

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.275/MP/2018**

**Coram:**  
**Shri P.K. Pujari, Chairperson**  
**Shri I.S Jha, Member**  
**Shri Arun Goyal, Member**  
**Shri P. K. Singh, Member**

**Date of Order: 11<sup>th</sup> April, 2022**

**In the matter of:**

Petition under Section 79 of the Electricity Act, 2003 read with Article 15 of the Power Purchase Agreement dated 13.12.2011 executed between Tata Power Trading Company Limited and SKS Power Generation (Chhattisgarh) Limited.

**And**

**In the matter of:**

Tata Power Trading Company Limited,  
Corporate Centre, 'A' Block,  
34, Sant Tukaram Road, Carnac Bunder,  
Mumbai 400 009

**...Petitioner**

**Versus**

SKS Power Generation (Chhattisgarh) Limited,  
B-501, Elegant Business Park,  
Andheri Kurla Road,  
J.B.Nagar, Andheri-(E),  
Mumbai - 400 059

**...Respondent**

**Parties Present:**

Shri Amit Kapur, Advocate, TPTCL  
Shri Vishrov Mukerjee, Advocate, TPTCL  
Ms. Aparajita Upadhyay, Advocate, TPTCL  
Shri Sajjan Poovayya, Senior Advocate, SPGCL  
Shri Hemant Singh, Advocate, SPGCL  
Shri Lakshyajit Singh Bagdwal, Advocate, SPGCL

**ORDER**

Tata Power Trading Company Limited (hereinafter referred to as "the Petitioner")  
has filed the present Petition against SKS Power Generation (Chhattisgarh) Limited



(hereinafter referred to as "the Respondent") under Section 79 of the Electricity Act, 2003 read with Article 15 of the Power Purchase Agreement dated 13.12.2011 for setting aside termination of Purchase Power Agreement (PPA) dated 24.8.2017. The Petitioner has made the following prayers:

- a) *Admit and allow the present Petition and adjudicate upon the present matter;*
- b) *Set aside the termination of PPA notice dated 24.08.2017 and declare the said termination thereof as unlawful;*
- c) *Grant specific performance of the PPA dated 13.12.2011 executed between TPTCL and SPGCL;*
- d) *In the alternate, award damages for loss of trading margin and other associated losses suffered by TPTCL on account of the illegal termination of the PPA;*
- e) *Direct SPGCL to make payment of Rs.6810,62,976/- towards loss of trading margin ;*
- f) *Direct SPGCL to make payment of Rs.489,03,534/- towards the non-supply of power by SPGCL;*
- g) *Direct SPGCL to make payment of Rs.103,12,500/- towards TPTCL's Consultancy Fee wrongfully withheld by SPGCL;*
- h) *Direct SPGCL to pay interest at the rate of 15% on the above amounts;*
- i) *Pass appropriate orders directing SPGCL to secure the sum due to TPTCL by adequate security and restraint SPGCL to alienate its assets to the prejudice of TPTCL in the interregnum ; and*
- j) *Pass such further and other order, as may be deemed necessary by this Hon'ble Commission.*

## **Background**

2. On 13.12.2011, the Respondent SKS Power Generation (Chhattisgarh) Limited, (SPGCL) executed a Power Purchase Agreement (PPA) with the Petitioner Tata Power Trading Company Limited (TPTCL) for sale of 137.50 MW power generated from each of its four generating units at Chhattisgarh (total 550MW), for a period of 15 years. As



per Schedule A of the PPA, the Scheduled Commercial Operation Date (“SCOD”) for various units of the Project is as follows:

Phase	Unit	Unit MCR (nominal) (MW)	Contracted Capacity upon completion (MW) (the “Scheduled Contracted Capacity”)	Scheduled COD
1	1	300	137.50	27.01.2014
1	2	300	137.50	27.04.2014
2	3	300	137.50	27.12.2014
2	4	300	137.50	27.03.2015

3. Pursuant to the terms of the PPA with SPGCL dated 13.12.2011, the Petitioner entered into the following arrangements for sale of electricity:

a) Supply of 90 MW to Brihan Mumbai Electric Supply & Transport Undertaking (“BEST”) in terms of the Lol dated 19.06.2017 for the period from 1.7.2017 to 30.9.2017;

b) Supply of 250 MW to Uttar Pradesh Power Corporation Limited (UPPCL) in terms of the Letter of Intent (“Lol”) dated 15.07.2017 for the period from 1.8.2017 to 30.09.2017; and

c) Supply of 180 MW to Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) in terms of the letter of intent dated 7.8.2017 for the period 8.8.2017 to 17.8.2017

4. The Petitioner participated in the Tenders/RFP in respect of the above arrangements with BEST, UPPCL and MSEDCL as per authorization given by the Respondent and on being successful in the bids, Lols were issued in its favour. The Petitioner has further submitted that the Respondent cited certain technical hindrances for its inability to achieve COD of the first unit within Scheduled COD and therefore, suggested that the Petitioner should arrange for alternate source of supply of power to meet the contractual obligations arising from Lols issued by BEST, UPPCL and MSEDCL. It has been submitted that accordingly, the Petitioner, for supplying power to BEST, UPPCL and MSEDCL had to procure power from alternate sources even at relatively higher costs for which the Respondent had given confirmation.



5. The Respondent vide its letter dated 10.08.2017 informed the Petitioner that due to storm, a Force Majeure event, the commissioning of its power plant has got delayed and the first unit is now expected to be commissioned by October, 2017 and therefore, the Respondent expressed its inability to supply power.

6. Subsequently, the Respondent vide its letter dated 24.08.2017 terminated the PPA on the following grounds:

- a) Failure of the Petitioner to tie-up 70% of the power under long term PPAs;
- b) Suppression of material fact that the Respondent had the option to exit the obligations under Lol and PPA with respect to UPPCL due to delay in issuance of letter of intent.

### **Submissions of the Petitioner**

7. The Petitioner has submitted as under:

- a) On account of the Respondent's failure to achieve COD in a timely manner, the Petitioner has suffered enormous losses in terms of revenue opportunities which would have been generated from trading margins earned through sale of power. Due to delay in COD, the Petitioner was unable to sell power on the power exchange resulting in loss of Rs.68,10,62,976.
- b) The Petitioner agreed to participate in the BEST Tender as per the instruction of the Respondent. However, since the Project had not achieved COD, the Respondent vide its letter 21.06.2017, expressed its inability to supply power and sought assistance of the Petitioner to arrange power from alternate source. The Petitioner had to incur Rs.21,03,963 on account of differential cost for arranging power supply from various alternative sources, whereas the Respondent has paid only Rs.41,030 on 18.07.2017.
- c) The Petitioner while acting on the Respondent's assurance relating to achieving of COD participated in UPPCL Tender. The Petitioner emerged as L-1 in several time slots, and thereafter, Lol was also issued to the Petitioner. However, the Respondent again defaulted in achieving COD and again



requested the Petitioner to arrange power from alternate source for both the months of power supply to UPPCL.

d) When the Petitioner was arranging power from alternate source, the Respondent informed the Petitioner on 26.07.2017 that it had arranged for supply of power to UPPCL under power banking/swap arrangement through a third party, namely, Manikaran Power Limited. Later, on 29.07.2017, the Respondent informed Petitioner (TPTCL) that the proposed Power Banking arrangement could not be executed due to failure of the third party and requested the Petitioner to arrange power from alternate source. Despite short period of time on hand, the Petitioner made all endeavours to secure power for supplying the same to UPPCL.

e) The Respondent vide its letter dated 08.08.2017 informed that it was not obligated to supply power to UPPCL in terms of Clause 13.1 of the UPPCL Tender as the PPA was not executed within 15 days of e-reverse auction.

f) The Petitioner raised the following bills on the Respondent against compensation payable for quantum less supplied as per Clause 23 of UPPCL Tender:

i. Bill dated 12.10.2017 (for the period of 01.08.2017 to 31.08.2017) for an amount of Rs.1,76,08,000;

ii. Bill dated 23.10.2017 (for the period of 01.09.2017 to 30.09.2017) for an amount of Rs.1,32,12,000; and

iii. Bill dated 31.10.2017 (for the period of 01.09.2007 to 30.09.2017) for an amount of Rs.1,59,14,400.

g) The Respondent has not made payment towards the above bills. Further, while participating in UPPCL Tender, the Petitioner has also incurred Rs.3,42,200 as MSTC fees which is also remained unpaid.

h) In order to be absolved from its obligations, the Respondent raised a similar and frivolous ground in MSEDCL Power Purchase Tender. Lol for MSEDCL Tender was issued pursuant to the Respondent's participation for 180



MW of power supply during 0600 Hrs. to 1600 Hrs. starting from 08.08.2017 to 17.08.2017. However, on account of non-readiness of the project of the Respondent, the Respondent again resiled from its position and informed the Petitioner about its inability to supply power in terms of MSEDCL Lol. While participating in MSEDCL Tender, the Petitioner incurred Rs.1,06,200 as MSTC fees which has also not been paid to the Petitioner by the Respondent.

i) As per Regional Energy Accounts for month of November, 2017 and December, 2017 the Respondent sold power to third parties, without consent of the Petitioner. Such sale of power to third parties without the Petitioner's consent is a breach of the express provisions of the PPA. Accordingly, the Petitioner should be compensated by the Respondent for the gross violation of its obligations under the PPA.

j) The Respondent after terminating the PPA, is selling power to third parties, which amounts to taking advantage of its own wrong, and the same is not permissible in law.

k) The Petitioner is also entitled to consultancy fees. As per Article 16.21 of the PPA, the Respondent had agreed to pay consultancy fees to the Petitioner in following schedule:

- i. Rs.1,03,12,500 within fourteen (14) Business Days of the Effective Date as initial consultancy fees for Phase-1.
- ii. Rs.1,03,12,500 within ninety (90) Business Days of the Effective Date as initial consultancy fees for Phase-2.
- iii. Rs.1,03,12,500 within fourteen (14) Business Days of the execution of the Financing Agreements relating to Phase-1.
- iv. Rs.1,03,12,500 within fourteen (14) Business Days of the execution of the Financing Agreements relating to Phase-2.

However, till date the Respondent has not made payment of Rs.2,06,25,000 as consultancy fees for Phase-2, out of which Rs.1,03,12,500 was due within 90 Business Days of the Effective Date (date of signing of the PPA) in terms of Article 16.21 of the PPA. Despite lapse of more than 6 years since the Effective Date, the said amount still remains outstanding.



l) The Respondent has failed to adhere to its obligations under the PPA, which has adversely impacted the Petitioner. The Respondent has not only failed to make any payments, but has also failed to follow the Dispute resolution procedure under the PPA for settlement of disputes between the parties. Having so flouted the PPA covenants, the Respondent has been selling power to third parties at the cost of and prejudice to the Petitioner's interests which amount to taking advantage of one's own wrong, which is not permissible either under law or equity.

m) The summary of Petitioners' claims in the present Petition is as under:

Amount Due for	Amount	Interest	Total
Power Sale Tenders (Tender won but power not supplied by SKS)	Rs.489,03,534	Rs.44,74,481	Rs.533,78,015
Loss of trading margin due to delay in COD	Rs.6810,62,976	Rs.1889,32,756	Rs.8699,95,732
Consultancy charges not paid	Rs.103,12,500	Rs.97,30,479	Rs.200,42,979
Total	Rs.7402,79,010	Rs.2031,37,717	Rs.9434,16,727

8. The Respondent had filed I.A No. 100/2018 seeking declaration that the present Petition is not maintainable due to the lack of jurisdiction of the Commission to adjudicate a private dispute between an electricity trader and a generating company. The Commission vide order dated 26.11.2019 in I.A No. 100/2018 dismissed the I.A and held as under :

*"16. Since SPGCL has entered into contractual obligations for supplying power to multiple States through PPA with TPTCL and binding arrangements by participating in the tenders and RFP floated by various distribution entities in a number of States, its generating station has a "composite scheme" for generation and sale of power to more than one State. Accordingly, this Commission has the jurisdiction to regulate the tariff of the generating station of SPGCL under Section 79(1)(b) and therefore, also to adjudicate the disputes raised in the present Petition in terms of Section 79(1)(f) of the 2003 Act. Accordingly, we hold that the Petition filed by TPTCL before the Commission to adjudicate the disputes with regard to contractual obligations under the PPA dated 13.12.2011 is maintainable under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.*

*17. I.A. No. 100 of 2018 in Petition No. 275/MP/2018 is disposed of in terms of above. The matter shall be listed for further hearing, for which a separate notice shall be issued."*



9. The Respondent has filed its reply vide affidavit dated 10.6.2021 and the Petitioner has filed its rejoinder vide affidavit dated 23.7.2021. The Respondent has also filed its written submissions.

### **Submissions of the Respondent**

10. The Respondent in its reply vide affidavit dated 10.6.2021 has submitted as under

a) The Original PPA is executed between the Petitioner, which is an inter-State trading licensee, and the Answering Respondent, which is a generating company in the nature of a memorandum under which the Petitioner targeted to sell 'in future' 70% of the contracted capacity of the Answering Respondent under long-term. Article 4.1.2(ii) of the Original PPA provides that the moment the Petitioner facilitates a transaction for selling power of the Answering Respondent 'in future', a Replacement PPA will have to be executed for that particular transaction; Article 4.1.2 (iii) of the Original PPA, gives an 'absolute discretion' upon the Answering Respondent, whether to execute a Replacement PPA or not. This means that the entire basis for execution of a future agreement to sell is based upon the discretion of the Answering Respondent and not the Petitioner. Therefore, the Original PPA is nothing but a determinable contract as per section 14(d) of the Specific Relief Act, 1963.

b) The Original PPA does not contain any provision requiring the Answering Respondent to keep the alleged contracted capacity available at all times for the Petitioner, or that the said Respondent cannot create any third party right qua such contracted capacity. In the absence of any such provision, the contracted capacity in the Original PPA carries no meaning, with the Answering Respondent retaining the absolute right to create third party rights qua the contracted capacity or to simply refuse any offer for sale of power through the Petitioner.

c) Article 4.1.2(v) of the Original PPA provides that the terms and conditions of the Original PPA will not be applicable to the Replacement PPA, and that the terms and conditions of the Original PPA will only govern the portion of the





contracted capacity, which is not a part of the Replacement PPA. Thus, the entire arrangement under the Original PPA is based on the execution of a 'future' agreement (Replacement PPA), which is purely at the discretion of the Answering Respondent herein. Further, any dispute qua performance/non-performance of the obligation of the Petitioner or the Answering Respondent will be governed by the said Replacement PPA.

d) Hence, when the Answering Respondent has the option to reject any proposal for facilitating sale of power brought by the Petitioner, the same means that honouring/enforcing the Original PPA is solely at the discretion of the said Respondent. This makes the Original PPA a determinable contract, as even if the said PPA is valid, unless the Answering Respondent gives its consent for any 'future' sale of power contemplated under the said PPA, the Original PPA remains a dead letter.

e) As per Article 4.1.2 of the Original PPA, a 'Replacement PPA' is executed 'in future' pursuant to the execution of a 'Power Sales Agreement' also 'in future', as defined in Article 1.1, read with Article 4.1.2 of the Original PPA. Hence, the capacity agreed by the Petitioner under the Replacement/'future' PPA, and consequently the 'future' PSA, is excluded from the contracted capacity under the Original PPA.

f) Further, in terms of Article 9.2.2 (a), the seller (Answering Respondent) has to issue a monthly bill to the buyer (Petitioner), which will include the trading margin.

g) The 'consideration' for sale of power is not at all envisaged under the Original PPA, rather, the same is only subjected to execution of a 'future' agreement (Replacement PPA and PSA). Hence, when there is no consideration under the Original PPA qua the contracted capacity, then the said agreement is simply a piece of paper in the nature of a memorandum, which stipulates execution of future agreements, which is not only determinable in nature but also unenforceable having no binding force. 'Consideration' is a vital part of any agreement, and without a consideration, every agreement is void. In the present case, there is no consideration on behalf of the Answering Respondent which



has been provided to the Petitioner with respect to the contracted capacity. As such, the Original PPA is void and unenforceable.

h) As per Article 16.21, the Answering Respondent has to pay the consultancy fees to the Petitioner. However, the same cannot be considered as consideration as the nature of the Original PPA is not in terms of any consultancy services to be provided by the Petitioner. Instead, the same is with respect to facilitating 'future' sale of power from the Answering Respondent. Further, as a trading licensee, the Petitioner cannot at all charge a consultancy fee, which is other than trading margin under a PPA which is meant for sale of power.

i) The Petitioner is not entitled to consultancy fee. Further, as per the CERC (Fixation of Trading Margin) Regulations, 2010, a trader cannot charge anything, except for the trading margin. Therefore, the consultancy fees as envisaged under the Original PPA, is de-hors the regulations of this Hon'ble Commission. This further means that the consultancy fee already paid by the Answering Respondent was illegally collected and is liable to be refunded with interest.

j) The Original PPA dated 13.12.2011 is also not at all enforceable, on account of no fixation of price (tariff), which could only be possible in an event a Replacement/'future' PPA is executed between the Petitioner and the Answering Respondent pursuant to a 'future' PSA executed between the Petitioner and the third party(ies).

k) The Ministry of Power, Government of India issued the DBFOO guidelines on 09.11.2013. As per the said guidelines, the traders are barred from participating under the long-term procurement process, as only those entities who can Design, Built, Finance, Own and Operate a power plant, can participate in long-term bidding, and not traders. Therefore, the Original PPA became infructuous on account of the fact that the said PPA was executed on 13.12.2011, and the aforesaid guidelines were issued subsequently on 09.11.2013. Pursuant to the said guidelines, the Petitioner became incompetent to implement the intent of the Original PPA which requires 70% of the capacity mentioned in the said PPA to be tied up under long term contracts, through the Petitioner.



l) The Original PPA is an illegal agreement, on account of being hit by section 23 of the Indian Contract Act, 1872. According to which, any agreement which defeats the purpose of any law in force, is illegal and void *ab initio*.

m) As per Clause A of Schedule C of the PPA, the Petitioner shall receive a trading margin of 1.5% of the sale price per unit. Further, Clause B of the aforesaid schedule encapsulates that the Petitioner will also be eligible for incentive sharing payment. The Petitioner, according to its wished, has determined the trading margin, and also, seeking incentive sharing in lieu of the Replacement PPAs which may be executed 'in future'. This is in direct contravention to Regulation 4 of the CERC (Fixation of Trading Margin) Regulations, 2010.

n) The Regulations of this Commission provide for a specific fixation of trading margins, which a trader (Petitioner) can charge from the seller or the procurer. The trader does not have, any right whatsoever, to charge a trading margin which is de-hors the aforesaid Regulations. In the present case, the Petitioner has arbitrarily decided a trading margin of 1.5%, without taking into account the aforesaid Regulations of this Commission. As per the aforesaid regulations, the trading margin is in Rupee terms, and not in percentage terms. This is because depending upon the tariff, the trading margin can exceed the limits specified under the aforesaid relevant regulations. This makes the Original PPA completely violative of the margin provisions.

o) The Petitioner is also seeking an incentive sharing payment, over and above the trading margin, which is completely contrary to the afore-quoted Regulations, which categorically states that the trading margin shall include all the charges.

p) A trading licensee has to adhere to trading margins specified in the regulations by this Commission with respect to short term contracts. In the present case, even though the Original PPA stipulates that it is an agreement for a period of 15 years, however, for the purpose of trading margin, the said agreement has to be deemed as a 'short term' agreement as the said agreement



provides for power sale 'in future'. Hence, by no stretch of imagination the said agreement can be termed as a long-term contract.

q) The Original PPA under Clause 2 (e) of Schedule E provides that the contracted capacity may also contain a capacity which may be sold in spot market subject to the consent of the Answering Respondent. This means that the entire transaction is to be deemed as a short-term transaction, as the Original PPA has been fraudulently made as a 15 year agreement, when apart from the aforesaid spot sale which is short term, there is no sale of power taking place under the standalone Original PPA.

r) In other words, there is no continuous sale of power contemplated under the Original PPA, and therefore, the optics that the said PPA is of 15 years is sham/bogus. The said PPA, qua trading margin for any spot sale, has to be deemed as a short-term contract, as otherwise any trader can have a stipulation in its contract with either the buyer or the generator that the term is of more than one year when actually there is no continuous sale of power under the said contract, solely for the purpose of violating the margin stipulations contained in the said regulations.

s) Above submissions demonstrate that various provisions of the Original PPA are hit by section 23 of the Indian Contract Act, 1872. Further, the Original PPA is also violative of the conditions mentioned in the license granted by this Hon'ble Commission to the Petitioner. This specifically attracts section 19 of the Electricity Act, 2003, thereby mandating cancellation of the trading license of the Petitioner.

t) As per CERC (Trading Licence Regulations), 2009 and CERC (Trading Licence) Regulations, 2020 a trading licensee cannot at all charge any margin which exceeds the margin specified under the regulations. If a trading licensee engages in trade in violation of the aforesaid terms of the regulations, then there is no option but to mandatorily cancel the trading license granted by this Commission.

u) The PPA was executed on 13.12.2011. On the said date, CERC Trading Licence Regulations, 2009, were in force. Regulation 7 of the said Regulations



makes it clear that with any agreement by a Trading Licensee with a generating company shall specifically contain the following:

- (a) Upper limit and lower limit of the power, in MW terms, which is to be sold or purchased;
- (b) Detailed modalities for scheduling of power;
- (c) Details of the concerned person who is authorised to revise or modify the schedule;
- (d) Modalities qua unilateral modification of schedules; and
- (e) Liabilities for deviation from schedules.

However, in the Original PPA, there is no provision, whatsoever, which contains the aforesaid mandatory requirements qua the contracted capacity under the standalone Original PPA (i.e., without execution of any 'future' replacement PPA/ PSA). Hence, the Original PPA is void and illegal, being contrary to the aforesaid regulations.

v) As per Article 7.3, the applicable charges mentioned therein are only applicable once energy/ power from the Answering Respondent is scheduled by the Petitioner 'in future'. The provision for scheduling of electricity, as per Article 6, is only applicable in the event there is a requirement 'in future' to schedule power for selling to a consumer, beneficiary or energy exchange. Additionally, in terms of Article 6.2.2, the Answering Respondent has to ensure that it does not enter into any agreement for sale of power with third parties for a quantum, which exceeds the quantum under the Power Sale Agreements (PSA) to be executed 'in future'. As per Clause 2(d) of Schedule E, for the contracted capacity, which is other than the Replacement PPA capacity, the Petitioner can sell power 'in future' up to such contracted capacity by undertaking spot sale.

w) Under Regulation 2(ii) of the CERC Power Market Regulations, 2010, spot market is defined as the market where delivery of electricity occurs either on the same day as on the date of transaction or on the next day through energy exchange.

x) The provisions relating to scheduling, metering etc. are only applicable in the event the Petitioner either facilitates a transaction through a Replacement PPA, or through a short-term transaction in spot market, 'in future'. Therefore, the aforesaid provisions are not meant for the contracted capacity qua the



'standalone' Original PPA. In other words, all the commitments mentioned in the Original PPA are with respect to only the 'future' sale of power through either Replacement PPAs or through spot market.

y) The Original PPA is an abuse of process by the Petitioner, thereby intending to bind the Answering Respondent in terms of an alleged contracted capacity, when otherwise from the provisions of the said PPA it is evident that the said Respondent is not at all bound. All the provisions relating to metering or scheduling are meant for 'future' contracts, which the Petitioner may enter on behalf of the Answering Respondent. Thus, the Original PPA has been executed contrary to the express terms of the relevant regulations of this Hon'ble Commission.

z) When there is neither tied up PPA or any other arrangement for supply of power of the Answering Respondent, facilitated by the Petitioner as a trader, then the said Petitioner cannot simply, by its sweet wish, decide to raise a claim for loss of trading margin. A trading licensee can claim trading margin only for a transaction in which power has been sold/scheduled. Without selling the said power, no claim, whatsoever, can be made by the Petitioner.

aa) As per Article 12.1.1 (ii), an indemnifying party has to indemnify for any loss, damage etc., incurred by the Indemnified Party on account of a breach of the obligations under of the Original PPA. However, such indemnification has certain limitations which are set out under Article 12.2 of the Original PPA. As per Article 12.2.2, any indemnification under the aforesaid PPA shall not exceed an amount equivalent to 6% of the average of all of the Monthly Bills for Contract Years prior to the Contract Year in which the indemnity claim is made. Therefore, any indemnification by an indemnifying party for an alleged loss or damage to the indemnified party is directly linked with the "Monthly Bills".

bb) As per the definition of Monthly Bill provided under the Original PPA, the same means the monthly invoice for the Scheduled Energy, determined based on the agreed Tariff.



cc) Further, as per the definition of tariff, the same means the tariff payable for the Scheduled Energy of the Power Station as agreed between the Parties in this Agreement, set forth in Schedule B.

dd) Hence, from a combined reading of the provisions of the Original PPA, it is quite evident that the indemnification under the Original PPA, for any loss or damage, if any, has to be in terms of the “tariff”, which is provided under Schedule B.

ee) As per Schedule B, the “tariff” is the net value realized by Seller/ Answering Respondent under the Long-Term, Medium-Term, Short-Term Replacement PPAs. In other words, the tariff is not at all envisaged under the Original PPA executed between the Petitioner and the Answering Respondent, rather the same would be envisaged under a ‘future’ back-to-back PPA which would be executed between the Petitioner and Answering Respondent, for the purpose of sale of power to a third party (i.e., ‘future’ Replacement PPA and ‘future’ PSA). Therefore, when there has been no execution of replacement PPA between the parties, which could establish a “tariff” payable to the Answering Respondent, then the Petitioner, in terms of the aforementioned articles of the Original PPA, cannot at all seek a claim for any trading margin. When tariff itself is non-existent qua the standalone Original PPA, then there cannot be a trading margin determined over and above the said tariff. Hence, in terms of Articles 12.1.1 (ii) and 12.2.2 of the Original PPA, the Petitioner cannot at all seek any loss or damage qua margin from the Answering Respondent.

ff) The principle behind computing damages/compensation flows from the provisions of Indian Contract Act, 1872. As per Section 73 and Section 74 of the Indian Contract Act, compensation can only be awarded upon demonstration of “actual” loss.

gg) The claim of the Petitioner is completely based on assumptions that, had the Answering Respondent achieved the COD of its generating units in terms of the PPA, then the Petitioner would have executed an arrangement for sale of power, wherein it would have made revenue in form of trading margin. The same is completely baseless on account of an established legal principle that



compensation/ damages have to be against actual loss, and can never be based upon assumptions. This is more so on account of the fact that the standalone Original PPA is enforceable at the option of the Answering Respondent, and hence, there cannot at all be any loss or damages suffered by the Petitioner.

hh) In this context, the Petitioner places reliance upon the following judgments of the Hon'ble Supreme Court. As per the decision of the Hon'ble Supreme Court in *State of Himachal Pradesh & Ors vs. Naval Kumar*, the Petitioner is completely barred under law, to raise a claim, which is based on an assumption of selling power generated by the Answering Respondent at the rates prevailing in the energy exchanges, when there has been no actual arrangement for supply of power. Furthermore, the Original PPA is enforceable only at the option of the Answering Respondent.

ii) The claim of the Petitioner towards the non-supply of power by the Answering Respondent under the BEST and UPPCL bid is completely unsubstantiated, without any cogent proof of loss being suffered by the Petitioner. The Petitioner has failed to justify and bring on record the bills/invoice of the above Discom (BEST), which were raised upon the Petitioner. Further, the Petitioner has also failed to bring on record the bills/invoice of the generators, who allegedly supplied alternate power in place of the Answering Respondent. Without producing the same on record, and demonstrating the alleged loss, the Petitioner cannot at all seek a refund from the Answering Respondent, towards the alternate supply of power to BEST.

jj) The Petitioner completely failed to perform the duty on its part, with respect to the bid issued by UPPCL for supply of power. Pursuant to the participation in the above bid, UPPCL issued Lol dated 15.07.2017 to the Petitioner for supply of power for the period commencing from 01.08.2017 to 30.09.2017. However, the Petitioner after 4 days from the issuance of the above Lol forwarded the copy of the said Lol to the Answering Respondent, only on 19.04.2017. This itself explains the delayed approach on the part of the Petitioner for not being prompt in communicating the information with the Answering Respondent.





kk) As per Clause 12.1 of the UPPCL tender document, the successful bidder has a right to exit from the bid, if the LOA is not issued within 15 days from the close of e-Reverse Auction. Further, as per the tender document, the e-reverse auction was to start on 26.06.2017, and as per Clause 11.2, the said e-reverse auction was to continue for a period of 120 Minutes. Therefore, in terms of the tender document, the e-reverse auction was to start and be concluded on 26.06.2017 itself.

ll) However, UPPCL issued LOI to the Petitioner 15.07.2017, which is much beyond the 15 days period, as provided under the Tender document. Hence, the Petitioner ought to have rejected the said bid, on account of breach on the part of UPPCL. Further, as per Clause 13.1 of the tender, the Petitioner had the option to exit from the bid in case UPPCL does not execute a PPA within the afore-quoted stipulated period of 15 days, without even forfeiting the EMD/ CPG, as the case maybe.

mm) As evident from the facts of the present case, no PPA was ever signed and as such, there was a clear breach on the part of UPPCL under the tender document. The Answering Respondent was proceeding bonafidely, without being aware of the fact that the Petitioner was playing a fraud upon the said Answering Respondent by not intimating about the delay in execution of PPA, as well as the issuance of the Lol by UPPCL beyond a period of 15 days as per the provisions of the bid document.

nn) As per the bid documents, the failure to comply with the said conditions gave the right to the Answering Respondent to seek exit from the transaction. However, the Petitioner chose not to intimate any of the above condition(s), when it was within the said Petitioner's knowledge that the generating units of the Answering Respondent had not commissioned due to the reasons beyond its control, and that the Petitioner did not disclose the above information for its greed to earn trading margin since, in the event the Answering Respondent had backed out in time, then the Petitioner would not have been entitled to earn any trading margin.



oo) The Respondent has a right to sell power to third parties during the term of the Original PPA, if the said power is not subject to consultation under the Replacement PPA marketing Strategy. Further, as per Article 4.4.2, the sale to third party shall not exceed 50% of the “scheduled” contracted capacity. As evident from the entire factual matrix of the case, the Petitioner and the Answering Respondent did not enter into any arrangement, where the power was being “scheduled” by the Answering Respondent. Further, it is pertinent to mention herein that Article 4.4.3 has further clarified that in the event that negotiations under Article 4.4.2(b) do not progress or conclude in accordance with the Replacement PPA Marketing Strategy, the Seller shall have the right to enter into a Direct PSA with any Third Party for sale of such portion of the Contracted Capacity. As evident from the entire factual matrix of the case, none of the replacement PPA market strategy was concluded, which would have resulted in execution of Replacement PPA(s). As such, in terms of the afore-quoted Articles 4.4.2 and 4.4.3 of the Original PPA, the Answering Respondent was well within its rights to sell power to third parties, and does not require any form of consent from the Petitioner. In addition to the aforesaid, reference may again be made to Article 4.1.2(iii) of the Original PPA which stipulates that the Answering Respondent has the absolute discretion to accept or reject any offer of the Petitioner qua execution of any Replacement PPA. Hence, the Answering Respondent had every right to sell power to third parties, without taking any sort of consent from the Petitioner, especially in light of the fact that the said Petitioner never brought an offer of a Replacement PPA qua the same quantum/capacity under the third-party sales made by the Answering Respondent.

pp) The consultancy fees which is being charged by the Petitioner under the Original PPA, is itself de-hors the provisions of the CERC (Fixation of Trading Margin) Regulations, 2010. Without prejudice, the payment of consultancy fees is linked to the COD of the generating units of the Answering Respondent. Phase-2 comprises of the COD of the second two units of (3X400) MW of the generating station of the Answering Respondent. Unit-3 and Unit-4 of the generating station of the Answering Respondent has not, till date achieved COD. Since the COD of Unit-1 and Unit-2 was achieved by the Answering Respondent, the consultancy fees as prescribed under the PPA, was duly paid to the Petitioner, which is also



illegally charged by the Petitioner. However, since the aforesaid Unit-3 and Unit-4 have not yet achieved their COD, there was no occasion for the Answering Respondent to pay the requisite consultancy fees to the Petitioner. This is, without prejudice to the contention of the Answering Respondent that the aforesaid consultancy fee is illegal and cannot be charged by the Petitioner. The Petitioner cannot at all seek for a specific performance from the Answering Respondent, as the termination of Original PPA, is valid under law. As per Article 13.2(iii) of the PPA, the Petitioner was under an obligation to act in a transparent manner. However, the Petitioner indulged in grave suppression of material facts and information from SPGCL in relation to the Short-Term Tender for Supply to UPPCL, which has resulted in huge losses to SPGCL. The Petitioner failed to transparently disclose to the Answering Respondent that UPPCL failed to honour the terms of the tender documents, which required issuance of Lol and execution of PPA within a stipulated period after the e-reverse auction has taken place.

qq) Article 2.2 of the PPA provides the right of “Early Termination” to both the parties. Accordingly, the Answering Respondent issued a notice dated 24.08.2017 by invoking Article 2.2 and Article 13 of the PPA. Under the said notice, the Answering Respondent categorically explained the reasons for such termination. As per Article 13.4.2 of the PPA, the consultation period is stipulated as 15 days. However, the Petitioner issued its response much later, on 13.10.2017. Therefore, it is clear that the Petitioner itself did not adhere to the timelines stipulated under the PPA. Hence, there is no merit, whatsoever, in the contention of the Petitioner that the Answering Respondent did not follow the due procedure, when the Petitioner itself defaulted by not responding to the termination notice, within a 15 days period.

rr) One of the crucial stipulations as contained under Schedule E of the PPA was that the Petitioner had a target of executing 70% of the contracted capacity, under long term PPAs. However, during the subsistence of the Original PPA, the Petitioner, neither signed any long-term Replacement PPA, nor made any efforts in this regard in respect of the subject power and as such, the commitments made in Schedule E to the Agreement stands violated. On account of such non-



performance of its obligations by the Petitioner (non-arrangement of long term PPAs), it has resulted in a loss of Rs.2,878 crores to the Answering Respondent.

ss) Further, it is reiterated that as per the DBFOO guidelines issued by the Ministry of Power, a trader cannot participate under long term power procurement process. As such, when an essential obligation of the agreement cannot be performed by the Petitioner, there is no case for seeking a specific performance of the Agreement.

### **Rejoinder of the Petitioner**

11. The Petitioner in its rejoinder to the reply submitted by the Respondent has submitted as under:

a) The Respondent's contention that the PPA is void due to lack of consideration is devoid of merit. The Respondent is compensating the Petitioner for services provided as an electricity trader. Therefore, the embargo of the Section 25 of the Contract Act as is sought to be portrayed by the Respondent has no applicability in the present case. In addition to the above, the PPA also provides for payment of consultancy fee by SPGCL to TPTCL for providing its services under the PPA.

b) The execution of 'Replacement PPA' is an obligation of Petitioner. Article 4.1.2 (ii) of the PPA provides that the Respondent shall provide the Petitioner with all the bid documents after which the Petitioner shall provide its consent along with calculations for tariff to be submitted and once the Petitioner finalises the terms and conditions, the Respondent is under an obligation to enter into a 'Replacement PPA' i.e. a separate power purchase agreement for the sale of such portion of contracted capacity with TPTCL with the terms and conditions on a 'back to back' basis with such power sales agreement. It is the Respondent which itself agreed to such condition of entering into 'Replacement PPAs' but was unable to supply power as per its commitments. It is for this reason that the Petitioner was asked to procure power from alternate sources.

c) Once a party enters into an agreement with the other party with a clear understanding of terms and conditions, they cannot take advantage of some



terms and conditions of the same contract and challenge or retract/repudiate other terms and conditions of the same contract. This principle was settled by the Hon'ble Supreme Court in *M/s New New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors.* (1981) 1 SCC 537 and *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation.*

d) An agreement is uncertain only if its essential terms are uncertain or incomplete. In the present case, the intention is extremely clear and evident. The Respondent has even acted upon such intention of requesting the Petitioner to arrange for purchasers of its power. The Respondent's action performed under the PPA is an admission that terms of the PPA were not uncertain.

e) The fact that 'Replacement PPAs' are to be entered into future cannot render the PPA void for the reason of 'uncertainty'. SPGCL's contentions are an incorrect understanding of law. Hon'ble Delhi High Court in *Jamna Auto Industries v. Union of India* AIR 1984 Del 235 held that a contract is not uncertain merely because the time of performance is not specified. Therefore, all contentions of the Respondent regarding the PPA being void due to uncertainty are baseless

f) The Respondent has further contended that since trading licensees are no longer eligible to participate in long term bidding process based on Design, Build, Finance, Own and Operate model, therefore the PPA has become infructuous. The said contention is wrong and denied. TPTCL is still capable of securing long term power supply agreement through negotiated route under Section 62 of the Electricity Act, 2003. Further, TPTCL is eligible to participate in all bidding processes conducted for medium-term power supply. Therefore, the Respondent's contention regarding the PPA being in-fructuous is wrong. The PPA is valid and binding on parties.

g) CERC (Fixation of Trading Margin) Regulations, 2010 are applicable only to short term purchase and sale of electricity and not to long term supplies (refer to Regulation 2). Admittedly, the PPA is for a period of 15 years during which TPTCL was going to trade power on behalf of the Respondent. The execution of long term PPA was left to parties to decide. The Statement of Reasons for the



2010 Trading Margin Regulations is noteworthy which states that “traders enter into long term power purchase agreements of duration exceeding a year the risks cannot be completely mitigated through a trading margin. Also, since the long term power procurement market is witnessing competitive forces at work, the Commission feels that the determination of an appropriate trading margin be best left to the market forces.”

h) The Commission in its order dated 20.11.2019 in Petition No. 204/AT/2019 (*Solar Energy Corporation of India Limited v. MNRE & Ors.*) has held that “Trading Margin Regulations do not provide for any Trading Margin for long term transactions and, therefore, it is up to the contracting parties to mutually agree on Trading Margin, if any, in such cases. In any case, the Commission does not fix Trading Margin on case to case basis. The spirit of the Act read with the Trading Margin Regulations gives freedom and choice to the contracting parties to mutually agree on Trading Margin for any kind of trading transaction, subject to the ceiling Trading Margin, whenever applicable. Accordingly, the Commission cannot fix or adopt any Trading Margin for long-term transactions under the provisions of the resent Trading Margin Regulations.”

i) The Appellate Tribunal in its judgment dated 2.7.2021 in Appeal No. 52 of 201 (*Solar Energy Corporation of India Ltd. vs. Delhi Electricity Regulatory Commission & Anr*) struck down the order of Delhi Electricity Regulatory Commission (“DERC”), wherein DERC had modified the trading margin agreed between the parties for long term contracts.

j) The PPA provides for three distinct kinds of payments to be made to the Petitioner for the services rendered by it, namely trading margin, incentive payment and consultancy fee. As per the PPA, the Petitioner is not only providing trading services to the Respondent (i.e., buying and selling power on back-to-back basis) but also providing consultancy services which are distinct from trading.

k) Schedule E of the PPA provides the scope of work to be undertaken by the Petitioner regarding market strategy for tying up power supply arrangements for the Respondent. Therefore, any fee charged towards consultancy is not a part



of the trading margin of the Petitioner and the same is payable towards the consultancy services rendered by the Petitioner. Neither the CERC (Fixation of Trading Margin) Regulations, 2010 nor the CERC Trading License Regulations, 2009 prohibits a trading licensee to provide consultancy services to its customers, and therefore, there is no embargo on charging a consultancy.

l) The Respondent has entered into the PPA after fully understanding the terms and conditions of the PPA and for a time also acted in line with the same. However, since the Respondent has failed to fulfil its own obligations under the PPA and failed to supply power due its poor management and execution of the Project, the Respondent is now trying to hold the entire PPA void. This is clearly an afterthought. The same is also evident from the termination notice dated 24.08.2017 which does not in any manner state that the PPA is void and it is for the first time that SPGCL seeks to make this baseless contention.

m) The Respondent has contended that specific performance of the PPA cannot be granted by this Commission because the PPA is a determinable contract as it vests a right in SPGCL to exercise its discretion to enter into 'Replacement PPAs' in 'future'. This contention of SPGCL is wrong and denied as the same is based on an incorrect understanding of law for the following reasons. It is a settled position of law that for a contract to become determinable, it must be shown that provisions of such contract are such that it would become possible for either of the parties to terminate it without assigning any reason. A contract which can be terminated by either of the parties at their own will, without assigning any further reason and without having to show any cause, is 'inherently determinable'. In the present case, the right to terminate is provided under Article 3.3 and Article 13 of the PPA. Article 3.3 provides two conditions for early termination of the PPA i.e. non-payment of consultancy fee by SPGCL to TPTCL and deferment/waiver or non-fulfilment of 'conditions subsequent' as per Article 3.1. Article 13.3 and Article 13.4 provide procedure for 'Termination of cases in case of Seller's Event of Default' and 'Termination for Buyer's Events of Default' respectively. Therefore, there is no right given to either party to terminate the PPA at its own whims, without assigning a reason. The right of termination of the



PPA is based on cogent reasons and the PPA does not provide for 'termination for convenience'.

n) TPTCL is seeking performance of PPA as the compensation in money will not be an adequate relief in TPTCL's case. There exist no standards for ascertaining actual damages that may be caused by the non-performance of the PPA as there is no way to assess the quantum of services offered by TPTCL since 2011 and for the term of the PPA i.e. 15 years. In addition, termination of the PPA would gravely affect the reputation and future business potential of TPTCL which is incalculable. Moreover, the PPA cannot be terminated by either of the parties by giving notice for specified period without any cause. The right to terminate is based upon the existence of one or more of the circumstances enumerated in the PPA as submitted hereinabove. In this regard, reliance is placed on the Adani Power judgment of the Hon'ble Tribunal.

o) The only reason power could not be scheduled from SPGCL's project was due to SPGCL's own failure to commission its Project. It is due to SPGCL's conduct and breach of obligations under the PPA that disabled TPTCL's ability to tie up SPGCL's contracted capacity with procurers and earn trading margin on the same. Had SPGCL commissioned its project in a timely manner and complied with the provisions of the PPA, TPTCL would have earned trading margin by supplying such power. Since, SPGCL failed to supply power under the PPA, TPTCL could not earn trading margin. Therefore, SPGCL is liable to pay damages to TPTCL for such loss of trading margin.

p) Trading margin shall be in addition to the tariff payable to SPGCL. Therefore, PPA clearly envisages payment of trading margin to TPTCL independent of the tariff payable to SPGCL. Also, tariff had been crystallised since the bid was submitted by TPTCL after approval of SPGCL. Therefore, tariff and trading margin were both available.

q) The payment of trading margin to TPTCL under the PPA is in addition to the tariff to be paid to SPGCL and therefore, SPGCL cannot claim that TPTCL is not entitled to compensation. Further, the provisions of Article 12.2.2 (Limitation of Indemnification Liability) could only have been applied to the present case, if





SPGCL at any time actually produced power, sold it and raised an invoice for the same. However, SPGCL instead of supplying power to TPTCL illegally terminated the PPA. Therefore, the indemnification provided in the PPA cannot be applied to the present case and TPTCL is entitled to actual loss of trading margin that it would have earned if SPGCL was ready with its Project and had supplied power.

r) When there is a breach of contract, the party suffering due to such breach shall be entitled to compensation which would naturally arise in the usual course of things. In this present case, SPGCL was aware that TPTCL is entitled to trading margin under the PPA. However, due to SPGCL's failure to supply power and consequent breach of PPA, TPTCL could not realise such trading margin. Therefore, TPTCL is entitled to receive compensation in terms of Section 73 of the Contract Act.

s) TPTCL is entitled to payment of full trading margin since due to SPGCL's breach of the PPA, TPTCL has lost out on its opportunity to earn trading margin for a period of 15 years (as stipulated in the PPA). SPGCL owes TPTCL on account of loss of trading margin, consultancy fee and cost incurred by TPTCL for arranging alternate sources of power.

t) PPA is not covered by the CERC (Fixation of Trading Margin) Regulations, 2010 and TPTCL is thus not bound by the trading margin determined by this Hon'ble Commission as far as this PPA is concerned. However, any short term 'Replacement PPA' entered into with SPGCL and the purchasers of power would be/would have been in accordance with all applicable regulations including the 2010 Trading Margin Regulations.

u) The consultancy fee forms consideration of the present PPA as provided under Article 9.1. PPA provides for this consultancy fee, as a lump sum fee, to be charged at four different occasions. Charging such consultancy fee is not contrary to any statutory provisions applicable as on date. Further, this has no bearing on the trading margin payable to TPTCL.



v) SPGCL has contended that the payment of consultancy fees is linked to the commercial operation of the generating units of SPGCL. The payment of consultancy fee is provided under Article 16.21 of the PPA. One of the instalments of Rs.1,03,12,500 to be paid within 90 Business Days of the 'Effective date' has been defined as "Phase-2 Initial Consultancy Fee". Nowhere does the PPA provide for a clause which mandates commercial operation of two units i.e., Phase-2 (Unit-3 and Unit-4) for payment of 'Phase-2 Initial Consultancy Fee'.

### **Hearing dated 2.12.2021**

12. The Petition listed for final hearing on 2.12.2021. The Commission after hearing the parties reserved the order and directed the Respondent to file written submissions on and the Petitioner to file its response to the same. The Respondent has filed its written submissions on 23.12.2021, which mainly reiterates the submissions made in its reply.

### **Analysis and Decision**

13. On considering the submissions of the parties and perusal of the documents available on record, the following issues arise for our consideration:

Issue No.1: Whether the termination of PPA, vide notice dated 24.8.2017 issued by the Respondent is valid?

Issue No.2: Whether the Petitioner is entitled to Specific Performance of the PPA dated 13.12.2011?

Issue No.3: Whether the Petitioner is entitled to compensation for the loss of trading margin?

Issue No.4: Whether the Petitioner is entitled for the payment of consultancy fees towards the consultancy provided to the Respondent?

Issue No.5: Whether the Petitioner is entitled to cost incurred by it due to non-supply of power to BEST, UPPCL and MSEDCL by the Respondent?

The above issues are being dealt with in the succeeding paragraphs.



***Issue No.1: Whether the termination of PPA vide Respondent letter dated 24.8.2017 is valid?***

***and***

***Issue No.2: Whether the Petitioner is entitled to Specific Performance of the PPA dated 13.12.2011?***

14. Since the issue of termination of the PPA and grant of specific performance are inter-related, we examine these issues together.

15. The Petitioner has submitted that notice of termination dated 24.8.2017 is illegal and ought to be set aside. It has submitted that the Respondent erroneously cited 'Buyers event of default' as a reason for terminating the PPA, and it has also not followed the due procedure under Article 13.4 of the PPA for terminating the PPA. The Petitioner has submitted that neither the Seller Preliminary Default notice was issued by the Petitioner nor any consultation period was observed by the Respondent. It has therefore submitted that the conduct of the Respondent is in direct contravention of the provisions of the PPA and hence the termination of PPA by the Respondents is non-est and illegal. The Petitioner has also submitted that in accordance with the Dispute Resolution mechanism, it had issued 'dispute notice' on 7.12.2017 under Article 15.2.1 of the PPA and invoked Article 15.3 of the PPA, the matter for arbitration. However, the Respondent refused to participate in the arbitration or amicably settle the dispute. The Petitioner has pointed out that the Respondent has failed to fulfil its obligations and is now attempting to wriggle out of its contractual obligations.

16. Per contra, the Respondent in its reply dated 10.6.2021 has raised preliminary objections stating that the (i) Original PPA dated 13.12.2011 cannot be specifically performed as per Section 14(1) (c) of the Specific Relief Act, 1963; (ii) Original PPA is void in terms of Section 25 of the Indian Contract Act, 1872 and (iii) Original PPA is hit



by Section 23 of the Indian Contract Act, 1872. The preliminary objections of the Respondent are examined below.

**(a) Original PPA dated 13.12.2011 cannot be specifically performed**

17. The Respondent has submitted that the original PPA dated 13.12.2011 executed by the Petitioner (inter-State trading licensee) and the Respondent (generating company) is in the nature of a memorandum under which the Petitioner targeted to sell 'in future' 70% of the contracted capacity of the Respondent under long-term basis. It has also submitted that Article 4.1.2(ii) of the PPA provides that the moment the Petitioner facilitates a transaction for selling power of the Respondent 'in future' a Replacement PPA will have to be executed for that particular transaction. The Respondent has stated that Article 4.1.2(iii) of the PPA gives 'absolute discretion' on the Respondent, whether to execute a Replacement PPA or not. Therefore, the PPA is nothing but a determinable contract as per section 14(d) of the Specific Relief Act, 1963. The Respondent has stated that the underlying scheme of the PPA in terms of the Schedule E of the PPA is that once power is finalized to be sold under long-term, medium-term or short-term basis, the same would be substituted by a 'Replacement PPA', and as such, the rights and liabilities of the parties, would be governed by the said Replacement PPAs only. The Respondent has further submitted that the PPA does not contain any provision requiring the Respondent to keep the alleged contracted capacity available at all times for the Petitioner or that the said Respondent cannot create any third party right qua such contracted capacity. In the absence of any such provision, the contracted capacity in the PPA carries no meaning, with the Respondent retaining the absolute right to create third party rights, qua the contracted capacity, or simply refuse any offer for sale of power through the Petitioner. This evidences that the PPA is a determinable agreement in terms of Section 14(d) of the Specific Relief Act,



1963, which can never be specifically performed, as has been prayed for by the Petitioner. The Respondent has contended that honouring/enforcing the PPA is solely at the discretion of the Respondent, which makes the PPA a determinable contract, as even if the PPA is valid, unless the Respondent gives its consent for any future sale of power contemplated under the PPA, the original PPA remains a dead letter. Referring to the judgments of the Hon'ble Supreme Court in IOCL vs Amritsar Gas Service & ors (1991 SCC (1) 533), Hon'ble Delhi High Court in Rajasthan Breweries Limited v The Stroh Brewery Company (2000 SCC online Del 481) and Inter Ads Exhibition Pvt Limited v Busworld International Cooperative (2020 SCC online Del 351), the Respondent has submitted that the question of granting specific performance of the contract does not arise in terms of amended Section 14(d) of the Specific Relief Act, 1963.

18. In response, the Petitioner vide its rejoinder dated 24.7.2021 has submitted that, it is settled position of law, that for a contract to become determinable, it must be shown that the provisions of such contract are that, it would become possible for either of the parties to terminate it, without assigning any reason. Placing reliance on the judgment of the Hon'ble High Court of Kerala in T.O. Abraham v Jose Thomas (2018) 1 KLJ 128, the Petitioner has stated that a contract which can be terminated by either of the parties, at their own will, without assigning any further reason, and without having to show any cause, is inherently determinable. Pointing to Article 3.3 and Article 13 of the PPA, the Petitioner has contended that there is no right given to either party, in the present case, to terminate the PPA at its own whims, without assigning any reason and the right of termination of the PPA is based on cogent reasons and the PPA does not provide for termination for convenience. The Petitioner has argued that as per Statement of Reason and Objects (SOR) to the Specific Relief Act, (Amendment), 2018, the same



was enacted with an intention to do away with wider discretion of courts to grant specific performance and to make specific performance of contract a general rule. The Petitioner has stated that the Appellate Tribunal for Electricity (in short 'APTEL') vide its judgment dated 7.9.2011 in Appeal No.184/2010 (APL v GERC & ors) has held that specific performance of the PPA can be granted as a relief in furtherance to the provisions of the Electricity Act, 2003 ('the Act'). It has submitted that though the Hon'ble Supreme Court had reversed the decision of the APTEL, the grounds of challenge were different and limited to the interpretation of the termination clause of the PPA. The Petitioner has further submitted that the provisions of the contract cannot be read in isolation and must be read harmoniously along with other provisions of the agreement to gather the true intention of the parties to agreement. The Petitioner has added that it is seeking performance of the PPA as the compensation in money will not be an adequate relief in the Petitioner's case. In addition, the termination of PPA would gravely affect the reputation and future business potential of the Petitioner, which is incalculable. It has stated that the right to terminate is based upon the existence of one or more of the circumstances enumerated in the PPA, as stated above.

19. We have examined the matter. Section 14 9(d) of the Specific Relief Act [Section 14(c) prior to the Amendment Act of 2018] is extracted as under:

"14. Contracts not specifically enforceable: - The following contracts cannot be specifically enforced, namely:-

(a) to (c) xxxxxxxxxxxx

(d) a contract which is in its nature determinable.

As per the above provisions, the contracts which are determinable or revocable in terms of specific provision for termination or revocation in the said contracts cannot be specifically enforced under Specific Relief Act. In other words, the contract, which



can be terminated by either of the parties at their own will, without assigning any further reason and without having to show cause, is 'inherently determinable'. In the present case, the right to terminate is provided under Article 2.2 and Article 3.3 of the PPA, which are extracted as under:

### **2.2 Early Termination**

*This Agreement shall terminate before the Expiry Date:*

- (a) if either the Seller or the Buyer exercises a right to terminate, pursuant to Article 3.3, Article 13.3 or Article 13.4, as the case may be; or*
- (b) in such other circumstances, as the Parties may mutually agree in writing.*

### **Article 3.3. Right to Terminate**

*3.3.1 If (i) payment of the Phase 1 Initial Consultancy Fee is not paid by the date specified for it in Article 16.21 or (ii) the Conditions Subsequent listed in Article 3.1 for Phase 1 are not duly satisfied or waived/deferred, as the case may be, within twenty seven (27) Months of the Effective Date, or such extended time as may be mutually agreed between the Parties in writing, the aggrieved Party may terminate this Agreement by giving a thirty (30) days prior written notice of its intention to terminate this Agreement to the defaulting Party...*

xxxx

*3.3.3 During the interregnum between the date of receipt of a notice under above Article 3.3.1 or Article 3.3.2 and the intended termination date, the Party to whom the notice is addressed, shall be entitled to fulfil the Condition Subsequent in question or get it waived, failing which the termination provided for in Article 3.3.2 of this Agreement shall take effect thirty (30) days from the date of receipt of such notice.*

20. Thus, Article 3.3 provides for two conditions for termination of the PPA i.e non-payment of consultancy fee by the Respondent to the Petitioner and/or the deferment /waiver or non-fulfilment of 'condition subsequent' as per Article 3.1 of the PPA. Similarly, Article 13.3 and Article 13.4 of the PPA provide the procedure for termination, in case of 'Sellers Event of Default' and termination for 'Buyers Events of Default' respectively. Therefore, no right has been given to either party to terminate the PPA at its own volition, without assigning any reason. As pointed out by the Petitioner, the Hon'ble High Court of Kerala in its judgment in T.O. Abraham v Jose Thomas (2018) 1 KLJ 128 has held that if an agreement is shown to be determinable at the happening of an event or on the occurrence of a certain exigency, then the contract would stand



determined only on the happening of such event or exigency. The relevant portion of the judgment is extracted below;

*“18. The question thus before us is whether this contract is determinable. Before we answer this, we deem it necessary to understand clearly what is meant by determinable contracts. In the now repealed Specific Performance Act, 1877, section 21(d) stipulated that a contract, which in its nature is revocable, cannot be enforced to unenforceable contracts. The provision of the old Act corresponds to section 14(1)(c) of the Specific Relief Act, 1963 (which will, hereinafter be referred to as the “Act” for convenience), the only difference between the two being that the word ‘revocable’ has been substituted with the word ‘determinable’. This was done because the word ‘revocable’ was inaccurate and it was felt that a more accurate word for it be substituted. Therefore, it is indubitable that a contract which in its nature is revocable or determinable, as described in the provisions of the sections afore referred, is definitely not enforceable through specific performance. For a contract to become determinable, it has to be first shown by the defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The words used in section 14(1)(c) is “inherently determinable”. The effect of the use of the word “inherently” in the section is to make it unambiguously clear that a contract which can be terminated by either of the parties on their own will without any further reason and without having to show any cause, would ones are inherently determinable. However, if an agreement is shown to be determinable at the happening of an event or on the occurrence of a certain exigency, then it is ineluctable that on such event or exigency happening or occurring alone that the contract would stand determined. In order to see if a particular contract is inherently determinable or otherwise, we have to first see whether the parties to the said contract have the right to determine it or to terminate it on their own without the junction of any other party and without assigning any reason. This is akin to a partnership at will, where one of the partners can notify the others of his intention not to continue in the said firm and the partnership itself then dissolves. The analogy we think is appropriate because a contract, to be inherently determinable, will have to specifically provide competence to the parties to it to terminate it without assigning any reason and merely by indicating that he does not intend to comply with the same.*

21. Thus, for a contract to become determinable, the same should contain provisions for ‘termination at will’. However, in the present case, the PPA signed by the parties only provide for termination due to default of the parties and no right has been given to either party to terminate the PPA on its own volition, without assigning any reason. Therefore, the Respondent is bound to perform its obligations under the PPA.

22. The Respondent has relied upon the judgment of the Hon’ble Supreme Court judgment in IOCL vs Amritsar Gas Service & ors (1991 SCC (1) 533) and argued that the question of granting specific performance of the contract does not arise, in the





present case, in terms of amended section 14(d) of the Specific Relief Act, 1963. In this case, the Hon'ble Supreme Court held as under:

*“12. The arbitrator recorded the finding on Issue No.1 that termination of distributorship by the appellant-Corporation was not validly made under Clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-Respondent No.1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-Respondent No. 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:-*

*“This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.”*

*This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid Clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revocable in accordance with Clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with Clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is ‘a contract which is in its nature determinable’. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14 (1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to ‘the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained.’*

23. As per the above judgement, since the finding of the Arbitrator is that the Distribution Partnership, though for an indefinite period, till it is terminated in accordance with clauses 27 and 28 of the Agreement and is, therefore, revocable, the provisions of Section 14(1)(c) [analogous provision in Article 14(1)(d) after the amendment] is attracted and the contract cannot be enforced. The present case is distinguishable since the PPA signed by the parties, provide for the PPA to be terminable on the happening of certain specified event of default or breach and do not enable either of the parties to



terminate the PPA at will. In circumstances other than this, the parties, in terms of Article 2.2(b) of the PPA, may mutually agree to terminate the PPA in writing. For these reasons, the submission of the Respondent that honouring/enforcing the PPA is solely at the discretion of the Respondent, which makes the PPA a determinable contract, is not acceptable. In our considered view, the PPA is not a determinable contract and can be enforced. We, therefore, allow the prayer of the Petitioner on this ground and direct the Respondent to perform its obligations under the PPA.

***(b) Original PPA is void in terms of Section 25 of the Indian Contract Act, 1872***

24. The Respondent has submitted that the original PPA i.e minus the Replacement PPA capacity is a 'void contract', as the same does not have any 'consideration' mentioned with respect to the contracted capacity. It has submitted that as per Article 9.1.1 of the PPA, the 'consideration' is the sale price per unit, which would be received by the Buyer (the Petitioner) under a 'future' Power Sales Agreement (PSA); Also, as per Article 4.1.2 of the PPA, a 'Replacement PPA' is to be executed 'in future' pursuant to the execution of a 'Power Sales Agreement' also 'in future', as defined in Article 1.1, read with Article 4.1.2 of the PPA. Hence, the capacity agreed by the Petitioner under the Replacement/'future' PPA, and consequently the 'future' PSA, is excluded from the contracted capacity under the PPA. The Petitioner has further submitted that in terms of Article 9.2.2 (a) of the PPA, the seller (Respondent) has to issue a monthly bill to the buyer (Petitioner), which will include the trading margin. The Petitioner has therefore submitted that the 'consideration' for sale of power is not at all envisaged under the PPA and rather, the same is only subject to execution of a 'future' agreement (Replacement PPA and PSA). The Petitioner has further submitted that from the provisions of Section 10 and Section 25 of the Indian Contract Act, 1872, it is evident that 'consideration' is a vital part of any agreement, and without a consideration, every agreement is void. It has



submitted that in the present case, there is no consideration on behalf of the Respondent which has been provided to the Petitioner, with respect to the contracted capacity and as such, the PPA is void and unenforceable. Referring to the decisions of the Hon'ble Supreme Court in John Tinson & Co. (P) Ltd. v. Surjeet Malhan, (1997) 9 SCC 651 and the judgment of the Honble Delhi High Court in M/s Harison Traders Ltd v. Mrs. Raj Bhalla, reported in 2006 SCC OnLine Del 824, the Respondent has submitted that in terms of the decisions of the Hon'ble Court and the provisions of the Indian Contract Act, 1872, the PPA is a void agreement, on account of there being no consideration provided under the said agreement. The Respondent has added that the payment of Consultancy fees to the Petitioner cannot be considered as 'consideration' since in terms of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010 (in short 'the 2010 Trading Margin Regulations'), the Petitioner, who is a trading licensee, cannot indulge in any activity other than trading, and further, cannot earn any revenue, apart from the permitted trading margin, specified therein.

25. Per contra, the Petitioner has submitted that the PPA has been entered into for valid consideration. It has submitted that as per the PPA, (i) the Respondent is to *inter alia* commission its project to supply power in a timely manner at no cost to Petitioner, in order for Petitioner to arrange for an onward PSA (Article 4.2); (ii) the Petitioner will keep Respondent informed of all upcoming bid opportunities, discuss terms and conditions of such bids and finalise the same with Respondent on case to case basis (Article 4.3); (iii) as a consideration for supply of power by Respondent to the Petitioner, the Petitioner shall pay Respondent, the proceeds of sale of power received from the power sales agreement with a purchaser, less the trading margin payment; and (iv) in terms of Article 9.1.1 of the PPA, for selling power supplied by Respondent, the



Petitioner is entitled to a trading margin payment. The Petitioner has contended that it is a settled common law principle that consideration need not be of any particular value, it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged, but it must be something which the law can regard as having some value so that the giving of it effects a real change in promisee's position. The Petitioner has stated that in the present case, the Respondent is compensating the Petitioner for its services to them as an electricity trader. In addition to this, the Petitioner has pointed out that the PPA also provides for payment of consultancy fee by the Respondent to the Petitioner for providing its services under the PPA. Accordingly, the Petitioner has submitted that the PPA was entered into with valid consideration and the contention of the Respondent that the PPA is void due to lack of consideration is rejected.

26. We have considered the matter. Section 2(d) of the Indian Contract Act 1872, defines 'Consideration' as:

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

27. Article 9.1.1 and Article 9.1.2 of the PPA provides as under:

*"9.1.1 As a consideration for the supply of power by the Seller to the Buyer, the Buyer shall pay the Seller for the Scheduled Energy delivered to the Delivery Point at the sale price per unit received by the Buyer under the Power Sales Agreement executed between the Buyer and the Purchaser less the Trading Margin Payment.*

*9.1.2 The Buyer shall receive the Trading Margin Payments and Incentive Sharing Payments as determined under this Agreement, as a credit against amounts owed by Buyer to Seller."*

28. It is evident from the provisions of the PPA that as a 'consideration' for supply of power by the Respondent to the Petitioner, the Petitioner is to pay the Respondent, the process of sale of power received from the purchaser, less the trading margin. It also



provides that for selling the power supplied by the respondent, the Petitioner is entitled to a trading margin payment. Also, Article 16.2 of the PPA provides that the Respondent has agreed to pay lump sum consultancy fee to the Petitioner in four parts viz. (i) within 14 business days of the 'effective date' for Phase 1; (ii) within 90 business days of the 'effective date' for Phase 2; (iii) within 14 business days of execution of financing agreements for Phase 1; and (iv) within 14 business days of execution of financing agreements for Phase 2. The contention of the Respondent that 'consultancy fees' to the Petitioner cannot be considered as 'consideration' in view of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, cannot be accepted since the Petitioner is not only providing trading services to the Respondent, but also 'consultancy services' which is different from trading. Also, the said 2010 Trading Margin Regulations do not prohibit the Petitioner from charging the 'consultancy fees' for 'consultancy services' undertaken by it, in terms of Article 16.21 the PPA. Schedule E of the PPA provides the scope of work to be undertaken by the Petitioner regarding marketing strategy for tying up power supply arrangements for the Respondent. Therefore, any fee charged towards consultancy for consultancy services rendered by the Petitioner do not form part of the trading margin of the Petitioner. In our view, it is clear that the PPA provides for a lawful 'consideration' in the form of 'consultancy fee' for consultancy services and trading margin in respect of power supply transactions. Therefore, the contention of the Respondent that the PPA is void due to lack of consideration is devoid of merit.

***(c) Original PPA is hit by Section 23 of the Indian Contract Act, 1872***

29. The Respondent has submitted that in terms of Section 23 of the Indian Contract Act, 1872, any agreement which defeats the purpose of any law in force is illegal and void *ab initio*. It has submitted that as per Clause A (Trading Margin Payment) and



Clause B (Incentive Sharing Payment) of Schedule C of the PPA, the Petitioner shall receive a trading margin of 1.5% of the sale per unit and will also be eligible for incentive sharing payment. The Petitioner has pointed out that the Petitioner, according to its own whims and fancies, has determined the trading margin and also seeking incentive sharing in lieu of the Replacement PPA, which may be executed in 'future'. It has further submitted that Regulation 4 (Trading Margin) of the CERC (Fixation of Trading Margin) Regulations, 2010 and Regulation 8 (Trading Margin) of the CERC (Procedure, Terms and Conditions for grant of trading license and other related matters) Regulations 2020, provide for a specific fixation of trading margins and the trader does not have the right whatsoever, to charge a trading margin of 1.5% of the sale per unit, which is *de hors* the said regulations. The Respondent has contended that even though the PPA stipulates that it is an agreement for a period of 15 years, however, for the purpose of trading margin, the said agreement has to be deemed as a 'short term' agreement as the PPA provides for power sale in future and cannot be termed as a long-term agreement. The Petitioner has submitted that the PPA is also violative of the conditions mentioned in the license granted by this Commission to the Petitioner and therefore attracts Section 19 of the Electricity Act, 2003, mandating cancellation of the trading license of the Petitioner. Referring to provisions of Regulation 7 (obligations of the licensee) of the CERC (Procedure, Terms and Conditions for grant of trading license and other related matters), Regulations 2009 and Regulation 9 (Obligations of the Trading Licensee) of the CERC (Procedure, Terms and Conditions for grant of trading license and other related matters), Regulations 2020, the Respondent has submitted that there is no mandatory requirements qua the contracted capacity under the standalone PPA, without execution of the 'future' Replacement PPA. It has added that the provisions relating to scheduling, metering etc. are only applicable in the event the



Petitioner either facilitates a transaction through Replacement PPA, or through short term transaction in spot market. The Respondent has submitted that the PPA is an abuse of process by the Petitioner and has been executed contrary to the express terms of the relevant regulations of this Commission and is therefore void and illegal.

30. Per contra, the Petitioner has submitted that the 2010 Trading Margin Regulations are applicable only to short term purchase and sale of electricity and not for long term supplies (Regulation 2). In this regard, the Petitioner has referred to the SOR to the 2010 Trading Margin Regulations, the Commission's order dated 20.11.2019 in Petition No.204/AT/2019 (SECI v MNRE & ors), judgment dated 2.7.2021 of APTEL in Appeal No. 52/2019 (SECI v DERC & anr). It has also submitted that the PPA is for a period of 15 years during which the Petitioner was going to trade power on behalf of the Respondent, and the execution of PPA was left to the parties to decide. The Petitioner has submitted that it has not raised any claims towards incentive payments in its petition. As regards the contention of the Respondent that the trading margin in the PPA is more than the trading margin allowed in the 2010 Trading Margin Regulations, the Petitioner has clarified that in terms of the law laid down by the Hon'ble Supreme Court in PTC v CERC & ors (2010) 4 SCC 603, the regulations of this Commission override the contract. It is implied that in case of short-term supply of power, the rate of trading margin provided in the PPA only provides the lower limit of the trading margins that may be charged by the Petitioner and the same shall naturally be capped at the rate, maximum trading margin provided in the 2010 Trading Margin Regulations. As regards the submission of the Respondent that the PPA is contrary to the 2009 Trading License Regulations as it does not provide specific details of modalities of scheduling of power as provided in Regulation 7 of the said regulations, the Petitioner has clarified that as per Article 6 of the PPA, the mechanism for Scheduling and Despatch of power shall be



in accordance with the Grid code, ABT order and applicable regulations. It has also submitted that due to failure of the Respondent to achieve COD of the project, the Petitioner cannot be expected to specify the modalities of scheduling or entering into long term contracts. With regard to the Respondents prayer for revocation of licence of the Petitioner under Section 19 of the Act, the Respondent has submitted that no public interest will be served if the licence of the Petitioner is revoked and that the Petitioners conduct as a licensee and the terms of the PPA executed between the parties do not fulfil any of the conditions prescribed in Section 19(1)(a) to (d) of the Act. The Petitioner has referred to the Commission's order dated 15.6.2020 in Petition No.71/MP/2020 (WKTL v TANGDCO & ors) and submitted that in case an entity is seeking revocation of a license, then it must move a separate application for the same and cannot be decided in any other petition. Accordingly, the Petitioner has prayed that the submissions of the Respondent may be rejected.

31. We have examined the matter. Admittedly, the PPA dated 13.12.2011 is for period of 15 years during and the Petitioner is to trade power on behalf of the Respondent in terms of this long term PPA. It is noticed that the 2010 Trading Margin Regulations are applicable only to short term purchase and sale of electricity and not for long term supplies. Neither the 2010 Trading Margin Regulations nor the 2009 Trading license Regulations prohibit the licensee to provide consultancy services to its customers and therefore charge consultancy fee for the same, which do not form part of the trading margin. However, in case of short-term supply of power the rate of trading margin provided in the PPA shall be capped at the rates notified under the relevant regulations, keeping in view that the regulations override the provisions of the contract. Also, there is no basis for the prayer of the Respondent for revocation of license of the Petitioner, as none of the conditions provided under Section 19 of the Act, is shown to





have been satisfied by the Petitioner. Even otherwise, the prayer of the Respondent for revocation of license of the Petitioner can only be considered by way of an appropriate application, filed under Section 19 of the Act and not in the present application. It is pertinent to note that the parties had entered into PPA after fully understanding the terms and conditions of the PPA and has for some time had acted in line with the said provisions. Having entered into and performed the PPA, the Respondent cannot now take a contrary stand and seek a declaration that the entire PPA is void. The preliminary objections of the Respondent to declare the entire PPA void, is clearly an afterthought, as the termination notice dated 24.8.2017 issued by the Respondent do not any manner state that the PPA is void. In the background of the above discussions, the contentions of the Respondent are rejected.

***(d) Whether the termination of the PPA by the Respondent vide letter dated 24.8.2017 is valid?***

32. The Petitioner has submitted that the Respondent on 24.8.2017, issued a notice terminating the said PPA, alleging that the (a) Petitioner has failed to tie-up 70% of the power under long term PPAs and (b) Petitioner suppressed the material fact that the Respondent had the option to exit the obligations under LOI and PPA with respect to UPPCL due to delay in issuance of LOI. The Petitioner has submitted that, it had, vide letter dated 13.10.2017, denied the contents and sought withdrawal of the said termination notice, which was not responded to by the Respondent. The Petitioner has submitted that the Respondent erroneously cited 'Buyer's Event of Default' as a reason for terminating the PPA. Moreover, the Respondent has not followed the due procedure under Article 13.4 of the PPA for terminating the PPA. It has submitted that neither was a 'Seller Preliminary Default Notice' issued by the Petitioner, nor any consultation period was observed by the Respondent. The Petitioner has submitted that the conduct of the Respondent is in direct contravention of the provisions of the PPA, and therefore, the



termination of PPA by SPGCL is *non-est* and illegal. The Petitioner has further submitted that the PPA provides for a 'Dispute Resolution Mechanism' to be followed by the parties, in the event of a dispute. Accordingly, the Petitioner issued Dispute Notice on 7.12.2017, under Article 15.2.1 of the PPA and invoked Article 15.3 of the PPA to refer the matter for arbitration. However, the Respondent by its letter dated 4.1.2018 refused to participate in the arbitration or amicably settle the dispute, but illegally terminated the PPA. The Petitioner has stated that the procedure stipulated under the PPA is a mandatory prerequisite and failure to comply renders the termination notice void and non-est. The Petitioner has stated that the Respondent had not followed the procedure set out as prescribed under the PPA and, therefore, the termination notice is contrary to the terms of the PPA and cannot be given effect to. It has stated that in terms of Section 50 of the Indian Contract Act, 1872, if the contract provides for something to be done in a particular manner, then the same can be done only in that manner and in no other manner. The Petitioner has contended that the Respondent had not commissioned even one unit of its 1200 MW project, as on the date of termination of the PPA i.e. 24.8.2017 and therefore, the Respondent cannot escape its obligations under the PPA and take advantage of its own wrong by terminating the PPA [judgment of the Hon'ble Supreme Court in *Nirmala Anand v. Advent Corporation (P) Ltd*, (2002) 5 SCC 4 was relied upon). The Petitioner has added that the PPA is still subsisting and continues to remain in force since the termination of the PPA is illegal and contrary to law. Accordingly, it has prayed that this Commission may direct specific performance of the PPA and direct the Respondent to supply power in terms thereof.

33. Per contra, the Respondent has submitted that the Petitioner, as per Schedule E of the PPA is primarily obligated to arrange the PPAs in the manner that (a) 70% of the contracted capacity is to be sold under Long Term PPAs (b) 60% of the contracted



capacity not sold under long term PPAs, is to be sold under Medium Term PPAs (c) 40% of the contracted capacity not sold under long term PPAs, is to be sold under Short Term PPAs and (d) Any portion, being not part of the aforesaid PPAs, is to be sold on spot basis through power exchanges. It has submitted that the underlying scheme of the PPA in terms of the aforesaid schedule is that once a power is finalized to be sold under long-term, medium-term or short-term basis, the same would be substituted by a "Replacement PPA", and as such, the rights and liabilities of the parties, would be governed by the said Replacement PPAs only. It has added that there is no consequence at all envisaged under the PPA, which gives right, whatsoever, to the Petitioner to raise the claim in the present petition, which has no legal basis or substance. The Respondent has pointed out that the Petitioner, however, failed to adhere to the aforesaid Schedule-E of the PPA and as a result of the same, the Respondent was constrained to terminate the said PPA vide letter dated 24.8.2017. The Respondent has further contended that in terms of the DBFOO guidelines of the Ministry of Power, Government of India dated 09.11.2013 the traders are barred from participating under the long-term procurement process, as only those entities who can Design, Built, Finance, Own and Operate a power plant, can participate in long-term bidding, and not traders.

34. In response, the Petitioner has clarified that the execution of Replacement PPA, is an obligation of the Respondent as Article 4.1.2 (ii) of the PPA provides that the Petitioner shall provide the Respondent with all bid documents after which the Respondent shall provide its consent along with calculations for tariff to be submitted. Once the Petitioner finalises the terms and conditions, the Respondent is under an obligation to enter into a 'Replacement PPA' i.e. a separate power purchase agreement for the sale of such portion of contracted capacity with the Petitioner, with the terms and



conditions on a 'back to back' basis, with such power sales agreement. The Petitioner has submitted that it is the Respondent which had agreed to such condition of entering into 'Replacement PPAs' but was unable declare COD and supply power, as per its commitments, and it was for this reason, that the Petitioner was requested to procure power from alternate sources. The Petitioner has further submitted that the Respondents contention is barred by estoppel and there is clear contractual relationship between the Petitioner and the Respondent. The Petitioner has stated that in furtherance of this contractual relationship, the Respondent asked the Petitioner to arrange for supply of power from alternate sources as the Respondent could not commission its project in time. According to the Petitioner, the Respondent not only gave its consent for the Petitioner to participate in bids when the Respondents project was not ready, but also consented for the Petitioner to comply with tenders by arranging alternate sources for supply of power and therefore, the Respondent cannot now contend otherwise.

35. We have examined the matter. The Respondent's letter dated 24.8.2017 terminating the PPA dated 13.12.2011 is as under:

*"One of the crucial stipulations contained in the Agreement was that 70% of tie-ups ought to have been long term PPAs. However, to the knowledge of SPGCL, TPTCL has neither signed any long term PPA, nor made any efforts in this regard in respect of the subject power and as such, the commitments made in Schedule E to the Agreement stands violated by now. On the one hand, TPTCL failed to perform its contractual obligations and on the other hand, by virtue of Article 4.2 of the Agreement, SPGCL stood restrained from entering into power supply arrangement with any third party. As a matter of fact, in view of the contractual obligation with you, SPGCL has missed a large number of tenders/business proposals/ opportunities through third parties. Thus, the major purpose of signing the PPA by SPGCL has already been rendered otiose, inasmuch as neither through you nor through third parties SPGCL has been unable to tie up substantial power sale agreements, which was intent for entering into PPA with TPTCL. This cannot be now rectified. The omissions of TPTCL cause grave prejudices and injury to SPGCL both in terms of loss of business and opportunity. The grave breach committed at your end triggers Article 12.1.1 (ii) of the Agreement, amongst others and SPGCL is entitled to be indemnified for the damages that it has been suffered in terms of loss of business.*



*Besides the above grave omission and non-performance of contractual obligations, you also proved to have been indulged in grave suppression of material facts and information from SPGCL in relation to the Short-Term tender for supply of 1500 MW by UP Power Corporation Limited (UPPCL) during the period of August to September, 2017 which has resulted in huge losses to SPGCL, which facts had already been put to your notice vide our communication dated 10<sup>th</sup> August, 2017.*

*As you are aware, since the Commissioning of SPGCL's unit got delayed due to circumstances beyond its reach, SPGCL vide its communication dated 31.07.2017 has given you the mandate to arrange the alternate power for supply to UPPCL at its cost. Needless to state that such mandate was given on a bonafide belief that all the formalities with respect to the said transaction had been completed and as such, TPTCL/ SPGCL are bound to comply with the terms of PPS with UPPCL, while as matter of fact neither PPA nor the Letter of Intent (LoI) was executed/issued, as the case may be, within the specified time of 15 days from the closure of e-auction , and the same would have given us an option to seek exit from the obligations qua supply of power to UPPCL through TPTCL, without any adverse consequences at all in terms of Article 13.1 of the concerned RFP.*

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*Needless to state that you have arbitrarily chosen to continue with the transaction despite knowing that the plant was not commissioned due to delay caused by Force Majeure, with the oblique motive to gain profit of margin by causing unlawful losses to SPGCL. It is sated that, considering the nature of relationship between the Parties in the transaction as envisaged, inter alia, in Article 4 of the Agreement and the rights of SPGCL emanate therefrom, the suppression of said material fact by TPTCL is contrary to law and principles of equity.*

*It is stated that by committing breach of substantive contractual obligations, TPTCL has committed material breach of Agreement enabling SPGCL to terminate the Agreement. Further, a reference can also be made to Article 13 .1 (iii) in this regard, which designate the events of "any of the representations and warranties made by the Buyer in his Agreement being found to be untrue or inaccurate and such breach results in a material adverse effect as an "Event of Default". Article 13.2 (iV) provided yet another event of default as that "the Buyer repudiates this Agreement or is in material breach of any of its obligations pursuant to this Agreement and does not rectify the material breach even within a period of thirty (30) days from a notice from the Seller in this regard".*

*Further, as stated above, SPGCL suffered huge loss due to your omission and the breach of performance of the obligation as envisaged the Agreement. As a matter of fact, SPGCL, by absolutely relying upon your commitments under the Agreement, had stood committed with its obligations and thus, did not explore power supply arrangement with any third party. The opportunity loss caused to your grave breach the terms of Agreement is not merely measurable in terms of money alone. However, SPGCL reserve its right to claim damages for the several inures caused due to your breach of Agreement.*

*In regard to the breach of the solemn obligation committed at your end, it is stated that such defaults are not rectifiable in nature, unlike what has been envisaged in the Agreement. Further, it is also pertinent to mention herein that SPGCL is also entitled to recover the Consultancy Fees, amongst others, that had been deposited by it with TPTCL for the accomplishment of the transaction.*

*Thus SPGCL while reserving its right to claim and recover damages for breach of Agreement commutes at your end, hereby terminates the Power Purchase Agreement dated 13.12.2011, which may kindly be taken note of and may act accordingly."*



36. It is noticed from the above that the Respondent has invoked Article 13.2(iii) [as per its reply affidavit] and Article 13.2(iv) of the PPA to terminate the PPA on the ground that there was material breach of the terms of the PPA by the Petitioner and that the Petitioner was under an obligation to act in a transparent manner. Article 13.2 (iii) and (iv) are extracted below:

**“13.2 Buyer Event of Default**

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

- (i) Xxx
- (ii) Xxx
- (iii) Any of the representations and warranties made by the Buyer in this Agreement being found to be untrue or inaccurate and such breach results in a material adverse effect;
- (iv) The Buyer repudiates this Agreement or is in material breach of any of its obligations pursuant to this agreement and does not rectify the material breach even within a period of thirty (30) days from a notice from the Seller in this regard;
- (v) xxxxx

37. However, for termination for Buyers event of default, Article 13.4 of the PPA provides as under:

*“13.4 Termination for Buyer’s Event of Default*

*13.4.1 Upon the occurrence and continuation of any Buyers Event of Default pursuant to Article 13.2, the Seller shall have the right to deliver to the Buyer a Seller preliminary default notice (Seller’s Preliminary Default Notice’) which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice and pursuant to issuance of such notice, the Seller shall follow the procedure prescribed in Article 13.4.2*

*13.4.2 Following the issue of a Seller Preliminary Default Notice, the Consultation Period of fifteen (15) days or such longer period as the parties may agree, shall apply. “*

38. Moreover, Article 15.2 (amicable settlement) and Article 15.3 (Dispute Resolution) of the PPA provides the mechanism to be followed by the parties for resolution of disputes. However, the Respondent has not adhered to the aforesaid mandatory procedures, prior to the termination of the PPA. As held by the APTEL in its



judgment dated 3.6.2016 in Talwandi Sabo Power Limited v PSPCL & ors, MANU/ET/0072/2016, when the contract provides for something to be done in a particular manner, then that act can be done only in the particular manner and no other manner. The relevant portion is extracted below:

*“Section 50 of the Indian Contract Act which we have reproduced hereinabove clearly states that the performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. Section 50 therefore embodies the oft quoted legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in a particular manner then it has to be done in that manner and in no other manner. Thus if Article 6.1.1 of the PPA prescribes notices to be given in a particular manner notices have to be given in that manner and no other manner. If Article 18.11 prescribes that notice to be served on the Procurer has to be served on its authorised representative it has to be served on him and on no other person. There is no scope to urge that conduct of parties shows that there was substantial notice. When the contract contains express and unambiguous terms there can be no question of there being any implied term or reading the contract as a whole. Search for implied term on the specious ground that it is equitable is not permissible. In this context following extracts from Chitty on Contracts (Thirty First Edition Volume I) are material. ...”*

39. Thus, the conduct of the Respondent is in contravention to the provisions of the PPA, as stated above, and therefore, the termination of PPA by the Respondent is *non-est* and illegal.

40. As per Schedule A of the PPA, the Scheduled Commercial Operation Date for various units of the project of the Respondent is as follows:

Phase	Unit	Unit MCR (nominal) MW	Contracted Capacity upon completion (MW)	Scheduled COD
1	1	300	137.50	27 January, 2014
1	2	300	275.00	27 April, 2014
2	3	300	412.50	27 December, 2014
2	4	300	550.00	27 March, 2015

41. As per Article 4.1.2(i) of the PPA, the Petitioner, in consultation with the Respondent, were to engage in negotiations and participate in bids floated by Purchasers and enter into further Power Sale Agreements. In terms of Article 4.2(b) of the PPA, the Respondent is required to execute the project in a timely manner, at no cost to the Seller, so that the contracted capacity at any time is equal to or greater than



the scheduled contracted capacity. The PPA executed between the Petitioner and the Respondent was on the premise that the Respondent shall commission its project as per aforesaid timelines specified in the PPA and only thereafter, the Petitioner shall tie up such available capacity of the Respondent through long term, medium term or short-term power supply arrangements. Admittedly, in the present case, the Respondent had failed to commission its project in a timely manner. Thus, in the absence of any available capacity from the project of the Respondent, the Petitioner cannot be expected to enter into long term contracts on a back-to back basis. The Respondent cannot, in our view, be permitted take advantage of its own wrong i.e failure to achieve COD. As held by the Hon'ble Supreme Court in *Nirmala Anand v Advent Corporation (P) Ltd*, (2002) 5 SCC 481, where an obligation is cast on a party and it commits a breach of such obligation, such party cannot be permitted to take advantage of such omission.

42. Further, in terms of the PPA, the obligation for execution of 'Replacement PPA' is with the Respondent and the Petitioner is required to provide the Respondent with all bid documents, after which the Respondent shall provide its consent along with calculations for tariff to be submitted. Thus, once the Petitioner, finalises the terms and conditions, the Respondent is under an obligation to enter into a 'Replacement PPA'. Though the Respondent had agreed to such conditions of entering into Replacement PPAs, it was unable to supply power as per its commitments (due to non-commissioning of its project) and therefore, had requested the Petitioner to procure power from alternate sources. The Respondent not only gave its consent for Petitioner to participate in bids, when the Respondents project was not ready, but also consented for the Petitioner to comply with tenders by arranging alternate sources for supply of power. This is also evident from some of the e-mails exchanged between the parties





viz. e-mails dated 18.5.2017, 21.6.2017, 30.6.2017, 15.7.2017, 20.7.2017, 21.7.2017 and 22.7.2017 (as enclosed in the petition) wherein, the Respondent, in furtherance of the contractual relationship, had informed the Petitioner that its project was getting delayed and specifically requested the Petitioner to arrange for alternate power supply, for fulfilling the obligations under the tenders, which the Respondent had directed the Petitioner to participate on its behalf. The submission of the Respondent that the execution of future 'Replacement PPA's brings 'uncertainty' to the PPA is also not acceptable. In our view, there is no uncertainty since the Respondent, except for the material breach of obligations (non-commissioning of the project), was acting in accordance with the PPA and accepting the performance of obligations on part of the Petitioner. The fact that 'Replacement PPAs' are to be entered into future cannot, therefore, render the PPA void for the reason of 'uncertainty'. The Respondent having directed the Petitioner to arrange alternate sources for supply of power to comply with tenders, cannot approbate and reprobate, to wriggle out of its obligations. The Hon'ble Supreme Court in Karam Kapahi v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753 has held that a person cannot approbate and reprobate. Relevant portion of the judgment is extracted hereunder:

*"23. ... The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.*

*It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election..."*

43. One more contention of the Respondent for termination of the PPA is that the Petitioner indulged in material breach of the PPA, as the Petitioner was under an obligation to act in a transparent manner, but indulged in grave suppression of material facts and information from the Respondent. The Respondent has submitted that the



Petitioner failed to transparently disclose that UPPCL failed to honour the terms of the tender documents, which required issuance of Letter of Intent (LOI) and execution of PPA within a stipulated period, after the e-reverse auction has taken place and this has resulted in huge losses to the Respondent. The Respondent has submitted that as per the tender document, the e-reverse auction was to start on 26.6.2017, and as per Clause 11.2, the said e-reverse auction was to continue for a period of 120 minutes. Therefore, in terms of the tender document, the e-reverse auction was to start and be concluded on 26.06.2017, itself. It has submitted that UPPCL issued LOI to the Petitioner 15.7.2017, which is much beyond the 15 days period, as provided under the tender document and therefore, the Petitioner ought to have rejected the said bid, on account of breach on the part of UPPCL. The Respondent has stated that as per Clause 13.1 of the tender, the Petitioner had the option to exit from the bid in case UPPCL does not execute a PPA within the afore-quoted stipulated period of 15 days, without even forfeiting the EMD/ CPG, as the case maybe. It has argued that the Petitioner chose not to intimate any of the above condition(s), when it was within the said Petitioner's knowledge that the generating units of the Respondent had not commissioned due to the reasons beyond its control, and that the Petitioner did not disclose the above information for its greed to earn trading margin. Per contra, the Petitioner in its reply has indicated the sequence of events relating to UPPCL tender and has submitted that the termination notice issued by the Respondent is without ascribing any cogent reasons and in complete disregard of the PPA.

44. The matter has been examined. The Respondent vide its letter dated 8.8.2017 addressed to the Petitioner had stated that it was under no obligation to accept the UPPCL LOI, as e-auction was completed on 26.6.2017 and LOI was issued belatedly on 15.7.2017. The relevant extracts of the said letter are as under:



*“Dear Kundan,*

*We were reviewing the UPPCL Short Term tender and preparing Note for Bankers/Management. Having reviewed the tender document, it is clear that SPGCL/TPTCL is under no obligation to execute/accept the LOI issued by UPPCL or supply any power to UPPCL because UPPCL’s E Reverse Auction was conducted on 26th June and LOI is dated 15th July, which was sent to us by TPTCL on 19th July.*

*As per Clause 13.1 of Tender document of UPPCL, “After acknowledgement of the LOA by the Selected Bidder(s), U P Power Corporation Limited, shall cause the Selected Bidder(s) to execute the PPA within the prescribed period in the Bid document i.e. within 15 days from the close of the e-Reverse Auction. The Selected Bidder(s) shall not be entitled to seek any deviation, modification or amendment in the PPA. U P Power Corporation Limited, would appropriate the EMD of such Bidder as Damages on account of failure of the Selected Bidder(s) to execute the PPA. In case U P Power Corporation Limited fails to sign the PPA within the period prescribed above, the Selected Bidder(s) shall have the option to exit without forfeiting the EMD/CPG as the case may be”.*

*Because UPPCL has issued the LOI much beyond the 15 days period stipulated in the tender document and no PPA is signed, we will not accept the LOI issued by UPPCL for the month of August and September.*

*As TPTCL is our Trader, it is your responsibility to advice on these contractual obligations as experts in power sale. Thus, SPGCL is under no obligation to supply power to UPPCL.”*

45. The main contention of the Respondent is that the Petitioner had not represented the material fact that in the event there is delay in signing of PPA by UPPCL beyond 15 days from the closure of e-auction, clause 13.1 of the RFP provides for option to exit from bid for supply of power. It is noticed that UPPCL on 19.6.2017 floated Request for Proposal (RFP) inviting bids for supply of power under short term arrangement during 1.7.2017 to 30.9.2017 and the Petitioner forward the same to Respondent to indicate willingness to participate in the bid, along with the quantum to be offered. On 22.6.2017, the Respondent provided the details of quantum and time blocks for submission of bid to UPPCL and also on 23.6.2017, provided authorisation letter to the Petitioner to participate in the bid on behalf of the Respondent, accepting to abide by the terms and conditions of the bid and specified the quantum and time slots. The Respondent on 23.6.2017 intimated to the Petitioner, the tariff to be quoted for UPPCL bid and, later on 24.6.2017, revised the bid prices for the said bid. UPPCL on 15.7.2017 issued LOI to



the Petitioner for supply of firm power from generating station of the Petitioner for the period 1.8.2017 to 30.9.2017. On 15.7.2017, the Respondent once again informed the Petitioner that COD of the 1<sup>st</sup> unit was delayed due to some technical problems and requested the Petitioner to look for alternate supply for the month of August, 2017 to UPPCL and obtain prior consent from the Respondent before confirming the same. The Petitioner forwarded UPPCL's LOI dated 15.7.2017 to the Respondent, on 19.7.2017. Thereafter, on 20.7.2017, the Petitioner requested the Respondent to inform regarding arranging alternate supply to UPPCL, for August 2017 and September, 2017 in case there is less visibility of COD, in order to avoid compensation to UPPCL. The Respondent on 20.7.2017 requested the Petitioner to arrange for alternate supply to UPPCL for both months of August, 2017 and September, 2017 and also gave its unconditional acceptance to the Petitioner on 21.7.2017, to procure power from alternate supply. The Respondent vide its email dated 22.7.2017 informed the Petitioner that due to storm there has been damage in plant due to which the commissioning was further delayed and again requested the Petitioner to arrange for alternate supply for the procurers. On 31.7.2017, the Respondent provided confirmation for supply from alternate sources. i.e JITPL and SCL, Rajasthan.

46. The submission of the Respondent that the Petitioner indulged in material breach of the PPA, as the Petitioner was under an obligation to act in a transparent manner, but indulged in grave suppression of material facts and information from the Respondent is incorrect and is not acceptable. We notice from records that pursuant to the issue of LOI, the Petitioner on 19.6.2017 had forwarded the RFP documents pertaining to UPPCL bid to the Respondent to indicate their willingness to participate in the bid. Also, on 23.6.2017, the Respondent while authorizing the Petitioner to participate in the bid unequivocally accepted to abide by the terms and conditions of RFP. Thereafter, on



issuance of LOI by UPPCL on 15.7.2017, the Petitioner had forwarded the same to the Respondent on 19.7.2017 and on 20.7.2017 and 28.7.2017, the Respondent had requested the Petitioner to arrange power through alternate sources for supply to UPPCL for the months of August, 2017 and September, 2017 for which unconditional acceptance was given to the Petitioner on 21.7.2017 and 31.7.2017 respectively. The Respondent having obtained the tender document /LOI issued by UPPCL through the Petitioner and after having accepted the term and conditions therein, and given its consent/acceptance thereafter, to the Petitioner for supply of power to UPPCL, through alternate sources, cannot now, in complete disregard to the same, contend that the Petitioner had suppressed material facts/information regarding the UPPCL bid. The Respondent, having knowledge of the terms and conditions of the tender document/LOI of UPPCL and accordingly, given its consent to the Petitioner for the supply of power to UPPCL from alternate sources, for the months of August, 2017 and September, 2017 (vide its e-mail communications exchanged with the Petitioner till 31.7.2017), cannot on 8.8.2017, object to the same on extraneous grounds. The Respondent having accepted the services rendered by the Petitioner under the PPA, cannot now contend to the contrary, and is therefore estopped from terminating the PPA on this ground. In our view, the termination of the PPA is unwarranted.

47. In view of the discussion and findings above, we set aside the termination of PPA dated 13.12.2011 vide Respondent's notice dated 24.8. 2017

***Issue No.3: Whether the Petitioner is entitled to compensation for the loss of trading margin?***

48. The Petitioner has submitted that on account of Respondent's failure to achieve COD, it has suffered losses in terms of revenue opportunities which would have been



generated from trading margins earned through sale of power. The Petitioner has sought payment of Rs.68,10,62,976 towards loss of trading margin.

49. The Respondent has repudiated the Petitioner's claim on the ground that it is based on assumptions i.e. had the Respondent achieved the COD of its generating units in terms of the PPA, then the Petitioner would have executed an arrangement for sale of power, wherein it would have made revenue in form of trading margin.

50. It is observed that the Petitioner in its reply affidavit has submitted that it is seeking performance of the PPA as the compensation in money will not be adequate relief. It has also submitted that there exist no standards for ascertaining actual damages that may be caused by the non-performance of the PPA as there is no way to assess the quantum of services offered by the Petitioner since 2011 and tied up its revenues for the term of the PPA. It is in this background that the Petitioner, has, in its prayer (d) in paragraph 1 above, as an alternate to its earlier prayers, sought award of damages for loss of trading margin and other associated losses suffered by it on account of illegal termination of the PPA. Since, we have, in paragraph 23 of this order, directed the Respondent to perform the obligations under the PPA, the prayer of the Petitioner under this head has not been considered.

**Issue No.4: Whether the Petitioner is entitled for the payment of consultancy fees towards the consultancy provided to the Respondent?**

51. The Petitioner has submitted that as per Article 16.21 of the PPA, the Respondent had agreed to pay consultancy fees to TPTCL in following schedule:

- a) Rs.1,03,12,500 within fourteen (14) Business Days of the Effective Date as initial consultancy fees for Phase-1.
- b) Rs.1,03,12,500 within ninety (90) Business Days of the Effective Date as initial consultancy fees for Phase-2.
- c) Rs.1,03,12,500 within fourteen (14) Business Days of the execution of the



Financing Agreements relating to Phase-1.

d) Rs.1,03,12,500 within fourteen (14) Business Days of the execution of the Financing Agreements relating to Phase-2.

52. The Petitioner has submitted that till date the Respondent has not made payment of Rs.2,06,25,000 as consultancy fees for Phase-2, out of which Rs.1,03,12,500 was due within 90 Business Days of the Effective Date (date of signing of the PPA). In terms of Article 16.21 of the PPA, the Respondent is obligated to make payment to the Petitioner within the prescribed time. However, despite lapse of more than 6 years since the Effective Date, the said amount still remains outstanding.

53. Per contra, the Respondent has submitted that the consultancy fees which is being charged by the Petitioner under the Original PPA, is itself contrary to the provisions of the CERC (Fixation of Trading Margin) Regulations, 2010. As per the CERC (Fixation of Trading Margin) Regulations, 2010, the Petitioner, which is a trading licensee, cannot indulge in any activity other than trading, and further, cannot earn any revenue apart from the permitted trading margin specified therein. The Respondent has also submitted that the payment of consultancy fees is linked to the COD of the units of the generating station. The Respondent has submitted that as per PPA, "Phase-2" means "the second phase of the Project comprised of the second two Units scheduled to achieve COD and the additional infrastructure required to support such Units". Phase-2 comprises of the COD of the second two units of the (3X400) MW generating station of the Respondent. Unit-3 and Unit-4 of the generating station have not, till date, achieved COD. Since the COD of Unit-1 and Unit-2 was achieved by the Respondent, the consultancy fees as prescribed under the PPA, was duly paid to the Petitioner, which is also illegally charged by the Petitioner. However, since Unit- 3 and Unit-4 have



not yet achieved their COD, there was no occasion for the Respondent to pay the requisite consultancy fees to the Petitioner.

54. We have considered the submissions of the parties. Regulation 2 and Regulation 3(d) of the 2010 Trading Margin Regulations read as under:

*2. Applicability: These regulations shall apply to the short term buy-short term sell contracts for the inter-State trading in electricity undertaken by a licensee.*

*Provided that these regulations shall not apply to the intra-State trading in electricity undertaken by the licensee by virtue of the provisions of Rule 9 of the Electricity Rules, 2005, on the basis of the inter-State trading licence granted by the Commission.*

*3. Definitions and Interpretation:*

*(d) "Short Term Buy- Short Term Sell contract" means a contract where the duration of the power purchase agreement and power sale agreement is less than one year;*

55. A plain Reading of Regulation 2 and Regulation 3(d) makes it clear that CERC (Fixation of Trading Margin) Regulations, 2010 is applicable to "Short Term Buy - Short Term Sell contract" i.e. a contract where the duration of the power purchase agreement and power sale agreement is less than one year. In the present case, it is undisputed that the Petitioner has entered into PPA with the Respondent for a term of 15 years. Therefore, we are of the view that CERC (Fixation of Trading Margin) Regulations, 2010 is not applicable in the present case.

56. Article 16.21 of the PPA deals with the Payment of Consultancy Fees, which reads as under:

*16.21 Consultancy Fees*

*The Seller agrees to pay Buyer consultancy fees in the amounts and at such times as follows:*

- (a) Rs.1,03,12,500/- within fourteen (14) Business Days of the Effective Date (such payment the "Phase 1 Initial Consultancy Fees")*
- (b) Rs.1,03,12,500/- within ninety (90) Business Days of the Effective Date (such payment the "Phase 2 Initial Consultancy Fees")*
- (c) Rs.1,03,12,500/- within fourteen (14) Business Days of the execution of the Financing Agreements for Phase 1 and*
- (d) Rs.1,03,12,500/- within fourteen (14) Business Days of the execution of the Financing Agreements for Phase 2*





57. Effective Date, Phase, Phase-1 and Phase-2 have been defined in the PPA as under:

*Effective Date: means the date of signing this Agreement by the parties*

*Phase: means one of the Phase 1 or the Phase 2*

*Phase 1: means the first phase of the Project comprised of the **first two Units** scheduled to achieve CoD and the associated infrastructure, including that in common with Phase 2.*

*Phase 2 means the second phase of the Project comprised of the **second two Units** scheduled to achieve COD and the additional infrastructure required to support such Units.*

58. We observe that the Respondent has contended that the payment of consultancy fees is linked to the commercial operation of the generating units of the Respondent. However, we observe that as per Article 16.21 of the PPA, the Petitioner is entitled to payment of consultancy fees in a time bound manner i.e. within fourteen (14) Business Days of the Effective Date for "Phase 1 Initial Consultancy Fees"; within ninety (90) Business Days of the Effective Date for "Phase 2 Initial Consultancy Fees"; within fourteen (14) Business Days of the execution of the Financing Agreements for Phase 1; and within fourteen (14) Business Days of the execution of the Financing Agreements for Phase 2.

59. We observe that as the payment of consultancy fees is not linked to commercial operation of the generating station of the Respondent, the Respondent has wrongfully withheld the payment towards the Consultancy Fees as under:

a) Rs.1,03,12,500 which was due within ninety (90) Business Days of the Effective Date (such payment the "Phase 2 Initial Consultancy Fees"); and

b) Rs.1,03,12,500 which was due within fourteen (14) Business Days of the execution of the Financing Agreements for Phase 2.

60. However, as the Petitioner has prayed for directing SPGCL to make payment of Rs.1,03,12,500 towards TPTCL's consultancy fee, we direct the Respondent to make



the payment of consultancy fees of Rs.1,03,12,500 to the Petitioner, within fifteen days of the date of this order.

**Issue No.5: Whether the Petitioner is entitled to cost incurred by it due to non-supply of power to BEST, UPPCL and MSEDCL by the Respondent?**

61. The Petitioner has submitted that on account of non-supply of power to BEST, UPPCL and MSEDCL by the Respondent the Petitioner had to arrange power from alternate source. In order to arrange power from such alternate source, the Petitioner had to incur differential cost. The Petitioner, in this regard, has placed on record the following invoices:

- a) Invoice dated 14.11.2017 raised by TPTCL for differential amount incurred on supply of power from alternate source to BEST;
- b) Invoices dated 12.10.2017, 31.10.2017, 23.10.2017 and 08.08.2017 raised by TPTCL for payment to UPPCL for the differential charges due to supply of power from alternate sources; and
- c) Invoice dated 30.08.2017 raised by TPTCL for differential amount incurred on supply of power from alternate source to MSEDCL.

62. The Respondent has termed the Petitioner's claim as unsubstantiated, without any cogent proof of loss being suffered by the Petitioner. The Respondent has further submitted that the Petitioner has failed to justify and bring on record the bills/ invoices of the Discoms which were raised upon the Petitioner. Further, the Petitioner has also failed to bring on record the bills/invoices of the generators, who allegedly supplied power as alternate source to that of the Respondent. Therefore, in the absent of such bills, the Respondent has submitted that the question of making payment against the invoices raised by the Petitioner does not arise.

63. We have considered the submissions of the parties. It is undisputed that the Respondent's project was delayed substantially. It is also not in dispute that time and again the Respondent has requested the Petitioner to arrange for supply of power from



alternate sources. In this regard, it is necessary to go through the communications (e-mails) exchanged between the parties.

64. One set of communications relating to supply of power from alternate source to BEST is reproduced below, wherein the Respondent had agreed to the supply of power from alternate source proposed by the Petitioner:

***“BEST Power purchase tender for period 01.07.17 to 31.12.17***

*Supply of power from alternate source for the period 1st July 2017 to 15th July 2017 for both the time slot (08 to 23 hrs & 11 to 16 hrs).*

*From: Saurav Srivastav*

*Sent: Tuesday, June 27, 2017 12:54 PM*

*To: Kumar Kundan*

*Cc: anilgupta@sksispat.com; anishgupta@spgcl.com; rkagarwal@spgcl.com; TPTCL Marketing; nmambade@spgcl.com*

*Subject: RE: BEST Power purchase tender for period 01.07.17 to 31.12.17*

*Dear Kundan, We agree for Alternate Supply to BEST from JNSTPP for 11 – 16 hrs and TPT (DHPP) for 08 – 23 Hrs as per the financial impact in the trail email.*

*Sincerely,*

*Saurav Srivastav General Manager - Commercial*

*SKS Power Generation (Chhattisgarh) Limited*

*B-501, Elegant Business Park, JB Nagar Andheri(E), Mumbai - 400059*

*From: Kumar Kundan [mailto:kundan@tatapower.com]*

*Sent: Tuesday, June 27, 2017 12:45 PM*

*To: Saurav Srivastav Cc: anilgupta@sksispat.com; anishgupta@spgcl.com; rkagarwal@spgcl.com; TPTCL Marketing; nmambade@spgcl.com*

*Subject: RE: BEST Power purchase tender for period 01.07.17 to 31.12.17*

*Dear Sir,*

*Reference to trailing mail and as discussed, we had taken up the matter with various generators regarding supply of power from alternate source for the period 1st July 2017 to 15th July 2017 for both the time slot (08 to 23 hrs & 11 to 16 hrs).*

*Response for 11 to 16 hrs slot: Due to MSEDCL power purchase tender, the generators are not willing to offer non- RTC power under alternate arrangement. However, two generators have agreed to supply*

*power during 11 to 16 hrs namely DB Power and JNSTPP. DB Power is willing to supply 60 MW power at a rate of Rs. 3.00/kWh (Including TPTCL trading margin of 3 paise/kWh). In such case, SPGCL shall have to bear the additional cost of Rs. 5.07 lakh (@ 13 paise/kWh) on account of alternate supply from DB Power.*

*JNSTPP is willing to supply 60 MW power at a rate of Rs. 2.90/kWh (Including TPTCL trading margin of 3 paise/kWh). **In such case, SPGCL shall have to bear the additional cost of Rs.78,000/- (@ 2 paise/kWh ) on account of alternate supply from JNSTPP.***

*We propose that we may go ahead with the option of supply from JNSTPP.”*



65. We also observe that the Petitioner vide its email dated 19.6.2017 had informed the Respondent about the UPPCL Tender for power purchase of up to 1500 MW power during 00-05 Hrs. and 19-24 Hrs. starting from 1.7.2017 and up to 30.9.2017. The Petitioner also apprised the Respondent that it has to reimburse the MSTC (DEEP) online e-bidding charge to TPTCL within 7 days from the date of receipt of the bill. UPPCL vide its letter dated 15.7.2017 had given its letter of intent to the Petitioner. But the Respondent had not commissioned its generating station and therefore, requested the Petitioner to arrange for supply of power from alternate sources for the month of August, 2017 and September, 2017.

66. The Petitioner vide its email dated 31.7.2017 at 2.29 PM informed the Respondent as under:

*“Dear Sir,*

*In continuation to the trail mail, we have taken the matter with JITPL for power supply during 19 to 24 Hrs. and have proposed them to apply on FCFS basis for one time. Applying for the corridor will enable us to complete our obligation to power supply on FCFS basis. Following is to be noted for this application:-*

*a) We have proposed to JITPL for applying on FCFS basis, assuming that this will relieve us of the obligation to apply on FCFS basis and JITPL's power will not be cleared for power flow to UPPCL.*

*b) In case partial quantum is approved:-*

*i) JITPL shall surrender this partially approved quantum by NRLDC, the charges for this corridor surrender shall be payable by SPGCL.*

*ii) In case the power is supplied to UPPCL, the rate payable to JITPL shall be higher of the two i.e., Rs.3.65/Unit or 100% of each time block of IEX ACP of E1 region, and accordingly the differential charges shall be borne by SPGCL.*

*As per the market conditions, we feel that the power will not be cleared on FCFS basis but this action will relieve us of one of our obligations.*

*Kindly confirm if the same is okay with SPGCL. We will let you know as soon as we receive approval from JITPL.”*

67. The Respondent vide its email dated 31.7.2017 at 2:35 PM confirmed the arrangement made by the Petitioner.

68. The Petitioner vide its email dated 31.7.2017 at 6:19 PM intimated the Respondent alternate supply as under:



“Dear Sir,

In continuation to our endeavours to arrange for alternate supply for UPPCL during Aug'17 and Sept'17. Following is the summary for the current status for all the three power supplies:-

Sr. No.	Duration	Time Period	Quantum as mentioned in LOA to be supplied from SPGCL	Options for Alternate Supply		Remarks
				Option 1	Option 2	
1	1st August 2017 to 31st August 2017	19 to 24 Hrs.	160 MW	160 MW from JITPL @ price which is higher of the two i.e., Rs.3.65/Unit or 100% of each time block of IEX ACP of E1 region. Plus Rs.10000 to be borne by SPGCL towards application fees.	We have approached another generator in NR region namely GoHP, they have prima facie agreed for (100 + 30) MW power supply to UPPCL starting from 4th or 5th of August 2017 to 31st August 2017 at the following conditions:- a) The generator is asking for a premium of 10 Paisa/Unit, which shall be borne by SPGCL, and the bill for same shall be raised by TPTCL a day after the approval is received from NRLDC. b) The Generator has asked for BG as Payment security for this power supply, which shall be provided by SPGCL as the payment will have to be made on 25th day of the bill date instead of 30th day of bill date as mentioned in the UPPCL's Tender document, to the alternate generator (GoHP). c) The trading margin for this transaction shall be 1.5% of the price mentioned in the LOI. d) The power shall be supplied on firm basis only.	TPTCL is trying to supply the remaining 30 MW during April 2017 from some other alternate source and thus avoid compensation.
2	1st September 2017 to 30th September 2017	00 to 04 Hrs.	250 MW	60 MW from Shree Cement Limited, Rajasthan 190 MW still to be supplied by SPGC.		We are continuously pursuing the matter with all prospective generators, and it seems we will be able to arrange this power but are not in a position to commit as of now.
3	1st September 2017 to 30th September 2017	19 to 24 Hrs.	170 MW	50 MW from Shree Cement Limited, Rajasthan 120 MW still to be supplied by SPGCL.		We are continuously pursuing the matter with all prospective generators, and it seems we will be able to arrange this power but are not in a



						<i>position to commit as of now.</i>
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69. The Petitioner vide its email dated 4.8.2017 at 7.11 PM informed the Respondent as under:

*“Dear Sir,*

*This has reference to our telephonic conversation in regard to the trail mail. We are pleased to share with you that we have received the LOI from GoHP for 100 MW power flow to UPPCL during Aug'17. GoHP has agreed for supplying this power on firm basis only that too without any compensation. We need to provide BG to GoHP/PTC for this power flow and cost for same shall be payable by SPGCL apart from the applicable trading margin. This is for your kind information and records.”*

70. A perusal of above email reveals that the Petitioner as per the consent given by the Respondent participated in the tender floated by the BEST and UPPPCL. Since the Respondent had not commissioned its generating station, it requested the Respondent to arrange for supply of power from alternate sources to the Discoms. Accordingly, the Petitioner arranged supply of power from alternate sources and the Respondent also accepted the financial implication. We are of the view that the Respondent having agreed to bear the differential cost of the alternate arrangement cannot retract from its earlier stand. However, the Petitioner has not placed on record the invoices raised by the generating stations through whom the Petitioner arranged the supply power as alternate arrangement. Therefore, the parties are directed to reconcile the bills and invoices raised by the generating stations upon the Petitioner, within fifteen days of the date of this order. The Respondent shall be liable to pay the differential cost of the alternate arrangement made by the Petitioner for supply of power within fifteen days of the reconciliation of the invoices. The Respondent shall also be liable to pay the MSTC (DEEP) online e-bidding charges to the Petitioner for the participation in the bidding process.



## **Summary**

71. The summary of our decision are as under:

- (1) The termination of the PPA dated 13.12.2011 executed between TPTCL and SPGCL vide notice dated 24.8.2017 of the Respondent is set aside.
- (2) The PPA is non-determinable and therefore, we direct the specific performance of the PPA dated 13.12.2011.
- (3) The Petitioner's claim for the compensation for the loss of trading margin and other associated losses has not been considered.
- (4) The Petitioner is entitled for the payment of Rs.103,12,500 as consultancy fees, which has been withheld by the Respondent.
- (5) The Petitioner is entitled to the differential cost of the alternate arrangement made by the Petitioner for supply of power on the request of the Respondent. The parties shall reconcile the bills and invoices raised by the generating stations upon the Petitioner, within fifteen days of the date of this order. The Respondent shall pay the differential cost of the alternate arrangement made by the Petitioner for supply of power within fifteen days of the reconciliation of the invoices. The Petitioner is also entitled to MSTC (DEEP) online e-bidding charges for the participation in the tender process floated by BEST, UPPCL and MSEDCL.

72. Petition No. 275/MP/2018 is disposed of in terms of above.

**Sd/-**  
**(P. K. Singh)**  
**Member**

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I S. Jha)**  
**Member**

**Sd/-**  
**(P. K. Pujari)**  
**Chairperson**

