accordance with defined duties/obligations under the Electricity Act, 2003, Power Purchase Agreements and

Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations, 2013 in the context of scheduling the energy. In case of any objection in terms of Regulation 14.1.6 of the Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations, 2013, consequent action would follow.

[82]. With these observations, both the writ petitions are allowed. The issue is relegated to Punjab State Load Dispatch Centre for doing the needful in accordance with law.”

Aggrieved by the said order and on the grounds enumerated, the present appeals have been filed.

Mr. Ramachandran, learned Senior counsel appearing for the appellant has opened his arguments and has contained the same qua the interpretation of the definition of *Force Majeure*. To substantiate his arguments, learned Senior counsel has relied upon Schedule 7 of the PPA and provisions especially Article 12.2, 12.3, 12.4, 12.5 and 12.7 of the PPA.

Relevant extract of Schedule 7, which relates to tariff is reproduced as below:

“Schedule 7: Tariff

1.1. General

- i. The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.*
- ii. The Tariff shall be paid in two parts comprising of Capacity and Energy Charge.*
- iii. For the purpose of payments, the Tariff will be Quoted Tariff, escalated as provided in this Schedule 7 for the applicable Contract Year as per Schedule 11.*
- iv. The Full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability*

and Incentive shall be provided for Availability beyond 85% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by Seller as provided in this Schedule.

1.2 Monthly Tariff Payment

1.2.1 Components of Monthly Tariff Payment

The Monthly Bill for any Month in a Contract Year shall consist of the following:

- i. Monthly Capacity Charge Payment in accordance with Article 1.2.2 below;*
- ii. Monthly Energy Charge for Scheduled Energy in accordance with Article 1.2.3 below;*
- iii. Incentive Payment determined in accordance with Article 1.2.4 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);*
- iv. Penalty Payment determined in accordance with Article 1.2.5 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);*
- v. Penalty Payment determined in accordance with Article 1.2.8 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);*
- vi. Early Commissioning Incentive payment in accordance with Article 1.2.10.*

1.2.2 Monthly Capacity Charge Payment

The Monthly Capacity Charge Payment for any Month m in a Contract Year n shall be calculated as below:

....Methodology of Calculation....

CAA is the cumulative Availability, as per state energy account, from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m”;

AA is the Availability, as per state energy account, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period);

CC is the Contracted Capacity in the relevant Settlement Period (expressed in kW);

L is the number of minutes in relevant Settlement Period, as divided by total number of minutes in one hour, (expressed as hour);

NA Normative Availability

$\Sigma C(m-1)$ is the cumulative Capacity Charges payable from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m-1” but not including month “m”, (in Rupees);

Provided, no Capacity Charges shall be paid for the Settlement Period during which the SLDC has not allowed the operation of the Power Station due to Sellers failure to operate it as per the provisions of Grid Code.

1.2.3 Monthly Energy Charges

The Monthly Energy Charges for Month “m” shall be calculated as under:

....Methodology of Calculation....

1.2A Contract Year Energy Incentive Payment

1.2.4 Contract Year Energy Incentive Payment

If and to the extend the Availability in a Contract Year exceeds eighty five percent (85%), an incentive at the rate of forty (40%) of the Quoted Non Escalable Capacity Charges (in Rs./kWh) for such Contract Year mentioned in Schedule 11 subject to a maximum of

twenty five (25) paise /kWh, shall be allowed on the energy corresponding to the Availability in excess of eighty five percent (85%).

1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year

In case the Availability for a Contract Year is less than 75%, the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in kWh) for all months in the Contract Year applied on the energy (in kwh) corresponding to the difference between 75% and Availability during such Contract Year.

1.2.6 Deviation from the schedule

Variation between Scheduled Energy and actual energy at the Delivery Point shall be accounted for through Unscheduled Interchange (UI) Charges as detailed in the Grid Code and ABT.

1.2.7 Transmission/Wheeling Charges and Scheduling Charges

The payment of Transmission/Wheeling charges shall be settled between the CTU/STU and the Procurer. The payment of scheduling charges to the respective nodal agency (RLDC or SLDC) shall be the responsibility of the Procurer.

1.2.8 Penalty and rights relating to minimum guaranteed quantity of Fuel

In case Seller has to pay penalty to the Fuel supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the Fuel Supply Agreement and if during that Contract Year Availability of the Commissioned Units is greater than the Minimum Off-take Guarantee but the Procure does not has Scheduled Energy corresponding to such Minimum Off-take Guarantee during that Contract Year, then Seller

will raise an invoice for the lower of the following amount, on the Procurer:

(a) penalty paid to the Fuel supplier under the Fuel Supply Agreement in that Contract Year, along with documentary proof for payment of such penalty, or

(b) an amount corresponding to twenty percent (20%) of cumulative Monthly Capacity Charge Payment (in Rs.) for the Procurer made for all the months in that Contract Year multiplied by $(1 - x/y)$ where:

X is the Scheduled Energy during the Contract Year for the Procurer {in kwh}; and

Y is the Scheduled Energy corresponding to Minimum Off-take Guarantee for the Procurer during the Contract Year (in kwh).

Provided, within ten (10) days of the end of each Month after the COD of the first Unit, the Seller shall provide a statement to the Procurer, providing a comparison of the cumulative dispatch for all previous Months during the Contract Year with the Minimum Off-take Guarantee of the Procurer. Further, such statement shall also list out the deficit, if any, in the Fuel off-take under the Fuel Supply Agreement, due to cumulative dispatch being less than the Minimum Off-take Guarantee. In case of a Fuel off-take deficit, within a period of fifteen (15) days from the date of receipt of the above statement from the Seller and after giving a prior written notice of at least seven (7) days to the Seller, the Procurer shall have the right to avail such deficit at the same price at which such deficit fuel was available to the Seller under the Fuel Supply Agreement and to sell such deficit to third parties.

1.2.9 Tariff for the period prior to Scheduled COD of first unit and for Contract years beyond the 25 years from the COD of the first Unit

The Tariff for the period prior to Scheduled COD of the first unit shall be the quoted tariff of the first year with escalation for relevant period only for energy charge. The Tariff for the Contract Years beyond the 25 years from the Scheduled COD of the first Unit shall be the Quoted Tariff of the 25th year from the Scheduled COD of the first Unit with applicable escalation.

1.2.10 *If the Commercial Operation Date (COD) of a unit is achieved before its Scheduled Commercial Operation Date, the procurer shall pay incentive ("Early Commissioning Incentive") to seller, as follows:*

....Methodology of Calculation....

A) The Early Commissioning Incentive will be on the units dispatched on Station bus bar for the Procurer.

B) The Early Commissioning Incentive will be paid only on the units dispatched by seller on Station bus bar after achieving COD of unit.

C) The Scheduled Commercial Operation Date mentioned in PPA will not change with declaring early COD of unit Only Early Commissioning Incentive will be paid extra on units dispatched on Station bus bar for the Procurer as per above mentioned incentive formula.

D) The Procurer-PSEB will procure entire power generated earlier with added Early Commissioning Incentive.

1.3 SETTLEMENT OF BILLS

1. The penalty of actual Availability shortfall during the Contract Year, Deviation from the schedule, Transmission .& Scheduling Charges, and Penalty to be paid to fuel supplier will be settled as detailed in Article 1.2.2, Article 1.2.5, Article 1.2.6, Article 1.2.7 and Article 1.2.8 of this Schedule.

2. Notwithstanding anything contained in this agreement, no separate reimbursement shall be allowed

for the cost of the secondary fuel.

It is relevant to reproduce the Articles 12.2, 12.3, 12.4, 12.5 and 12.7 at this stage:

(12.2) Affected Party

An affected party means the Procurer of the Seller whose performance has been affected by an event of Force Majeure.

An event of Force Majeure affecting the CTU/STU or any other agent of Procurer, which has affected the Interconnection Facilities, shall be deemed to be an event of Force Majeure affecting the Procurer.

Any event of Force Majeure affecting the performance of Seller's contractors, shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

- (a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Project: or*
- (b) a delay in the performance of nay of the Seller's contractors.*

Similarly, any event of Force Majeure affecting the performance of the Procurers' contractor for the setting up or operating Interconnection Facilities shall be deemed to be an event of Force Majeure affecting Procurer only if the Force Majeure event is resulting in a delay in the Performance of Procurer's contractors.

12.3 Force Majeure

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care

or complied with Prudent Utility Practices:

i. Natural Force Majeure Events:

Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

ii Non-Natural Force Majeure Events:

1. Direct Non-Natural Force Majeure Events

(a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or

(b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew any consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

(c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Events

(a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(b) Radio active contamination or ionising radiation originating from a source in India or resulting from another

Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the Affected Party or those employed or engaged by the Affected Party.

(c) Industry wide strikes and labor disturbances having a nationwide impact in India.

12.4 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

(a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project:

(b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;

(c) Non-performance resulting from normal wear and tear typically experienced in power generation material and equipment:

(d) Strikes or labour disturbance at the facilities of the Affected Party:

(e) Insufficiency of finances or funds or the agreement becoming onerous to perform: and

(f) Non-performance caused by, or connected with, the Affected Party's:

(i) Negligent or intentional acts, errors or omissions;

(ii) Failure to comply with an Indian Law; or

(iii) Breach of, or default under this Agreement or any Project Documents.

12.5 Notification of Force Majeure Event

The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable,

but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement. Provided that such notice shall be a pre-condition to the Seller's entitlement to claim relief under this Agreement. Such notice shall included full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the situation.

The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement as soon as practicable after becoming aware of each of these cessations.

12.7 Available Relief for a Force Majeure Event

Subject to this Article 12:

- (a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;*
- (b) every Party shall be entitled to claim relief in relation to a Force Majeure Even in regard to its obligations, including but not limited to those specified under Article 4.5.*
- (c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurer for the part of Contracted*

Capacity affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event. For the balance part of the Contracted Capacity, the Procurer shall pay the Tariff to the Seller, provided during such period of Natural Force Majeure Event, the balance part of the Power Station is declared to be Available for scheduling and dispatch as per ABT for supply of power by the Seller to the Procurer.

(d) If the average Availability of the Power Station is reduced below sixty (60) per cent for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of an Indirect Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below sixty (60) percent as result of an Indirect Non Natural Force Majeure of any kind, the procurer shall make payments for Debt Service, subject to a maximum of Capacity Charges based on Normative Availability, relatable to such Unit, which are due under the Financing Agreements and these amounts shall be paid from the date, being the later of (a) the date of cessation of such Indirect Non Natural Force Majeure Event and (b) the completion of sixty (60) days from the receipt of the Financing Agreements by the Procurer from the Seller, in the form of an increase in Capacity Charge. Provided such capacity charge increase shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Debt Service in a situation where the Indirect Non Natural Force Majeure had not occurred.

Provided that the Procurer will have the above obligation to make payment for the Debt Service only (a) after the Unit(s) affected by such Indirect Non Natural Force Majeure Event has been Commissioned, and (b) only if in the

absence of such Indirect Non Natural Force Majeure Event, the Availability of such Commissioned Unit(s) would have resulted in Capacity Charges equal to Debt Service.

(e) If the average Availability of the Power Station is reduced below eighty (80) percent for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of a Direct Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below eighty (80) percent as a result of a Direct Non Natural Force Majeure of any kind, the Seller may elect in a written notice to the Procurer, to deem the Availability of the Power Station to be eighty (80) percent from the end of such period, regardless of its actual Available Capacity. In such a case, the Procurer shall be liable to make payment to the Seller of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Direct Non Natural Force Majeure in the form of an increase in Capacity Charge. Provided such Capacity Charge increase shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity Charges in a situation where the Direct Non Natural Force Majeure had not occurred.

(f) For so long as the Seller is claiming relief due to any Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer) under this Agreement, the Procurer may from time to time on one (1) days notice inspect the Project and the Seller shall provide Procurer's personnel with access to the Project to carry out such inspections, subject to the Procurer's personnel complying with all reasonable safety precautions and standards. Provided further the Procurer shall be entitled at all time to request Repeat

Performance Test, as per Article 8.1 of the Unit(s) Commissioned earlier and now affected by Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), where such Testing is possible to be undertaken in spite of the Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), and the Independent Engineer accepts and issues a Final Test Certificate certifying such Unit(s) being capable of delivering the Contracted Capacity and being Available, had there been no such Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer). In case, the Available Capacity as established by the said Repeat Performance Test(provided that for such Repeat Performance Test, the limitation imposed by Article 8.1.1 shall not apply) and Final Test Certificate issued by the Independent Engineer is less than the Available Capacity corresponding to which the Seller would have been paid Capacity Charges equal to Debt Service in case of Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), then the Procurer shall make pro rata payment of Debt Service but only with respect to such reduced Availability. For the avoidance of doubt, if Debt Service would have been payable at an Availability of 60% and pursuant to a Repeat Performance Test it is established that the Availability would have been 40% then Procurer shall make payment equal to Debt Service multiplied by 40% and divided by 60%. Similarly, the payments in case of Direct Non Natural Force Majeure Event (and Natural Force Majeure Event affecting the Procurer) shall also be adjusted pro rata for reduction in Available Capacity.

(g) In case of a Natural Force Majeure Event affecting the Procurer which adversely affects the performance obligations of the Seller under this Agreement, the provisions of sub-proviso (d) and (f) shall apply.

(h) *For the avoidance of doubt, it is specified that the charges payable under this Article 12 shall be paid by the Procurer.*

The learned Senior counsel has taken this Court through the impugned order especially para 68 to 71, 75, 76, 78 and 81 and has contended that the provisions of *Force Majeure* had come into play and were in effect from 24.03.2020 till 25.05.2020 and contended vehemently that the appellants cannot be forced to pay for capacity charges for the said period as it had not taken the said electricity at all.

The learned Senior counsel relying upon Clause 12.2 as enumerated above has contended that the word used in the said clause is **“an affected party means the procurer or the seller whose performance has been affected by an event of *Force Majeure*”** and enlarging the scope of the said definition, the counsel submits that they are squarely covered and would fall within the meaning of procurer for the reason that it is PSPCL which is the affected party within the meaning of the word 'the Procurer'. He has further argued that the definition of *Force Majeure* as enshrined in Clause 12.3 clearly states and safeguards the interest of the 'affected party'. He further submits that the doctrine of *Force Majeure* would come into play by the co-joint reading of the above two clauses to address his argument that the appellants were justified in the issuance of the notice impugned in the writ petition and hence the appellants are not liable to make any payments for the capacity charges.

Learned Senior counsel for the appellant taking his argument further has tried to distinguish Clause 12.4 which deals with the exclusions from *Force Majeure*. He submits that the circumstances within which the

reasonable control of the parties could not be exercised would fall within the domain of the *Force Majeure*. None of the exclusions as detailed in Clause 12.4 ever took place and therefore, the appellants are protected by the provisions of *Force Majeure*. He submits that the notices dated 29.03.2020 (TSPL) and 29.03.2020 (NPL) respectively were issued to the respondents in compliance of Clause 12.5 and the same was issued within seven days of the lock down imposed on 24.03.2020. However, while referring to Clause 12.7 which details the available relief for a *Force Majeure* event, learned Senior counsel for the appellant has submitted that no tariff was payable by the Procurer for the part of contracted capacity affected by the natural *Force Majeure* event affecting the seller for the duration of such natural *Force Majeure* event. He further contends that the appellants never took the delivery of the power from 24.03.2020 till 25.05.2020 and hence was under no obligation to pay for the same. He further relies upon an office order under the Epidemic Disease Act, passed by the Government of Punjab to emphasize on the restrictions laid for the prevention and containment of the spread of COVID-19. Learned Senior counsel for the appellant has submitted that on the strength of the office order dated 22.03.2020, respondents No.1 and 2 were issued the notice dated 29.03.2020.

The crux of the arguments raised by learned Senior counsel for the appellant is that Article 12 of the PPA protects the interest of PSPCL and since it had no demand of electricity due to the lock down and the *Force Majeure* being applicable on the consumer, PSPCL cannot be directed to burden itself with such payments, which, in turn, would burden the State exchequer. The appellant was well within its rights to issue the

notice in terms of Clause 12.3 and more so the learned Single Judge has failed to consider the matter in its correct perspective inasmuch as the fact that the *Force Majeure* clause applies to the benefit of both the parties. However, the way Single Judge has interpreted the said clause, the same is nugatory and redundant qua the appellant. Mr. Ramachandran, learned Senior counsel has further submitted that the inability to make the payment is only a consequence of the *Force Majeure* event and is not the *Force Majeure* event itself but the payments had to be seen in the context as to whether the appellant was in a position to procure the power especially in the light of the notification No. OM No.F.18/4/2020-PPD dated 19.02.2020 issued by the Government of India clarifying “*disruption due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause.*” A similar OM has also been issued by the Ministry of New and Renewable Energy(MNRE) on 20.03.2020.

Learned Senior counsel for the appellant has relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of ***“Evergreen Land Mark Pvt.Limited vs. John Tinson and Company Pvt. Limited”***, 2022 (7) SCC 757 to submit that *Force Majeure* will be applicable. The relevant extract of the said judgment is as under:

11.*It is the case on behalf of the appellant that for a substantial period there was a total closure due to lockdown and for the remaining period the appellant was allowed with 50% capacity and therefore, the force majeure principle contained in Clause 29 shall be applicable. When the same was submitted before the Arbitral Tribunal, no opinion, even a prima facie opinion on the aforesaid aspect was given by the Arbitral Tribunal. In para 39, it is observed that “it*

would not be fair at this stage of the proceedings, where evidence is yet to be adduced by the parties in support of their rival contentions on the issues that arise, to record any definitive opinion on the import and effect of the force majeure clause (Clause 29) contained in the lease deed". Therefore, applicability of the force majeure principle contained in Clause 29 is yet to be considered by the Arbitral Tribunal at the time of final adjudication.

12.*Hence, the liability to pay the rentals for the period during lockdown is yet to be adjudicated upon and considered by the Tribunal. Therefore, no order could have been passed by the Tribunal by way of interim measure on the applications filed under Section 17 of the Arbitration Act in a case where there is a serious dispute with respect to the liability of the rental amounts to be paid, which is yet to be adjudicated upon and/or considered by the Arbitral Tribunal. Thus, no such order for deposit by way of an interim measure on applications under Section 17 of the Arbitration Act could have been passed by the Tribunal.*

13.*However, at the same time, the aforesaid can be considered only for the period of complete closure due to lockdown. As per the available record, there was complete closure for the period between 22-3-2020 to 9-9-2020; for the period between 19-4-2021 to 28-6-2021 and for the period between 11-1-2022 to 27-1-2022 and for the remaining period the appellant was allowed to run the Restro/Bar with 50% capacity. The appellant will therefore have to deposit the entire rental amount except the period for which there was complete closure due to lockdown. As the applicability of force majeure principle (Clause 29) is yet to be considered at least, for the period during the complete*

closure, it would not be justified to direct the appellant to deposit the rental amount for the said period of complete closure by way of an interim measure, pending final adjudication.

14. *In view of the above and for the reasons stated above, the present appeal succeeds in part. The order passed by the Arbitral Tribunal passed in applications under Section 17 of the Arbitration Act, directing the appellant to deposit the entire rental amount for the period between March 2020 to December 2021, confirmed by the High Court by the impugned judgment and order [Evergreen Land Mark (P) Ltd. v. John Tinson & Co. (P) Ltd., 2022 SCC OnLine Del 442], is modified and it is directed that the appellant to deposit the entire rental amount for the period other than the period during which there was complete lockdown i.e. 22-3-2020 to 9-9-2020 and for the period between 19-4-2021 to 28-6-2021.*

He further relies upon the judgment of Hon'ble Apex Court in ***“State of Andhra Pradesh vs. National Thermal Power Corporation Limited,”*** (2002) 5 SCC 203 to submit and clarify as to what is the electricity and the relevant extract from the said judgment are as under:

20. *Before we deal with the constitutional aspects, let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court in CST v. M.P. Electricity Board, Jabalpur [(1969) 1 SCC 200 : (1969) 2 SCR 939] that electricity is goods. The definition of goods as given in Article 366(12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which “goods” means all kinds of movable property. The term “movable property” when considered with reference to “goods” as defined for the*

purpose of sales tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book, it cannot cease to be movable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly, is punishable under Section 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other movable object, this Court held that there was no difficulty in holding that electric energy was intended to be covered by the definition of “goods”. However, A.N. Grover, J. speaking for the three-Judge Bench of this Court went on to observe (at SCC p. 205, para 9) that electric energy “can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property”. In this observation we agree with Grover, J. on all other characteristics of electric energy except that it can be “stored” and to the extent that electric energy can be “stored”, the observation must be held to be erroneous or by oversight. Science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.

21. *Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar's Law Lexicon (2nd Edn., 2000)—*

“Electricity in physics is ‘the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves’. Its true nature is not understood. Imperial Dictionary (quoted in Spensley v. Lancashire Ins. Co. [54 Wis 433, 442, 11 NW 894] where the court, quoting from the same authority, said, ‘we are totally ignorant of the nature of this cause

whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another’.”

This characteristic quality of electric energy was judicially noticed in Indian Aluminium Co. v. State of Kerala [(1996) 7 SCC 637] . Vide para 25 this Court has noted : (SCC p. 650)

“Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the substation installed at the units of the consumers through electrical high-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place ... as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place.”

These properties of electricity as goods are of immense relevance as we would state hereafter.

23. *With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is*

goods, it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92-A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if electricity was not includible in the meaning of the term “goods”. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise, as held by the Constitution Bench in Jiyajeerao Cotton Mills Ltd. v. State of M.P. [AIR 1963 SC 414 : 1962 Supp (1) SCR 282] A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance, Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, electricity being goods, shall also be subject to provisions of Entry 92-A of List I. This, in our opinion, is the best way of reading the two entries. In C.P. Motor Spirit Act, [Central Provinces and Berar Sales of Motor Spirit and Lubricants

Taxation Act, 1938, Re, AIR 1939 FC 1] it was held that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible, the overriding power of the Union Legislature operates and prevails. Gwyer, C.J. observed : (AIR p. 7)

“A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.”

And again he said : (AIR p. 8)

“[A]n endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail:”

In Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B. [AIR 1962 SC 1044 : 1962 Supp (3) SCR 1] the Constitution Bench has held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list.

Mr.Ramachandran, learned Senior counsel has also relied upon

the judgment passed by the Hon'ble Apex Court in the case of “**Energy**

Watchdog vs. Central Electricity Regulatory Commission and others,”

(2017) 14 SCC 80, to assert that *Force Majeure* is governed by the provisions of the Contract Act, 1872. The relevant extract of the same is as under:

34. “*Force majeure*” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs *dehors* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:

“32. 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.

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

35. *Prior to the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24], the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor v. Caldwell [Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24] in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.*

36. *The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co. [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44] The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract*

would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place *dehors* the contract, it will be governed by Section 56.

37. In *Alopi Parshad & Sons Ltd. v. Union of India* [*Alopi Parshad & Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588], this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [*Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 522], this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.* [*Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310 : AIR 1954 SC 44] Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its

performance has become onerous on account of an unforeseen turn of events.

39. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH [Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)], despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

On the strength of the above, learned Senior counsel for the appellant summarize the arguments by reiterating that the appellant being the procurer falls within the definition of affected party and the lock-down imposed falls within the ambit of “event of *force majeure*” and therefore the notice invoking the *force majeure* clause were absolutely legal and valid. The learned Senior counsel, concluded by praying for setting aside the order dated 04.07.2022 passed by the learned Single Judge and consequently dismissing the writ petitions while upholding the impugned notices issued to the respondent-electricity generating companies, respectively and as a

consequence absolving the appellant from payment of the capacity charges which are being claimed by the respondents.

Per contra, Mr.Chetan Mittal, learned Senior Counsel assisted by Mr.Kunal Mulwani, Advocate and other advocates, appearing for Talwandi Sabo Power Limited-respondent No.1 in LPA-767-2022 has opened his arguments by referring to Sections 32 and 33 of the Electricity Act, 2003, the same reads as under:

“Section 32. (Functions of State Load Despatch Centres): -

(1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

(b) monitor grid operations;

(c) keep accounts of the quantity of electricity transmitted through the State grid;

(d) exercise supervision and control over the intra-State transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.

(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission.

Section 33. (Compliance of directions):

(1) The State Load Despatch Centre in a State may give such

directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the State Load Despatch Centre under sub-section (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the directions of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section(1), he shall be liable to a penalty not exceeding rupees five lacs.”

He has submitted that a perusal of Section 32(2)(e) imposes a responsibility on the State Load Despatch Centre (SLDC) for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operations of the State grid in accordance with the Grid Standards and the State Grid Code.

He has further submitted that by virtue of Section 33, the SLDC is empowered to give direction and exercise the supervision and control as may be required *for ensuring the integrated operations and for achieving*

the maximum economy and efficiency in the operations of power system in that State (emphasis laid). He further submits that the role of the transmission licensee is to build, maintain and operate an efficient, coordinated and economical transmission system and comply with the directives issued by the SLDC to provide non-discriminatory and open access.

Learned Senior counsel for the respondent relies upon Clause 2.3.4(d) which deals with the role of distribution licensee to submit that the respondent was under obligation to inform the SLDC about the details of 15 minutes'/hourly/daily/weekly/monthly demand and energy requirement and also contracts entered into for importing power from different sources and coordinate with SLDC in real time operation. It shall follow the directions of SLDC in scheduling its exchange of power and help in controlling the operation of the system by adjustment of drawl from the system. They shall take special care for drawl/injection of reactive power from/to the State Power System.

He further relies upon Clause 2.3.5, which deals with the role of generating companies to submit that the generating companies connected to and/or using the STS for evacuating their generation, shall inform the STU and SLDC about the contracts entered into with different parties for exporting power along with its schedule from individual generating station under the company. It shall follow the relevant provisions of the SGC and assist the SLDC in the real time operation and control of the system and scheduling of generation.

The next argument raised by the learned Senior counsel is with regard to the clause dealing with monthly tariff payment. He submits that

Power Purchase Agreement prescribed a two-fold tariff regime i.e. Capacity Charges paid to the generating company on the basis of Declared Availability of the generating company irrespective of whether PSPCL and/or SLDC have scheduled electricity or not. Energy Charges are paid to the generating companies on the basis of Scheduled Generation (the actual electricity supplied).

He refers to Clause 1.2 of the PPA which demonstrates and enshrines the method of calculation of the monthly capacity charges payment and the monthly energy charges for scheduled energy and further relies upon Clause 11.3.10 to demonstrate the obligation upon the respondents being a State Generating Station (SGS) to make an advance declaration of ex-power plant MW and Mwh capabilities foreseen for the next day, i.e. from 0000 hrs to 2400 hrs. During fuel shortage condition, in case of thermal stations, they may specify minimum MW, maximum MW, Mwh capability and declaration of fuel shortage. The generating stations shall also declare the possible ramping up/ramping down in a block. In case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on APM (Administered Pricing Mechanism) gas, RLNG (Regasified Liquefied Natural Gas) and liquid fuel separately, and these shall be scheduled separately. He further submits that the SGS is always under obligation and required to demonstrate the declared capability of its generating stations as and when asked by SLDC.

Mr.Mittal, learned Senior counsel has also submitted that it is the SLDC which is responsible for collection, examination and compilation of the generation schedule for each SGS and the entire day is divided into

96 time blocks of 15 minutes interval meaning thereby that once an SGS has declared its capacity, the SLDC can call upon the supply at a very short notice. He relies upon Clause 11.4.1 and 11.4.2 to substantiate his argument.

The learned Senior Counsel has also submitted that by virtue of Article 4 of the PPA especially 4.2(c) it was procurer's obligation who shall be responsible for payment of transmission charges and RLDC and SLDC charges. The relevant clauses are reproduced as under:

“Article 4.2 Procurer's obligation:

Subject to the terms and conditions of this Agreement, the Procurer:

(a) shall be responsible for procuring the Interconnection and Transmission Facilities to enable the Power Station to be connected to the Grid System not later than the Scheduled Connection Date;

(b) shall ensure that the Seller is provided an electrical connection for reasonable construction, commissioning and start up power at the Project as reasonably requisitioned by the Seller by written intimation to the Procurer, on the then prevalent terms and conditions as applicable to such consumers;

(c) shall be responsible for payment of the Transmission Charges and RLDC and SLDC Charges.

(d) shall make all reasonable arrangements for the evacuation of the Infirm power from the Power Station: subject to the availability of transmission lines and

(e) fulfilling obligations undertaken by them under this Agreement.”

Learned senior counsel for the respondent has further submitted that PSPCL has been taking self contradictory stands inasmuch as the fact that the letter dated 06.04.2020 (Annexure P-8) issued by the Government of India, Ministry of Power, addressed to all the State Governments clearly

clarified that the obligation to pay for the power within 45 days of the presentation of bill (or the period given in the PPA) shall remain the same.

It was further clarified as below:

“(a) The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.

(b) Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020) and after 30.06.2020 the delayed payment surcharge shall be payable at rates given in the PPA/regulations.

(c) Obligation to pay for capacity charges as per the PPA shall continue, as does the obligation to pay for transmission charges.”

In the light of the above, Mr.Mittal, learned senior counsel has taken this Court to Article 12 of the PPA which deals with the issue of *Force Majeure* (the relevant extracts of the said Clause has been already reproduced hereinabove), to contend that in the light of the clear directions by the Government of India, the supply of electricity was not included in the definition of the event of *Force Majeure*. On the contrary, in the light of the said calamity, the electricity department was advised to perform as a pillar to the economy and sustain in the fight against the pandemic. He submits that in case the electricity generating companies or for that matter had there been no electricity supply in the State, the same would have affected the hospitals and all the essential services which were provided by the Centre and State Governments to fight the lock-down.

Mr.Mittal, learned senior counsel has submitted that the PSPCL

has already recovered the electricity charges from the consumers but is not discharging its liability towards the respondents. He further submits that vide order dated 17.07.2020 by the Punjab State Electricity Regulatory Commission, the PSPCL was directed to only defer the payment of the pending amounts from the consumers qua the fixed charges and the same was allowed to be recovered in six equal monthly installments without any late payment surcharge. Therefore, PSPCL was never an affected party by any event of *Force Majeure*.

To summarize the arguments, learned Senior counsel for the respondents while detailing out the tenor of the PPA read with the Code of 2013 has submitted that due to the huge investment and fixed cost involved in this project, the daily availability of power has to be uploaded with the SLDC and this process is applicable upon all the power generating units in the State. Subsequent thereto, the SLDC allocates the further transmission as per its requirement and demand. The dispute in the writ petition was that SLDC without any notice recorded the availability of power qua the respondent as zero only with an oblique motive that the responsibility and obligation of PSPCL to discharge an amount towards the fixed costs and minimum purchase consumption could be avoided. However, now SLDC has already implemented the order passed in the writ petition and therefore the appellant are trying to create a new case by saying that PSPCL will not discharge its obligation on the premises of invocation of *Force Majeure* Clause. Mr.Mittal has further tried to demolish the case of the appellant by relying upon the information received under RTI to demonstrate that PSPCL in identical set of circumstances has already made the demand to NTPC and therefore it cannot absorb itself and discriminate qua the answering

respondents. Mr.Mittal has further contended that by virtue of the orders passed under the Disaster Management Act by the Government of India and the orders passed by the State Governments, they were directed to keep the generation of electricity available and hence the *Force Majeure* Clause will not come into play for the period of 24.03.2020 to 30.05.2020 for which the PSPCL is bound to make the payments.

Mr.Mittal has relied upon the order dated 20.01.2022 passed by Central Electricity Regulatory Commission, New Delhi in petition No.594/MP/2020 only for the purpose of a guiding principle of law, wherein identical issue was decided though, at the outset, Mr.Mittal has fairly conceded that this has no binding force. The relevant extracts are as under:

“58. In view of the above discussions, the submission of the Respondent that Covid19 pandemic led lockdown and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment of capacity charges under the PPA deserves to be rejected and accordingly, the Respondent is directed to make payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 within 60 days from the date of this order.

61. In order dated 03.04.2020, the Commission has decided in Petition No. 6/SM/2020 (quoted in earlier part of this order) that “the generating companies whose tariff has been determined under Section 63 of the Act by this Commission, relief on the Late Payment Surcharge for payment which become delayed beyond 45 days (from the date of presentation of the bill) during the period from 24.03.2020 to 30.06.2020 may be claimed in terms of the force majeure provisions of the respective power purchase agreements (PPAs)”. There is no denying the fact that COVID-19 pandemic has adversely

affected the liquidity position of all stakeholders of power sector, including the Respondent. Therefore, we feel it appropriate that in the given facts and circumstances, it is a fit case for exercise of our regulatory power, and accordingly, we direct that delayed payment of the bills which falls between 24.03.2020 to 30.06.2020, shall be payable at the reduced rate of 12% per annum that translates into 1% per month. The same shall be paid within 60 days of this order.

62. *The summary of our decision is as under:*

- a) The outbreak of the COVID-19 pandemic did not dislodge the obligation of the Respondent. Since the Petitioner has declared its capacity on day ahead basis, the Respondent is under obligation to pay the capacity charges, along with late payment surcharge.*
- b) The delayed payment of the bills which falls between 24.03.2020 to 30.06.2020, shall be payable at the reduced rate of 12% per annum that translates into 1% per month.*
- c) Payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 along with late payment surcharge shall be payable within 60 days from the date of this order.”*

He further submits that even the Madhya Pradesh Electricity Regulatory Commission, Bhopal, vide order dated 18.11.2021 passed in petition No.10 of 2021 has specifically dealt with the identical proposition where a PPA was in force and held that a lock down declared by the Government of India shall not fall under the Natural *Force Majeure* Event.

Mr.Mittal has also referred to the judgment passed in “***Energy Watchdog vs. Central Electricity Regulatory Commission and others,***” (2017) 14 SCC 80, to assert that *Force Majeure* is governed by the provisions of the Contract Act, 1872. The relevant extract of the same is as

under:

“34. “Force Majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Sections 32 and 56 are set out herein:

*“32. **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.

*56. **Agreement to do impossible act.**—An agreement to do an act impossible in itself is void.*

***Contract to do act afterwards becoming impossible or unlawful.**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

***Compensation for loss through non-performance of act known to be impossible or unlawful.**—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.*

*35. Prior to the decision in **Taylor v. Caldwell** [**Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER***

*Rep 24], the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the Common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in **Taylor v. Caldwell** [**Taylor v. Caldwell, (1863) 3 B&S 826 : 122 ER 309 : (1861-73) All ER Rep 24]** in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.*

*36. The law in India has been laid down in the seminal decision of **Satyabrata Ghose v. Mugneeram Bangur & Co.** [**Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310: AIR 1954 SC 44]** The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration*

is to take place dehors the contract, it will be governed by Section 56.

37. In *Alopi Parshad & Sons Ltd. v. Union of India* [*Alopi Parshad & Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588], this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [*Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 522], this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of ***Satyabrata Ghose v. Mugneeram Bangur & Co.* [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44]** Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

39. *It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment, namely, **Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH** [**Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH**, 1962 AC 93 : (1961) 2 WLR 633 : (1961) 2 All ER 179 (HL)], despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.*

43. *Coming to the PPAs themselves, we find that the force majeure clause contained in all of them is in a standard form and is as follows:*

“12.3. Force Majeure

“Force Majeure” means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under this agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with

prudent utility practices:

(i) *Natural force majeure events:*

Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

(ii) *Non-natural force majeure events:*

1. *Direct non-natural force majeure events*

(a) *Nationalisation or compulsory acquisition by any Indian government instrumentality or any material assets or rights of the seller or the seller's contractors; or*

(b) *The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any consent required by the seller or any of the seller's contractors to perform their obligations under the project documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the project, provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or*

(c) *Any other unlawful, unreasonable or discriminatory action on the part of an Indian government instrumentality which is directed against the project, provided that an*

appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. *Indirect non-natural force majeure events*

(a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(b) Radioactive contamination or ionising radiation originating from a source in India or resulting from another indirect non-natural force majeure event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the affected party or those employed or engaged by the affected party; or

(c) Industry-wide strikes and labour disturbances having a nationwide impact in India.

12.7. Available relief for a force majeure event

Subject to this Article 12:

(a) No party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a force majeure event;

(b) Every party shall be entitled to claim relief in relation to a force majeure event in regard to its obligations, including but not limited to those specified under Article 4.5.

(c) For the avoidance of doubt, it is clarified that no tariff shall be paid by the procurers for the part of

contracted capacity affected by a natural force majeure event affecting the seller, for the duration of such natural force majeure event. For the balance part of the contracted capacity, the procurer shall pay the tariff to the seller, provided during such period of natural force majeure event, the balance part of the power station is declared to be available for scheduling and dispatch as per ABT for supply of power by the seller to the procurers.

(d) If the average availability of the power station is reduced below sixty (60) per cent for over two (2) consecutive months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of an indirect non-natural force majeure, then, with effect from the end of that period and for so long as the daily average availability of the power station continues to be reduced below sixty (60) per cent as a result of an indirect non-natural force majeure of any kind, the procurers shall make payments for debt service, relatable to such unit, which are due under the financing agreements, subject to a maximum of capacity charges based on normative availability, and these amounts shall be paid from the date, being the later of

(a) the date of cessation of such indirect non-natural force majeure event, and

(b) the completion of sixty (60) days from the receipt of the financing agreements by the procurer(s) from the seller, in the form of an increase in capacity charge.

Provided such capacity charge increase shall be determined by CERC on the basis of putting the seller in the same economic position as the seller would have been in case the seller had been paid debt service in a situation when the indirect non-natural force majeure event had not

occurred:

Provided that the procurers will have the above obligation to make payment for the debt service only

(a) after the unit(s) affected by such indirect non-natural force majeure event has been commissioned, and (b) only if in the absence of such indirect non-natural force majeure event, the availability of such commissioned unit(s) would have resulted in capacity charges equal to debt services.

(e) If the average availability of the power station is reduced below eighty (80) per cent for over two (2) consecutive months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of a direct non-natural force majeure, then, with effect from the end of that period and for so long as the daily average availability of the power station continues to be reduced below eighty (80) per cent as a result of a direct non-natural force majeure of any kind, the seller may elect in a written notice to the procurers, to deem the availability of the power station to be eighty (80) per cent from the end of such period, regardless of its actual available capacity. In such a case, the procurers shall be liable to make payment to the seller of capacity charges calculated on such deemed normative availability, after the cessation of the effects of non-natural direct force majeure in the form of an increase in capacity charge:

Provided such capacity charge increase shall be determined by CERC on the basis of putting the seller in the same economic position as the seller would have been in case the seller had been paid capacity charges in a situation where the direct non-natural force majeure had not occurred.

(f) For so long as the seller is claiming relief due to

any non-natural force majeure event [or natural force majeure event affecting the procurer(s)] under this agreement, the procurers may from time to time on one (1) day's notice inspect the Project and the seller shall provide procurer's personnel with access to the Project to carry out such inspections, subject to the procurer's personnel complying with all reasonable safety precautions and standards. Provided further the procurers shall be entitled at all times to request repeat performance test, as per Article 8.1, of the unit(s) commissioned earlier and now affected by direct or indirect non-natural force majeure event [or natural force majeure event affecting the procurer(s)], where such testing is possible to be undertaken in spite of the direct or indirect non-natural force majeure event [or natural force majeure event affecting the procurer(s)], and the independent engineer accepts and issues a final test certificate certifying such unit(s) being capable of delivering the contracted capacity and being available, had there been no such direct or indirect non-natural force majeure event [or natural force majeure event affecting the procurer(s)]. In case, the available capacity as established by the said repeat performance test (provided that such repeat performance Test, the limitation imposed by Article 8.1.1 shall not apply) and final test certificate issued by the independent engineer is less than the available capacity corresponding to which the seller would have been paid capacity charges equal to debt service in case of indirect non-natural force majeure event [or natural force majeure event affecting the procurer(s)], then the procurers shall make pro rata payment of debt service but only with respect to such reduced availability. For the avoidance of doubt, if debt service would have been payable at an availability of 60%

and pursuant to a repeat performance test it is established that the availability would have been 40%, then procurers shall make payment equal to debt service multiplied by 40% and divided by 60%. Similarly, the payments in case of direct non-natural force majeure event [and natural force majeure event affecting the procurer(s)] shall also be adjusted pro rata for reduction in available capacity.

(g) In case of a natural force majeure event affecting the procurer(s) which adversely affects the performance obligations of the seller under this agreement, the provisions of sub-provisos (d) and (f) shall apply.

(h) For the avoidance of doubt, it is specified that the charges payable under this Article 12 shall be paid by the procurers in proportion to their then existing allocated contracted capacity.

44. *It has strongly been contended by the counsel for the respondents that, first and foremost, the force majeure clause is not exhaustive, but is only inclusive. Further, it may wholly or partly prevent an affected party from performance of obligations under the agreement. Rise in the price of Indonesian coal, according to them, was unforeseen inasmuch as the PPAs have been entered into sometime in 2006 to 2008, and the rise in price took place only in 2010 and 2011. Such rise in price is also not within their control at all and, therefore, Clause 12.3 read with Clause 12.7 would apply. They further argued that the force majeure clause in the present case went further and stated that so long as performance of their obligation was “hindered” due to a force majeure event, they can claim compensatory tariff.*

45. *First and foremost, the respondents are correct in stating that the force majeure clause does not exhaust the possibility of unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered by an unforeseen*

*event, the clause applies. Chitty on Contracts, 31st Edn. at Para 14-151 cites a number of judgments for the proposition that the expression “hindered” must be construed with regard to words which precede and follow it, and also with regard to the nature and general terms of the contract. Given the fact that the PPA must be read as a whole, and that Clauses 12.3 and 12.7(a) are a part of the same scheme of force majeure under the contract, it is clear that the expression “hindered” in Clause 12.7(a) really goes with the expression “partly prevents” in Clause 12.3. Force majeure clauses are to be narrowly construed, and obviously the expression “prevents” in Clause 12.3 is spoken of also in Clause 12.7(a). When “prevent” is preceded by the expression “wholly or partly”, it is reasonable to assume that the expression “prevented” in Clause 12.7(a) goes with the expression “wholly” in Clause 12.3 and the expression “hindered” in Clause 12.7(a) goes with the expression “partly”. This being so, it is clear that there must be something which partly prevents the performance of the obligation under the agreement. Also, Treitel on Frustration and Force Majeure, 3rd Edn., in Para 15-158 cites the English judgment of **Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)]** for the proposition that a mere rise in price rendering the contract more expensive to perform will not constitute “hindrance”. This is echoed in the celebrated judgment of **Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd. [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)]** in which it was held that the expression “hinders the delivery” in a contract would only be attracted if there was not merely a question of rise in price, but a serious hindrance in performance of the contract as a whole. At the beginning of the First World War, British ships were no longer available, and although foreign shipping could be obtained at an increased*

*freight, such foreign ships were liable to be captured by the enemy and destroyed through mines or submarines, and could be detained by British or allied warships. In the circumstances, the **Tennants (Lancashire) Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)] judgment was applied, and the Court of Appeals held: (Peter Dixon case [Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., (1919) 2 KB 778 (CA)] , KB p. 784)***

*“... Under the circumstances, can it be said that the sellers were not “hindered or prevented” within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in **Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd. [Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd., 1917 AC 495 (HL)]** is applicable to the present case: (AC p. 516)*

‘... Where I think, with deference to the learned Judges, the majority of the court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more.’

That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade were hindered or prevented from carrying out those contracts.”

46. *As a matter of fact, Clause 12.4 of the PPA, which deals with force majeure exclusions, reads as follows:*

“12.4. Force Majeure exclusions

Force Majeure shall not include

- (i) any event or circumstance which is within the reasonable control of the parties, and*
- (ii) the following conditions, except to the extent that they are consequences of an event of force majeure:*

- (a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, fuel or consumables for the Project;*

- (b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;*

- (c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*

- (d) Strikes or labour disturbance at the facilities of the affected party;*

- (e) Insufficiency of finances or funds or the Agreement becoming onerous to perform; and*

- (f) Non-performance caused by, or connected with, the affected party's:*

- (i) Negligent or intentional acts, errors or omissions;*

- (ii) Failure to comply with an Indian*

law; or

(iii) Breach of, or default under this Agreement or any project documents.”

This clause makes it clear that changes in the cost of fuel, or the agreement becoming onerous to perform, are not treated as force majeure events under the PPA itself.

*47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in **Satyabrata Ghose case [Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310 : AIR 1954 SC 44]**, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.”*

In addition to all the above, Mr.Mittal has submitted that the present appeal by PSPCL is *per se* not maintainable for the reason that the action taken by SLDC in not declaring the available capacity on the portal and consequently the notice issued by the PSPCL denying the payment in lieu of the capacity charges were challenged. He submits that PSPCL has

no independent cause and as of today, SLDC has declared the available capacity on its portal and hence PSPCL is obligated to discharge and release the payments. He has emphasized heavily on the fact that there is no challenge to the impugned order by SLDC and in the absence of the same, the PSPCL has no legs to stand. Hence the present appeal deserves to be dismissed with exemplary cost as the action of the appellant authority smells mala fide and against the mandate of law. He submits that the respondents have suffered immense losses due to this uncalled for litigation as there was no ambiguity in the obligation of the parties and everything was absolutely crystal clear as enshrined in the terms and conditions of the PPA.

Mr.Akshay Bhan, Senior Advocate assisted by Mr. A.S. Talwar, Advocate appearing for Nabha Power Limited-Respondent No. 1 in LPA No. 770 of 2022 and at the outset raised objection with regard to the fact that there is no challenge to the order dated 04.07.2022 by SLDC and in the absence of any challenge by SLDC, the present appellant cannot seek to absolve itself from its obligation to make the payment once the capacity is duly recorded on the portal.

Mr.Bhan, learned Senior counsel has opened his arguments by referring to the definitions under the PPA dated 18.01.2010 and has drawn the distinction between the availability account for which capacity charges are to be paid by PSPCL and has further demonstrated, that the respondent was obligated to disclose the quantity of availability on daily basis to SLDC. Learned Senior counsel has further contended that as per the PPA 100% generation done by the respondent has to be kept ready and available for the appellant. Even a situation when the appellant does not raise a

demand and the respondent wishes to sell the energy to someone else, in that eventuality also the appellants have imposed two conditions (i) the appellant will be having share in the profits from the sale of energy to any third party and (ii) the appellant at a short notice of two hours can recall the said requirement. For example, at the ratio of 100, the respondent has declared availability at 50 units on the portal of SLDC and the said energy is not distributed and further if the respondent sells the remaining 50 units to any third party at the price of Rs.1/-, (hypothetically), the appellant will have a share in Rs.50/- and at the same time, the respondents are duty bound and obligated to make available the 50 units at a short notice of 2 hrs. This being the position and as submitted by Mr.Chetan Mittal, learned Senior counsel for Talwandi Sabo Power Plant, they have contended that once the availability is uploaded on the portal of SLDC, there is no escape for the appellant from payment of the capacity charges. The learned Senior counsel has further dwelled upon the argument that this capacity charges are sacrosanct and are binding on the respondent for 25 years and therefore irrespective of the fact whether the respondents make profit or loss, they have to generate electricity for 25 years and consequently the obligation of PSPCL, though optional to buy energy too, it is binding upon them to pay the charges.

The learned Senior counsel further submits that the PPA is long term PPA for a period of 25 years which is the expected time period to cover up the investments involved and earn profit. He submits that the present PPA was entered into between the parties in January, 2010 for procurement of power on long term basis from coal based Thermal Power Stations to be set up in the State of Punjab. It is submitted by the counsel

for the respondent that the PPA itself duly defines the Allocated Contracted Capacity and the Availability Based Tariff which reads as under:

“Allocated Contracted Capacity means the Contracted Capacity allocated to the Procurer as provided in Schedule 13 hereof, subject to adjustment as per the terms of this Agreement.

Availability Based Tariff or ABT shall mean all the regulations contained in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, as amended or revised from time to time, to the extent applied as per the terms of this Agreement.”

Learned senior counsel further submits that Schedule 13 of the PPA deals with the allocated contracted capacity which has been agreed to be PSEB (as it then was, now known as PSPCL) to the extent of 100%. Meaning thereby the entire electricity generated by the respondent had to be made available only to the appellant and hence the appellant cannot turn around and withdraw from its obligation. He further submits that as per Schedule 11, a chart has been agreed with respect to quoted tariff.

Learned counsel for the respondent has submitted that as per Article 4.2 which deals with the Procurers Obligation, the relevant being 4.2.C duly records that the Procurer shall be responsible for payment of the transmission charges and RLDC and SLDC charges also. He further refers to Clause 4.3 and 4.4 which reads as under:

“4.3 Purchase and sale of Available Capacity and Schedule Energy

4.3.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurer, and the Procurer undertake to pay the Tariff for all of the Available Capacity up to the Contracted Capacity and Scheduled Energy of the Power Station, according to its

then existing Contract Capacity, throughout the terms of this Agreement.

4.3.2 Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity up to the Contracted Capacity of the Power Station to the Procurer pursuant to Dispatch Instructions.

4.4 Right to Available Capacity and Scheduled Energy

4.4.1 Subject to other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurer and the Procurer shall have the exclusive right to purchase the entire Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Available Capacity and/or Scheduled Energy.

4.4.2 Notwithstanding Article 4.4.1, the Seller shall be permitted to sell power, being a part of the Available Capacity of the Power Station to third parties if:

(a) there is a part of Available Capacity which has not been Dispatched by the Procurer.

(b) Not Applicable.

4.4.3 If the Procurer does not avail of power upto the Available Capacity provided by the Seller and the provisions of Article 4.4.2 have been complied with, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Procurer for such un-availed Available Capacity. In such a case, the sale realization in excess of Energy Charges, shall be equally shared by the Seller with the Procurer. In the event, the Seller sells such Available Capacity to the shareholders of the Seller or any direct or indirect affiliate of the Seller/Shareholders of the Seller without obtaining the

prior written consent of the Procurer, the Seller shall be liable to sell such Available Capacity to such entity at tariffs being not less than the Tariff payable by the Procurer. During this period; the Seller will also continue to receive the Capacity Charges from the Procurer. Upon the Procurer not availed of the Available Capacity, as envisaged under this Article, intimating to the Seller of its intention and willingness to avail of the part of the Available Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and said third party, commence supply of such capacity to the Procurer from the later of two (2) hours from receipt of notice in this regard from the Procurer or the time for commencement of supply specified in such notice.

4.4.4 The Seller shall not itself use any of the electricity generated by the Power Station during the term of this Agreement, except for the purpose of meeting the Power Station's auxiliary load requirements, as per the norms laid down by the Appropriate Commission and housing colony for the staff.

4.4.5 The sale under Unscheduled Interchange shall not be considered as sale to third party for the purposes of this Agreement.”

On the strength of the above, it is argued that the once the respondent had declared the available capacity, it was incumbent upon the procurers, to utilize the entire available capacity and schedule energy and it was incumbent upon the procurer to pay the tariff for all of the available capacity upto the contracted capacity and schedule energy. It was one of the condition that the answering respondent could not sell the available capacity to any third party without the instructions of the procurer and hence in the

above backdrop the procurer cannot be permitted to step back from its obligation to pay.

As regards the issue of *force majeure* is concerned, learned Counsel adopts the arguments made by Mr.Mittal, and taking it further that the scope of *force majeure* sought to be enlarged by adding the events due to *force majeure* will though widen the horizon and scope of the term *force majeure* but even then the appellants cannot absolve from their obligation.

In light of the fact that PSPCL itself has collected the fixed charges from the consumers but now acting in a most illegal and mala fide manner, is not making the payment to the respondents. More so, the appellant has not taken the ground that the consumers had not paid the fixed charges. Be that as it may even if that would have been a scenario or a concession extended by the appellant to its consumers, the same cannot hit the rights, duties and obligations agreed upon between the parties under the PPA. The contract and its terms are sacrosanct between the parties hence binding.

It has been further submitted that SLDC transgress its obligation being hand in glove with the appellant and it had no power to show the available capacity as “nil” despite the fact that the available capacity was duly submitted. The only purpose for showing the available capacity as “nil” on portal was to enable the appellant to avoid the payment, which it was legally bound to make. Be that as it may, after the order dated 04.07.2022, SLDC has implemented the said order and hence PSPCL cannot claim any *force majeure*.

On the strength of the above arguments, learned Senior counsel has prayed for dismissal of the appeal with exemplary cost and direction to

the appellants to immediately release its due payments as the respondents are facing acute financial crunch because of this uncalled for litigation.

Having heard learned counsels of the parties, we are of the view that the present appeal deserves to be dismissed for the following reasons:

1. The entire ambit of the argument raised by the appellant is invocation of the *force majeure* clause, which has been very heavily relied upon by the appellant.

The term '*Force Majeure*' has been defined in *Black's Law Dictionary*, as 'an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.' Force Majeure Clause is basically provided for waiver of damages or penalty for non performance of the contractual obligation and consequently non payment or consideration for deduction in payment along with excuse to unable to perform the contract which the defaulting party was bound to perform. It is a clause which caters to remove or reduce liability for unforeseeable and unavoidable circumstances. In the present case, the appellants are claiming themselves to be an affected party by the event of Force Majeure and hence wants to seek non payment of the charges which are due and payable.

However, a perusal of Article 12 of the PPA if read with clarification of the Central Government dated 06.04.2020, goes

a long way to show that the act and conduct of the appellant was not at all bona fide. It was clearly mentioned in the clarification dated 06.04.2020 that there has been some misconception regarding the interpretation of the order dated 24.03.2020 and letters dated 27.03.2020 etc. and it was made clear that the obligation to pay for the power within 45 days of the presentation of bill (or the period given in the PPA) remains the same. It was clearly mentioned that:

“(a) The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.

(b) Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020 and after 30.06.2020 the delayed payment surcharge shall be payable at rates given in the PPA/regulations.

(c) Obligation to pay for capacity charges as per the PPA shall continue, as does the obligation to pay for transmission charges.”

It is pertinent to mention here that the appellant vide its letter 14.04.2020 though acknowledges the letter dated 06.04.2020 issued by Ministry of Power but the appellant has gone ahead to submit that Ministry of Power can neither override the express provisions of PPA and has tried to refer the said letter with regard to Late Payment Surcharge (LPS). The learned Single Judge has rightly noticed that as per Article

7 of the Power Purchase Agreement, parties to the agreement shall comply with the provisions of applicable law, which includes the orders passed by the Ministry of Power in the given context. Inaction on behalf of Punjab State Load Dispatch Centre is in blatant disregard to the order dated 06.04.2020 passed by the Ministry of Power and the aforesaid order has stated in the notice dated 14.04.2020 that the said order relates to stoppage of payment by DISCOMs against scheduled power. However, the order of Ministry of Power dated 06.04.2020 categorically stated that the obligation to pay capacity charges as per power purchase agreement shall continue. Similar contentions were made by other State DISCOMs which have been rejected in the following cases:-

- (i) **Jhabua Power Ltd. Vs. MP Power Management Co. Ltd.**, order dated 18.11.2021 in Petition No.10 of 2021 [MPERC]-No further appeal was filed to APTEL.
- (ii) **GGMR Warora Energy Ltd. Vs. DNH Power Distribution Co. Ltd.**, order dated 20.01.2022 in Petition No.594/MP/2020 [CERC].

It is very strange that on one hand the appellant invoked the *force majeure* clause on the basis of lock-down imposed by the Central Government but conveniently denies the import of instructions issued by Ministry of Power issued vide letter dated 06.04.2020. Therefore the appeal lacks merit and deserves to be dismissed as the force majeure clause could not be invoked by the appellant and more so had it been a reverse

situation that the respondent would have put to notice the appellant or the SLDC that it could not supply the electricity due to non availability of staff and labour occurring out of complete lock down, the things would have been different. The appellant was under obligation to provide electricity in the State and despite the difficult times, the respondent did perform its part of the obligation coupled with the fact that SLDC has accepted the judgment of the Single Bench and has uploaded the available capacity on its portal, the appellant is duty bound to make the payment.

2. The another aspect which needs to be looked into is that as per Schedule 7 of the PPA, the procedure for calculating the payment has been duly enumerated. The respondent was under obligation to disclose the available capacity to the SLDC, which, in turn, had to channelize the transmission. Even regulation 15 of the Central Electricity Regulatory Commission (Terms and conditions of tariff), regulations, 2004, deals with the component of tariff for sale of electricity from Thermal Power Generating Station, shall comprise of two parts namely the recovery of annual capacity (fixed) charges and energy (variable) charges and regulation 27 deals with the methodology. As per regulation 30, the State Load Dispatch Centre had definite obligation at different stages and capacity charges are independent of actual energy consumed by the beneficiary. Pursuant to the order passed by the learned Single Judge, the SLDC has corrected the anomaly and has displayed

the available capacity for payment of capacity charges to the respondent and has chosen not to challenge the order.

In the light of the above also, it is binding on the appellant to make the payment. More so, the capacity charges are unfettered even in the event of invocation of force majeure. The capacity charges cannot be denied as the same are towards the heavy cost incurred by the respondents in setting up the said plants. In fact the appellants have been terming the said contracts/PPA as long term contracts. A perusal of Article 15 which relates to the liability and indemnification categorically holds that the procurer shall indemnify, defend and hold the seller harmless against any and all losses, damages, costs and expenses including legal costs, fines, penalties and interest('Indemnifiable Losses') actually suffered or incurred by the Seller from third party claims arising by reason of (i) a breach by the Procurer of any of its obligations under this Agreement (Provided that this Article 15 shall not apply to such breaches by the Procurer, for which specific remedies have been provided for under this Agreement), except to the extent that any such Indeminifable Losses have arisen due to a negligent act or omission, breach of this Agreement or breach of statutory duty on the part of the Seller, its contractors, servants or agents or (ii) any of the representations or warranties of the Procurer under the Agreement being found to be inaccurate or untrue. Therefore, also the present appeals deserve to be dismissed.

For the reasons stated above, we do not find any merit in these appeals and thus dismiss the same.

However, the interim arrangements granted by this Court, vide order dated 20.09.2022, shall continue for a further period of three weeks from today.

(AUGUSTINE GEORGE MASIH)
JUDGE

(ALOK JAIN)
JUDGE

30.01.2023
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Whether speaking/reasoned : Yes
Whether Reportable : Yes