No.N/206/2018

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052.

Dated:28.01.2020

Present:

Shri Shambhu Dayal Meena .. Chairman
Shri H.M. Manjunatha .. Member
Shri M.D. Ravi .. Member

OP No.80/2018

BETWEEN:

Messrs Bhalkeshwar Sugars Limited,
A Company incorporated under
the Companies Act, 1956
having its Registered Office at
Basavaeshwar Chowk,
New Inspection Bungalow, Bhalki,
Bidar-585 328. **… PETITIONER**

[Represented by Sri V. Ravi, Advocate,
Viswakarma Law Offices, Bengaluru]

AND:

1) Bangalore Electricity Supply Company Limited,
Having its Corporate Office at
K.R. Circle,
Bengaluru-560 001.

2) Mangalore Electricity Supply Company Limited,
Corporate Office,
"MESOM Bhavana",
Bejai, Kavoor Cross Road,
Mangaluru-575 004.

3) Hubli Electricity Supply Company Limited,
Corporate Office,
Navanagar,
P.B. Road,
Hubli-580 025.

4) Gulbarga Electricity Supply Company Limited,
Railway Station Main Road,
Kalaburgi-585 102.

5) Chamundeshwari Electricity Supply Company Limited,
No.29, Vijayangar 2nd Stage,
Hinkal,
Mysuru-570 017.

6) Power Company of Karnataka Limited,
5th Floor, KPTCL Building,
Kaveri Bhavan, K.G. Road,
Bengaluru-560 009. … **RESPONDENTS**

[Respondents-1 to 6 are Represented by
Sri Shahbaaz, Advocate, Bengaluru.]

O R D E R S

The petitioner has filed the present petition under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs:

a) To declare that the petitioner was not liable to pay any damages to any of the Respondents for its inability to supply targeted energy in terms of the PPA dated 31.08.2015, during the months of February 2016, March 2016 and April 2016 and that the recovery of a sum of Rs.91,29,529/- from the petitioner, as liquidated damages is illegal, opposed to the provisions of the PPA dated 31.08.2015 and under Section 56 of the Indian Contract Act, 1872;

b) To direct the Respondents jointly or severely to refund the aggregate sum of Rs.1,20,73,800/- (Rupees One crore twenty lakh seventy-three thousand eight hundred only) being the principal amount of Rs.91,29,529/- plus interest @ 15% per annum on it till 29.08.2018, the date of filing the present petition; and-

c) To direct the Respondents to pay the future interest @ 15% per annum on the aggregate sum of Rs.1,20,73,800/- with costs.

2. The description of the parties may be stated as follows:

a) That the petitioner is a Company incorporated under Companies Act, 1956, having its Registered Office at Basavesvara Chowk, near Inspection Bungalow, Bhalki, Bidar District-585 328. The petitioner is having an integrated Complex for Sugar Factory, Distillery and Bio-compost Units and also Cogen Power Plant.

b) The Respondents No.1 to 5 are the Distribution Licensees under the Electricity Act, 2003 in the State of Karnataka and the Respondent No.6 is a Government Company incorporated to act as a Nodal Agency/Agent of Respondents No.1 to 5 for the procurement of electricity on their behalf.

3. The material facts stated by the petitioner in support of its claim may be stated as follows:

a) The petitioner had entered into a short term Power Purchase Agreement (PPA) dated 31.08.2015 (Annexure-P1) with Respondents No.1 to 5, for supply of energy from its Cogen Power Plant. The contracted capacity was 8.5 MW and the Delivery Point was 110 kV Sub-station, Bhalki. The tariff agreed was Rs.5.08 per unit for the Energy Delivered and the period of supply was 15.11.2015 to 30.04.2016. The PPA contained the other terms and conditions regarding the transaction of power purchase between the parties.

b) The petitioner supplied the power to Respondents No.1 to 5 till 20.02.2016 and thereafter, stopped the supply of power from 21.02.2016 onwards. The petitioner has not supplied any power during the months of March and April 2016 as well.

c) The 6th Respondent/PCKL was managing the affairs of the power purchase under the PPA dated 31.08.2015. The Respondents 1 to 5 have claimed a total sum of Rs.91,29,529/- towards Liquidated Damages for failure to supply the instructed capacity (targeted capacity), as provided under Article 6.2.4 read with 6.2.5 of the PPA. Out of it, they realised Rs.28,02,848/- on 08.06.2016 by invoking Bank Guarantee (Contract Performance Guarantee), furnished under the PPA for guaranteeing, the commencement and continuity of supply of power up to the targeted capacity during the term of PPA. Further, they deducted an amount of Rs.63,26,681/- out of the dues

payable to the petitioner towards tariff invoices for the energy supplied by the petitioner.

d) The petitioner had contended that there existed *'Force Majeure'* event during the relevant period and thereby it could not run the sugar factory as well as the Cogen Plant and that the case of the petitioner also attracted the provisions of Section 56 of the Indian Contract Act, 1872 and the contract in question became impossible to perform. The petitioner has also contended that the claim for damages by the Respondents is also opposed to the well-established law laid down by the Hon'ble Supreme Court of India for claiming the Liquidated Damages agreed in a contract as per Section 74 of the Indian Contract Act, 1872.

e) That the second part of the Article 6.2.5 of the PPA did not provide for payment of damages in case of loss of generation i.e., failure of Generation. The Respondents failed to note that in the present case, the generation of power could not take place due to 'Force Majeure' event, i.e., shortage of water due to drought and thereby it amounts to failure to generate power as contemplated in second part of Article 6.2.5. However, the second part of Article 6.2.5 of the PPA did not provide for payment of any damages in case of loss of generation i.e., failure of Generator. The respondents failed to note this point while imposing the damages.

4. The material facts of the *'Force Majeure'* events alleged by the petitioner are as follows:

   a) That the fuel used for power generation in the Cogen Plant of the petitioner was Bagasse and the nature of load was Base Load. Hence, the power generation required huge quantity of water per day and without water, the power generation was not possible. In the case of the petitioner 4 lakh litres of water per day was required for generation of power in the Plant. The water requirement was met through the supplies from the nearby Karanja Reservoir and also through the bore-wells sunk within the Power Plant premises. That the twelve (12) Districts of Northern-Karnataka faced severe rain shortage during October 2015 to December 2015 and these Districts were faced with severe water shortage even for drinking purposes. In this area, the crop loss due to water shortage was estimated as 34.61 lakh hectares. The GoK vide its Order bearing No.RD 11 TNR 2016 dated 09.02.2016 declared 62 taluks of twelve (12) Northern Districts of Karnataka as drought affected areas. Bhalki taluk of Bidar district, where the Power Plant of the petitioner located was also covered under the drought affected area declared under the said Government Order. The said GoK Order dated 09.02.2016 is produced as Annexure-P2. The Karnataka Neeravari Nigam Limited, which was managing Karanja Reservoir had intimated that the live capacity of the Reservoir as on 27.02.2016 was 0.144 TMC as against

1.219 TMC as on 27.02.2015. The said intimation is produced as Annexure-P3.

b) The petitioner informed all the Respondents about its inability to generate electricity with effect from 26.02.2016 due to water shortage which was an exceptional adverse weather condition and Act of God. The petitioner also requested to terminate the PPA and to absolve the petitioner from any liability arising out of the said PPA for the month of February 2016, March 2016 and April 2016. The copy of the letter dated 25.02.2016 is produced as Annexure-P4.

c) That the said drought situation and exceptional adverse weather condition was never anticipated by the petitioner at the time of execution of the PPA and the petitioner had no role in the drought conditions that prevailed at the relevant period. The drought condition and the water shortage were totally beyond the control of the petitioner. The 6th Respondent/PCKL vide letter dated 12.04.2016 rejected the contention of the petitioner that there was 'Force Majeure' event, and cited Article 5.1.4 of the PPA which allowed alternate source of power supply in case the petitioner was unable to provide supply of power from its Cogen Plant. That the petitioner wrote series of letters informing the impossibility in generation of power and its inability to supply the contracted power to the 6th Respondent/PCKL and others. However, the 6th Respondent/PCKL replied as per letter dated 04.07.2017 (Annexure-P8) that the drought

condition stated by the petitioner do not come under the '*Force Majeure*' event as per the terms of the PPA. The 6th Respondent/ PCKL confirmed and justified the recovery of Rs.91,29,529/- as compensation under Article 6.2.5 of the PPA.

5. That even by assuming for a moment that the 'Force Majeure' Clause in the PPA were not applicable to the facts of this case, still the provisions of Section 56 of the Indian Contract Act, 1872, was applicable, due to supervening impossibility to perform the contract as a consequence of non-availability of water for power generation and thereby the PPA itself became void from February 2016 onwards. Section 56 of the Indian Contract Act, 1872 reads as follows:

> *"56. Agreement to do impossible act. – An agreement to do an act impossible in itself is void.*
>
> *Contract to do act afterwards becoming impossible or unlawful. – A contract to do an act, which, after the contract is made, becomes impossible, or, by reason of some event, which the promises or could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

The petitioner has relied upon a portion of para 16 of the decision of the Hon'ble Supreme Court of India in SATYABRATA GHOSE Vs MUGNEERAM BANGUR & CO. AND ANOTHER reported in 1954 SCR 310 : AIR 1954 SC 44, which reads as follows:

"In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This may be called a rule of construction by English Judges but it is certainly not a, principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Indian Contract Act,".

6. Alternatively, the petitioner has alleged that the claim of the Respondents for the Liquidated Damages is opposed to Section 74 of the Indian Contract Act, 1872. This contention is elaborated as follows:

a) That the damages can be awarded only if the Respondents plead and prove that breach of contract has resulted in loss or damage to the Respondents. Section 74 of the Indian Contract Act, 1872 does not distinguish between stipulations by way of "*liquidated damages*" and by way of "*penalty*". It provides for uniform principle applicable in both cases. The award of compensation needs to be reasonable and needs to be determined as per the settled principles. Section 74 of the Indian Contract Act, 1872 does not dispense with the requirement that the party seeking damages should prove that it has suffered loss or damage. Even if a sum is named as liquidated damages and stated in the contract/agreement, the Respondents can only be awarded reasonable compensation (not exceeding the amount stated as liquidated damages) in case of breach which has resulted in loss or damage and it cannot claim or recover the amount of purported damage. The compensation which can be awarded is to be ascertained having regard to the conditions that existed on the date of breach.

b) The party complaining of a breach of contract can receive a reasonable compensation of such liquidated amount only, if it is a genuine pre-estimate of damages fixed by both parties and found to

be such by the Commission. A genuine pre-estimated damages can be awarded without proof of actual damages only in case the damages suffered by the Respondents could not be estimated. But it was not so in the present case.

c) Unless the Respondents establish that they have suffered actual loss and the same is adjudicated, the amount cannot be termed as a debt due and enforceable. If the liquidated damages claimed are not debt due, there cannot be any encashment of Bank Guarantee and adjustment/deduction of any amount from out of the pending tariff invoices.

d) The Respondents have not suffered any loss or they have not even claimed that they have actually suffered any loss. In the absence of actual loss being established and the Commission not adjudicating on the damages payable to the Respondents there is no crystalized amount due from the petitioner to the respondents. The liquidated damages cannot be adjusted by enforcement of the Contract Performance Guarantee, before adjudicating on the quantum of damages payable by the petitioner to the respondents.

e) The liquidated damages named in the PPA is unreasonable, onerous and not a genuine pre-estimated loss. Since the electricity is moveable goods and was freely available, the alleged actual loss suffered by the Respondents could be assessed, if the Respondents

had purchased electricity from some other source to compensate the shortfall of electricity due to non-supply of power by the petitioner. But the respondents purchased the electricity at much cheaper price than stipulated under the PPA. Hence, the respondents have failed to prove any loss or damages to them. Therefore, the petitioner has prayed for the reliefs claimed in the petition.

7. The Respondents 1-4 and 6 appeared through Counsel. On behalf of all the Respondents, Respondent No.6/PCKL has filed the Statement of Objections. The non-appearance of the Respondent No.5 is not a material fact, as the defence of other Respondents would be same as the defence of the 5th Respondent. Apart from it, Respondent No.6/PCKL sufficiently represents the interest of Respondent No.5. The defences of the Respondents stated in their Statement of Objections are as follows:

a) That the grounds urged by the petitioner to establish the '*Force Majeure*' event leading to closure of Cogeneration Unit of the petitioner, are irrelevant and that the petitioner had the knowledge before executing the PPA that there was likelihood of the scarcity of water and non-availability of fuel during the season. The possibility of scant rains and shortage of water was well within the knowledge of the petitioner at the time of execution of the PPA. The petitioner himself produced a news item published in "*The Hindu*" Daily Newspaper dated 08.08.2015 wherein under the Headline "*Bidar*

Steering at one of Its worst drought". The petitioner entered into a PPA and committed to supply the contracted energy to the Respondents, despite being aware of the difficulty it may face in sourcing water for the Plant.

b) The scarcity of water and acute drought situation are not covered as the event or circumstances under the definition of *'Force Majeure'* in the PPA. The petitioner has failed to establish that in no circumstances could it have generated the contracted energy. Therefore, it is contended that the scarcity of water or drought condition does not fall under the definition of 'Force Majeure'.

c) That the phrase *'Act of God'* and *'Adverse Weather Condition'* stated in the definition of 'Force Majeure' has also been exhaustively defined in the said Article to mean lightening, flood, cyclone, earthquake, volcanic eruption, fire or land slide and that *'Drought as a Force Majeure'* event had not been included. If the parties had intended to include drought as a 'Force Majeure' event it should have been specifically stated so in the relevant Article defining *'Force Majeure'*.

d) As *'Force Majeure'* event is not established as an excuse for supply of energy, the petitioner was bound to supply the energy from alternate source as required under Article 5.1.4 of the PPA. In default, the petitioner is liable to pay for liquidated damages for failure to supply

the contracted capacity under Article 6.2.4 read with Article 6.2.5 of the PPA. The Respondents have stated that the supply of power was stopped with effect from 21.02.2016 onwards and that the availability of energy during February 2016 was only 66.53% as against the targeted availability of 85% as provided in the PPA, therefore, the petitioner was liable to pay liquidated damages to the extent of Rs.11,10,082/-. Further, it is contended that during March and April 2016, no supply of energy was done, thereby the liquidated damages payable comes to Rs.54,61,406/- and Rs.52,85,232/- respectively.

e) It is contended that Section 56 of the Indian Contract Act, 1872 is not applicable to the facts of the present case, as the present contract (PPA) contains a '*Force Majeure*' Clause in which event, Section 56 can have no application, as laid down by the Hon'ble Supreme Court of India in Energy Watchdog and Others Vs. Central Electricity Regulatory Commission and Others [2017 (14) SCC 80].

f) That the liquidated damages agreed to be payable under Article 6.2.5 of the PPA is a genuine pre-estimation of the damages payable for failure to supply the contracted capacity. The Distribution Licensees are supplying energy to the consumers at large and the short term power supply was necessitated because of the shortage of power during the relevant period. Therefore, any short supply of energy would affect the end consumers and it also causes loss to the Respondents due to reduction of sales of energy. It is also contended

that, it is difficult to prove the actual level of loss caused to the consumers at large and the Distribution Licensees and because of these reasons, the liquidated damages payable under Article 6.2.5 of the PPA being a reasonable pre-estimate of the loss or compensation, is payable from the defaulting party to the non-defaulting party. It is contended that the liquidated damages payable under the said Article 6.2.5 of the PPA cannot be considered as a penalty.

g) That the interpretation of the second part of the Article 6.2.5 as stated by the petitioner is incorrect. That the requirement of furnishing undertaking stated in this second part of Article 6.2.5 is in addition to the payment of liquidated damages and not in substitution of such liability for payment of damages.

h) All other grounds alleged by the petitioner are denied by the Respondents as false and untenable.

8. Subsequent to filing of the Statement of Objections of the Respondents, the petitioners have filed the Rejoinder to it. The material replies of the petitioner in the Rejoinder may be stated as follows:

a) That the petitioner had no knowledge about the impending drought condition and the resultant water scarcity, when it entered into the PPA. The production of the news item published in daily newspaper 'The Hindu' dated 08.08.2015 by the petitioner regarding the news

item "*Bidar steering at one of its worst drought",* cannot be deemed that the petitioner had been in the knowledge of such report dated 08.08.2015. That the said news item was the part of the "*Revised Memorandum submitted to the Government of India, seeking central assistance for drought mitigating the measures in Karnataka State during 2015*" by the Department of Revenue (Disaster Management), Government of Karnataka, during September 2015, which was also a part of Annexure-P2.

b) That the interpretation made by the respondents regarding '*Force Majeure'* event, is incorrect and "*adverse weather condition*" was one of the '*Force Majeure'* events along with other events stated therein. The events such as drought, water shortages etc., are falling under "adverse weather conditions" stipulated in Article 7.1 (ii) of the PPA.

c) In fact, the petitioner was procuring water from the nearby Karanja Reservoir after drying up of its own source of water. Only after Karnataka Neeravari Nigam Limited prohibited the petitioner from drawing water from the Karanja Reservoir, it could not able to procure the required water and that was "adverse weather condition".

d) That the first part of the Article 6.2.5 of the PPA speaks about the payment of compensation, in case of deviation from the Seller side

was more than 15% of the contracted energy for which Open Access has been allocated on monthly basis. Whereas, the second part of Article 6.2.5 of the PPA speaks about the failure of the Seller to schedule the capacity approved for Open Access for the concerned period on account of loss of generation. For the cases falling under the second part of the Article 6.2.5 of the PPA, payment of compensation was not stipulated. The case of petitioner is coming under the second part of Article 6.2.5 of the PPA. Therefore, respondents cannot claim any compensation.

9. We have heard the learned counsel for the parties. They reiterated the contentions taken in their respective pleadings.

10. From the rival submissions and the pleadings and documents of the parties, the following issues arise for our consideration:

    1) Whether the extreme scarcity of water and drought condition alleged by the petitioner affecting power generation of Cogen Plant falls within the meaning of 'Force Majeure' as provided in Article 7.1 (ii) of the PPA?

    2) If Issue No.1 is held in negative, whether Section 56 of the Indian Contract Act, 1872 attracts so as to grant any relief to the petitioner?

3) Whether the claim for liquidated damages is established by the respondents, as required under Section 74 of the Indian Contract Act, 1872?

4) Whether the invoking of performance guarantee and deduction of amount from out of dues payable in respect of pending tariff invoices by the respondents towards the satisfaction of the claim for liquidated damages is valid and legal?

5) Whether the petitioner is entitled to get refund of Rs.91,29,529/- with interest at 15% per annum till the date of filing of the petition?

6) Whether the petitioner is entitled to *pendent-lite* interest and future interest at 15% per annum on Rs.91,29,529/-?

7) To which reliefs the petitioner is entitled to?

8) What Order?

11. After considering the submissions of the parties and the pleadings and records, our findings on the above issues are as follows:

12. Issue No.1: Whether the extreme scarcity of water and drought condition alleged by the petitioner falls within the meaning of 'Force Majeure' as provided in Article 7.1 (ii) of the PPA?

a) Let us consider the meaning of Force Majeure event as stated in Article 7.1 of the PPA which reads as follows:

"Article 7.1 Force Majeure

i) Any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of Transmission/Grid constraint shall be treated as Force Majeure without any liability on either side.

ii) Any of the events or circumstances, or combination of evens and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake, volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system.

iii) The contracted power will be treated as deemed reduced for the period of Transmission Constraint. The non / part availability of transmission corridor should be certified by concerned RLDC / SLDC.

The Affected Party shall give intimation to the other Party of any event of Force Majeure immediately but not later than 24 Hours."

Article 7.2 of the PPA provides for duty to mitigate the effect of 'Force Majeure' event which reads as follows:

"7.2 Duty to Mitigate

To the extent not prevented by a Force Majeure event, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable."

b) The petitioner has alleged that extreme scarcity of water and drought condition prevailed during the relevant period led to closure of the Cogen plant as it was impracticable to fetch water for running the Cogen plant. The petitioner has contended that its case falls under Article 7.1 (ii) of the PPA. Therefore, it is contended that the petitioner was relieved from its duty to supply the power under the PPA.

c) However, this Commission in previous instances while interpreting Article 7.1 of the PPA has come to the conclusion that any disruption caused to the generating plant due to breakdown of machinery, want of fuel for generation etc., were outside the scope of Force Majeure event stated in Article 7.1 of the PPA. The Force Majeure event and its consequences as noted in Article 7.1 (i) of the PPA would show that, any restriction imposed by the RLDC/SLDC in scheduling of power due to breakdown of transmission/grid constraint shall be treated as Force Majeure event without any

liability on either side. Article 7.1 (ii) of the PPA provides that any of the event or circumstances or combination of events and circumstances such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake etc., causing disruption of the system should be treated as Force Majeure event. The words "causing disruption of the system" would refer only to transmission system, but it cannot include the breakdown or disruption of the generating plant. This Article 7.1 of the PPA does not provide any relief in case of breakdown or disruption of generating plant for any reason. Therefore, the conclusion is that the disruption of power generation from the power plant for any reason is not considered as a Force Majeure event in Article 7.1 of the PPA.

d) It may be seen that Article 5.1.4 of the PPA provides for supply of power from alternate source, in case the Seller is unable to supply the required quantum of power except due to a Force Majeure event. As already noted, the Force Majeure event is restricted to disruption of transmission system due to breakdown or grid constraint. Therefore, in case of disruption of generation of energy from the generating plant, the Seller has a duty to supply power from alternate source as provided in Article 5.1.4 of the PPA. The said Article 5.1.4 of the PPA reads as follows:

"Article 5.1.4 - Alternate source of power supply

If the Seller is unable to provide supply of power to the Procurer (s) up to the Contracted Capacity from the Delivery Point except due to a Force Majeure Event, the Seller shall supply power up to the Contracted Capacity from an alternative generation source to meet its obligations under this Agreement with the consent of Procurer (s). Such power shall be supplied to the Procurer (s) at the same Tariff as per the terms of this Agreement. In case the Open Access Charges and other incidental charges, including but not limited to application fees for open access, RLDC/SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable Open Access Charges from Delivery Point to Procurer (s) Periphery, the Seller would be liable to bear such additional charges."

e) The above provisions would show that the parties contemplated the supply of energy by the Seller to the required quantum as provided in Article 6.2.4 read with Article 6.2.5 of the PPA, even in the event of failure of generation of power from the generating plant for any reason. Therefore, we hold that extreme security of water affecting the generation of power from the Cogen plant of the petitioner does not fall within the meaning of Force Majeure event as provided in Article 7.1 (ii) of the PPA.

f) Alternatively, the learned counsel for the petitioner submitted that the second part of the Article 6.2.5 of the PPA covers the case of failure to supply the schedule capacity on account of loss of generation i.e., failure of generator and further submitted that in such circumstances, the generator has to give an undertaking regarding the failure of generator and confirming that power has not been sold to a thirty party during the said period. Therefore, he contended there is no liability to pay liquidated damages in the case of failure to supply the required quantity of energy as provided in first part of the Article 6.2.5 of the PPA. The learned counsel for the respondents submit that the 2nd part of Article 6.2.5 of the PPA does not relieve the generator from payment of liquidated damages in the case of failure to supply the required quantity of energy as provided in 1st part of the Article 6.2.5 of the PPA. He further submitted that the second part of the said Article only imposes a further condition on the generator to provide an undertaking confirming that the power has not been sold to the third party. We are of the considered opinion that the second part of Article 6.2.5 of the PPA does not provide for any relief from failure to supply the required quantity of energy but it only provides for giving an undertaking that the power has not been sold to a third party. If really it was intended to provide any relief to the generator for failure of generator to supply the required quantity of energy due to Force Majeure event, there should have been a specific mention to that

effect in Article 7.1 itself or at least in the second part of the Article 6.2.5 of the PPA.

g) Accordingly, Issue No.1 is held in negative.

13. Issue No.2: If Issue No.1 is held in negative, whether Section 56 of the Indian Contract Act, 1872 attracts to grant any relief to the petitioner?

a) The petitioner has contended that even by assuming for a moment that the Force Majeure clauses in the PPA were not applicable to the facts of this case, still the provisions of Section 56 of the Indian Contract Act, 1872 was applicable, as the performance of contract has become impossible due to non-availability of water for power generation and in that event, the PPA itself has become void from February 2016 onwards. The learned counsel for the petitioner relied upon the decision cited in 1954 SCR 310 : AIR 1954 SC 44 between "SATYABRATA GHOSE Vs. MUGNEERAM BANGUR & CO. AND ANOTHER" in support of his contention. The paragraphs relied upon by the learned counsel for the petitioner from the above decision are already extracted in Paragraph 5 of this Order.

b) The close reading of the decision in "SATYABRATA GHOSE Vs. MUGNEERAM BANGUR & CO. AND ANOTHER" case would show that in the present case, the petitioner is not entitled to raise the contention that due to extreme scarcity of water, the contract has

become impossible to perform. In Paragraph 16 of the above said Judgment of the Supreme Court, it is stated as follows:

> "According to the Indian Contract Act, a promise may be express or implied. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether." …

We may also note the principles noted in Paragraph 17 of the same Supreme Court Judgment, which reads thus:

> "17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in Matthey V. Curling "a person who expressly contracts absolutely to do a thing not naturally impossible is

> not excused for non-performance because of being prevented by the act of God or the King's enemies … or vs major". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognized in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."

c) As already noted in the present case, the parties contemplated the possibility of non-generation of power from the Cogen plant of the petitioner for one or the other reason and expressly stipulated that the contract would continue despite such circumstance, by allowing the petitioner to arrange for alternate supply of power from some other source. The said Article 5.1.4 of the PPA is already extracted above in sub-para (d) of para 12 of this Order.

d) However, if there was no provision in the PPA as contained in Article 5.1.4 for alternate power supply, the contention of the petitioner could have been accepted.

e) It is not the case of the petitioner that it made sincere attempts for supply of energy from alternate source and it could not secure such alternate source. For establishing subsequent impossibility so as to treat the contract as void, the petitioner was required to establish the extreme scarcity of water which prevented the generation of

electricity from Cogen plant and also non-availability of alternate source for power supply.

f) For the above reasons, we hold Issue No.2 is in negative.

14. Issue No.3: Whether the claim for liquidated damages is established by the respondents, as required under Section 74 of the Indian Contract Act, 1872?

a) The petitioner has alleged that the claim of the respondents for liquidated damages is opposed to Section 74 of the Indian Contract Act, 1872. The elaboration of the said contention is noted in Paragraph 6 of this Order while narrating the case of the petitioner.

b) The Articles 6.2.4 and 6.2.5 of the PPA read thus:

"Article 6.2.4 -Payment for Liquidated Damages for failure to supply the Instructed Capacity.

- Both the parties would ensure that actual scheduling does not deviate by more than 15% of the Contracted power as per the approved open access on monthly basis.

- In case deviation from Procurer side is more than 15% of either contracted energy for which open access has been allocated or the energy corresponding to actual availability, whichever is lower on monthly basis, Procurer shall pay compensation at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.

Article 6.2.5 - In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis. Seller shall pay compensation to Procurer at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer. In case of Seller being a Trader, Generation source wise deviation shall be considered for compensation calculation.

If Seller fails to schedule the capacity approved for the open access for the concerned period on account of loss of Generation i.e., failure of Generator/Transmission constraints then Seller shall provide an undertaking regarding the failure of Generator and confirming that power has not been sold to a third party during the period. For the purpose of clarity, third party would mean party other than ESCOMs of Karnataka and notified customers of the Sellers. The list of notified customers would be submitted by Seller 15 days before the commencement of supply of Power. The list will also specify the quantum of power which needs to be supplied to notified customers as per their agreements with Seller. In case, rescheduling is required, rescheduling shall be done proportionately. This list, upon submission will be an integral part of the Agreement."

c) The learned counsel for the petitioner relied upon the following decision in support of his contention on this issue:

"i) (1964) 1 SCR 515 : AIR 1963 SC 1405 between Fateh Chand v. Balakishan Dass (particularly Paragraph 15)

ii) (1973) 1 SCC 649 between Union of India v. Rampur Distillery & Chemical Co.,

iii) (2011) 1 SCC 394 between Bharat Sanchar Nigam Limited v. Reliance Communication Limited.

iv) (2015) 4 SCC 136 between Kailash Nath Associates v. Delhi Development Authority and Another."

d) In Kailash Nath Associates case, the Hon'ble Supreme Court of India, on consideration of the various authorities has summarized the principle, in paragraph 43 of its judgment, which reads thus:

"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount to stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the

liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4 The section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

e) Opposing the entitlement to claim the liquidated damages by the respondents, the petitioner has alleged the following facts:

i) That the respondents have not suffered any loss or they have not even claimed that they have actually suffered any loss, before invoking the performance guarantee and effecting the adjustment out of the pending tariff bills.

ii) That during the relevant period short term power price has come down sharply and the respondents themselves could not have been able to purchase power from the petitioner, under the PPA due to merit order purchase stipulations applicable for purchase of power by the respondents.

iii) That the liquidated damages named in the PPA is un-reasonable, onerous and not a genuine pre-estimated loss.

iv) That the electricity is moveable goods and was freely available, therefore, the actual loss that would be suffered by the respondents could have been assessed, if the respondents had purchased the electricity from some other sources to compensate the shortfall of electricity due to non-supply by the petitioner. In fact, the respondents purchased electricity at much cheaper price than stipulated under the PPA.

v) That the average cost of supply as determined in the Retail Supply Tariff Order in respect of each ESCOMs, was higher than the cost of power to be obtained under the PPA from the petitioner. Therefore, it is contended that by not getting power from the petitioner, the respondents were in fact saved money by not incurring loss.

f) The respondents denied all the averments made by the petitioner. The following decisions are relied upon by the respondents:

i) PTC India Limited Vs. Gujarat Electricity Regulatory Commission and Another MANU/ET/0119/2014 : 2014 ELR (APTEL) 1243 Paras 43-53);

ii) Lanco Kondapalli Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission MANU/ET/0004/2015 : 2015 ELR (APTEL) 755;

iii) ACB (India) Limited Vs. Gujarat Electricity Regulatory Commission and Others (in Appeal No.279 of 2015 decided on 18.01.2019).

g) In the decision of Bharat Sanchar Nigam Limited Vs. Reliance Communications Limited, the Hon'ble Supreme Court of India at paragraph 20 has noted as follows:

"20. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and therefore, the court should not be

astute to categorize as penalties the clauses described as liquidated damages. The principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated damages", one must keep in mind the concept of pricing of these contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen."

h) We have gone through the pleadings and the citations relied upon by the parties on this issue. The following facts are relevant for considering the controversy involved in this issue:

i) Whether respondents have not suffered any loss due to non-supply of power under PPA?

ii) Whether it is possible to prove the actual damage or loss?

iii) Whether the liquidated amount named in the contract is genuine pre-estimate of damage or loss?

i) <u>Regarding the 1st fact:</u>

- The contention of the petitioner that the respondents had not suffered any loss and even they were benefitted due to non-supply of power under the PPA is to be rejected out-rightly.

Admittedly, there was scarcity of energy during the relevant period and the respondents had taken steps to purchase the short term power and the State Government had also issued Order under Section 11 of the Electricity Act, 2003, directing the Generating companies in the State to supply power to the State grid. The Distribution Licensee is required to follow certain procedure before purchasing the short term power. The compliances of these procedures require sufficient time and the short term power cannot be purchased within a short gap of time. The short term power purchase from inter-state Sellers could be finalised only if there is no corridor constraint. The required quantum of electricity cannot be purchased by distribution licensee so easily as in the case of purchase of marketable goods available in the open market. The averments made by the petitioner do not establish that without any difficulty or hindrance, the respondents could have easily purchased the power from other sources during that period. Therefore, even if the short term power price has come down in other regions of the country, the petitioner has not established that the respondents could have realised that benefit.

- The contention of the petitioner that the respondents were benefitted due to the non-supply of power under the PPA is based on wrong preposition and assumptions. The petitioner has attempted in para 17 of its rejoinder, to establish that due to non-

supply of power under PPA, the respondents were saved from incurring losses. The petitioner states that cost of energy procured under PPA at Rs.5.08 per unit at KPTCL periphery would increase considerably at consumption point due to transmission and distribution losses incurred while transmitting the energy. Further, it states that average cost of supply per unit of energy, as per Tariff Order dated 02.03.2015, for different ESCOMs is lower than the cost of energy procured under PPA at consumption point. Therefore, the petitioner contended that the respondents were saved from incurring loss by not procuring the energy under PPA. This reasoning advanced by the petitioner is incorrect. Because the average cost of supply arrived at in the Tariff Order dated 02.03.2015 included the fixed cost of Rs.2.68 per unit (Rs.1.46 per unit payable to generator plus Rs.1.22 per unit incurred by respondents). The fixed cost stated above can be calculated from the various relevant figures stated in the Tariff Order dated 02.03.2015. Therefore, by not effecting sale of one unit of energy, respondents would incur loss of Rs.2.68. The respondents can reduced loss to be incurred towards payment of fixed cost by purchasing energy even at higher rate than the average power purchased cost stated in the said Tariff Order and reaching the sales target. This important aspect is not considered by the petitioner, while asserting that the respondents were saved from incurring loss by not procuring the energy under the PPA. Therefore, the 1st fact is held in negative.

ii) Regarding the 2nd fact: Whether it is possible to prove the damage or loss?

The petitioner has not alleged any acceptable fact to establish that proof of actual damage or loss is possible in the present case. The petitioner contended that the respondents had purchased the power from other sources, and effected load-shedding and also imposed Section 11 of the Electricity Act, 2003. Therefore, they did not suffer any loss or damage. The respondents have not admitted purchase of any power from other sources except imposing Section 11 during that relevant period. It may be noted that Section 11 was imposed during the month of September 2005 itself much earlier to the period of supply undertaken by the petitioner. The price fixed by this Commission at Rs.4.67 per unit for the energy supplied under Section 11 was challenged before the Hon'ble High Court of Karnataka and ultimately the tentative price fixed at Rs.5.08 per unit by the Government was ordered to be the minimum price to be paid for the energy supplied under Section 11. Therefore, any supply of energy under Section 11 has no relevance to consider the liability of the petitioner. We are of the considered view that it is highly complicated to determine the exact loss caused due to non-supply of power to the distribution licensees by the Seller under PPA, when there is scarcity of power. It may

be noted that consumer is the person who is affected by short supply of power. One cannot ignore the loss caused to the consumer by load-shedding. In the absence of supply of power to the consumer by the distribution licensee, the consumer has to arrange for power by installing the generators. The cost of electricity produced by using a generator is much higher than the tariff payable to the distribution licensee. Therefore, the distribution licensee purchases the short term power even at higher rate and supplies to the consumers. The loss caused to a consumer is a direct consequence of non-supply of energy to the distribution licensee. Therefore, it is not possible to prove the actual damage or loss caused due to non-supply of power to distribution licensee. Therefore, we hold that proof of actual damage or loss caused due to non-supply of power is highly difficult and impracticable.

iii) Regarding the 3rd fact: Whether liquidated damage is genuine pre-estimate:

- When there is term contained in a contract entered between parties regarding the payment of liquidated damages, the initial presumption is that the quantum of liquidated damages fixed is a genuine pre-estimate of the damage or loss in the case of the breach of the term of the contract. We have already noted the article regarding

payment of liquidated damages payable by the petitioner as well as payable by the respondents in case of failure to supply or to procure instructed capacity. The quantum of liquidated damages agreed between the parties is same for failure but supply as well as for failure to procure the required power as agreed to between the parties. The petitioner has not shown that the liquidated damages agreed is unreasonable or by way of penalty, though the initial burden that the proof is on the petitioner. Therefore, we held the third fact accordingly.

- It may be noted that the terms of the PPA were stipulated in line with the "*guidelines for short term procurement of power by the distribution licensees through tariff based bidding process, 2012*" issued by the Ministry of Power, Government of India, under Section 63 of the Electricity Act, 2003. In the said guidelines, the quantum on liquidated damages for failure to supply the instructed capacity is stipulated and the same stipulation is brought in Articles 6.2.4 and 6.2.5 of the PPA. Therefore, the claim of the respondents is in the nature of claim under a statutory contract, were under presumption could be drawn that the liquidated damage stipulated are genuine pre-estimate of the loss or damage. Therefore, we hold the 3rd fact in affirmative.

i) For the above reasons, we hold Issue No.3 in affirmative.

15) Issue No.4: Whether the invoking of performance guarantee and deduction of amount from out of dues payable in respect of pending tariff invoices by the respondents towards the satisfaction of the claim for liquidated damages is valid and legal?

a) The learned counsel for the petitioner submitted that the invoking of performance guarantee (bank guarantee) and also the deduction of the amount from out of the dues payable to the petitioner in respect of pending tariff invoices by the respondents, towards the satisfaction of the claim for liquidated damages is invalid and the respondents could not have invoked the bank guarantee and deducted the amount from out of the pending tariff invoices, until and unless the liquidated damages payable is ascertained by of an Order passed by this Commission in a duly instituted proceedings. In support of his contention, he relied upon the decision cited in (1974) 2 SCC 231 between Union of India Vs. Raman Iron Foundry.

b) In the above said Raman Iron Foundry case in paragraph 11, the principles laid down are as follows:

> "11..... *that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the beach does not eo instanti incur*

any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6 (e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred…….

……..A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor……..”

c) From the above principles stated in Raman Iron Foundry case, the learned counsel for the petitioner submitted that the invoking of bank guarantee as well as adjustments from out of the pending tariff invoices are illegal, therefore, the respondents should be directed either jointly or severally to refund the said sums. The learned counsel for the respondents denied the said contentions of the petitioner. He submitted that the respondents are entitled to invoke the bank guarantee as well as to effect adjustments of the balance amount

from out of the dues payable to the petitioner towards pending tariff invoices.

d) We may note that the decision in Raman Iron Foundry case has been over-ruled. It is stated in Paragraph 52 of the decision cited in *(2003) 5 SCC 705 between Oil & Natural Gas Corporation Limited (ONGC) Vs. Saw Pipes Limited* which reads thus:

> *"52. Firstly, it is to be stated that in the aforesaid case the Court has not referred to the earlier decision rendered by the five-Judge Bench in Fateh Chand case or the decision rendered by the three-Judge Bench in Maula Bux case. Further, in H.M. Kamalauddin Ansari and Co. v. Union of India a three-Judge Bench of this Court has overruled the decision in Raman Iron Foundry case and the Court while interpreting similar term of the contract observed that it gives wider power to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the standard contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."*

e) The legal position regarding the entitlement of the defendant, in a suit for recovery of money, to raise a plea of adjustments is stated in Paragraph 9 of the Division Bench decision of the Hon'ble High Court of Delhi in case *FAO (OS) No.39/2007 between Walchandnagar Industries Limited Vs. Cement Corporation of India, reported in 2012 SCC online Del 2389 : (2012) 2 Arb LR 219 (DB)* which reads thus:

> *"9. To the observations which have already been made by the Division Bench of this court in Cofex Exports Ltd. (supra), we seek to reiterate and add that as regards the pleas of payment or adjustment i.e., where the defendant sets up such pleas and consequently pleads that the plaintiff is not entitled to the suit amount, the defences of payment or adjustment have to be adjudicated by the Court after the defendant proves its case during trial in accordance with law. Meaning thereby, even where there are pleas of payment or adjustment are taken, an adjudication by the Court does take place and an imprimatur of the Court is given in the final judgment with respect to the validity of the defence with respect to payment or adjustment. If the defendant fails to prove his entitlement, the defence of payment or adjustment is rejected and suit of the plaintiff for recovery of moneys will be decreed. Be it noted that in spite of the fact that there is a requirement of adjudication,*

neither limitation applies nor court fee is payable because the defendant does not go to a court of law as he already has moneys in his pocket for which he does not have to file a suit for recovery. We also seek to remove the misconception that the plea of adjustment is the same as the plea of equitable set-off. Though the effect of both the pleas is extinguishment of the claim of the Plaintiff, equitable set-off is pleaded where there is an extinguishment of the claim of the Plaintiff, equitable set-off is pleaded where there is an agreed crystallization of the amount/an admitted amount which is payable being an admitted contractual amount or where there is a decree of a Court in favour of the defendant for an amount. There is, however, a difference on one aspect between the defence of equitable set-off and the defences of payment/adjustment, and which is that unlike in the case of payment/adjustment there has to be an adjudication in the defence of equitable set-off, no exhaustive adjudication or evidence is required to support the defence of disentitlement of the plaintiff to the suit amount in as much as there is an existing adjudication or an admitted position that an agreed amount is due and payable".

f) For the above reasons we hold Issue No.4 in affirmative.

16. Issue No.5: Whether the petitioner is entitled to get refund of Rs.91,29,529/- with interest at 15% per annum till the date of filing of the petition?

Issue No.6: Whether the petitioner is entitled to *pendent-lite* interest and future interest at 15% per annum on Rs.91,29,529/-?

These two Issues arise for consideration only in the event of there being an order for refund of Rs.91,29,529/-. In view of the findings on Issues 1 to 4, there is no question of ordering the refund of Rs.91,29,529/- to the petitioner. If the petitioner were to be entitled to any refund, the interest could have been awarded at 6% per annum, from the date the refund of amount becoming due, to the date of realisation of the said amount. Hence, Issues 5 & 6 are held accordingly.

17. Issue No.7: To which reliefs the petitioner is entitled to?

The petitioner is not entitled to any relief. Hence Issue No.7 is held accordingly.

18. Issue No.8: What Order?

For the foregoing reasons, we pass the following:

O R D E R

The petition is dismissed, holding that the petitioner is not entitled to any of the reliefs prayed for.

Sd/-	Sd/-	Sd/-
(SHAMBHU DAYAL MEENA)	(H.M. MANJUNATHA)	(M.D. RAVI)
CHAIRMAN	MEMBER	MEMBER