Gujarat Urja Vikas Nigam Ltd vs Essar Power Limited on 9 August, 2016

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Bench: Adarsh Kumar Goel, Anil R. Dave

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3455 OF 2010

Gujarat Urja Vikas Nigam Ltd. … APPELLANT

VERSUS

ESSAR POWER LIMITED ...RESPONDENT

J U D G M E N T

ADARSH KUMAR GOEL, J.

Part I : Introductory

1. This appeal has been preferred under Section 125 of the Electricity Act, 2003 ('the Act') against the judgment and order dated 22nd February, 2010 passed by the Appellate Tribunal for Electricity (the Tribunal) in Appeal No.86 of 2009 whereby the Tribunal has set aside the order of the Gujarat Electricity Regulatory Commission ('the Commission') which was in favour of the appellant.

2. The substantial question of law sought to be raised by the appellant is :

> "Whether the Tribunal has correctly interpreted the terms of Power Purchase Agreement dated 30th May, 1996 (PPA) and is justified in reversing the finding of the Commission based on interpretation of the said PPA and other documents on record.?" Part II : Facts

3. The appellant, Gujarat Urja Vikas Nigam Ltd. ('the GUVNL'), is the successor of the Gujarat Electricity Board and is a deemed licencee under Section 2 (39) read with Sections 12 and 14 of the Act. The respondent, ESSAR Power Limited ('the EPL'), is a generation company within the

meaning of Section 2 (28) of the Act. The appellant filed a petition before the Commission under Section 86 (i)(f) of the Act for adjudication of the dispute arising out of the Power Purchase Agreement ('the PPA'). The appellant inter alia sought compensation for wrongful allocation of electricity by the EPL to its sister concern, Essar Steel Ltd. (ESL) in preference to the appellant.

4. According to the appellant, the EPL was required to allocate 300 MW out of the total 515 MW of electricity and the remaining 215 MW was to be allocated to ESL. In case the quantum of generation was less than 515 MW, the allocation was to be in the proportion of 300 : 215. Contrary to this requirement, the EPL allocated more electricity to ESL. The EPL agreed, vide letter dated 17.02.2000, that the appellant will be entitled to electricity in the proportion of 300 : 215 but the same was not adhered to. This resulted in loss to the appellant and gain to the EPL which, according to the appellant, tentatively worked out to Rs.476.22 crores (towards principal amount). It was further pleaded by the appellant that under the agreement, the appellant was liable to pay the annual fixed charges, the variable charges, incentive etc. in relation to the allocated capacity of 300 MW out of total 515 MW. Similarly, the ESL to whom balance capacity of 215 MW was allocated was to bear proportionate annual fixed cost, thus, the EPL was required to make electricity available to the appellant in the proportion of 300 : 215 as per clause 3 of the Agreement. The EPL was required to declare the availability in the same proportion so that the dispatch instruction could be issued as per the Agreement. The appellant pleaded that it was entitled to compensation for wrong allocation of electricity based on the applicable HT rate from time to time. The appellant claimed damages equal to the difference of rate at which electricity was to be supplied to it and the rate at which the appellant was to supply the same to its consumers. For this purpose, the respondent was liable to give true details and complete account of the allocation made to the appellant and to ESL. The appellant had also raised a claim for recovery of Deemed Generation Incentive paid to the respondent to which the respondent was not entitled but the said claim is no longer subject matter of this appeal, the order of the Tribunal in that respect having become final.

5. It will be appropriate to refer to the prayer clause in the petition filed by the appellant :-

> "(a) hold that the petitioner is entitled to adjust in the tariff payable by the petitioner to the respondent for purchase of electricity all amounts received by the respondent as a result of wrong allocation of electricity; and deemed generation incentive when Naphtha is proposed to be used as fuel;
>
> (b) award cost of the proceedings in favour of the petitioner and against the respondent; and
>
> (c) pass such other or further orders as may be deemed proper to give relief to the petitioner;
>
> (d) continue to raise bills on Essar Group Companies based on proportionate methodology."

6. The above claims were contested by the respondent based on preliminary objections including the plea of limitation as well as on merits.

Part III : Pleadings

7. As noticed in Para 4 above, the case of the appellant in the petition filed before the Commission was that the respondent had wrongly utilized the capacity of the generating station in favour of its sister concern, against the rights and interest of the appellant in violation of the PPA, the respondent allocated part of generating capacity required to be allocated to the appellant to its sister concern. The appellant had the obligation to pay annual fixed charges, variable charges, incentive etc. in relation to the specified allocated capacity and the sister concern of the respondent was to pay proportionate annual fixed cost. The Agreement required the EPL to declare availability in the specified proportion even when generation was less than the total 515 MW capacity. Contrary to the said requirement, the respondent allocated more electricity to ESL and offered proportionately less electricity to the appellant. Thereby, not only the agreement was violated, the understanding reflected in letters issued by the respondent was also not honored. In para 23.0 it was specifically mentioned that the appellant was entitled to claim compensation for the wrong allocation and in para 24.0, it was mentioned that the respondent was required to give detailed and complete account of the allocation made.

8. As against the above stand of the appellant, the stand of the respondent in its written submission filed before the Commission on 15th January, 2009 is that its only obligation was to supply 300 MW to the Board as and when called upon to do so. There was no bar to supply more than 215 MW to ESL. There is no evidence of any loss suffered by the appellant. Article 3.1 of the Agreement could not be read as suggested by the appellant. Further, if supply was below the quantum specified in the dispatch instructions, penalty could be claimed as per clause 7.4.3 of Schedule VII of the Agreement. Further, the appellant was defaulter in complying with its obligations in making timely payment.

Part IV : Finding of the Commission

9. The Commission upheld the plea of limitation raised by the respondent to the extent that the appellant was held entitled to its claims only for three years preceding the filing of the petition, i.e., from 14th September, 2002, the petition having been filed on 14th September, 2005. The Tribunal upheld the said finding. Though the appellant had filed Civil Appeal No.3454 of 2010 on this aspect, the said appeal was dismissed by this Court vide order dated 2nd September, 2011 as follows :

> “The appeal directed against the decision dated 22.2.2010 rendered by the Appellate Tribunal for

Electricity in appeal No.77/2009 upholding the finding of the State Commission that the claim of the appellant against the respondent for any period upto 14.9.2002 is barred by time except to the extent of Rs.64 crores paid by the respondent to the appellant pursuant to the full and final settlement of claims for the period from 1998 upto September, 2004, is dismissed.”

10. The Tribunal also upheld the order of the Commission accepting the claim of the appellant under the head of a Deemed Generation Incentive and the respondent has not challenged this aspect.

11. Thus, the only question for consideration is the claim of the appellant for failure to declare availability of power in the proportion of 300 : 215 MW for the period from 14th September, 2002 onwards.

12. The Commission on this aspect held as follows :

> "9.1 The PPA was executed on 30.5.1996 and effective for a period of 20 years. The relevant clauses of the PPA have been examined. It is quite clear that under the PPA, GUVNL has an obligation to pay an annual fixed cost for the allocated capacity, which is 300 MW. Having paid the annual fixed cost for the said capacity, GUVNL has a right for an equivalent amount of electrical output. The purpose of paying annual fixed cost is to ensure that GUVNL alone has the right to the said capacity and that no part of the same can be sold to any other party. It is true that 41 the normal industry practice is that unless the allocated capacity, for which fixed charges are being paid by the beneficiary is surrendered, the beneficiary has the ability to sell/ negotiate any transaction for utilisation of such allocated capacity. In this context, reference is also made to the CERC (Terms and Conditions of Determination of Tariff) Regulations, 2004.
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> 9.2 The question that arises for consideration is whether GUVNL can claim allocation on a proportionate basis i.e. to say, that if EPL is unable to declare 300MW capacity which is allocated to GUVNL under the PPA, EPL would then have to declare capacity proportionately in the ratio of 58:42 from the total declared capacity. In this context one is required to carefully review Article 3.1 of the PPA.
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> 9.3 Although in the definition of allocated capacity, it is only mentioned that 192MW capacity during Open Cycle mode operation and 300MW capacity during Combined Cycle mode operation is allocated to GUVNL, the same is further elaborated in Article 3.1. In Article 3.1, the parties have agreed as follows:
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> "3.1 The allocation of the Capacity shall be as under:
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> a) During Open Cycle mode operation prior to commissioning of the Combined Cycle mode operation: 138MW to the Essar Group of Companies; and 192 MW to the Board
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> b) During Combined Cycle mode:
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> 215 MW to the Essar Group of Companies; and 300 MW to the Board The Company undertakes that, subject to the provisions and during the term of this Agreement, it will fuel and operate the Generating Station to meet the requirements of electrical output that can be generated corresponding to the allocated capacity, in accordance

with its Dynamic Parameters so as to comply with the Operating Characteristics except to the extent:

(i) as anticipated under the Maintenance Programme during the period of Scheduled Outage.

(ii) That to do so would not be in accordance with Good Industry Practice;

(iii) That may be necessary due to circumstances relating to Safety (of personnel or plant apparatus);

(iv) that to do so would be unlawful;

(v) That may be necessary for reasons of Force Majeure Natural or NonNatural." 9.4 For the interpretation of the contract the following principle as laid down by the Supreme Court in Mrs. M.N. Clubwala v. Fida Hussain Saheb (1964) 6 SCR 642 has to be kept in mind:

Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of "all the relevant provisions in the agreement." "...The dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a 'licence' and the other that it is a 'lease'. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing." (Underline Supplied).

Also, the Hon'ble Supreme Court has held in State of Andhra Pradesh. Vs. Kone Elevators India Ltd. (2005) 3 SCC 386:

"It is a settled law that the substance and not the form of the contract is material in determining the nature of the transaction".

Therefore, it is necessary to read the PPA as a whole in order to give a correct interpretation to the terms therein contained. The definition of 'Allocated Capacity' in the PPA has to be read in conjunction with Article 3.1. Article 3.1 clearly records the allocation of capacity between two entities i.e. GUVNL as well as Essar Steel.

9.5 From the reading of the Article 3.1 of the PPA as also the corresponding Articles in the PPA with Essar Steel, it is clear that the intention of the parties was that the capacity of the generating plant will be shared between the two beneficiaries only. The fact that Article 3.1 of the present PPA records the capacity allocated to the Essar Group companies along with the capacity allocated to GUVNL shows that intention of the parties was to provide for allocation in the proportion of 138:192 (while working

in open cycle mode) and 215:300 (while working in combined cycle mode). Otherwise there is no reason for mentioning in Article 3.1. of PPA about the quantum that is contracted with Essar Steel. Similarly, the fact that the PPA with Essar Steel states the allocation to GUVNL goes to show that the allocation was intended to be on a proportionate basis, between the two parties / purchasers only. During the arguments, the Learned Counsel for the Respondent also clarified that apart from the two purchasers of power there is no other third party sale that has taken place. The intention of EPL is to recover the fixed charges is only from the two beneficiaries, in proportion to the allocated capacity. This is clear from the reading of the two PPAs. Hence, EPL cannot argue that the PPA does not recognise the proportionate principle at all. If the proportionate principle is acceptable for recovery of fixed charges, it cannot be abandoned for allocation of supply.

9.6 The submission of EPL that there is no clause in the PPA that it cannot supply more than 215 MW to Essar Steel is also not correct. Once the entire capacity has been allocated between the two parties in a particular proportion, EPL cannot violate the proportionate allocation for the benefit of any one party. Having sold the capacity of 300 MW to GUVNL and 215 MW to Essar Steel, for which fixed charges are paid in the said proportion, EPL cannot argue that it can sell power to Essar Steel beyond the capacity allocated to it. There is no spare capacity that allows EPL to do that. Under the procedure for dispatch in Schedule VI of the PPA, EPL had to declare weekly schedules of the "Capacity" that is available for the entire station (and not the "Allocated capacity"). On the basis of such declaration, requirement-schedule and dispatch instructions are issued. The obligation of EPL is clearly to declare the "Capacity" of the generating plant as a whole. Once the declared availability for the entire plant is known, the beneficiaries will proceed to issue dispatch instructions in accordance with the terms of the PPA. Hence, the argument of EPL that it does not have the obligation to declare capacity for the entire plant is incorrect and contrary to the terms of Schedule VI of the PPA. This submission is contrary to the procedure prescribed in the PPA as well as the normal industry practice. Once the capacity of the generating station as a whole is available, the allocation of capacity has to take place in the proportion that is contracted. Also, the submission of EPL that the Petitioner's only concern, under terms of the PPA, is that it must get electricity in accordance with its Dispatch Instructions, within the limits of allocated capacity is not entirely correct. The Petitioner has a right to be supplied electrical output proportionate to the declared capacity of the generating plant in terms of the PPA. EPL cannot ignore its obligation of declaring the entire capacity. Once the entire capacity of the generating plant is declared, the proportionate principle of allocation of capacity will become applicable and as a natural consequence, the electrical output will be allocated and supplied between the two beneficiaries on proportionate basis, in accordance with the dispatch instructions. It appears that EPL is avoiding its obligation to declare the entire capacity. The ability to recover deemed non generation due to difference in schedule generation and actual generation has nothing to do with the requirement to allocate capacity and supply electrical output on a proportionate basis.

9.7 In view of the aforesaid, the Commission accepts the submission made by GUVNL to the effect that, if in a time block the declared availability for the station with 515 MW of the installed capacity in only 400 MW, the same should be declared available to GUVNL to the extent of 233 MW and to

Essar Group to the extent of 167 MW, maintaining the proportion of 58% : 42% (300:215). It is not valid for EPL to declare available in any time block to Essar Group to the extent of 215 MW towards their share and declare available to GUVNL 185 MW. Such an act would mean that Essar Group is being preferred at the cost of GUVNL. As against the GUVNL's entitlement of 233 MW they will get only 185 MW and therefore a deficit of 48 MW equivalent of electricity. That certainly cannot be the intention of the parties.

9.8 Under the PPA, the obligation to supply power by EPL to GUVNL is limited to the electrical output equivalent to the allocated capacity of 300 MW. The fact that the EPL has an obligation to make payment of deemed non generation incentive and reduce annual fixed charges on a pro rata basis, cannot in any manner negate the proportionate principle of allocation when EPL declares availability less than the allocated capacity.

9.9 In this context, EPL's reliance on the letter of the Government of Gujarat dated 05.06.1995 to argue that only the surplus, after meeting the requirement of its sister companies, is to be supplied to GUVNL is not correct. Once the PPA has been executed, the parties are governed by the terms of the PPA. In fact Article 12.5 of the PPA clarifies that the PPA and the schedules attached thereto are a complete and exclusive statement of the terms of the agreement and that all prior written or oral understandings, offers or other communication of every kind pertaining to the sale or purchase of electrical output and dependable capacity between the parties is abrogated and withdrawn.

9.10 Furthermore, in the letter dated 17.02.2000, EPL categorically agreed to the concept that power should be supplied in the ratio of 58:42 provided certain conditions are fulfilled. The conditions mentioned in the said letter will demonstrate that the each condition is either in the nature of additional concessions / modification that were sought by EPL or alleged defaults on the part of GUVNL, which was not agreed to by GUVNL.

9.11 However, if GUVNL does not take the power declared available by EPL in terms of the aforesaid ratio, EPL will have the right to sell the power to its sister concern subject to reimbursement of the proportionate of the annual fixed charges. GUVNL cannot make a submission that although it will not purchase such power as declared available by EPL, EPL cannot sell the same to its sister concern. Such a submission would defeat the purpose of the Electricity Act, 2003 and the National Electricity Policy which promotes generation and encourages sale of surplus capacity. If GUVNL does not schedule the power to the extent of availability declared by EPL of the entire plant in terms of the PPA, it cannot complain if the power is sold to EPL's sister concern and the proportionate of the annual fixed cost is reimbursed.

9.12 The Commission is of the view that GUVNL is entitled to claim compensation for the energy diverted to Essar Steel from the capacity allocated to GUVNL under the PPA. EPL at all times has an obligation under the present PPA to declare availability for the entire plant and allocate the supply on the basis of 300:215 or 58:42.

9.13 As regards the quantum of compensation payable on account of diversion, the PPA is silent on the same. The parties in the settlement for dues on account of diversion for the period between 1998

and September, 2004 agreed on a particular methodology for determining such compensation. The parties had agreed that GUVNL is entitled to the HTP 1 energy tariff after excluding the variable cost. The diversion in the circumstance should be computed on an hourly basis. This appears to be a fair manner of determining the compensation that is to be paid for the period after September, 2004. The parties are required to reconcile the generation data and make final calculation on the basis of the aforesaid principle.

9.14 The Commission also directs that for the remaining period of the PPA, EPL has a legal obligation to declare availability for the entire capacity and that it shall not divert any power to its sister concern in a manner contrary to the proportionate principle. If GUVNL declines to purchase power allocated on the proportionate basis, EPL will have the right to sell the power to its sister concern subject to reimbursement of proportionate of the fixed cost." Part V : Appeal to the Tribunal and the Finding of the Tribunal

13. The respondent preferred an appeal before the Tribunal being Appeal No.86 of 2009. Contention of the appellant was that the EPL was not obliged to declare electricity availability in ratio of 300 : 215 MW to the appellant. The PPA signed with the appellant and the sister concern of the EPL were independent. The obligation to supply was to arise after receiving dispatch instructions only.

14. The Tribunal framed following questions for consideration :

> " (i) Whether under the PPA I and II the supply of electrical output to be made by the Appellant shall be in the ratio of 300:215 MW, the allocated capacity of the Electricity Board (R-1) and Essar Steels Ltd. respectively?
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> (ii) Whether the Appellant, which failed to declare the entire capacity of its generating station to the Electricity Board made the supply of electricity to its sister concern Essar Steels Ltd. in excess of the said ratio is liable to be held responsible for the breach of the terms of PPA and consequently the Appellant is liable to compensate the Electricity Board (R-1)".....

15. The Tribunal upheld the stand of the EPL. It was held that Articles I and III of Schedule VI to the PPA did not require the EPL to declare the capacity in the ratio of 300 : 215 MW. As regards letters dated 17th February, 2000 and 4th October, 2001 by which the respondent accepted its liability, it was held that the GUVNL never accepted or complied with its obligations and therefore, the respondent was not bound by the stand in the said letters. It was further observed that the claim for the period from 1st July, 1996 stood settled in view letter dated 13th October, 2006 of the GUVNL to accept Rs.64 crores for diverting electricity to ESL. Non-declaration of available capacity on proportionate basis was not shown to have resulted in any loss or damage to GUVNL. GUVNL had not proved any actual loss. It was observed that on the principle of Section 35 of the Sale of Goods Act, 1920, there was no obligation to deliver in absence of dispatch instructions. Further, the ESL supplied fuel to EPL for conversion into electricity but for supply to the GUVNL, the EPL had to procure fuel from outside. GUVNL also made default in making payment to the EPL which amounted to breach of reciprocal obligation. GUVNL also failed to establish letter of credit to secure

the payment of the amount payable to the EPL which also was breach on the part of the appellant.

16. The finding of the Tribunal is :-

> "45. From these provisions of Schedule-VI, it is clear that there is no provision, express or implied, to suggest that the EPL is liable to declare the available capacity in the said ratio to the Board and the Essar Steels Ltd. All these provisions would only say that the EPL has to first give Weekly Schedules to the Electricity Board indicating the time and capacity which would be available and the Electricity Board shall thereafter issue its requirement schedule through Despatch Instructions and thereupon EPL is liable to operate generating station in accordance with the Despatch Instructions given by the Electricity Board and supply.
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> 46. On a combined reading of Articles 1 and 3 and Schedule VI of the PPA-1, it is clear that EPL has to declare available capacity up to the allocated capacity to both the Electricity Board as well as to Essar Steels Ltd. and not on proportionate theory basis.
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> 47. As a matter of fact, Article 5.2 of the PPA-1 obligates the Electricity Board to pay to the Appellant its Annual Fixed Charges including the cost of the project on the level of generation achieved up to the allocated capacity and not on the allocated capacity itself. The Electricity Board has accordingly paid the Annual Fixed Charges on monthly basis on the level of generation achieved up to the allocated capacity.
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> 48. It is pointed out by the Ld. Senior Counsel for the Appellant that so far as the payment towards cost of the project is concerned, the Electricity Board had agreed to pay Rs. 945 crores out of the total cost of the project amounting to Rs. 2061 crores which only comes to approximately 46%, i.e. less than 58% of the total project cost.
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> 49. In such circumstances, the Electricity Board (R-1) cannot claim that by reasons of it's making payment for the Annual Fixed Charges up to the allocated capacity, it was always obligatory on the part of the EPL to supply power to the extent of 58% to the Electricity Board and that since EPL has sold a part of Electricity Board's share in the power generated by the EPL to its sister concern, EPL is liable to compensate the Electricity Board for the same by treating such power which sold by EPL to Essar Steel Ltd. as if it was sold by the Electricity Board itself to Essar Steel Ltd.

after purchasing the same from the EPL.

50. On the basis of letters dated 17.02.2000 and 04.10.2001, it is contended on behalf of the Electricity Board (R-1) that EPL has conceded to its proportionate theory basis and as such it cannot go back. This contention is not tenable. EPL in those letters merely expressed its willingness to agree to the proportionate theory basis subject to the condition that Electricity Board should commit default in making the payment of dues payable under the PPA-1 to EPL and also subject to the condition that the Electricity Board shall comply with other conditions of the PPA-1.

51. Admittedly, the stipulated conditions in those letters were neither accepted nor complied with by the Electricity Board. Hence the offer made by the EPL to the Electricity Board for agreeing to the proportionate theory basis would not be construed to be conceding and as such it is binding on it.

52. In the second letter dated 04.10.2001 also, EPL stipulated the condition of making prompt payments by the Electricity Board to EPL and for establishment of Letter of Credit to secure payments under PPA-1. Even this condition, the Electricity Board was not ready to comply with. As such the proposal made by the EPL to the Electricity Board regarding proportionate theory subject to the conditions is not binding on the Appellant.

53. Furthermore, when there is an amendment to the PPA-1 on 18.12.2003, there is no reference about these amendments for declaration of supply of power in the ratio of 58:42 to the Electricity Board as well as to the Essar Steels Ltd. respectively. The preamble of the said Supplemental Agreement dated 18.12.2003 clearly establishes that EPL is only obliged to generate the electricity up to 300 MW allocated to the Electricity Board and nothing more. In other words, there is no amendment with regard to the declaration of electricity generated on proportionate basis in the said Supplemental Agreement dated 18.12.2003.

54. Under such circumstances, it is not open to the Electricity Board to rely upon the aforesaid letters dated 17.02.2000 and 04.10.2001 to advance the plea of its proportionate theory.

55. It is an admitted fact that the Electricity Board through its letter dated 29.10.2003 demanded from EPL the payment of an aggregate amount of Rs. 537 crores on account of alleged diversion of power by EPL to Essar Steels Ltd for the period commencing from 01.07.1996 to 31st March 1999. It is also an admitted fact that the parties thereafter held several rounds of discussions and as a result of those discussions, a settlement was actually arrived at by the parties in October 2004. Pursuant to the said settlement, the Electricity Board recalculated the amount, due on the basis of power supplied by the EPL to Essar Steels Ltd in excess of the allocated capacity of 215 MW shall alone be treated as sold and supplied by the Electricity Board. On this basis, the Electricity Board itself furnished a statement to the Appellant, EPL showing that a sum of Rs. 64 crores is payable for the aforesaid period and on the aforesaid basis, the EPL accepted the same as a part of overall package and authorized the Electricity Board to recover the same on a condition that the same methodology would be adopted in future also. Thereafter, through their letter dated 13.10.2006, the Electricity Board accepted to receive Rs. 64 crores for diverting the electricity to the Essar Steels Ltd.

56. Under those circumstances, it is clear that the claim of the Electricity Board against the EPL with respect to the alleged diversion of power by the EPL to Essar Steels Ltd. for the period from 01.07.96 had already been settled by the payment and this settlement is final, conclusive and binding on the parties. As correctly observed by the State Commission, the same is not liable to be reopened at this stage.

57. Admittedly, it is not established that there is any breach of the contract as the part of the Appellant under PPA-1 on account of non- declaration of available capacity to the Electricity Board on proportionate basis. The compensation can be claimed only when there is a breach and due to the

same there was a loss or damage caused by the said breach of contract. This has to be pleaded and proved. Unless this is done, no compensation can be claimed. This is a settled law as held by the Supreme Court in (1974) Vol-2 SCC 231 – Raman Foundry V/s Union of India.

58. In the present case, the Electricity Board has not pleaded and proved the actual loss or damage caused to it due to the alleged breach of contract. The principle enshrined in section 73 of the Contract Act has been incorporated in Article 10.1 of the PPA-1 which reads as follows:

> ".....neither Party shall be liable to the other Party in contract, trot, warranty, strict liability or any other any other legal theory for any indirect, consequential, incidental, punitive or exemplary damages. Neither Party shall have any liability to the other Party except pursuant to, or for breach of this Agreement, provided, however, that this provision is not intended to constitute a waiver of any rights of one Party against the other with regard to matters related to this Agreement or any activity contemplated by this Agreement".

59. Similarly, the explanation to Section 73 of the Indian Contract Act provides that in estimating the loss or damage arising from breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. It is the duty of the court to take into account whether the party affected by breach of contract has performed its duty to mitigate the loss while estimating the loss or damage arising from the breach of contract. In the present case, the Electricity Board merely pleads that EPL has failed to declare and supply the available capacity of electricity on proportionate basis to the Electricity Board and nothing more.

60. As indicated above, as per Article 3.2 of PPA-1, the EPL becomes liable to deliver the capacity to the Electricity Board at the delivery point in accordance with the Despatch Instructions. The Despatch Instructions are instructions for delivery of electricity. The principle contained in Article 3.2 of PPA-1 is in terms of the provisions of Section 35 of the Sale of Goods Act, 1920. Section 35 of the Sale of Goods Act declares that the seller of goods is not bound to deliver until the buyer applies for the delivery.

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74. One more aspect needs to be mentioned. The arrangement in relation to supply of electricity up to the allocated capacity of 300 MW between the Appellant EPL and the Electricity Board under the PPA-1 and between the EPL and its sister concern Essar Steels Ltd. under PPA-2 read with Fuel Management Agreement dated 18.10.1996 are materially different. The Essar Steels Ltd supplies fuel to EPL for conversion into electricity, whereas the Electricity Board is under no obligation to supply fuel to EPL. Admittedly, the EPL has to procure fuel from outside and use it for generating electricity for sale to the Electricity Board.

75. The PPA-1 is a contract between the EPL and the Electricity Board containing reciprocal promises. In consideration of EPL supplying electricity to the Electricity Board up to the allocated capacity in accordance with the Despatch Instructions, the Electricity Board had agreed and

undertaken to pay the EPL the tariff as mentioned in the PPA- 1. It is an admitted fact that the Electricity Board has committed default in making payment when due to be made to the EPL under the PPA-1. In fact, the EPL, the Appellant has produced materials to show that at one point of time in March 2008, the aggregate amount due to EPL was to the tune of Rs. 519 crores. EPL has produced documents to show that the Electricity Board is a defaulter in making payment of its due under the PPA-1 right from the inception of it.

76. It is also an admitted fact that EPL had written several letters to the Electricity Board to establish Letter of Credit to secure the payment of the amount payable under PPA-1 and also pay the amounts when due. But the Electricity Board did not heed to the request made by the EPL in this behalf and as a result of it the ability of EPL to purchase the fuel for generating electricity meant for sale to the Electricity Board got impaired.

77. As mentioned above, the claim for compensation made by the Electricity Board against EPL in the present case is due to the alleged breach of contract by EPL in declaring and supplying the power to the Electricity Board in the proportion of 300MW out of the total capacity 515 MW. The grievance is that EPL has supplied less power than what is due to the Electricity Board under the PPA-1. As aforesaid, Article 3.2 of the PPA-1 obliges the Appellant to supply electricity to the Electricity Board only in accordance with the Despatch Instructions given by the Electricity Board from time to time. As a matter of fact, there is no provision in the PPA-1 which restricts the right of the Electricity Board to demand for supply of electricity only up to the declared available capacity of the EPL. Admittedly, many a times the Electricity Board asked for supply of more quantum of electricity than what was declared as available to it by the EPL by revising its Despatch Instructions and immediately thereafter the EPL met this demand.

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81. In the light of the above position, the direction given by the State Commission with reference to reimbursement of Annual Fixed Charges to the Electricity Board when the Electricity Board has not secured energy to the extent allocated under the proportionate principle is not correct as the same is misconceived. In this case we are of the view that the Annual Fixed Charges are not refundable for the surrendered portion of the electricity to the person in whose favour such electricity is surrendered. Hence, in regard to the issue relating to the liability to pay compensation we hold that, in Electricity Board is not entitled to get the compensation as claimed and as such the Appellant EPL succeeds in this issue. Consequently the findings given by the State Commission on this issue are set aside. " Part VI : Rival Submissions

17. We have heard Shri C.A. Sundaram, learned senior counsel for the appellant and Shri K.K. Venugopal, learned senior counsel for the respondent.

18. Learned counsel for the appellant submitted that the Tribunal had ignored the implications of Article 3 of the PPA. The true import of the PPA clearly casts an obligation on the EPL to allocate electricity in ratio of 300 : 215 MW. This interpretation was accepted by the EPL in its letters dated 17th February, 2000, 4th March, 2000 and 4th October, 2001. Issues of non payment of money due

or not opening the letter of credit and not making advance payment of fuel stood settled by Supplementary Agreement dated 18th December, 2003 and letter dated 19th December, 2003. Thus, the Tribunal erroneously assumed that amount of Rs.519 crores was outstanding. Moreover, there is an error in the order of the Tribunal in observing that GUVNL had not proved suffering of any damage. Para 23 of the petition expressly asserted the damage. There is further error in interpretation of Schedule VI in regard to the obligation to declare the availability of generating power upon which the dispatch instructions could be issued. In absence of such declaration, the dispatch instructions could not be issued. Finding that the appellant accepted Rs.64 crores by way of settlement was against record.

19. The EPL supports the view taken by the Tribunal. It is submitted that there was no obligation for proportionate declaration of available generation capacity. The respondent was to meet the requirement of electric output corresponding to allocated capacity of 300 MW. This obligation was subject to reciprocal performance of obligation by the appellant. The PPA executed by the respondent with the ESL was on different terms. The appellant was required to make payment on due dates under Article 5.3 of the Agreement and was also required to establish a letter of credit under Article 5.5. As against this, under Article 4.1 of the PPA with the ESL, fuel is to be supplied by the ESL which created an obligation to generate electrical output upto the capacity allocated to the ESL. For supply to the appellant, fuel is required to be arranged by the respondent. The appellant had not paid cost for its allocated capacity. The cost was pegged at Rs.945 crores as against investment of Rs.2061 crores by the respondent. The stand taken in the letter of the Respondent dated 17th February, 2000 could not be read as obligation of the respondent for proportionate generation of the output or declaration of available capacity in absence of compliance of obligations under the PPA by the appellant. In letter dated 4th March, 2000, it was made clear that if letter of credit was not opened by the appellant, respondent will not be obliged to supply power.

Part VII : Points for consideration

20. The points which arise for consideration are :

(i) True interpretation of PPA to determine whether there is any obligation to declare availability of power in the ratio of 300 : 215;

(ii) Effect of letters dated 17th February, 2000, 4th March, 2000 and 4th October, 2001on the rights of the parties;

(iii) Interpretation of Schedule VI to determine whether the obligation to issue dispatch instructions arose before declaration of availability.

(iv) Relief to which the appellant may be entitled to.

Part VIII : Decision on above points and reasons therefor Re : (i) :

21. It is necessary to refer to the relevant provisions of the Agreement:

"Article 3 3.1 Allocation of the Capacity The allocation of the Capacity shall be as under:

a) During Open Cycle mode operation prior to commissioning of the Combined Cycle mode operation: 138MW to the Essar Group of Companies; and 192 MW to the Board

b) During Combined Cycle mode:

215 MW to the Essar Group of Companies; and 300 MW to the Board The Company undertakes that, subject to the provisions and during the term of this Agreement, it will fuel and operate the Generating Station to meet the requirements of electrical output that can be generated corresponding to the allocated capacity, in accordance with its Dynamic Parameters so as to comply with the Operating Characteristics except to the extent:

(i) as anticipated under the Maintenance Programme during the period of Scheduled Outage.

(ii) That to do so would not be in accordance with Good Industry Practice;

(iii) That may be necessary due to circumstances relating to Safety (of personnel or plant apparatus);

(iv) that to do so would be unlawful;

(v) That may be necessary for reasons of Force Majeure Natural or Non-

Natural." 3.2 Delivery of Active Energy The Company shall deliver Active Energy and Reactive Energy to the Board at the Delivery Point in accordance with Dispatch Instructions issued by the Board under the Dispatch procedures as specified in Schedule VI. All Active Energy delivered by the Company shall have at the Delivery Point, the voltage, frequency and the other electrical parameters associated with active/reactive power as may be decided by the Board in accordance with the Operating Characteristics.

3.3 Availability Declarations From the date of Entry into Commercial Service of the first Unit the Company shall, submit to the Board from time to time, Declared Available Generation Capacity as per the procedures set forth in Schedule VI.

xxx Schedule VI 6.1 Submission of Weekly Schedules The Company will submit to the Board's Load Dispatch Centre at Jambua, Baroda weekly schedules indicating the times and Capacity which will be available from Generating Station and if not available and reasons therefor. These weekly schedules will be submitted on or before each Friday for the next week starting from Monday. If at any time after the issue of such schedule, there is any change in circumstances, the Company will notify the Board about the revisions necessary in the weekly schedule and the reasons therefor.

6.2 Issuance of Requirement Schedule The Board shall issue to the Company's Generating Station at Hazira a Schedule of its requirement with respect to the generation of the Allocated Capacity by the Generating Station during each day by 5.00 PM on the preceding day. This schedule will indicate the level of Active Power required to be produced by Generating Station.

6.3 Issuance of Dispatch Schedule The Board may issue Dispatch Instruction at any time after issue of the schedule as mentioned in Clause 6.2 above. Dispatch instruction may include requirements in respect of the reactive power output measured at the Delivery Point to be maintained by the Generating Station.

6.4 Operation of Generating Station The Company, subject to the provisions contained in Article 3.3 of this Agreement, shall operate Generating Station in accordance with the relevant Dispatch Instructions given by the Board from time to time provided that the Company shall not be obliged to comply with such instructions to the extent that it would require the Company to operate the Generating Station otherwise than the Dynamic Parameters applicable from time to time.

Schedule VII 7.1 TARIFF The Tariff shall be determined as follows Annual Fixed Charges to be determined in terms of Section 7.1.1 Variable Charges to be determined in terms of Section 7.2 Incentive Payment to be determined in terms of Section 7.3.

7.1.1 Annual Fixed Charges: Computation and payment The Annual Fixed Charge shall be computed on the following basis:

Interest on Debt:

It shall be computed on the Debt as per the Financial Plan approved by the Board. Interest on Debt shall also include lease rentals payable in respect of lease assistance obtained by the Company towards financing the Capital Cost.

If the Financing Plan envisages variable rates of interest on any component of Debt, the Interest on Debt shall be recomputed by applying the prevailing rates of interest during the month on each such Debt.

In respect of interest on Foreign Debt, the interest liability on the applicable Foreign Debt shall first be computed in the applicable foreign currencies and thereafter be converted to Rupees by adopting the Base Exchange Rate and such amount shall be adopted for the purposes of computing Interest on Debt.

A Supplementary Invoice shall be raised for an amount equal to the difference between the amount of interest liability on Foreign Debt as determined on the basis of Base Exchange Rate and the amount of interest liability as on the due dates of the payment of interest as per the Financing Plan computed on the basis of the then prevailing exchange rate. If the amount payable to the Company is determined to be less, on account of foreign exchange variation, than the amount paid by the Board at

the Base Exchange Rate, such difference shall be repaid to the Board within 14 days from the date of the determination.

Operation and Maintenance Expenses (O&M) Expenses:

O&M Expenses including Insurance Charges for the first full Accounting Year, after commissioning of Combined Cycle Operation of the Generating Station, shall be calculated at the rate of 2.5% of the Capital Cost of Rs.945 crores in respect of the Allocated Capacity.

The expenditure on the O&M expense in each subsequent year shall be revised on the basis of the weighted Price Index based on the Wholesale Price Index and Consumer Price Index in the ratio of 70:30 respectively or at the rate of 10% progressively every year, whichever is lower. O&M expenses shall not qualify for foreign exchange variations.

Depreciation Depreciation will mean the depreciation as notified by the Government of India from time to time and provided under the Electricity (Supply) Act, 1948 and shall be first computed on the assets of the Generating Station and thereafter apportioned for the purposes of the determining the Annual Fixed Charges as a proportion of the Allocated Capacity over the Nominal Installed Capacity.

Tax on Income:

Tax on Income shall be determined in accordance with the provisions of the Income Tax Act, 1961 every year as under:

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Tax payable by the Company   x    Return on Equity plus
Total taxable Income              Incentive Payment
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For the purposes of determination of the Annual Fixed Charges, the Tax on Income shall be computed on an estimated basis. Any under or over recovery of Tax on Income shall be adjusted every year on the basis of certificate of documentation of Tax paid and assessment by the Income Tax Officer concerned.

Return on Equity (ROE):

Return on Equity shall be computed on Equity at 16% per annum and shall include ROFE.

Return on Foreign Equity (ROFE) shall be computed at the rate of 16% on the amount of Foreign Equity in the applicable foreign currency and thereafter be converted to Rupees at the Base Exchange Rate and such amount shall be adopted for the purpose of computing ROFE.

A Supplementary Invoice shall be raised at the end of each Quarter in an Accounting Year, for an amount equal to the difference between the amount of ROFE determined on the basis of Base Exchange Rate and the amount of ROFE as at the end of each Quarter computed on the basis of the then prevailing exchange rate. If the amount payable to the Company is determined to be less, on account of foreign exchange variation than the amount paid by the Board at the Base Exchange Rate, such difference shall be re-paid to the Board within 14 days from the date of the determination.

Interest on Working Capital :

The amount of working capital on the Allocated Capacity shall be computed on the basis of annual estimated level of generation adopting the following norms:

Fuel Cost for liquid fuels only for one month;

Operation & Maintenance expenses (Cash) for one month;

Maintenance Spares at actual but not exceeding one year's requirement, less value of One Fifth of initial spares already capitalized; and Receivable equivalent to two months' average billing for sale of electricity.

The Interest on Working Capital shall be computed by applying the rate of interest as applied by the Company's bankers or the Board's Bankers whichever is lower on the amount of working capital computed above.

Base Foreign Debt Repayment Adjustment Amount:

In respect of the Foreign Debt, the amounts falling due for repayment during the Accounting Year shall be first computed in the applicable foreign currencies and thereafter be converted to Rupees by adopting the Base Exchange Rate. The difference between the amounts of repayment determined as above and the amount of repayment of Foreign Debt falling due during the relevant Accounting Year and expressed in rupees adopting the exchange rate as per the Financing Plan shall be included in the Annual Fixed Charges.

A Supplementary Invoice shall be raised for an amount equal to the difference between the amount of repayment on Foreign Debt determined on the basis of Base Exchange Rate and the amount of repayment on Foreign Debt as on the due dates of

repayment of Foreign Debt as per Financing Plan on the then prevailing exchange rates. If the amount payable to the Company is determined to be less on account of foreign exchange variation than the amount paid by the Board at the Base Exchange Rate, such difference shall be re-paid to the Board within 14 days from the date of the determination.

The amount of Annual Fixed Charges for the purposes of this Agreement shall the aggregate of (a) to (g), but excluding the amounts of supplementary Invoices under (a), (e) and (g) above. For the purpose of monthly Invoice 1/ 12th of the Annual Fixed Charges will be claimed.

The Invoice in each month shall further specify the number of units of Active Energy and Deemed Generation expressed in Kwh achieved during such month and the cumulative Level of Generation including Deemed Generation less Deemed Non-Generation achieved upto end of such month.

22. The agreement clearly contemplates the proportion of allocation of a capacity. The EPL has to fuel and operate the generating station to meet the requirement of electric output that can be generated corresponding to the allocated capacity. The appellant has to pay annual fixed cost as determined in terms of clause 7.1.1 of Schedule VII of the Agreement. The Commission is thus, right in observing that once the entire capacity has been allocated in two parts in a particular proportion, the contention of the EPL that it could sell power to ESL beyond the allocated capacity could not be accepted. The EPL was under obligation as per Schedule VI to declare weekly schedule of the capacity available and the dispatch instructions were to be issued on the basis of the said declaration. It could not thus be said that the EPL had no obligation to declare the capacity and the obligation of GUVNL to issue dispatch instructions was not dependent on declaration of the available capacity by the EPL. Contrary view of the Tribunal is clearly erroneous. In paras 45 and 46 and elsewhere in its judgment, the Tribunal erred in holding that there was no obligation to declare available capacity on proportionate basis. The finding of the Commission in paras 9.5 to 9.12 of its order quoted above is the correct interpretation of the Agreement. We hold accordingly.

Re : (ii) :

23. The Commission in this aspect observed :

“8.4 In the present case, the PPA was executed on 30.5.1996 and remains operational for a period of twenty years. Under the terms of the PPA, the generating company i.e. EPL is required to declare availability and supply of electricity for the entire duration of the PPA, while the Petitioner GUVNL has an obligation to purchase electricity and pay the tariff in terms thereof. The dispute appears to have arisen sometime in 1998-99, when the CAG Report for the year 1998-99 rejected the contention of the

> Government that there was no adverse financial impact as a result of diversion of power. Thereafter, on or around 10.2.2000, a meeting was conducted with the GEB to discuss the issue of diversion. On 17.2.2000, EPL subject to certain conditions accepted that power is required to be supplied on a 58:42 basis. Attempts were made to renegotiate the PPA. By a letter dated 23.4.2002, GEB wrote to EPL identifying certain key areas for negotiation of PPA. The issue of allocation of power was also part of the agenda. Since the issue of allocation of power could not be settled, GEB by its letter dated 29.10.2003 raised a claim of Rs. 537 crores for the period 1.7.1996 to 31.3.1999. EPL by its letters dated 1.11.2003 and 1.12.2003 denied the claim of GUVNL.

xxxx 9.10 Furthermore, in the letter dated 17.02.2000, EPL categorically agreed to the concept that power should be supplied in the ratio of 58:42 provided certain conditions are fulfilled. The conditions mentioned in the said letter will demonstrate that the each condition is either in the nature of additional concessions / modification that were sought by EPL or alleged defaults on the part of GUVNL, which was not agreed to by GUVNL. "

24. It is clear from the above that the letters of the respondent acknowledged its liability to allocate the generated power to the appellant and to the ESL in the ratio of 58 : 42. The Tribunal in para 54 quoted above, held that the said letters could not be relied upon in support of the claim that the appellant was entitled to be allocated generated power in proportion of 58 : 42. This finding is clearly erroneous and is without any basis and is liable to be set aside. The finding of the Commission is based on record.

Re : (iii) :

25. In interpreting Schedule VI, the Commission held that the EPL was liable to declare weekly capacity available and on that basis dispatch instructions were required to be issued (para 9.6). The contrary view taken by the Tribunal in para 45 and elsewhere is clearly contrary to the agreement between the parties as reflected in Schedule VI quoted above.

Re : (iv) :

26. The main basis of the order of the Tribunal in rejecting the claim of the appellant is the finding that the respondent had no obligation to allocate available power in the ratio of 58 : 42 under the terms of the Agreement and in terms of correspondence between the parties. Apart from this, the Tribunal held that the appellant had claimed Rs.64 crores by way of full and final settlement (para 55) and that the appellant was in default in not opening letter of credit and not paying Rs.519 crores. In doing so, the Tribunal has ignored clear stipulation in the letter of the appellant dated 13th December, 2004 referred to in para 8.14 of the Commission that the amount of Rs.64 crores was not accepted by way of final settlement. Similarly, the Tribunal has ignored the supplementary agreement between the parties dated 18th December, 2003 followed by letter dated 19th December, 2003 (page 337 and 341,Vol.V) under which amount of Rs.289.40 crores was paid to the respondent by way of settlement for the delayed payment charges and other heads. Thus, the Tribunal was not

justified in observing in para 75 that the appellant had defaulted in making payment of Rs.519 crores which was a breach of promise on the part of the appellant, thereby absolving the respondent of its obligation to supply power as per the agreement. Similar is the position with regard to letter of credit referred in para 17.6 of the order of the Tribunal. We have been informed that these aspects have been gone into by the State Commission in a subsequent dispute vide order dated 22nd October, 2014 and Appeal No.2 of 2015 against the said order before the Tribunal. We thus, make it clear that our observations may not be treated as affecting the decision of the said appeal.

27. We thus, hold that the order of the Tribunal is erroneous. The said order has given rise to the substantial question of law which has been discussed above, i.e., the interpretation of the Agreement between the parties and the obligation of the respondent to declare availability of generated power in the ratio of 58 : 42 and consequence of default therein. The Tribunal erroneously held that there was no pleading for making the claim. Thus, the Tribunal has committed error of law as well as of record in recording its finding as demonstrated above. It may also be noted that the Commission has left actual working out of the loss to be worked out separately and on that basis the appellant has already filed its claim which was pending consideration before the Commission. The said proceeding can now be revived in the light of our finding.

28. Accordingly, we allow this appeal, set aside the order of the Tribunal and restore that of the Commission.

An Epilogue

29. Before we part with this judgment, it appears to be necessary to draw attention of all concerned to a vital issue of composition and functioning of Tribunals and statutory framework thereof especially its impact on working of this Court and in turn on the rule of law.

30. It is well known that in the wake of 42nd Amendment to the Constitution of India, incorporating Article 323A and 323B of the Constitution under Part XIVA, various Tribunals have been set up. The Tribunals constitute alternative institutional mechanism for dispute resolution. The declared objective of such Tribunals is inability of the existing system of courts to cope up with the volume of work. This Court has gone into the question of validity of scheme under which the High Court is bypassed without the alternative institutional mechanism being equally effective for the access to justice which was necessary component of rule of law and this Court being over burdened with routine matters in several judgments to which reference may be made.

31. In L Chandra Kumar Vs. Union of India[1], in the course of considering the constitutional validity of exclusion of jurisdiction of the High Courts in service matters against the orders of the Central Administrative Tribunal, this Court observed that the manner in which justice is dispensed with by the Tribunals left much to be desired. The remedy of appeal to this Court from the order of the Tribunals was too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such remedy was that the docket of this Court was crowded with decisions of the Tribunals and this Court was forced to perform the role of a first appellate court. It was necessary that High Courts are able to exercise judicial superintendence over decisions of the Tribunals. With

these observations this Court directed that "all" decisions of the Tribunals will be subject to High Court's writ jurisdiction under Article 226/227[2]. It was further observed that the then existing position of direct appeal to this Court from orders of Tribunal will stand modified[3].

32. In Madras Bar Association Vs. Union of India[4], the issue considered by this Court was validity of setting up of National Tax Tribunals under the National Tax Tribunal Act, 2005. While striking down the Act, this Court commented upon validity of various provisions of the said Act. Section 5 of the Act which provided for sittings to be at Delhi, it was observed that a litigant who may belong to a distant/remote State, may have to travel a long distance and may find it difficult to identify an advocate who will represent him. It was further observed that while vesting jurisdiction in an alternative court/Tribunal, it was imperative for the legislature to ensure that redress should be available with the same convenience and expediency as it was prior to the introduction of the newly created court/tribunal[5]. As regards Section 6 dealing with the qualification for appointment of a member, it was observed that it was difficult to appreciate how non judicial members could handle complicated questions of law which the Tribunal was required to deal with[6]. Further, composition of tribunals which were like courts of first instance whose decisions are amenable to challenge under Article 226/227 and which are subservient to jurisdiction of the High Court stood on a different footing from the Tribunals whose appeals were directly provided to Supreme Court. Such Tribunals were practically substitute for the High Courts. Process of selection and appointment of Chairperson and members of such Tribunals could not be different from the manner of selection of the High Court Judges[7].

33. The above resume of law laid down by this Court may call for review of composition of Tribunals under the Electricity Act or other corresponding statutes. Appeals to this Court on question of law or substantial question of law show that Tribunals deal with such questions or substantial questions. Direct appeals to this Court has the result of denial of access to the High Court. Such Tribunals thus become substitute for High Courts without manner of appointment to such Tribunals being the same as the manner of appointment of High Court Judges. A perusal of Sections 113(b)(i) to (iii) and 113(3) read with Section 78, Sections 84, 85 and 125 of the Electricity Act and corresponding provisions of similar Acts may, thus, need a fresh look.

34. It may also be noted that in some Tribunals (For example, the tribunal constituted under the Telecom Regulatory Authority of India Act, 1997), the Tribunal exercises original jurisdiction to the exclusion of all courts and is located only at Delhi[8]. It may further be noted that normally tenure of office of the Chairman and members is of short duration of three to five years. Access to justice may not be, thus, available with the convenience with which it is available when jurisdiction is with the local civil courts sought to be substituted. Such provisions may need review in larger public interest and for providing access to justice.

35. Apart from the above aspect, further question is whether providing appeals to this Court in routine, without there being issues of general public importance, is not a serious obstruction to the effective working of this Court.

36. This issue has already been subject matter of debate. In an Article by Shri T.R. Andhyarujina former Solicitor General of India, titled "Restoring the Character and Stature of the Supreme Court of India[9]" learned author states that it was necessary to restore the character and stature of the Supreme Court. The jurisdiction of the Supreme Court should by and large be limited to matters of constitutional importance and matters involving substantial questions of law of general importance. The Supreme Court of India, like apex Courts in other jurisdictions, was not to be a final court to decide ordinary disputes between parties. The highest court has its unique assigned role. But after the year 1990, the Supreme Court is losing its original character and becoming a general court of appeal by entertaining and deciding cases which do not involve important constitutional issues or issues of law of national importance. The adverse effect of this trend is that matters of constitutional importance are not getting the due priority and are pending for several years. Reference has been made to the Statement of Objects for amending the Supreme Court (Number of Judges) Act, 1956 in the year 2008, to the effect that "it has not been possible for the Chief Justice of India to constitute a five-judge Bench on a regular basis to hear the cases involving interpretation of constitutional law as doing that would result in constitution of less number of Division Benches which in turn would result in delay in hearing of other civil and criminal cases". In spite of the said amendment to increase strength of judges to 31, larger Benches to decide constitutional and important cases have not been regularly functioning. On account of increase in number of issues other than constitutional law or substantial questions of general importance, all the Benches are engaged in handling the heavy routine work. The court rooms are so crowded that it is hardly possible to enter a court room or to pass through the corridors. "No other Supreme Court presents such an undignified sight." Further reference has been made to functioning of other Supreme/highest courts in the world to emphasize that the highest courts are engaged in deciding cases of national importance by larger benches of 9/11 judges while the Supreme Court of India is deciding most of the cases by Benches of two-judges, which has its own adverse implications. Reference has also been made to the discussion between Sir B.N. Rau, the Constitutional Advisor and Justice Frankfurter of the U.S. Supreme Court that the jurisdiction exercisable by the Supreme Court should be exercised by Full Court. It is further stated that the highest court should have limited number of cases and should not be overloaded. On an average, in a year 80 cases are decided by Supreme Court of U.K., the Canadian Supreme Court and the Australian High Court. 38 cases are decided by Constitutional Court of South Africa in a year. Supreme Court of India is deciding large number of cases and the reports in the cases sometimes run upto 19 volumes in a year with only a few cases of real constitutional or of national importance. In Australia there is no appeal to the highest court as of right and the cases are entertained only if they are of public importance. They are to resolve difference of opinion in different courts. This was necessary to preserve efficiency and standing. Reference is also made to the expert opinion that no litigant should get more than two chances in litigation. It is further stated that "The Supreme Court of India must cease to be a mere court of appeal to litigants and a daily mentor of the Government, if it is to preserve its pristine character, dignity and stature comparable to the Supreme Court in other jurisdictions." The Article ends with observation "This requires a national debate by Judges, Lawyers, jurists and informed public."

37. In Mathai alias Joby Vs. George[10], this Court referred to the R.K. Jain Memorial Lecture delivered on 30th January, 2010 by Shri K.K. Venugopal, senior advocate to the effect that "an alarming state of affairs has developed in this Court because this Court has gradually converted itself

into a mere court of appeal which has sought to correct every error which it finds in the judgments of the High Courts of the country as well as the vast number of tribunals[11]. The court has strayed from its original character as a constitutional court and the apex court of the country. Failure to hear and dispose of cases within reasonable time erode confidence of the litigants in the apex court. Reference was made to an Article by Justice K.K. Mathew to the effect that time, attention and energy should be devoted to matters of larger public concern. Functioning of Supreme Court was not to remedy a particular litigant's wrong, but consideration of cases involving principles of wide public or governmental interest which ought to be authoritatively declared by the final court. The docket of the court should be kept down so that its volume did not preclude wise adjudication. The matter was referred for consideration of the larger Bench for interpretation of Article 136. By the time, the matter came up for consideration of the larger Bench on 11th January, 2016, the SLP became infructuous as the suit in which the impugned interim order was passed itself had been decided. This Court while dismissing the SLP as infructuous observed that while Article 136 could be used with circumspection but its scope could not be limited.

38. In Bihar Legal Support Society Vs. Chief Justice of India[12], it was observed that Supreme Court was not a regular court of appeal. If an additional forum above the Tribunal was required to be set up, a separate national court of appeal could be created. In this respect, the matter was also considered in 229th Report of the Law Commission submitted in August, 2009. However, that is a different issue particularly when this aspect is being separately considered by a different Bench in Writ Petition (C) No.36 of 2016 titled V. Vasanthakumar Vs. Sri H.C. Bhatia.

39. In Justice H.R. Khanna Memorial Lecture delivered on 8th September, 2014 by Hon'ble Mr. Justice J. Chelameswar of this Court, the topic was "the Supreme Court of India, its jurisdiction and problem of arrears"[13]. It was stated that :

> "The law declared by the Supreme Court in Hindustan Commercial Bank Ltd. v. Bhagwan Dass [AIR 1965 SC 1142] was that normally a party should approach the Supreme Court with a certificate of the High Court. Only in exceptional circumstances would the Supreme Court relax that requirement, is simply ignored. The exception has become the rule now. The result is more and more unsuccessful people getting encouraged to have another go at it by approaching the Supreme Court. In most of the cases, what is sought is a simple second or third "guess on facts" or taking another plausible view of the matter.
>
> xxxx Coming to matters where the rights and obligations of the parties are purely founded upon a local law i.e. a law made by the legislature of a State, etc., I do not see any harm befalling the nation, if the judgment of the High Court is to become final. At least in these areas of litigation, the time worn cliche "we are not final because we are infallible, but we are infallible only because we are final" might as well be extended to the decisions of the High Courts which are equally constitutional courts."

40. While there may be no lack of legislative competence with the Parliament to make provision for direct appeal to the Supreme Court from orders of Tribunals but the legislative competence is not

the only parameter of constitutionality. It can hardly be gainsaid that routine appeals to the highest court may result in obstruction of the Constitutional role assigned to the highest court as observed above. This may affect the balance required to be maintained by the highest court of giving priority to cases of national importance, for which larger Benches may be required to be constituted. Routine direct appeals to the highest court in commercial litigation affecting individual parties without there being any issue of national importance may call for reconsideration at appropriate levels. Further question is composition of Tribunals as substitutes for High Courts and exclusion of High Court jurisdiction on account of direct appeals to this Court. Apart from desirability, constitutionality of such provisions may need to be gone into. We are, however, not expressing any opinion on this aspect at this stage.

41. We are thus of the view that in the first instance the Law Commission may look into the matter with the involvement of all the stakeholders.

42. We make it clear that as far as heavy pendency in this Court on account of liberal exercise of jurisdiction under Article 136 of the Constitution of India is concerned, we do not wish to make any comment as this is a matter in the discretion of the Court and it is for the Court to address this issue. Our discussion is limited to the consideration of desirability of providing statutory appeals directly to this Court from orders of Tribunals on issues not affecting national or public interest and other aspects of statutory framework in respect of Tribunals as discussed above.

43. The questions which may be required to be examined by the Law Commission are :

> I Whether any changes in the statutory framework constituting various Tribunals with regard to persons appointed, manner of appointment, duration of appointment, etc. is necessary in the light of judgment of this Court in Madras Bar Association (supra) or on any other consideration from the point of view of strengthening the rule of law?
>
> II Whether it is permissible and advisable to provide appeals routinely to this Court only on a question of law or substantial question of law which is not of national or public importance without affecting the constitutional role assigned to the Supreme Court having regard to the desirability of decision being rendered within reasonable time?
>
> III Whether direct statutory appeals to the Supreme Court bypassing the High Courts from the orders of Tribunal affects access to justice to litigants in remote areas of the country?
>
> IV Whether it is desirable to exclude jurisdiction of all courts in absence of equally effective alternative mechanism for access to justice at grass root level as has been done in provisions of TDSAT Act (Sections 14 and 15).
>
> V Any other incidental or connected issue which may be considered appropriate.

44. We request the Law Commission to give its report as far as possible within one year. Thereafter the matter may be examined by concerned authorities.

45. Action taken by the Central Government, after its consideration, may be placed on record. List the matter in November, 2017 before an appropriate Bench, preferably of three Judges to consider the above issue.

……J. [ANIL R. DAVE] ……J. [ADARSH KUMAR GOEL] NEW DELHI;

AUGUST 09, 2016.

1A-FOR JUDGMENT COURT NO.13 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 3455/2010

GUJARAT URJA VIKAS NIGAM LTD. Appellant(s)

VERSUS

ESSAR POWER LIMITED Respondent(s)

Date : 09/08/2016 This appeal was called on for pronouncement of JUDGMENT today.

For Appellant(s) Ms. Hemantika Wahi,Adv.

Ms. Puja Singh, Adv.

Mr. Shubham Arya, Adv.

For Respondent(s) Ms. N. Nagpal, Adv.
Mr. E. C. Agrawala,Adv.

Hon'ble Mr. Justice Adarsh Kumar Goel pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Anil R. Dave and His Lordship.

The appeal is allowed in terms of the signed Reportable Judgment inter alia with following observations.

“We are thus of the view that in the first instance the Law Commission may look into the matter with the involvement of all the stakeholders.

We make it clear that as far as heavy pendency in this Court on account of liberal exercise of jurisdiction under Article 136 of the Constitution of India is concerned, we do not wish to make any comment as this is a matter in the discretion of the Court and it is for the Court to address this issue. Our discussion is limited to the consideration of desirability of providing statutory appeals directly to this Court from orders of Tribunals on issues not affecting national or public interest and other aspects of statutory framework in respect of Tribunals as discussed above.

The questions which may be required to be examined by the Law Commission are :

> I Whether any changes in the statutory framework constituting various Tribunals with regard to persons appointed, manner of appointment, duration of appointment, etc. is necessary in the light of judgment of this Court in Madras Bar Association (supra) or on any other consideration from the point of view of strengthening the rule of law?
>
> II Whether it is permissible and advisable to provide appeals routinely to this Court only on a question of law or substantial question of law which is not of national or public importance without affecting the constitutional role assigned to the Supreme Court having regard to the desirability of decision being rendered within reasonable time?
>
> III Whether direct statutory appeals to the Supreme Court bypassing the High Courts from the orders of Tribunal affects access to justice to litigants in remote areas of the country?
>
> IV Whether it is desirable to exclude jurisdiction of all courts in absence of equally effective alternative mechanism for access to justice at grass root level as has been done in provisions of TDSAT Act (Sections 14 and 15).
>
> V Any other incidental or connected issue which may be considered appropriate.
>
> We request the Law Commission to give its report as far as possible within one year. Thereafter the matter may be examined by concerned authorities.
>
> Action taken by the Central Government, after its consideration, may be placed on record. List the matter in November, 2017 before an appropriate Bench, preferably of three Judges to consider the above issue." | (VINOD KUMAR JHA) | | (SUMAN JAIN) | |AR-CUM-PS | |COURT MASTER | (Signed Reportable judgment is placed on the file) | | | |

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[1] (1997) 3 SCC 261
[2] Para 91
[3] Para 92

[4] (2014) 10 SCC 1
[5] Para 123
[6] Para 126
[7] Para 130
[8] Sections 14 and 15
[9] (2013) 9 SCC (J) 43
[10] .(2010) 4 SCC 358
[11] Para 15
[12] (1986) 4 SCC 767
[13] (2015) 9 SCC (J-I)