THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 113 OF 2019
&
IA NO. 485 OF 2019

Dated: 15th October, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S. D. Dubey, Technical Member

In the matter of:-

GRIDCO Limited
Through CMD,
Janpath, Bhubaneswar
Odisha - 751022 **…Appellant**

V E R S U S

1. **NTPC Limited**
Through CMD,
NTPC Bhawan, Core-7,
SCOPE Complex, Lodhi Road,
New Delhi – 110003.

2. **(a) South Bihar Power Distribution Company Limited,**
(b) North Bihar Power Distribution Company Limited
Through CMD,
1st Floor, Vidyut Bhawan,
Bailey Road,
Patna – 800 001

3. Jharkhand Urja Vikas Nigam Limited,
Through CMD,
Engineering Bhawan,
Heavy Engineering Corporation,
Dhurwa,
Ranchi – 834004

4. West Bengal State Electricity Distribution Company Limited,
Through CMD,
Vidyut Bhawan,
Block DJ, Sector-II, Salt Lake City,
Kolkata – 700091

5. Power Department,
Through The Secretary,
Govt. of Sikkim,
Kazi Road, Gangtok,
Sikkim- 737101.

6. Central Electricity Regulatory Commission,
Through the Secretary,
Chanderlok Building,
Janpath, New Delhi – 110001 **….Respondents**

Counsel for the Appellant(s) : Mr. R. K. Mehta
Ms. Himanshi Andley

Counsel for the Respondent(s) : Mr. M.G.Ramachandran, Sr.Adv.
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Tanya Sareen for R-1

Ms. Anusha Upadhyay

Mr. Nishant Kumar for R-2

Mr. Aabhas Parimal

Mr. Himanshu Shekar
Mr. Jamnesh Kumar for R-3

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This Appeal is filed by the Appellant – GRIDCO Limited (hereinafter referred to as **"GRIDCO"**) challenging the legality of the Order dated 18.03.2019 passed by the Central Electricity Regulatory Commission (hereinafter referred to as **"CERC/Central Commission"**) in Petition No. 130/GT/2014 directing GRIDCO to refund an amount of Rs. 359.69 Crore to NTPC within 7 days, which was adjusted by GRIDCO. According to the Appellant, the said amount was adjusted towards payment made by GRIDCO to NTPC for the power injected by Barh-II Unit-IV from 15.11.2014 to 07.03.2016 and billed by NTPC on the Provisional Tariff Rate, and the same had to be treated as infirm power in terms of order of CERC dated 20.09.2017 passed in Petition No. 130/MP/2015, which has been upheld by this Tribunal in its order dated 25.01.2019 in Appeal No. 330 of 2017.

2. According to the Appellant, the issue involved in the present appeal is with regard to the implementation of the direction given in the order dated 20.09.2017 in Petition No. 130/MP/2015 passed by CERC to treat the Power injected by NTPC in respect of Barh STPS Stage II Unit IV before 08.03.2016 (15.11.2014 to 07.03.2016) as infirm power and adjust the revenue earned over and above fuel cost from the sale of infirm power in the Capital Cost. The case stated by the Appellant, in brief, is as under:

3. The Appellant is Government Company wholly owned by the Government of Odisha. It carries on the business of supply of electricity in bulk to the four Distribution Companies in the State of Odisha. The Appellant purchases power from various Generators such as Captive Generating Plants (CGPs) and Co-Generation Plants and supplies the same to the four Distribution Companies of the State of Odisha for onward supply to the various categories of the Consumers.

4. The Appellant had entered into Long Term Power Purchase Agreements (**"PPAs**") with NTPC for purchase of power from five Power Stations of NTPC, namely, Talcher Thermal Power Station (TTPS),

Talcher Super Thermal Power Station (TSTPS), Kahalgaon Super Thermal Power Station (KHSTPS), Farakka Super Thermal Power Station (FSTPS) and Barh Super Thermal Power Station (BSTPS).

5. On 12.03.2014, CERC notified the CERC (Terms & Conditions of Tariff) Regulations, 2014, for the period 2014-2019 (for short "**CERC Tariff Regulations, 2014"**). Contrary to the provisions of the said Tariff Regulations, on 14.11.2014, NTPC declared its Unit-IV of Barh STPS Stage-II (Unit-IV) on commercial operation with effect from 00:00 hrs of 15.11.2014. Aggrieved thereby, on 01.05.2015, the Appellant/GRIDCO approached the CERC by filing Petition No. 130/MP of 2015 praying for declaring the COD as null and void as well as other consequential reliefs. CERC by its order dated 20.09.2017 has set aside the COD as 15.11.2014 holding that since the said Unit had demonstrated the full load running capability at MCR during 04.03.2016 to 07.03.2016, 08.03.2016 shall be taken as the COD of the Unit. Further, CERC also directed that the Power injected by NTPC in respect of the said Unit before 08.03.2016 shall be treated as 'infirm power' and the revenue earned over and above fuel cost from the sale of such infirm power from 15.11.2014 to 07.03.2016 shall be adjusted in the capital cost.

6. Aggrieved by the order dated 20.09.2017 passed by CERC in Petition No. 130/MP/2015, NTPC filed an Appeal before this Tribunal being Appeal No. 330 of 2017.

7. In the meantime, in terms of the order of CERC dated 20.9.2017, Eastern Region Power Committee (ERPC) vide its letters dated 12.01.2018 & 02.02.2018 revised and issued Regional Energy Account (REA), Deviation Settlement Mechanism (DSM) & Regional Transmission Account (RTA) and Regional Transmission Deviation Account (RTDA) for the period from 15.11.2014 to 07.03.2016 treating the power injected by NTPC during the said period as 'infirm power' in accordance with CERC Regulations. In the letter of ERPC dated 12.01.2018 it was clearly stated that the Beneficiaries will get refund of Energy Charges, Capacity Charges and Transmission Charges on account of Barh Stage – II Unit 4 for the period from 15.11.2014 to 07.03.2016.

8. As stated aforesaid, on 25.01.2019, this Tribunal dismissed the Appeal No. 330 of 2017 filed by NTPC and upheld the order dated 20.09.2017 passed by CERC.

9. Pursuant to the dismissal of Appeal No. 330 of 2017, as no amount was credited by NTPC in the monthly bills pertaining to GRIDCO received during February, 2019, vide letter dated 11.02.2019 GRIDCO adjusted the amount of Rs. 359.69 Crore paid by it to NTPC along with the interest in respect of the power injected from Barh-II Unit-IV from 15.11.2014 to 07.03.2016 and billed by NTPC on the Provisional Tariff Rate, which according to the Appellant, had to be treated as infirm power in terms of order dated 20.09.2017 of CERC as upheld by this Tribunal.

10. Thereafter, vide letter dated 15.02.2019, NTPC wrote to GRIDCO stating that : "*NTPC is billing beneficiaries of Barh-II provisionally at 85% of initial Tariff Petition filed before Hon'ble CERC. The fixed charges billed provisionally will be revised along with applicable interest after issue of Tariff by Hon'ble CERC in Petition No. 130/GT/2014 based on*

above order. Once the Tariff is determined by Hon'ble CERC, NTPC shall issue revised bills".

11. Vide letter dated 19.02.2019, Ministry of Power, Govt. of India re-allocated Odisha's share of 166 MW of Barh-II STPS to Bihar and directed Bihar to sign PPA and enter into Commercial arrangements with regard to the allocated power. On 23.02.2019, GRIDCO sent a letter to NTPC justifying its action in deducting the Scheduled Power Bill amount pertaining to the period from 15.11.2014 to 07.03.2016 in compliance of CERC order dated 20.09.2017, which was confirmed by this Tribunal in its judgment dated 25.01.2019.

12. On 09.03.2019 NTPC filed an Appeal before the Hon'ble Supreme Court being Civil Appeal No. 2927 of 2019 against the judgment of this Tribunal dated 25.01.2019 passed in Appeal No. 330 of 2017 which came to be dismissed by the Supreme Court on 05.04.2019.

13. The main grievance of the Appellant is that on 12.03.2019, during the hearing of Tariff Petition for FY 2014-19 i.e. Petition No. 130/GT/2014 before the CERC, NTPC made an oral submission that

GRIDCO had adjusted the amount of Rs. 359.69 Crore paid by it to NTPC in respect of the Power injected from Barh-II Unit-IV from 15.11.2014 to 07.03.2016 and billed by NTPC on the Provisional Tariff rate, which had to be treated as infirm power in terms of the order dated 20.09.2017 of CERC as upheld by this Tribunal, against the Bills for the months of December, 2018 to January, 2019. Contending that the Revenue earned from supply of infirm power is to be adjusted in the Capital Cost as per order dated 20.09.2017 of CERC, learned Counsel for NTPC prayed for a direction to the GRIDCO to refund the amount adjusted by it. Appellant states that it is pertinent to mention that during the hearing before CERC on 12.03.2019, NTPC concealed the fact that in terms of the order dated 20.9.2017 of CERC, Eastern Region Power Committee (ERPC) had already revised and issued the Regional Energy Account (REA), Deviation Settlement Mechanism (DSM) & Regional Transmission Account (RTA) Accounts vide letter dated 12.01.2018 and Regional Transmission Deviation Account (RTDA) Account vide letter dated 02.02.2018 for the period from 15.11.2014 to 07.03.2016. Learned counsel states that without directing NTPC to file a fresh/revised Tariff Petition in view of change of COD or at least an application for interim relief and without giving any opportunity to

GRIDCO to file Reply, Vide impugned order dated 18.03.2019, CERC directed the Appellant to refund the adjusted amount to NTPC within 7 days from the date of the order and further directed that any delay in refund of the amount shall attract the provisions of late payment surcharge as per Tariff Regulations. On 20.03.2019 GRIDCO made payment of the amount of Rs. 25.57 crore in terms of the letter dated 12.01.2018 of ERPC.

14. The Appellant has filed the present Appeal challenging the said order dated 18.03.2019 and praying for the following reliefs:

(a) Set aside the order 18.03.2019 of the Central Electricity Regulatory Commission in Petition No. 130/GT/2014;

(b) Pass such other Order/s as may be deemed just and proper in the facts and circumstances of the case.

15. We have heard learned counsel for the parties and perused the pleadings.

16. Learned counsel for the Appellant has filed written submissions and rejoinder. The gist of which is as under:

(a) Without raising any objection to the billing of ERPC dated 12.01.2018, NTPC vide its Letter dated 18.01.2018 requested ERPC to keep the Revised REA in abeyance till the Application for stay is decided by this Tribunal. After the letters dated 12.01.2018/02.02.2018 are issued by ERPC in implementation of the order dated 20.09.2017 of CERC, NTPC in the written Submissions filed on 26.02.2018 for interim order stated as under:-

> *"32. The recovery of money by adjustment from NTPC, a Government of India Undertaking is not difficult. If finally the matter is decided against NTPC, the Respondent Beneficiaries can withhold the payment from the bills raised by NTPC for future supply."*

(b) Appeal No. 330 of 2017 filed by NTPC was dismissed by this Tribunal on 25.01.2019 upholding the order dated 20.09.2017 of CERC. Since NTPC did not refund the amount, in accordance with the submission made by it in the Written Submission dated 26.02.2018, quoted above, on 11.02.2019 GRIDCO adjusted the amount of Rs. 359.69 crore paid by it to NTPC along with interest in respect of the power injected from Barh-II Unit-IV from 15.11.2014 to 07.03.2016 as the same is treated as infirm power.

(c) In terms of the letter of ERPC dated 12.01.2018, on 20.03.2019 GRIDCO made payment of the amount of Rs.2557.45384 lakhs towards cost of Infirm Power to the Regional Deviation Settlement Fund Account. ERLDC transferred the amount of Rs.2557.45384 lakhs deposited by GRIDCO to NTPC. Vide letter dated 07.05.2019 Power System Operation Corporation Limited (POSOCO) informed GRIDCO that NTPC has returned the amount of Rs. 2557.45384 lakh to ERPC Deviation Fund account on the ground that no adjustment can be carried out till the issue is finalized by the appropriate authority.

(d) On 05.04.2019, Hon'ble Supreme Court also dismissed Civil Appeal No. 2927 of 2018 filed by NTPC against the judgment dated 25.01.2019 of the Tribunal in Appeal No.330 of 2017.

(e) Every Generating Station has to undergo "Commissioning & Testing" Stage before declaration of the Commercial Operation Date (CoD). The power injected by such Generating Station during that stage is termed as "Infirm Power". The following are the

relevant Regulations which provide about the treatment of such infirm power:

(i) **Regulation 3(32) of CERC Tariff Regulations, 2014**

"Infirm Power means electricity injected into the grid prior to the commercial operation of a unit or block of the generating station in accordance with Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 as amended from time to time."

(ii) **Regulation 18 of CERC Tariff Regulations, 2014**

"Sale of Infirm Power: Supply of infirm power shall be accounted as deviation and shall be paid for from the regional deviation settlement fund accounts in accordance with the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014, as amended from time to time or any subsequent re-enactment thereof:

Provided that **any revenue earned by the generating company from supply of infirm power after accounting for the fuel expenses shall be applied in adjusting the capital cost accordingly.**"

(iii) **CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and related matters) Regulations, 2009 as amended by 2nd Amendment (2012).**

Regulation – 8 Clause (7): Grant of Connectivity

7th Proviso:

"Provided that the **infirm power so interchanged by the unit(s) of the generating plant shall be treated as deviation and the generator shall be paid/charged for such injection/drawal of infirm power in accordance with the provisions of the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014,** as amended from time to time or subsequent re-enactment thereof.**"**

(iv) CERC (Deviation Settlement Mechanism & Related Matters) Regulations, 2014:

2. **Charges for Deviations**:

"(5) The infirm power injected into the grid by a generating unit of a generating station during the testing, prior to COD of unit shall be paid at Charges for Deviation for infirm power injected into the grid ……"

9. Accounting of Charges for Deviation:

"(1) **A statement of Charges for Deviations including Additional Charges for Deviation levied under these regulations shall be prepared by the Secretariat of the respective Regional Power Committee** on weekly basis based on the data provided by the concerned RLDC(s) by the Thursday of the week and shall be issued to all constituents by next Tuesday, for seven day period ending on the penultimate Sunday mid-night.

(2) **All payments on account of Charges for Deviation including Additional Charges for Deviation levied under these regulations and interest, if any, received for late payment shall be credited to the funds called the 'Regional Deviation Pool Account Fund'**, which shall be maintained and operated by the concerned Regional Load Despatch Centre in each region in accordance with provisions of these regulations."

(iv) **Regulation (9) of CERC Tariff Regulations, 2014**

9. Capital Cost: (1) The Capital Cost as determined by the Commission after prudence check in accordance with this regulation shall form the basis of determination of tariff for existing and new projects.

(2) The Capital Cost of a new project shall include the following:-

…….

(g). **Adjustment of revenue due to sale of infirm power in excess of fuel cost prior to the COD as specified under Regulation 18 of these regulations;"**

(f) Infirm Power is billed by ERPC in accordance with Regulation 9 (1) of the Deviation Settlement Mechanism Regulations, 2014 and the concerned Beneficiaries pay the above Bills to Regional Deviation Settlement Fund Account. From that account, the Generator gets its dues. The Commission determines as to whether there is any revenue earned over and above the fuel cost out of sale of the infirm power and the said revenue is adjusted towards Capital Cost of the Project, which shall form the basis for determination of Scheduled Tariff in accordance with Regulation 9 (2) (g) and Regulation 9 (1) of CERC Tariff Regulations, 2014.

(g) As per the Regulations, before COD, the beneficiaries need not pay to the Generator in respect of Infirm Power whereas, in the present case, during the period 15.11.2014 to 07.03.2016 NTPC had billed and collected the charges from GRIDCO treating the infirm power injected as 'Scheduled Power'.

(h) In terms of the Order of CERC dated 20.09.2017, as the Power injected by NTPC shall be treated as Infirm Power, the amount collected by NTPC by billing on the basis of Scheduled Power had to be refunded by NTPC along with the consequential charges and NTPC cannot be allowed to retain the said amount.

(i) In terms of the impugned order, the cost of the Power collected by NTPC on the basis of Scheduled Power, after deducting the cost of Infirm Power (adjustment of the rates of Infirm Power against the rates of Scheduled Power) will be appropriated against the Capital Cost, which is contrary to the Regulations and the earlier order of CERC dated 20.09.2017.

(j) The Power injected before COD is only 'Infirm Power' which has been billed by ERPC. Such power in no case be treated as

'Scheduled Power' as is sought to be done by the Commission in the impugned order.

(k) The amount illegally billed and collected by NTPC on the basis of Scheduled Power has to be refunded back to GRIDCO and there is no scope for adjustment of the said amount in the Capital Cost as no Regulation provides for such adjustment.

(l) The provision in CERC Tariff Regulations provide for adjustment of the Revenue earned out of sale of Infirm Power i.e. the amount receivable by NTPC from the Regional Deviation Settlement Fund Account less the Fuel Cost, against Capital Cost.

(m) When the settled position of statute provides for a thing to be done in a particular manner, it has to be done only in that manner and no other manner. Reliance in this regard is placed on the following judgments of Hon'ble Supreme Court:-

i) Gujarat Urja Vikas Nigam Vs. Essar Power Ltd. (2008) 4 SCC 755 (**Para 35**)

ii) J. Jayalalitha Vs. State of Karnataka (2014) 2 SCC 401 (**Para 34**)

iii) A.R. Antulay Vs. Ramdas Sriniwas Nayak
(184) 2 SCC 500 (**Para 22)**

(n) As per the earlier order of CERC dated 20.09.2017, ERPC has to bill the infirm power in terms of Regulations to the beneficiaries and the beneficiaries will make payment to the Regional Deviation Settlement Fund Account, and in turn ERPC makes payment to NTPC from the said account and any revenue earned by NTPC from sale of infirm power after adjusting fuel cost will be adjusted in the Capital Cost. But, as per the impugned order of CERC amount collected by NTPC from the Beneficiaries (GRIDCO) treating the Power injected during the period 15.11.2014 to 07.03.2016 as Scheduled Power will be allowed to be retained by NTPC and the said amount after adjusting the cost of Infirm Power shall be appropriated towards reduction of capital cost.

(o) When the Order of CERC dated 20.09.2017 has attained finality, how NTPC can be allowed to retain the amount illegally collected by it by treating the said Power as 'Scheduled Power'. If the Commission is allowed to modify its orders after the said

orders attain finality, it will result in breakdown of the Rule of Law and create chaos.

(p) The Commission is bound by the Regulations which are in the nature of law. Reliance in this regard is placed on the judgment dated 01.07.2014 of this Tribunal in Appeal No. 169 of 2013, wherein it has been held as under:-

> *"32.2 The Central Commission or any State Electricity Regulatory Commission or this Appellate Tribunal has no jurisdiction or power to add, substitute or delete any word in any of the provisions of the Electricity Act, 2003 or Regulations for Electricity or any State Regulations. This Appellate Tribunal is not competent and empowered to quash or set-aside or declare or decide the validity of any of the provisions of the Electricity Act, 2003, Central Commission or State Regulations. It can only interpret the provisions as the facts and circumstances of any particular case warrant."*

(q) The impugned interim order of the Commission amounts to a review/modification of the final order dated 20.09.2017 of the Commission, which has attained finality after being affirmed by the

Tribunal and the Hon'ble Supreme Court. Such a situation is wholly unprecedented and legally impermissible.

(r) GRIDCO cannot be made liable to pay anything more for the power which has been directed to be treated as "Infirm Power" by the order dated 20.09.2017 of the Commission than what it is liable to pay as per the CERC Regulations for such 'infirm power'. NTPC has already retained the said illegally collected amount for more than 4 years and any further retention of the said amount by NTPC will be prejudicial to the interest of the Consumers of the State of Odisha.

(s) The reasoning given by the Commission at Para-8 of the impugned order that "Since the power was scheduled to the beneficiaries during the relevant period which has now been deemed to be infirm power, there is a requirement for adjustment of the rates of infirm power against the rates of scheduled power", completely contradicts Para 28 of the Order dated 20.09.2017 of the Commission in Petition No. 130/MP/2015 which stipulates that "Power injected by Respondent No. 1 in respect of the Unit before

8.3.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries during the period."

In view of the above submissions, learned counsel prays that the appeal may be allowed.

17. Learned counsel for Respondents 2(a) and 2(b) has filed reply/written submissions. Since Respondent 2(a) & 2(b) support the Appellant, their submissions are dealt with before we go to the arguments of Respondent No.1. **The gist of the submissions is as under:**

(a) Respondent 2(a) & 2(b) are the distribution companies of Odisha and they support the view/stand taken by the Appellant in the present appeal.

(b) The beneficiaries of Respondent No. 1's Super Thermal Power Plant Barh Stage-II 1320 MW (2x660MW) include Bihar, Orissa, Jharkhand, West Bengal and Sikkim. Though the trial run conducted by Respondent No. 1 from 5th August 2014 to 8the August 2014 was not in accordance with the 2014 Tariff Regulations and could not be completed successfully, Respondent

No. 1 unilaterally declared the COD of NTPC – Barh Plant as 15.11.2014. Subsequent to the declaration of COD of the unit, Respondent No.1 has been raising bills to the Respondents 2(a) and (b) and other beneficiaries. The Respondent Nos.2(a) and (b) have already paid a sum about Rs. 2700 Crores towards such bills for capacity charges, Energy charges, Transmission charges, ERLDC Fee and charges, Water Pollution Cess etc. Apart from that, they had to bear approximately Rs. 181 Crore towards Transmission Charges of CTU owing to mis-declaration of COD of the Unit-IV of NTPC Barh.

(c) Thereafter, the Appellant moved a Petition before CERC being Petition No. 130/MP/2015 for declaration of COD in respect of the said Unit. By its order dated 20.09.2017, CERC set aside the declared COD of 15.11.2014 and held the date of COD of the said Unit as 08.03.2016. Relevant portion states as under:

> *"28. Power injected by Respondent no. 1 in respect of the Unit before 08.03.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries during the period, the revenue earned over and above fuel cost from sale*

of infirm power from 15.11.2014 to 07.03.2016 shall be adjusted in the capital cost."

The above order of the CERC dated 20.09.2017 is also affirmed by this Tribunal vide judgment dated 25.01.2019. The claim of Respondent 2(a) and 2 (b) is that the excess amount received by NTPC, owing to mis-declaration of COD as 15.11.2014, is required to be refunded along with the applicable carrying cost to the beneficiaries including Respondents Nos.2(a) and (b).

(d) After the Appellant recovered the amount due to it from the energy bill of respondent No.1, Respondent 2(a) &2(b) also proposed to follow the said recovery procedure. However, the respondent No.1 preferred a fresh Tariff petition before the CERC vide Petition No. 130/GT/2014, whereby the CERC took a contrary view vide the impugned order dated 18.03.2019 directing the Appellant to refund the recovered amount within a period of 7 days. Therefore, Respondent 2(a) & 2(b) are also aggrieved by the order dated 18.03.2019 as it restrains the other beneficiaries from

taking any action for recovering the excess amount from the Respondent No.1.

(e) The observation of the CERC in the impugned order dated 18.03.2019 to the effect that since the power scheduled to the beneficiaries during the relevant period has now been deemed to be infirm power, there is requirement for adjustment of the rates of infirm power against the rates of schedule power and it is creating an embargo on the beneficiaries in recovering the excess amount paid to Respondent No. 1, which according to the Appellant is contrary to the order dated 20.09.2017.

(f) A reference is made to Regulation 6.4 Clause 20 of the IEGC Grid Code, 2010, which reads as under:

> *"20. The quantum of penalty for the first mis-declaration for any duration/block in a day shall be the charges corresponding to two days fixed charges. For the second mis-declaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis-declarations, the penalty shall be multiplied in the geometrical progression over a period of a month."*

In view of the above provision, according to learned counsel, the penalty in the present case runs into several crores of rupees and it shall be the liability of Respondent No. 1 to reimburse the amount along with the penalty to the beneficiaries. Therefore, the direction given in the impugned order dated 18.03.2019 is incorrect and is liable to be set aside for the reasons mentioned as under:

(i) Central Commission has dealt with the issue based on the oral submission, which is against the settled principles of natural justice. It is submitted before CERC that in view of shifting of COD in terms of Order dated 20.09.2017, there is no scheduled power and the charges of scheduled power earlier claimed by the Respondent-NTPC have been adjusted. The earlier scheduled power would now become infirm power and accordingly it is required to be treated as such.

(ii) Central Commission has not appreciated that the power injected by Respondent-NTPC has to be considered as Infirm Power. Regulation 3(32) of the Tariff Regulations, 2014 relating to Infirm Power read with Regulation 8(7)(b) of the Central Electricity Regulatory Commission (Grant of

Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and Related matters) Regulations, 2009 provides that the injection of infirm power shall not exceed 6 months from the date of first synchronization. This is the ceiling limit and consideration of infirm power beyond six months is in violation of regulatory provision and thus is illegal.

(iii) Central Commission failed to appreciate that Regulation 18 of the Tariff Regulations, 2014 stipulates that the sale of Infirm Power shall be accounted as deviation and it shall be paid from the regional deviation settlement Fund accounts in accordance with the Central Electricity Regulatory Commission (Deviation of Settlement Mechanism and related matters) Regulations, 2014 (hereinafter referred to as the 'DSM Regulations, 2014'). The deviation is calculated for the regional entities by the RLDC/RPC for each time block of 15 minutes (96-time block in a day). Further, the deviation charges are levied by the RPC Secretariat as per Regulation 9 of the DSM Regulations, 2014. The payment of deviation charges has a high priority as these are billed on weekly basis. These bills are

required to be cleared within a period of 10 days. The defaulting constituents have to pay a simple interest of 0.04% each day of delay.

(iv) The Hon'ble Supreme Court in the case of ***"All India Power Engineer Federation v. Sasan Power Ltd"*** 2017 (1) SCC 487 directed M/S Sasan Power Ltd. to reimburse Rs 1000 Crores to the procurers on account of changed tariff schedule by treating the power before COD as infirm power. In the present case, since the power was declared as infirm power Respondent no. 1 is liable to refund the entire amount on account of such intentional mis-declaration of COD.

(v) Central Commission failed to appreciate that huge amount has been paid by Respondents Nos.2(a) and (b) on account of Transmission Deviation Charges, Capacity and Energy Charges, ERLDC Fees and Charges, Water Pollution Cess Charges, Transmission charges and interest accrued on the said heads for the period between 15.11.2014 and 07.03.2016.

(vi) Central Commission has exceeded its jurisdiction by holding that since the power schedules to the beneficiaries during the relevant period has now been deemed to be infirm power, there is a requirement for adjustment of the rates of infirm power against the rates of scheduled power and the said observation requires to be set aside.

(vii) Central Commission failed to appreciate that after the order dated 20.09.2017 treating the power injected prior to the COD of 08.03.2016 as infirm power, the same can only be billed by the RPC from the Regional Deviation Settlement Fund Account, which in the instant case is the ERPC and not NTPC.

(viii) Central Commission failed to appreciate that the bills issued by Respondent No. 1 on the basis of Schedule Power stood nullified by issue of Infirm Power Bills by ERPC as per CERC DSM Regulations.

(ix) Lastly, the order dated 18.03.2019 is erroneous in law as well as on the facts on record and is extremely prejudicial to

the interest of Respondents Nos.2(a) and (b) and is liable to be set aside.

18. Learned counsel for Respondent No.1 filed reply/written submissions. In brief, the submissions are as under:

(a) According to Respondent No.1, the earlier order dated 20.09.2017 passed by CERC with regard to the scope of the revenue to be adjusted against the capital cost was not challenged either by GRIDCO or the Bihar Utilities or any other Procurers, therefore the said aspect has become final and binding. The said order is also upheld by this Tribunal vide its Judgment dated 25.01.2019 and also by Hon'ble Supreme Court vide its Order dated 5.04.2019 in Civil Appeal No. 2927 of 2019. Therefore, it is not open to GRIDCO or the Bihar Utilities or any other Procurer to unilaterally adjust the monthly bills, contrary to the specific directions contained in Para 28 of the Order dated 20.9.2017.

(b) According to the Appellant, the Impugned Order dated 18.03.2019 does not change, modify or otherwise vary the order dated

20.09.2017. The expression `*since the power was scheduled*' used in Para 8 of the impugned Order is only the reiteration of the expression `*though power was scheduled*' contained in Para 28 of the Order dated 20.09.2017 and the GRIDCO is wrong in contending that the above reference in Para 8 constitutes a deviation or variation of the Order dated 20.09.2017. Both the orders held that the revenue earned in excess of the fuel cost needs to be adjusted in the capital cost determined considering 8.03.2016 as the COD. Even the earlier order dated 20.09.2017 does not contain any direction with regard to refund of any amount to the Procurers – Beneficiaries.

(c) Learned counsel points out that in the order dated 20.09.2017 except that the fuel cost should be reduced or adjusted against the revenue earned, there is no reference to any other cost element to be adjusted. Anything in excess of the fuel cost has been held to be treated as surplus revenue earned and no distinction has been made to the effect that the revenue earned over and above the fuel cost, should either be restricted to the energy/variable charges or up to the UI/Deviation and Settlement Charges or excluding the

capacity charges etc. Therefore, from a plain and simple interpretation of the expression `*revenue earned over and above the fuel cost'* can only mean that anything excluding the fuel cost recovered from scheduling of the power, should be treated as revenue earned. Thus, the Central Commission has proceeded on the basis that though there was a regular scheduling of power with recovery of full tariff inclusive of the capacity charges and variable charges, the same shall be treated as infirm power and excluding the fuel cost, the entire revenue recovered shall be adjusted in the capital cost. Therefore, According to Respondent No.1, the scope of the expression `*revenue earned over and above the fuel cost*' shall extend to the entire revenue recovered by NTPC from the beneficiaries during the period from 15.11.2014 to 7.3.2016 and It is not open to GRIDCO or the Bihar Utilities to claim that it should be restricted to the notional part or a part which represents only the variable charges or UI/Deviation Charge prevalent at the relevant time.

(d) Learned counsel submits that Regulation 18 of the Tariff Regulations, 2014 is in two parts. The main part deals with the

deviation from the schedule and the computation of the amount in terms of the DSM Regulations, 2014 and the second part (Proviso) deals with the adjustment of the revenue earned from supply of infirm power.

Learned counsel submits that in the present case, since there was a regular supply of electricity through appropriate declaration of availability and scheduling during the period from 15.11.2014 to 7.03.2016 there is absolutely no deviation as per the DSM Regulations. Thus, the supply during the above period does not fall under the first part of Regulation 18 of the Tariff Regulations, 2014. The said supply is to be treated as infirm power as per the directions of the Central Commission, which is covered under the proviso contained in the second part, referring to the entire 'revenue recovered'. In terms of the proviso, such revenue recovered in entirety minus the fuel cost is required to be adjusted in the capital cost. It is in this context that Para 28 of the earlier Order and Para 8 of the Impugned Order states that though the power was scheduled, it shall be treated as infirm power and the revenue earned by NTPC during the period from 15.11.2014 to

7.3.2016 is not restricted to what is stated in the opening part of Regulation 18 of the Tariff Regulations, 2014, namely, the Deviation Charges. The second part of the provision deals with how the quantum of adjustments to be made. Therefore, the Second part has to be given effect to as a substantive provision in the context of the present case. In support of his contention, learned counsel places reliance on the following decisions:

(i) **A. Motiram Ghelabhai vs. Jagan Nagar(1985) 2 SCC 279**

(ii) **B. Shah Bhojraj Kuverji Oil Mills & Ginning Factory vs. Subbash Chandra Yograj Sinha(1962) 2 SCR 159**

(e) Learned counsel further points out that the purpose of incorporating a provision for adjusting the revenue earned for the period prior to commercial operation, as against the capital cost, has been explained in the Explanatory Memorandum to the earlier Tariff Regulations, 2014.

(f) Learned counsel contends that in view of the above, there is no merit in the contentions raised by GRIDCO or the Bihar Utilities on the scope of Regulation 18 of the Tariff Regulations, 2014 as

applicable to the present case, by restricting the adjustment in the capital cost to a limited extent only.

(g) Learned counsel for Respondent No.1 further contends that the arguments raised by GRIDCO leads to the conclusion that the revenue earned by NTPC is to be considered in two parts, namely (a) Deviation/UI Charges inclusive of fuel cost; and (b) revenue in excess of (a), and that only the Deviation/UI Charges should be adjusted is not supported by the wording in the order dated 20.09.2017. Therefore, learned counsel strenuously submits that the operative part of the Order dated 20.09.2017 does not contain any direction to NTPC to refund any amount. While NTPC challenged the Order, there was no challenge by GRIDCO or any other utility on the aspect of the Order not providing for refund of any amount. It is therefore, not open for GRIDCO or any other procurer to claim refund of any part of the revenue earned.

(h) Learned counsel contends that de-allocation of the capacity by the Central Government in February, 2019 was at the instance of GRIDCO and it is not that NTPC compelled GRIDCO to relinquish the capacity. Thus, the GRIDCO cannot now claim that the de-

allocation of capacity should be considered for the purpose of interpreting Regulation 18 of the Tariff Regulations, 2014 or modification of the Order dated 20.09.2017 passed by the Central Commission.

(i) Learned counsel further contends that it is wrong on the part of the GRIDCO to unilaterally adjust the amount of Rs.359.69 Crores from the monthly bills raised by NTPC on GRIDCO for supply of power in respect of number of generating stations (totaling 20/32 in number). Admittedly, there is no dispute on the quantum claimed by NTPC under these bills for generation and supply of electricity. The decision of the CERC relates to the generation and supply of electricity for the period 15.11.2014 to 7.3.2016 and not for the months in which the two bills have been issued. It is well settled that it is not open to a party to unilaterally claim the amount when the same has not been subjected to any adjudication. In this regard, Respondent No.1 has placed reliance on the following decisions:

(i) Union of India v. Raman Iron Foundry, (1974) 2 SCC 231
(ii) Greenhills Exports (P) Ltd. v. Coffee Board: ILR 2001 Kar 2950

(j) Learned counsel states that GRIDCO is wrong in asserting that it was not heard before passing the impugned order. In fact, the counsel appointed by GRIDCO (Mr. R.B. Sharma) was heard by CERC before the order was passed.

(k) Learned counsel further states that GRIDCO is only referring to the submissions made by NTPC at the interim stage before this Tribunal without referring to the Additional Affidavit filed by NTPC.

(l) As far as Bihar Utilities are concerned, learned counsel submits that they did not participate in the proceedings before the Central Commission, which led to the Order dated 20.09.2017 and did not even challenge the declaration of the commercial operation made by NTPC as on 15.11.2014. The Bihar Utilities continued to schedule power from the Barh Thermal Power Station on a regular basis based on the COD declared on 15.11.2014. During the relevant period from 15.11.2014 to 07.03.2016 the Bihar Utilities took full advantage of availing the regular supply of power from NTPC under the merit order and distributed the electricity to the consumers in the State of Bihar.

(m) Reiterating that no prayer was made in the earlier proceedings before the Tribunal or before the Hon'ble Supreme Court that there should be an adjustment in the current tariff instead of the revenue surplus being adjusted in the capital cost, learned counsel submits that the Order dated 20.9.2017, therefore, became final insofar as the Procurers are concerned in regard to the right to get adjustment for the revenue earned over and above the fuel cost during the period from 15.11.2014 to 7.3.2016.

(n) Learned counsel submits that the ground of challenge by the Bihar Utilities is that a sum of Rs 2520 Crores comprising of various charges is required to be refunded by NTPC to the Bihar Utilities, in terms of Regulation 6.4 (20) of the Indian Electricity Grid Code, 2010, which reads as thus:

> *"20. The quantum of penalty for the first mis-declaration for any duration/block in a day shall be the charges corresponding to two days fixed charges. For the second mis-declaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis-declarations, the penalty shall be multiplied in the geometrical progression"*

Learned counsel states that the reliance placed by the Bihar State Power (Holding) Company Limited on Regulation 6.4 (20) is misplaced and misconceived since the said provision applies only when there is deliberate mis-declaration, which is also clear from a reading of the Regulations, particularly, Regulations 16 to 19 of the Electricity Grid Code, 2010:

> *"16. The ISGS shall 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 gas, RLNG an liquid fuel separately, and these shall be scheduled separately.*
>
> *17. While making or revising its declaration of capability, the ISGS shall ensure that the declared capability during peak hours is not less than that during other hours. However, exception to this rule shall be allowed in case of tripping/re-synchronisation of units as a result of forced outage of units.*
>
> *18. It shall be incumbent upon the ISGS to declare the plant capabilities faithfully, i.e., according to their best assessment. In case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the RLDC may ask the ISGS to explain the situation with necessary backup data.*
>
> *19. The ISGS shall be required to demonstrate the declared capability of its generating station as and when asked by the Regional Load*

Despatch Centre of the region in which the ISGS is situated. In the event of the ISGS failing to demonstrate the declared capability, the capacity charges due to the generator shall be reduced as a measure of penalty."

Therefore, sub-clause (20) of Regulation 6.4 cannot be relied on in isolation, without meeting the requisites provided in Sub Clause (16) to (19). The generating companies are required to declare the capability of the power station faithfully in accordance with the declaration of availability, scheduling and despatch procedure specified.

(o) Learned counsel further states that the quantum of power offered by NTPC as declared availability during the above period remains the same irrespective of such supply being treated as a regular supply with the COD being considered as 15.11.2014 or as infirm power with a revised COD of 8.03.2016.

(p) It is submitted that the Bihar Utilities did not participate in the proceedings before the Central Commission on 18.3.2019. However, the counsel who has filed the reply on behalf of the Bihar State Power (Holding) Company Limited had appeared in the proceedings on 18.3.2019.

(q) So far as the reliance placed by Bihar Utilities on Regulation 8(7)(b) of the Connectivity Regulations, 2009, to allege that infirm power cannot be injected beyond a period of 6 months from the date of synchronization is concerned, learned counsel submits that there are several instances where the Central Commission has been pleased to extend the time beyond 6 months for infirm power injection. In the present case the Order dated 20.09.2017 passed by the Central Commission is deemed to have extended the time for infirm power injection beyond six months.

With the above submissions, they seek dismissal of the appeal.

ANALYSIS & CONCLUSION:

19. We have gone through the pleadings, so also written submissions and the arguments addressed at length by both the parties. The controversy involved in the above Appeal is, what happens subsequent to injection of power between 15.11.2014 to 07.03.2016 once it is treated as infirm power. According to Appellant-GRIDCO, it has to be restored to the position when COD had not been declared.

20. We have to refer to some relevant definitions so also provisions of CERC Tariff Regulations, 2014 which is relevant for consideration of the above Appeal on merits.

21. Regulation 3 (32) of CERC Tariff Regulations, 2014 reads as under:

> ***"Regulation 3(32) of CERC Tariff Regulations, 2014***
>
> *Infirm Power means electricity injected into the grid prior to the commercial operation of a unit or block of the generating station in accordance with Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 as amended from time to time."*

22. Regulation 18 of the same Regulations refer to sale of infirm power and how it should be accounted for. The proviso for this Regulation deals with the manner in which any excess revenue earned has to be dealt with.

23. Tariff Regulation 2014 reads as under:

> ***"Regulation 18 of CERC Tariff Regulations, 2014***

> ***Sale of Infirm Power:*** *Supply of infirm power shall be accounted as deviation and shall be paid for from the regional deviation settlement fund accounts in accordance with the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014, as amended from time to time or any subsequent re-enactment thereof:*
>
> *Provided that any revenue earned by the generating company from supply of infirm power after accounting for the fuel expenses shall be applied in adjusting the capital cost accordingly."*

24. The main dispute seems to be whether Deviation Settlement Mechanism (DSM) and related Regulations of 2014 has to be applied to the facts of the present case which is the stand of the Appellant, since the supply of power for the above mentioned period is now settled as infirm power. However as against this, Respondent-NTPC contends that Deviation Settlement Mechanism cannot be in *stricto sense* applied, for want of circumstances applicable in the case of DSM. None of the provisions of Deviation Settlement Mechanism is applicable to the facts of the present case, is the stand of the Respondent-NTPC.

25. Before we proceed with the controversy between the Appellant-GRIDCO and 1st Respondent-NTPC, we should first refer to the stand of

the Respondent-South Bihar and North Bihar Power Distribution Companies and other procurers. Apart from 1st Respondent-NTPC and 2nd Respondent-South and North Bihar DISCOMs, other Respondents have not contested the matter. So far as 2nd Respondent- Discoms, it is seen from the record that they have never appeared before the Respondent-Commission so far as the proceedings pertaining to the impugned order. Even otherwise, Bihar Utilities had not challenged the order dated 20.09.2017 of the Respondent-Commission which has reached finality before the Hon'ble Supreme Court. Therefore, it is not proper for the Bihar Utilities to agitate claims on par with the Appellant-GRIDCO against the Respondent-NTPC. Further, Bihar Utilities have not filed any Appeal against the Order dated 18.03.2019. Therefore, we have to deal with the controversy that is fought between the Appellant-GRIDCO and 1st Respondent-NTPC alone.

26. According to Appellant-GRIDCO, the impugned order dated 18.03.2019 amounts to modification/review of the final order dated 20.09.2017 which is affirmed by the Hon'ble Apex Court. According to Appellant, in terms of order dated 20.09.2017 by the Respondent-Commission which has reached finality, ERPC has to bill the infirm

power in terms of Regulations to the beneficiaries; beneficiaries will make payment in respect of infirm power to the Regional Deviation Settlement Fund Account; payment in respect of infirm power will be made by ERPC to NTPC from Regional Deviation Settlement Fund Account; and any revenue earned by NTPC from the sale of infirm power i.e., amount received from Regional Deviation Settlement Fund Account after adjusting the fuel cost will be adjusted in the Capital Cost.

27. Appellant further contends that the impugned order is contrary to the above Regulations on account of the following:

(a) Amount illegally collected by NTPC from the beneficiaries (GRIDCO) treating the Power injected during the period 15.11.2014 to 07.03.2016 as Scheduled Power will be allowed to be retained by NTPC; and

(b) the said amount after adjusting the cost of Infirm Power (adjustment of the rates of Infirm Power against the rates of Scheduled Power) shall be appropriated towards reduction of capital cost.

28. Appellant also contends that quite contrary to the directions given in the earlier order dated 20.09.2017, in the impugned order the Respondent-Commission has directed to adjust the same in the capital cost and the same could not have been done since the amount collected by 1st Respondent-NTPC towards the sale of power as scheduled power was in fact infirm power. Therefore, the directions in the order dated 20.09.2017 has to be complied with in *stricto sense*. Once the power injected during the above said period has to be treated as infirm power, the 1st Respondent-NTPC cannot retain the amount paid for the supply of said power as if it was "Scheduled Power".

29. According to the learned counsel, Mr. R. K. Mehta arguing for the Appellant, at any stretch of imagination the said power supplied for the above said period cannot be treated as scheduled power subjecting the same to regular billing for calculating the revenue earned out of sale of power as scheduled power.

30. According to the Appellant, the Respondent-Commission is bound to follow the regulations which are in the nature of law. Therefore, the impugned order suffers from illegality.

31. As against this, the learned senior counsel Mr. M. G. Ramachandran arguing for 1st Respondent-NTPC contends that there is no variation of the earlier order dated 20.09.2017 passed by the Respondent-Commission while passing the impugned order. According to 1st Respondent-NTPC, the consequential direction of the Central Commission in its order 20.09.2017 in no way is modified or reviewed in the impugned order. Further, the directions given in the earlier order and the impugned order do not contradict in any manner.

32. We have gone through the details of the order dated 20.09.2017 as well as the impugned order. Para 28 of the order dated 20.09.2017 is very relevant to understand the scope of the subsequent order. Para 28 of the order dated 20.09.2017 reads as under:

> *"28. Power injected by Respondent No. 1 in respect of the Unit before 8.3.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries Order in during the period. The revenue earned over and above fuel cost from sale of infirm power from 15.11.2014 to 7.3.2016 shall be adjusted in the capital cost."*

33. The order dated 20.09.2017 was affirmed by this Tribunal by order dated 25.01.2019 in Appeal No. 330 of 2017. The operative portion of the Judgment of the Tribunal dated 25.01.2019 is relevant which reads as under:

> *"In the light of above, we are of the considered view that the issues raised in the present appeal being Appeal No. 330 of 2017 are devoid of merits. Hence the Appeal filed by the Appellant is dismissed. Needless to say that IA No. 840 of 2017 does not survive, hence stand disposed of.*
>
> *The impugned order passed by the Central Electricity Regulatory Commission dated 20.09.2017 in Petition No. 130/MP/2015 is hereby upheld.*
>
> *No order as to costs.*
>
> *Pronounced in the Open Court on this* ***25th day of January, 2019."***

34. It is seen from the earlier orders of the Commission and also the order of the Tribunal which upheld the earlier order of the Respondent-Commission, it mainly refers to scope of revenue and how it is to be adjusted against the capital cost in relation to the supply of infirm power. The so-called adjustment of the revenue in the directions given by the Respondent-Commission in its order dated 20.09.2017 was upheld by

this Tribunal by order dated 25.01.2019 which has now reached finality before the Hon'ble Supreme Court. This was never challenged by the Appellant-GRIDCO or the Bihar Utilities or for that matter any other procurer. Therefore, the directions given by the Central commission in its order dated 20.09.2017 as to how the revenue earned by sale of infirm power has to be adjusted was never challenged.

35. Therefore, now we have to see whether the said direction which is of binding nature could be challenged by the Appellant-GRIDCO. Relevant paras of the impugned order are as under:

> ***"Analysis & decision***
>
> *6. The matter has been examined. Regulation 18 of the 2014 Tariff Regulations, provides a under:*
>
> *"Supply of infirm power shall be accounted as deviation and shall be paid for from the regional deviation settlement fund accounts in accordance with the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014 as amended from time to time or any subsequent re-enactment thereof.*
>
> *Provided that any revenue earned by the generating company from supply of infirm power after accounting for the fuel*

expenses shall be applied in adjusting the capital cost accordingly.

7. *It is noticed that the Commission in its order dated 20.9.2017 while declining to accept the COD of 15.11.2014 declared by the Petitioner, had observed that the revenue earned from sale of infirm power shall be adjusted in the capital cost. The relevant portion of the order is extracted hereunder:*

   "28. Power injected by Respondent No. 1 in respect of the Unit before 8.3.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries during the period. The revenue earned over and above fuel cost from sale of infirm power from 15.11.2014 to 7.3.2016 shall be adjusted in the capital cost.

8. *The order of the Commission has been affirmed by the Tribunal in its judgment dated 25.1.2019. Since the power was scheduled to the beneficiaries during the relevant period which has now been deemed to be infirm power, there is a requirement for adjustment of the rates of infirm power against the rates of scheduled power. Further, the amount adjusted towards infirm power shall be applied towards the reduction of capital cost which will have impact in determination of tariff after the COD. Taking all these factors in view, the amount payable/receivable during the relevant period is to be adjusted. The Commission will undertake the exercise at the time of determination of tariff of the generating station. In our view, unilateral action on the part*

of the Respondent, GRIDCO to recover the payments made for scheduled power prior to 8.3.2016 cannot be accepted. Accordingly, we direct the Respondent, GRIDCO to refund the adjusted amount to NTPC within 7 days from the date of this order. Needless to say, any delay in refund of the amount shall attract the provisions of late payment surcharge as per the Tariff Regulations.

9. The petitioner is granted liberty to amend the Petition along with tariff filing forms by 29.4.2019, with copy to the respondents, who shall file their replies on or before 13.5.2019. Rejoinder, if any, by 22.5.2019."

36. According to Appellant, in the impugned order, the Respondent commission has opined that the power was scheduled though it was infirm power, therefore, this expression used at Para 8 of the impugned order is incorrect because once it is infirm power, it cannot be treated as scheduled power. Therefore, it is nothing but deviation from the earlier order dated 20.09.2017 i.e., the direction at Para 28 given by the Respondent-Commission. On perusal of Para 28 of the earlier order and Para 6 to 9 of the present impugned order, what we notice is that Respondent-Commission never opined that the supply of power between 15.11.2014 to 07.03.2016 as "scheduled power". It always referred to the same as power which was scheduled. The expression

"since the power was scheduled" used at Para 8 of the impugned order only confirm and reiterates its earlier opinion at Para 28 of the earlier order dated 20.09.2017 wherein it was mentioned that "though the power was scheduled". Therefore, we agree with the contention of the 1st Respondent-NTPC that both orders refer to adjustment of revenue earned from sale of infirm power which was scheduled between 15.11.14 to 07.03.2016. In both the orders, it refers to entire revenue earned and how after deducting the cost of fuel, the same has to be adjusted in the capital cost.

37. To accept the contention of the Appellant-GRIDCO that the Deviation Settlement Mechanism and Related Matters Regulations of 2014 (in short referred to as **"DSM Regulations"**) has to be followed, what we notice from the earlier order dated 20.09.2017 is that CERC did not give any directions to limit the revenue to be adjusted only to the extent specified in the DSM regulations. In fact, there was no such specific direction to refund any of the amounts to the procurers (beneficiaries). Both, the earlier and the impugned orders express the same opinion that notwithstanding the fact that there was regular scheduling of power, still the power has to be treated as infirm power as

the COD was postponed to 08.03.2016. In other words, the revenue earned in excess of fuel cost was directed to be adjusted in the capital cost determined taking into consideration the date of COD as 08.03.2016.

38. The 1st Respondent placed on record reasons how the implication of the order dated 20.09.2017 is clear without any ambiguity. The implications of the said order, in short are as under:

> *"(a) The Central Commission had taken note of the fact that the electricity from the Barh Super Generating Unit was scheduled by the beneficiaries against the due declaration of availability given by NTPC during the period from 15.11.2014 to 7.03.2016;*
>
> *(b) NTPC had accordingly, earned revenue by way of generating and supplying the scheduled power to the beneficiaries in terms of the tariff chargeable as per the Tariff Regulations, 2014 namely, comprising of both - the capacity charges and energy charges;*
>
> *(c) NTPC, as such, did not recover any amount from the beneficiaries under the Deviation Settlement/Unscheduled Interchange Mechanism governed by DSM Regulations during the period 15.11.2014 to 7.03.2016.*
>
> *(d) The revenue recovered by NTPC from the beneficiaries (including GRIDCO and the Bihar Utilities) during the relevant period was*

under regular scheduling and dispatch mechanism and not under deviation settlement mechanism;

(e) Despite the fact that the power was scheduled by the beneficiaries, the power supplied to the beneficiaries during the period from 15.11.2014 to 7.03.2016 should be treated as infirm power. Thus, the firm power is treated as infirm power and the entire revenue recovered to be treated as recovery from infirm power; and

(f) The revenue so earned over and above the fuel cost during the period from 15.11.2014 to 7.3.2016 shall be adjusted in the capital cost."

39. By bringing on record the above fact, 1st Respondent is justified saying that only fuel cost should be deducted against the revenue earned by sale of the power which was scheduled, treating the same as infirm power. It is noticeable that the consequential directions given by CERC in its earlier order do not refer to any energy/variable charges or up to the UI/DSM charges or excluding the capacity charges. There was no direction to refund money to any of the beneficiary/procurer including the Appellant-GRIDCO. There was no distinction made by the Commission that revenue over and above the fuel cost should be adjusted towards any other charges as contended by the Appellant. In

other words, in the first Order the Commission opines that excess revenue earned after deducting fuel cost has to be treated as surplus revenue earned i.e., revenue earned over and above the fuel cost. Therefore, we agree with the contention of the 1st Respondent that the direction stipulated in the earlier order of the Commission which has reached finality; there is no scope for any expansion of the meaning or clarification of any ambiguity. It is plain and simple while expressing the word that "revenue earned over and above the fuel cost."

40. On careful perusal of the earlier order dated 20.09.2017, we certainly are of the view that the Central Commission proceeded with the directions thereunder on the basis that though there was regular scheduling of power and recovery of full tariff which includes capacity charges and variable charges, the same shall be treated as infirm power with a rider i.e., to deduct or minus the fuel cost. Thereafter, the entire revenue in excess of fuel cost has to be adjusted in the capital cost.

41. The scope of Regulation 18 of the Tariff Regulations 2014 is relevant to understand the scope of the said Regulation vis-à-vis the merits of the Appeal. This Regulation consists of proviso also. The main

Regulation deals with the situation whenever there is deviation from the schedule and how the amount has to be computed in terms of DSM Regulations of 2014. The proviso deals with the adjustment of the revenue earned from supply of infirm power Regulation 18 of the Tariff Regulations, 2014 reads as under:

> *"Supply of infirm power shall be accounted as deviation and shall be paid for from the regional deviation settlement fund accounts in accordance with the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related matters) Regulations, 2014 as amended from time to time or any subsequent re-enactment thereof.*
>
> *Provided that any revenue earned by the generating company from supply of infirm power after accounting for the fuel expenses shall be applied in adjusting the capital cost accordingly."*

42. The DSM Regulations define and provide for various aspects. The relevant provisions and definitions of DSM Regulations read as under:

> *"2. Definitions and Interpretation*
>
> *(1) In these regulations, unless the context otherwise requires,-*
>
> *… …*
>
> *(e) 'buyer 'means a person, including beneficiary, purchasing electricity through a transaction scheduled in accordance with*

the regulations applicable for short-term open access, medium-term open access and long-term access;

… …

(h) 'Deviation' in a time-block for a seller means its total actual injection minus its total scheduled generation and for a buyer means its total actual drawal minus its total scheduled drawal.

… …

(n) 'Scheduled generation' at any time or for a time block or any period means schedule of generation in MW or MWh ex-bus given by the concerned Load Despatch Centre;

(o) "Scheduled drawal' at any time or for a time block or any period time block means schedule of despatch in MW or MWh ex-bus given by the concerned Load Despatch Centre;

(p) 'seller' means a person, including a generating station, supplying electricity through a transaction scheduled in accordance with the regulations applicable for short-term open access, medium-term open access and long-term access;"

43. In order to understand the purpose/objective of these Regulations, one has to refer to objective of these regulations which reads as under:

"3. Objective

The objective of these regulations is to maintain grid discipline and grid security as envisaged under the Grid Code through the

commercial mechanism for Deviation Settlement through drawal and injection of electricity by the users of the grid."

44. On perusal of the facts and circumstances on record as stated above in the above appeal, there was regular supply of power after proper declaration of availability and scheduling between the period as stated above. The supply of power during the period in question is not as contemplated under DSM Regulations. One cannot say that there was deviation as per the DSM Regulations. Therefore, it is clear that though the power was declared and scheduled during the above said period, it is not a case of deviation as per the DSM Regulations and it cannot be held as supply of power under DSM Regulations so as to attract first part of the Regulation 18. The first order of the Commission dated 20.09.2017 directed this supply of power to be treated as infirm power for the application of proviso with reference to entire revenue recovered. Even in the impugned order, the emphasis of the CERC is on the implementation of proviso to the Regulation 18. Therefore, as already stated, in this context, the Respondent-Commission opined in the impugned order that though the power was scheduled, the same has to be treated as infirm. The CERC has not referred to restriction as indicated in the main part of the Regulation. However, it opined that the

power, though supplied as per declaration and schedule, it has to be deemed as infirm power.

45. One has to understand whether the proviso to the main Regulation is in the nature of exclusion or exemption from the main Regulation. The proviso in fact, only deals with the process of adjustment of revenue i.e., how quantum of adjustment has to be made. Therefore, the effect of proviso is in the nature of substantive provision in the context of the present Appeal. Therefore, one has to understand whether the proviso to Regulation 18 was enacted as a special provision suggesting that it was an exemption or exclusion to the main provision. If the proviso itself makes that it has been enacted to provide for special saving, then it cannot be understood to qualify the same as exception to the main provision. On this issue, the senior counsel arguing for 1st Respondent has rightly placed reliance on the following decisions of the Hon'ble Supreme Court which read as under:

> *" **A. Motiram Ghelabhai vs. Jagan Nagar (1985) 2 SCC 279***
>
> ***9.*** *Bearing in mind the aforesaid legislative amendments we shall proceed to consider the question as to what is the true nature and scope of the proviso. For that purpose it will be necessary to read as a whole the entire provision, namely, the*

substantive part of Section 50, the proviso thereto and the new paragraph added at the end of the proviso. So read, two aspects stand out very clearly. In the first place, it is clear that under the substantive part of Section 50 on the coming into force of the Act (the 1947 Act) the two earlier enactments (the 1939 Act and the 1944 Act) stand repealed. If nothing more was said then Section 7 of the Bombay General Clauses Act, 1904 would have come into play and would have had the effect of saving the legal proceedings or remedies in respect of any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactments. In other words, all suits and proceedings including execution proceedings and appeals arising therefrom which were pending on the relevant date and which were governed by the provisions of these respective repealed Acts would have been saved and the rights and obligations of the parties thereto would have been worked out under the relevant provisions of the repealed Acts. But here a clear intention to deviate from the normal rule which applies to the repeal of enactments is clearly evinced by the legislature by the manner in which the proviso was enacted initially or as it now stands after the amendments. Either under the proviso as it originally stood or under the new separate paragraph enacted by way of an amendment the legislative intent was and is quite clear that only suits and original proceedings between a landlord and a tenant (of the description or categories specified therein) which were pending on the relevant date are required to be decided and disposed of by applying the provisions of the 1947 Act while

execution proceedings and appeals arising out of decrees or orders passed before the coming into operation of the Act are denied the benefits of the provisions of the Act and have been directed to be decided and disposed of as if this Act had not been passed, that is to say, such execution proceedings and appeals would be continued to be governed by and shall be disposed of in accordance with the law that was then applicable to them. In other words, it is clear that the proviso was and has been enacted to provide for special savings which suggests that it has not been introduced merely with a view to qualify or create exceptions to what is contained in the substantive part of Section 50. Secondly, it does appear that the legislature while framing the Act (the 1947 Act) was enacting certain provisions for the benefit of tenants which conferred larger benefits on them than were in fact conferred by the earlier enactments which were repealed, [and this would be clear if regard be had to the wider definition of the expression "tenant" adopted in Section 5(11) of the Act] and therefore, the legislature thought it advisable that in regard to pending suits and original proceedings also (of course of the description or categories specified therein) in which the decrees and orders were not passed the provisions of the Act should be made applicable. It is with this intention that the proviso to Section 50 has been enacted in the manner it has been done. What is more, while so extending the larger benefits of the Act (the 1947 Act) to tenants the legislature has used a very wide expression, namely, "all suits and proceedings between a landlord and a tenant" so as to

include within that category suits and proceedings filed under the repealed Acts as also under the general law or Transfer of Property Act. Deliberate use of such wide expression clearly shows that the benefit of the Act was intended to be given to all tenants who were parties to all suits and proceedings filed either under the repealed Acts or under the general law or Transfer of Property Act and were pending at the relevant date. It is therefore, clear that the proviso read with the separate paragraph added thereto will have to be regarded as an independent provision enacting a substantive law of its own by way of providing for special savings and counsel's contention that the same has been added merely with a view to qualify or to create an exception to what is contained in the main provision of Section 50 has to be rejected. We might refer to a Bombay High Court decision in Shankarlal Ramratan Shet v. Pandharinath Vishnu Phatak [AIR 1951 Bom 385 : (1951) 53 Bom LR 319 : ILR 1951 Bom 670] where a similar view of the proviso to Section 50 of the Act has been taken and we approve the same.

B. ***Shah BhojrajKuverji Oil Mills & Ginning Factory vs. Subbash Chandra Yograj Sinha [(1962) 2 SCR 159]***

10. *The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, 'a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or*

qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section. The proviso which has been added to s. 50 of the Act deals with the effect of repeal. The substantive part of the section repealed two Acts which were in force in the State of Bombay. If nothing more had been said, s. 7 of the Bombay General Clauses Act would have applied, and all pending suits and proceedings would have continued under the old law, as if the repealing Act had not been passed. The effect of the proviso was to take the matter out of s. 7 of the Bombay General Clauses Act and to provide for a special saving. It cannot be used to decide whether s. 12 of the Act is retrospective. It was observed by Wood, V. C., in Fitzgerald v. Champneys(2) that saving clauses are seldom used to construe Acts. These clauses are introduced into Acts which repeal others, to safe. guard rights which, but for the savings, would be lost. The proviso here saves pending suits and proceedings, and further enacts that suits and proceedings then pending are to be transferred to the Courts designated in the Act and are to continue under the Act and any or all the provisions of the Act are to apply to them. The learned Solicitor-General contends that the savings clause enacted by the proviso, even if treated as substantive law, must be taken to apply only to suits and proceedings pending at the time of the repeal which, but for the proviso, would be governed by the Act repealed. According to the learned Attorney- General, the effect of the savings is much wider, and it applies to such

cases as come within the words of the proviso, whenever the Act is extended to new areas."

46. The learned senior counsel, Mr. M. G. Ramachandran arguing for 1st Respondent-NTPC has rightly pointed out the purpose of incorporating a provision for adjustment of revenue earned for the period prior to the commercial operation of the thermal stations with reference to capital cost. This was explained in the earlier Tariff Regulations of 2014 i.e., in the Explanatory Memorandum which reads as under:

*"**5.** It would be seen from the above that no criteria has been specified for the rate at which infirm power has to be sold in case of thermal stations, whereas in case of hydro stations it is specified that the rate for infirm power shall be same as the primary energy rate of the generating station. In both cases, the revenue earned by the generating company from sale of infirm power has to be considered for reduction in capital cost.*

***6.** The infirm power (as its name itself signifies) is generated according to the requirements of trial operation of a generating unit, and its generation cannot be predicted on any firm basis. It is implied that the generation of infirm power cannot be scheduled in advance. As of now, the actual infirm power injection is included in the schedule of a generating station post facto, which leads to post facto changes in the schedules of the beneficiaries as well.*

Such post facto changes dilute the sanctity of the scheduling process and, therefore, should be avoided.

7. *The present practice also is to specify a constant rate for infirm power from thermal generating stations according to their fuel cost per kWh based on normative operational parameters. In this scenario, the generating company has no inducement to programme its testing activities in a manner that the infirm power is injected into the grid during peak load hours and not during off-peak hours. As a consequence, the beneficiaries get extra power at a comparatively low rate, but not necessarily when theyrequire it.*

8. *It is proposed that Regulations 19 and 35 quoted above be revised to stipulate that the rate of infirm power shall be same as the prevailing rate of Unscheduled Interchange (UI). This would be in line with the concept of Unscheduled Interchange, since any power which cannot be scheduled in advance is in fact Unscheduled Interchange. Once this is stipulated, it would not be necessary to carry out any post facto changes in the schedules either for the generating station or for the beneficiaries in respect of infirm power. The mechanism would also induce the generating companies to maximize injection of infirm power during peak load hours and minimize it during off-peak hours.*

9. *It is expected that the generating companies will get, in comparison to the present situation, higher revenue from sale of infirm power when its rate is equal to the UI rate. The increased*

revenue shall be accounted for reduction in capital cost as already stipulated. This would be beneficial for both the generating company (as it would recover some of its investment upfront) and for the beneficiaries (as the capacity charge for the generating station would get reduced on account of reduction in capital cost).”

47. We have already mentioned the definition of infirm power. One has to see whether infirm power can be equated with unscheduled power. As rightly pointed out by learned senior counsel Mr. M. G. Ramachandran arguing for 1st Respondent-NTPC, in a given case even a scheduled power can become infirm power if facts and circumstances warrant. It is possible that agreements are entered into for sale of infirm power to Distribution Company at agreed price. Merely because scheduled power in peculiar circumstances was treated as infirm power and mere fact that it is infirm power, it cannot be treated as unscheduled power. Therefore, 1st Respondent’s stand that scheduled or unscheduled power is on real time basis when power is generated and supplied and apparently, all these are provided in terms of Indian Electricity Grid Code seems to be correct.

48. Apparently, the argument of the Appellant is that the revenue earned by 1st Respondent-NTPC has to be considered in two stages i.e., deviation/UI charges inclusive of fuel cost and the revenue earned in excess of deviation/UI charges which includes fuel cost. The entire discussion and conclusion arrived at by the CERC in its order dated 20.09.2017 certainly has no reference to these deviation/UI charges inclusive of fuel cost. This is not even remotely referred to in the first order of the Commission. Similarly, this Tribunal in the appeal against the order dated 29.09.2017 so also the Hon'ble Apex Court never opined that the main Regulation of the Regulation 18 has to be applied. At the cost of repetition, we again place on record that there was no direction for refund of any part of revenue earned by the 1st respondent–NTPC that is over and above the fuel cost. As already stated, this order of the Commission was never challenged by GRIDCO or any other person on the ground that there was no provision for refund of any revenue earned after adjustment of fuel cost.

49. Bihar utilities or other procurers have not challenged the said order dated 20.09.2017 and so far as the Impugned Order dated 18.03.2019, Bihar utilities did not even participate in the proceedings and they

continued to pay the amounts raised in the invoices by 1st Respondent–NTPC on regular basis.

50. It is seen that the Appellant-GRIDCO adjusted a sum of Rs.359.69 crores from the running monthly bills of December 2018 and January 2019 on the ground that after the Judgment dated 20.09.2017, there was no dispute so far as quantum claimed by NTPC in all the bills raised for generation and supply of power. We are concerned with the generation and supply of power for the period from 15.11.2014 to 07.03.2016. We are not concerned with the bills raised for December 2018 and January 2019. According to 1st respondent-NTPC, this act of GRIDCO is unilateral without subjecting the issue for any adjudication or determination by the concerned authorities.

51. The contention of the GRIDCO that CERC did not hear the Appellant before passing the impugned order is unsustainable because one Mr. R.B. Sharma appeared for Appellant-GRIDCO and CERC did hear said Mr. Sharma.

52. So far as contention of the Appellant that NTPC accepted that there should be refund of money to GRIDCO by the 1st Respondent-

NTPC, the learned senior counsel, Mr. M. G. Ramachandran arguing for NTPC brought to our notice that GRIDCO is referring to the submissions of NTPC at the interim stage before the Tribunal, without referring to the Additional Affidavit which was filed by NTPC. According to the learned senior counsel, the contents of reply filed by NTPC at Para 10 and 11 of Additional Affidavit clarify the actual stand of the 1st Respondent, which read as under:

> ***"10.*** *I say that any event, in the Impugned Order, the Central Commission has not directed the adjustment of the revenue earned by NTPC during the period from 14th November 2014 to 7th March 2016 in terms of the REA accounting. In terms of the Order passed by the Central Commission, the revenue earned over and above the fuel cost for the sale of infirm power from 15th November 2014 to 7th March 2016 shall be adjusted in the capital cost. The capital cost of the project is yet to be determined. The petition being Petition No 130/GT/2014 in regard to the determination of the tariff from the date of the COD of the Barh Generating Station is pending before the Central Commission. On the other hand, the revenue earned by NTPC, even according to the decision of the Central Commission is a recovery for infirm power supply which would be adjusted in the capital cost. The relevant extracts from the Impugned Order dated 20.09.2017 reads as under:*

> *"28. Power injected by Respondent No. 1 in respect of the Unit before 8.3.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries during the period. The revenue earned over and above fuel cost from sale of infirm power from 15.11.2014 to 7.3.2016 shall be adjusted in the capital cost."*

> ***11.*** *I say that in the circumstances mentioned above, there is no justification for the ERPC to make adjustment for revenue earned by NTPC during the period from 15th November 2014 to 7th March 2016. Further, in view of the letter dated 19.01.2018 received from ERPC, the Hon'ble Tribunal may clarify the issue regarding the pendency of the Interim Application and the ERPC and the Eastern Regional Load Dispatch Centre should not proceed to make any further adjustments, until further orders by this Hon'ble Tribunal."*

53. Pertaining to generation and supply of power of Barh Generating Station of the 1st Respondent for each time block during the period between 15.11.14 to 07.03.2016, there was declaration of availability of power by NTPC and the same was scheduled by Appellant. The declaration of availability has nothing to do with the COD which was declared by NTPC on 15.11.2014. The fact remains that by order dated 20.09.2017, the said declaration of COD on 15.11.2014 was set aside. Consequently, the quantum of power supplied by NTPC as available

during the above said period is deemed to be infirm power, since the revised COD is 08.03.2016. In terms of proviso to Regulation 18, after adjusting fuel cost, the excess revenue has to be adjusted in the capital cost.

54. It is noticed that prior to the impugned order, there was de-allocation of capacity from the Barh Super Thermal Power station in question falling to the share of GRIDCO. It is also seen that this de-allocation of capacity was not at the instance of the 1st Respondent-NTPC. In other words, 1st Respondent did not compel the Appellant-GRIDCO to relinquish the capacity. The said de-allocation was at the instance of GRIDCO and notified by Ministry of Power. The fact remains that if excess revenue is earned by the 1st Respondent-NTPC after deducting the fuel cost met towards the supply of power between 15.11.2014 to 07.03.2016, it has to be adjusted in the capital cost.

55. In the light of de-allocation of capacity even if the capital cost is reduced, the contention of the Appellant is that the said benefit in the form of reduced tariff do not endure to the consumers of Appellant-GRIDCO. There is some force in the said argument of the Appellant.

56. In view of the above, there is no doubt that findings of the Central Commission with respect to the treatment of revenue earned by NTPC during the period 15.11.2014 to 07.03.2016 has now attained finality and cannot be tinkered with. Therefore, it is not open to GRIDCO or any other Procurer to raise such issues after the disposal of the Appeal No. 330 of 2017 by this Tribunal in its Judgment dated 25.01.2019 and unilaterally adjust the monthly bills, contrary to the specific directions contained in Para 28 of the Order dated 20.09.2017. If at all GRIDCO was aggrieved by the finding of the Central Commission, it was open for GRIDCO to challenge the same before this Tribunal which admittedly it has not done. It cannot be lost sight of the fact that GRDICO had sought for relinquishment of its share from the NTPC's Project which is much before the Judgment passed by this Tribunal. Therefore, at the relevant point in time GRIDCO was aware that its relinquishment would deprive GRIDCO of the benefit envisaged in the Order dated 20.09.2017 in Petition No. 130/MP/2015 passed by Central Commission; still GIRDCO did not assail the finding of the Central Commission.

57. Hence, in so far as treatment of revenue is concerned, the said issue has attained finality. Further, even the relevant Tariff Regulations

specified by the Central Commission also does not envisage any refund of Tariff in such circumstances. Since there is no direction given for refund in the Order passed by the Central Commission, the same cannot be allowed. Accordingly, the revenue earned over and above the fuel cost during the period 15.11.2014 to 07.03.2016 is directed to be adjusted from the Capital Cost of NTPC.

58. However, the Tribunal is faced with a rather peculiar situation as one of the beneficiaries i.e., GRIDCO has now made exit from the Project and even though GRIDCO has paid fixed charges from 15.11.2014 to 07.03.2016 but would not be able to receive the benefit of reduction of capital cost with effect from 19.02.2019 as it is no longer a beneficiary of Barh-II station. Further, the beneficiary to whom the share of GRIDCO has been allocated has not made the payment of fixed charges for the additional quantum of power allocated after 19.02.2019 for the relevant time i.e., between 15.11.2014 to 07.03.2016. Therefore, corresponding to the additional quantum of allocation, the said Utility is not entitled for the reduced capital cost as directed by the Central Commission in its Order dated 20.09.2017 in Petition No. 130/MP/2015. Therefore, considering the peculiar circumstances of the present case,

as an exception, an arrangement needs to be put in place whereby the benefits of reduction in Capital Cost can be transferred to GRIDCO in proportion of its contracted capacity by the beneficiary replacing GRIDCO. This is being directed to balance the interest of all parties. The Central Commission may work out the modalities of the above arrangement as directed by us.

59. For the foregoing reasons, the matter is remanded to the Central Electricity Regulatory Commission to pass the consequential orders in accordance with law and our directions as stated *supra.*

60. No order as to costs. Pending IAs, if any, shall stand disposed of.

61. Pronounced in the Virtual Court on this, **the 15th day of October, 2020.**

S.D. Dubey
(Technical Member)

Justice Manjula Chellur
(Chairperson)

REPORTABLE/~~NON-REPORTABALE~~

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