

M/S ADANI POWER (MUNDRA) LTD.

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v.

GUJARAT ELECTRICITY REGULATORY COMMISSION AND
ORS.

(Civil Appeal No.11133 of 2011)

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JULY 02, 2019

[ARUN MISHRA, B. R. GAVAI AND SURYA KANT, JJ.]

Electricity Act, 2003 – ss. 86 (1) (F), 95 – Respondent No. 2-Procurer initiated the process of bidding for supply of power on long term basis, by issuing Request for Qualification – Three separate bids were invited – Appellant was selected as a successful bidder in respect of bid no. 2 for supplying 1000 MW power at the rate of Rs. 2.35 per Kwh – Consequently, Power Purchase Agreement (PPA) came to be entered into between the procurer and the appellant – Appellant contended that the bid submitted by it was on the basis of the assurance given by Gujarat Mineral Development Corporation (GMDC) to supply coal – It was also contended that, the GMDC was not abiding by the said assurance – There was a dispute between the appellant and the GMDC with regard to certain terms and conditions of the Fuel Supply Agreement (FSA) and as such FSA could not be finalized – Various communications were exchanged between the Government of Gujarat, appellant and GMDC to find out a solution – Finally, appellant by a communication dated 28.12.2009, issued notice to the procurer, terminating the PPA with effect from 04.01.2010 – Procurer filed petition u/ss. 86(1)(F), 95 of the Act, 2003 before Commission – The Commission held that the termination was illegal and directed the appellant to supply the power to the procurer at the rate determined in the PPA – Aggrieved, appellant filed appeal before the Appellate Tribunal, which was dismissed – On appeal, held: Appellate Tribunal depicted an erroneous approach – It is settled that to harmonize is not to destroy any statutory provision or render it otiose – A harmonious reading of Art. 3.4.2 and Art. 3.1.2 of the PPA indicated that in the event of non-compliance of any of the conditions as stipulated in Art. 3.1.2 within the period prescribed thereunder, either of the parties, i.e., the seller or the procurer have the right to terminate

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- A *the contract – Further, Appellate Tribunal was totally incorrect in holding that the provisions u/Art. 3.4.2 of the PPA can be invoked only when there is an agreement between the parties that there is a violation of any of the conditions specified in Art. 3.1.2 of the PPA – If such a view of the Appellate Tribunal is accepted, it will amount to inserting a totally new condition in Art. 3.4.2 of the PPA and*
- B *would amount to re-writing the contract between the parties; it would violate the provisions of Art. 3.4.2 of the PPA – And it will make the provisions of Art. 3.4.2 a dead letter and render them otiose – Also, it cannot said to be a condition which is necessary to give business efficacy to the contract – Besides, Appellate Tribunal erred in holding*
- C *that the bid of the appellant was not on the basis of the commitment by the GMDC to supply indigenous coal – As it is clear from various communication between Government of Gujarat, Procurer and GMDC that the bid of the appellant was on the basis of the commitment by the GMDC to supply the indigenous coal – Thus, the termination of PPA by appellant was legal and valid –*
- D *Interpretation of Statutes – Harmonious Construction.*

- Electricity Act, 2003 – s.62 – Determination of compensatory tariff by Central Electricity Regulatory Commission (CERC) – Respondent No.2-procurer initiated the process of bidding for supply of power – Appellant was selected as a successful bidder for*
- E *supplying 1000 MW power at rate of Rs. 2.35 per kwh – Appellant contended that the bid submitted by it was on basis of the assurance given by Gujarat Mineral Development Corporation (GMDC) to supply coal – It was also contended that GMDC did not abide by the said assurance – Appellant terminated the PPA – Procurer filed*
- F *petition u/ss.86(1)(f) & 95 of the Act before the Commission – The Commission and the Appellate Tribunal held that the termination was illegal and directed the appellant to supply the power to the procurer at the rate determined by PPA – On appeal, held: Termination by appellant was valid and legal – Appellant supplied*
- G *electricity to the procurer in accordance with the decision of the Commission and the Appellate Tribunal – In order to do economic justice, on the principle of business efficacy, the appellant entitled for adjustment of cost of the project and also entitled to the interest on the expenditure incurred by it for completion of project – Therefore, parties relegated to the CERC for determination of the*

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compensatory tariff payable to the appellant from the date of termination of the PPA – CERC (Terms and Conditions of Tariff) Regulations 2009. A

Doctrines/Principles – Principle of Business Efficacy – Discussed.

Allowing the appeal, the Court B

HELD: 1. The observations of the Appellate Tribunal depicted a totally erroneous approach. A harmonious reading of Article 3.4.2 and Article 3.1.2 of Power Purchase Agreement (PPA) clearly indicates that in the event of non-compliance of any of the conditions as stipulated in Article 3.1.2 within the period prescribed thereunder, either of the parties, i.e., the seller or the procurer have the right to terminate the contract. However, in either of the events, it is the seller's liability to pay the liquidated damages at the rate of Rs. 10 lakhs per Mega Watt. [Para 25] [1047-B-C] C D

2. This Court is of the considered view that the finding of the Appellate Tribunal that the provisions under Article 3.4.2 of the PPA can be invoked only when there is an agreement between the parties that there is violation of any of the conditions specified in Article 3.1.2 of the PPA is totally incorrect. If such an argument is accepted, it will amount to inserting a totally new condition in Article 3.4.2 of the PPA and would amount to re-writing the contract between the parties; it would do total violence to the provisions of Article 3.4.2 of the PPA. It cannot be said to be a condition which is either reasonable or equitable; it also cannot be said to be a condition which is necessary to give business efficacy to the contract; it also cannot be said to be a test which justifies the Officious Bystander Test; it also cannot be said to be a condition which is capable of the clear expression; it is also not a condition which does not contradict any expressed terms of the contract. On the contrary, is a condition which would totally change the tenor of Article 3.4.2 of the PPA. We are, therefore, of the considered view that the Appellate Tribunal has grossly erred in coming to the conclusion that Article 3.4.2 of the PPA could be invoked only in the event that there is an agreement E F G

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A with regard to violation of any of the conditions in Article 3.1.2.
[Para 26] [1047-D-F]

3. This Court finds, that both the Commission and the Appellate Tribunal have grossly erred in arriving at finding that termination can be effected under Article 3.4.2 only if there is an agreement with regard to non-compliance of condition under Article 3.4.2 by both the parties. If the finding of the Appellate Tribunal is accepted, it will be amounting to making provisions of Article 3.4.2 a dead letter and rendering them otiose.
B [Para 31] [1051-F-G]

4. In the present case, the perusal of various Articles would reveal that provisions under Article 14 are general in nature. The provision under Article 3.4.2 is specific, only to be invoked in the case of non-compliance with any of the conditions as provided under Article 3.1.2. As such, the special provision made in Article 3.4.2 will exclude the applicability of general provisions contained in Article 14 of the contract. [Para 34] [1051-F]
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5. In the brief summary of the Project given in the said bid document, it has been specifically mentioned by the appellant that the bid was submitted on the basis of indigenous coal supply committed by the Gujarat Mineral Development Corporation (GMDC). The bid documents also form part of the PPA between the parties. [Para 37] [1052-C]
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6. It could thus be clearly seen that even the Government of Gujarat has also clearly indicated that the bid submitted by the appellant in the competitive bid was on the basis of the commitment for supply of coal from Morga-II mines by the GMDC. It has, therefore, requested the Managing Director, GMDC to give 50 per cent of coal from Morga block to the appellant. The State Government had, therefore, requested that the Managing Director of the GMDC to go for coal allotment from Morga block. It could thus be seen that, even the procurer was aware that the bid of the appellant was on the basis of the commitment by the GMDC to supply the indigenous coal. [Paras 39 and 41] [1053-B, C, F-G]
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7. In that view thereof, after the GMDC resiling from its commitment and refusing to enter into Fuel Supply Agreement (FSA) with the appellant, the appellant was justified in invoking Article 3.4.2 of the PPA, in view of non-compliance of Condition No. (ii) in Article 3.1.2 since it had failed to produce the Fuel Supply Agreement. [Para 43] [1054-E]

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8. In the light of the aforesaid finding, this Court fails to understand as to how the Appellate Tribunal has come to a finding that the bid of the appellant was not on the basis of the commitment by the GMDC to supply indigenous coal. This Court is of the considered view that the Appellate Tribunal has erred both on facts and in law. This Court is of the considered view that the appellant was entitled in law as well as on facts to invoke Article 3.4.2 of the PPA and terminate the agreement. [Para 44] [1054-H; 1055-A]

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9. Now, the question would arise as to at what rate the appellant is entitled to compensatory tariff from the date of supply of power. Undisputedly, even after the PPA was validly terminated, the appellant continued to take the project to its logical end. After commissioning of the project, it has started supplying electricity to the procurer in accordance with the decision of the Commission and the Appellate Tribunal. The appellant must have incurred huge expenditure on the same. In order to do economic justice, on the principle of business efficacy, the appellant would be entitled for adjustment of cost of the project and would also be entitled to the interest on the expenditure incurred by it for completion of the project. The expenditure towards running of the project after obtaining the coal from the open market would also be required to be taken into consideration. The appellant would also be entitled to the interest on the delay of payment after it receives payment upon determination of the rate which would be determined by the Central Electricity Regulatory Commission (CERC). [Para 49] [1056-D-G]

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10. Section 62 of the Electricity Act, 2003, provides entire mechanism for determination of the tariff by the CERC. It will also be relevant to note that the CERC (Terms and Conditions of Tariff) Regulations 2009 also consider various factors which

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- A are required to be taken into consideration by the CERC while determining the compensatory tariff. This Court finds that it will be appropriate to relegate the parties to CERC for determination of the compensatory tariff payable to the appellant from the date of termination of the PPA. After such determination, the procurer would be entitled to adjust the amount if already paid in accordance with affidavit dated 23.11.2015, from the amount so determined by the CERC. [Para 50] [1056-G-H; 1057-A]

C *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and others* AIR 1962 SC 1044 : [1962] Suppl. SCR 1 – followed.

- D *Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond & Gem Development Corporation Ltd. & Anr.* (2013) 5 SCC 470 : [2013] 4 SCR 331 ; *Bharat Aluminium Company v. Kaiser Aluminium Technical Services INC* (2016) 4 SCC 126 : [2016] 1 SCR 364 ; *Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) and Anr.* (2018) 11 SCC 508 ; *Sultana Begum v. Prem Chand Jain* AIR 1997 SC 1006 : [1996] 9 Suppl. SCR 707 ; *Anwar Hasan Khan v. Mohammed Shafi and others* AIR 2001 SC 2984 ; *J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh*, AIR 1961 SC 1170 : [1961] SCR 185 ; *Maharashtra State Board of Secondary and Higher Secondary Education and Ors. v. Paritosh Bhupeshkumar Sheth and Ors.* (1984) 4 SCC 27 : [1985] 1 SCR 29 – relied on.

- F *Indian Oil Corporation v. Amritsar Gas Services Ltd.*, (1991) 1 SCC 533 : [1990] 3 Suppl. SCR 196 ; *Her Highness Maharani Shanti Devi Gaekwad v. Savji Haribhai Patel & Ors.* (2001) 5 SCC 101 : [2001] 2 SCR 590 ; *Vermagiri v. Transco*, 2007 SCC online APTEL 107 – referred to.

G *Attorney General of Belize v. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC) – referred to.

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Case Law Reference

[1990] 3 Suppl. SCR 196	referred to	Para 10
[2001] 2 SCR 590	referred to	Para 10
[2013] 4 SCR 331	relied on	Para 16
[2016] 1 SCR 364	relied on	Para 17
(2018) 11 SCC 508	relied on	Para 18
[1962] Suppl. SCR 1	followed	Para 28
[1996] 9 Suppl. SCR 707	relied on	Para 29
AIR 2001 SC 2984	relied on	Para 29
[1961] SCR 185	relied on	Para 32
[1985] 1 SCR 29	relied on	Para 33

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11133 of 2011.

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From the Judgment and Order dated 07.09.2011 of the Appellate Tribunal for Electricity in Appeal No. 184 of 2010.

Gopal Jain, Sr. Adv., Ashish Prasad, Ms. Mukta Dutta, Avinash Tripathi, Mahfooz A. Nazki, Praveen Kumar, Advs. for the Appellant.

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M. G. Ramachandran, Sr. Adv., Ms. Ranjeetha Ramachandran, Ms. Vishakha, Ms. Puja Singh for Mrs. Hemantika Wahi, Ms. Swati Bhardwaj, M/S. Parekh & Co., Prashant Bhushan, Advs. for the Respondents.

The Judgment of the Court was delivered by

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B. R. GAVAI, J.

1. The appellant has approached this Court being aggrieved by the judgment and order passed by the Appellate Tribunal for Electricity (“the Appellate Tribunal” for short) in Appeal No. 184 of 2010 dated 07.09.2011 thereby dismissing the appeal filed by the present appellant and confirming the judgment and order passed by the Gujarat Electricity Regulatory Commission (“the Commission” for short) dated 31.08.2010.

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A 2. The facts in brief giving rise to the present appeal are as under.

Respondent No. 2, namely, Gujarat Urja Vikas Nigam Ltd. (hereinafter referred to as “the procurer”) is a holding company engaged in the business of bulk purchases from the power generators and supply to the distribution companies in the State of Gujarat. On 01.02.2006, the
B procurer initiated the process of bidding for supply of power on long term basis, by issuing a Request For Qualification (“RFQ” for short). Three separate bids for purchase of power in accordance with the provisions of Section 63 of the Electricity Act, 2003 were invited. Each of the three bids envisaged purchase of power to the maximum extent of 2000 Mega Watt (“MW” for short). The RFQ was followed by
C Request For Proposal (“RFP” for short) on 24.11.2006. The present matter concerns bid No. 2 in respect of which the appellant was selected as a successful bidder.

3. On being successful in the bidding process, the procurer issued a Letter of Intent (“LOI” for short) in respect of bid no. 2, to the appellant
D on 11.01.2007 for supplying 1000 MW power at the rate of Rs. 2.35 per Kwh. Consequently, the Power Purchase Agreement (“PPA” for short) came to be entered into between the procurer and the appellant, for purchase and sale of 1000 MW power from the appellant’s power project at Korba, Chhatisgarh, at the delivery point at Nani Khakhar in the State
E of Gujarat. Similarly, on 06.02.2007 another PPA came to be executed by the procurer with the appellant in respect of bid No. 1, which project was to be executed by using imported coal. The rate determined was Rs. 2.89 per unit in respect of bid No. 1.

4. On 12.02.2007, the appellant informed the procurer that it would
F supply power against bid No. 2, from Mundra Power Project in Gujarat instead of Chhatisgarh Project. Accordingly, a supplemental PPA was entered into between the appellant and the procurer on 18.04.2007, to off take the contracted capacity of 1000 MW against bid No. 2, from Mundra Power Project.

5. The appellant contended that, the bid submitted by it in respect of bid No. 2 was on the basis of the assurance given by Gujarat Mineral Development Corporation (“GMDC” for short) to supply 4 million tonnes of coal. It also contended that, the GMDC was not abiding by the said assurance. So it addressed a communication to the Government of Gujarat on 21.05.2007 to find out a solution. Since the Fuel Supply Agreement
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(“FSA” for short) could not be executed, as contemplated between the appellant and the GMDC; the appellant informed the procurer that the FSA between it and the GMDC had not yet been finalized. Again, a communication came to be addressed by the appellant on 01.05.2008 to the Government of Gujarat, requesting it to impress upon the GMDC to adhere to its assurance and supply the coal from the coal blocks allocated to the GMDC. The procurer, thereafter, in the month of June, 2008, addressed a communication to the appellants stating that, since it had not complied with certain conditions stipulated in the PPA and as such, it should furnish an additional performance bank guarantee. The appellant addressed another communication to the procurer on 17.01.2009, reiterating its inability to supply the power to the procurer in the absence of FSA with GMDC. It also informed that it had no other option except to terminate the PPA. On 27.02.2009, the Government of Gujarat wrote to the GMDC, asking it to supply coal to the appellant from Naini block.

6. It appears that there was a dispute between the appellant and the GMDC with regard to certain terms and conditions of the FSA and as such the FSA could not be finalized. The record would further reveal, that there was a long correspondence between the Government of Gujarat, the GMDC, the procurer and the appellant with regard to the commitment by the GMDC to supply coal to the appellant in respect of bid No. 2 and non-adherence by the GMDC to abide by the said commitment. The appellant addressed a communication dated 15.11.2008 specifically informing the procurer that the bid was on the basis of the assurance by the GMDC to supply coal. It also informed the procurer that though it was in a position to comply with all other conditions subsequent but they are unable to execute the FSA since the GMDC had not cooperated in the matter. Another communication was addressed by the appellant on 17.01.2009 reiterating that in the absence of FSA with the GMDC, the appellant will not be in a position to supply contracted capacity of power to GUVNL/the procurer in the absence of FSA with the GMDC. It further informed that the appellant shall have no other option than to terminate the PPA unless the coal supply comes from the GMDC from Morga-II coal block. However, it appears that, thereafter, there was an attempt to amicably settle the matter between the appellant, the procurer, the GMDC as well as the Government of Gujarat. As such, the appellant addressed communication dated 28.04.2009 keeping its notices dated 15.11.2008 and 17.01.2009 in abeyance till the matter

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A was resolved between the appellant and the GMDC/Government of Gujarat. It, however, appears that the said attempts were not fruitful.

Finally, the appellant by a communication dated 28.12.2009, issued notice to the procurer, terminating the PPA with effect from 04.01.2010. The procurer addressed a communication to the Government of Gujarat on 30.12.2009, requesting the Government to impress upon the appellant to withdraw its termination notice dated 28.12.2009 and also impress upon the GMDC for resolution of FSA with the appellant. The procurer also addressed a communication to the appellant on 05.01.2010, requesting it to keep the notice of termination dated 28.12.2009 in abeyance. On 06.01.2010, the appellant addressed another communication to the procurer, informing it that since the period of termination has already expired, the PPA stands terminated with effect from 4.01.2010. The appellant also deposited an amount of Rs. 25 crores with the procurer towards liquidated damages in addition to the performance bank guarantee of Rs. 75 crores, which was already with the procurer. On 13.01.2010 the procurer sent a letter to the appellant, returning the amount of Rs. 25 crores and calling upon it to withdraw the termination notice. However, the appellant asserted that termination was valid.

7. The procurer, thereafter, filed a petition under Sections 86(1)(f) and 95 of the Electricity Act, 2003, for adjudication of the dispute between the procurer and the appellant on 01.02.2010 before the Commission. The Commission by its judgment dated 31.08.2010 allowed the petition of the procurer, holding that the termination of the PPA was illegal and directed the appellant herein to supply the power to the procurer at the rate determined in the PPA. Being aggrieved, the appellant approached the Appellate Tribunal for Electricity. By the judgment and order impugned dated 07.09.2011, the Appellate Tribunal dismissed the appeal. Hence, the present appeal.

8. We have heard Mr. Gopal Jain, learned senior counsel for the appellant, and Mr. M.G. Ramachandran, learned senior counsel for the respondent(s).

9. The main contention raised on behalf of the appellant is that the bid which was submitted by the appellant in respect of bid No. 2 was on the basis of the commitment given to it by the GMDC that it will supply the coal. It is submitted that the PPA executed between the appellant and the procurer was on the premise that the GMDC would abide by its

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commitment. It is also submitted that since the GMDC had failed to abide by its commitment and had not executed the FSA with the appellant, there was a non-compliance with the conditions stipulated in Article 3.1.2 of the PPA and therefore the appellant was entitled to terminate the agreement, by giving 7 days notice in writing in accordance with the provisions of Article 3.4.2 of the PPA. So the only liability of the appellant was to pay the liquidated damages at the rate of Rs. 10 lakhs per Mega Watt of the contracted capacity, which is worked out to Rs. 100 crores for 1000 MW.

10. It is the submission of Mr. Jain, learned senior counsel, that the Commission and the Appellate Tribunal have grossly erred in holding that unless there was an agreement between the parties to the effect that there was non-compliance with the conditions mentioned in Article 3.1.2 of the PPA, the appellant was not entitled to invoke the provisions of Article 3.4.2 of the PPA. Mr. Jain further submitted that since the contract also provided for liquidated damages, the Commission as well the Appellate Tribunal, ought not to have given a direction for specific performance. Reliance in this respect is placed on the judgments of this Court in the case of *Indian Oil Corporation vs. Amritsar Gas Services Ltd.*, (1991) 1 SCC 533 and *Her Highness Maharani Shanti Devi Gaekwad vs. Savji Haribhai Patel & Ors.* (2001) 5 SCC 101.

11. Mr. Jain further submitted that the Appellate Tribunal by the impugned judgment has varied the terms of the contract executed between the parties, which is not permissible in law. Reliance in this respect is placed on the judgments of this Court in the case of *Vermagiri vs. Transco*, 2007 SCC On Line APTEL 107 and *Gujarat Urja Vikas Nigam Ltd. vs. Solar Semiconductor Power Company*, (2017) 16 SCC 498.

12. Per contra, Mr. Ramachandran, learned senior counsel appearing on behalf of the procurer, would submit that the PPA which was entered into between the parties, was not executed on the basis of commitment by the GMDC. He submits that the procurer is not concerned with the issue as to from where the appellant would arrange for its supply of coal. The PPA between the appellant and the procurer is only in respect of supply of power. It is submitted that on the GMDC's failure to adhere to its commitment to supply indigenous coal, it was the responsibility of the appellant to make arrangement for an alternative source and to enter into FSA with any other coal supplier. It is submitted that as a matter of fact, the appellant is importing the coal from other

A nations and using it for generation of power, both for the plant under bid No. 1 and the plant under bid No. 2. Shri Ramachandran, learned senior counsel, further submits that, by not making arrangements for fuel supply, it is the appellant who had committed default and, therefore, a party in default cannot be permitted to terminate the agreement. Reliance in this respect is placed on various judgments of English Courts as well as this Court. Reliance is also placed on various judgments of this Court, in support of the proposition that in spite of the provision of liquidated damages in the PPA, the courts are not powerless to direct a specific performance of the contract.

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C 13. Shri Ramachandran further submitted that the contract is required to be read as a whole and the provisions of the contract cannot be read in isolation. He, therefore, submits that the Commission as well as the Appellate Tribunal has rightly held that Article 3.4.2 and Article 14.1 and Article 14.2 have to be read together. Thus, no fault could be found with the reasoning given by the Commission as well as the Appellate Tribunal. Learned senior counsel, therefore, submits that the appeal has no merit and deserves to be dismissed.

14. For appraising the rival submissions it would be necessary to refer to certain clauses of the PPA:

The relevant part of Article 3 reads thus:

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“3. Article 3: CONDITIONS SUBSEQUENT TO BE SATISFIED BY THE SELLER AND THE PROCURER

3.1 Satisfaction of conditions subsequent by the Seller

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3.1.1 xxx

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3.1.2 The seller agrees and undertakes to duly perform and complete the following activities within (i) Twelve (12) Months from the Effective Date or (ii) Fourteen (14) Months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the Procurer’s failure to comply with its obligations under this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurer :

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- i. xxx A
- ii. the Seller shall have executed Fuel Supply Agreement and provided the copies of the same to the Procurer.”

The relevant part of Article 3.4 reads thus: B

**“3.4 Consequences of non-fulfilment of conditions under
Article 3.1**

3.4.1 xxx

3.4.2 Subject to Article 3.4.3, if: C

- (i) fulfilment of any of the conditions specified in Article 3.1.2 is delayed beyond the period of three (3) Months and the Seller fails to furnish any additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof; or D
- (ii) the Seller furnishes additional Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof but fails to fulfil the conditions specified in Article 3.1.2 for a period of eight (8) months beyond the period specified therein, the procurer or the Seller shall have the right to terminate this Agreement by giving a notice to the Seller/ Procurer in writing of at least seven (7) days. E

If the Procurer or the Seller elects to terminate this Agreement in the event specified in the preceding paragraph of this Article 3.4.2, the Seller shall be liable to pay to the Procurer an amount equivalent to Rupees Rs. 10.00 lakhs per MW of the Contracted Capacity as liquidated damages. The Procurer shall be entitled to recover this amount of damages by invoking the Performance Guarantee to the extent of an amount equivalent to Rupees 10.00 lakhs per MW of the Contracted Capacity and shall then return the balance Performance Guarantee, if any, to the Seller. If the Procurer is unable to recover the said amount or any part thereof from the Performance Guarantee the F
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A amount not recovered from the Performance Guarantee, if any, shall be payable by the Seller to the Procurer within ten (10) days from the end of eight (8) Months period from the due date of completion of conditions subsequent. It is clarified for removal of doubt that this Article shall survive the termination of this Agreement.

B 3.4.3 In case of inability to the Seller to fulfil the conditions specified in Article 3.1.2 due to any Force Majeure event, the time period for fulfilment of the Condition Subsequent as mentioned in Article 3.1.2, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by the Procurer or the Seller by giving a notice of at least seven (7) days, in writing to the Other Party.”

D Since both the Commission and the Appellate Tribunal have referred to Article 14, we also reproduce the same.

“14. ARTICLE 14 : EVENTS OF DEFAULT AND TERMINATION

E 14.1 Seller Event of Default

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

- F i) the failure to Commission any Unit by the date falling twelve (12) Months after its Scheduled Commercial Operation Date, or
- G ii) after the commencement of construction of the Project, the abandonment by the Seller or the Seller’s Construction Contractors of the construction of the Project for a continuous period of two (2) Months and such default is not rectified within thirty (30) days from the receipt of first notice from the Procurer in this regard, or

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- iii) if at any time following a Unit being Commissioned and during its retest, as per Article 8, such Unit's Tested Capacity is less than ninety two (92) per cent of its Rated Capacity, as existing on the Effective Date, and such Tested Capacity remain below ninety two (92) percent even for a period of three (3) Months thereafter and also the Seller is unable to make available the full Contracted Capacity at the Delivery Point from the Tested Capacity of the Unit(s) of the Power Station; or A
- iv) after Commercial Operation Date of Contracted Capacity, the Seller fails to achieve Average Availability of sixty five per cent (65%), for a period of twelve (12) consecutive Months or within a non-consecutive period of twelve (12) Months within any continuous aggregate period of thirty six (36) Months, or B
- v) the Seller fails to make any payment (a) of an amount exceeding Rupees One (1) Crore required to be made to Procurer under this Agreement, within three (3) Months after the Due Date of an undisputed invoice / demand raised by the Procurer on the Seller or (b) of an amount upto Rupees One (1) Crore required to be made to Procurer under this Agreement within six (6) Months after the Due Date of an undisputed invoice / demand, or C
- vi) any of the representations and warranties made by the Seller in Schedule 10 of this Agreement; being found to be untrue or inaccurate. Further, in addition to the above, any of the undertakings submitted by the Seller at the time of submission of the Bid being found to be breached or inaccurate, including but not limited to undertakings from its parent company/affiliates related to the minimum equity obligation; Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Procurer shall give a notice to the Seller in writing of at least thirty (30) days, or D

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- A vii) if the Seller :
- a) assigns or purports to assign any of its assets or
 rights in violation of this Agreement; or
- b) transfers or novates any of its rights and / or
 obligations under this agreement, in violation of this
B Agreement; or
- viii) if (a) the Seller becomes voluntarily or involuntarily the
 subject of any bankruptcy or insolvency or winding up
 proceedings and such proceedings remain uncontested
 for a period of thirty (30) days, or (b) any winding up or
C bankruptcy or insolvency order is passed against the
 Seller, or (c) the Seller goes into liquidation or dissolution
 or has a receiver or any similar officer appointed over
 all or substantially all of its assets or official liquidator is
 appointed to manage its affairs, pursuant to Law, except
D where such dissolution or liquidation of the Seller is for
 the purpose of a merger, consolidation or reorganization
 and where the resulting entity has the financial standing
 to perform its obligations under this Agreement and
 creditworthiness similar to the Seller and expressly
 assumes all obligations of the Seller under this
E Agreement and is in a position to perform them; or
- ix) the Seller repudiates this Agreement and does not rectify
 such breach even within a period of thirty (30) days
 from a notice from the Procurer in this regard; or
- F x) except where due to Procurer's failure to comply with
 its material obligations, the Seller is in breach of any of
 its material obligations pursuant to this Agreement or of
 any of the RFP Documents where the Procurer and
 Seller are parties, and such material breach is not
 rectified by the Seller within thirty (30) days of receipt
G of first notice in this regard given by the Procurer to the
 Seller;
- xi) the Seller fails to complete/fulfill the activities /conditions
 specified in Article 3.1.2, beyond a period of 8 Months
 from the specified period in Article 3.1.2 and the right
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- of termination under Article 3.4.2 is invoked by the Procurer; or A
- xii) any direct or indirect change in the shareholding of the Seller in contravention of the terms of the Bid RFP Documents; or
- xiii) The Seller fails to provide additional bank guarantee to the Procurer in accordance with Article 3.4.1 of this Agreement, or B
- xiv) Occurrence of any other event that is specified in this Agreement to be a material breach / default of the Seller. C

14.2 Procurer Event of Default

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

- i) the Procurer fails to pay (with respect to a Monthly Bill or a Supplementary Bill) an amount exceeding 15% of the most recent undisputed Monthly Bill for a period of ninety (90) days after the Due Date and the Seller is unable to recover the amount outstanding to the Seller through the Collateral Arrangement and Letter of Credit; or E
- ii) the Procurer repudiates this Agreement and does not rectify such breach even within a period of thirty (30) days from a notice from the Seller in this regard; or F
- iii) except where due to any Seller's failure to comply with its obligations, the Procurer is in material breach of any of its obligations pursuant to this Agreement or of any of the RFP Documents where the Procurer and the Seller are Parties, and such material breach is not rectified by the Procurer within thirty (30) days of receipt of notice in this regard from the Seller to the Procurer; or G

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- A iv) any representation and warranties made by any of the
 Procurer in Schedule 9 of this Agreement being found
 to be untrue or inaccurate. Provided however, prior to
 considering any event specified under this sub-article
 to be an Event of Default, the Seller shall give a notice
B to the concerned Procurer in writing of at least thirty
 (30) days; or
- v) if (a) the Procurer becomes voluntarily or involuntarily
 the subject of any bankruptcy or insolvency or winding
 up proceedings and such proceedings remain
C uncontested for a period of thirty (30) days, or (b) any
 winding up or bankruptcy or insolvency order is passed
 against the Procurer, or (c) the Procurer goes into
 liquidation or dissolution or has a receiver or any similar
 officer appointed over all or substantially all of its assets
 or official liquidator is appointed to manage its affairs,
D pursuant to Law, except where such dissolution or
 liquidation of the Procurer is for the purpose of a merger,
 consolidation or reorganization and where the resulting
 entity has the financial standing to perform its obligations
 under this Agreement and has creditworthiness similar
 to the Procurer and expressly assumes all obligations
E of the Procurer under this Agreement and is in a position
 to perform them; or;
- vi) occurrence of any other event which is specified in this
 Agreement to be a material breach or default of the
 Procurer.

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14.3 Procedure for cases of Seller Event of Default

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14.3.1 Upon the occurrence and continuation of any Seller
Event of Default under Article 14.1, the Procurer
shall have the right to deliver to the Seller a
Procurer Preliminary Default Notice, which shall
specify in reasonable detail, the circumstances
giving rise to the issue of such notice.

14.3.2 Following the issue of Procurer Preliminary
Default Notice, the Consultation Period of ninety

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- (90) days or such longer period as the Parties may agree, shall apply. A
- 14.3.3 During the Consultation Period, the Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement. B
- 14.3.4 After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Seller Event of Default giving rise to the Consultation Period shall have been remedied and, C
- (a) in case the Contracted Capacity from a Power Station is less than 50% of the installed capacity of such Power Station, the Procurer may terminate this Agreement. Provided such seller shall have the liability to make payments for Capacity Charges based on Normative Availability to the Procurer for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that at the end of the three year period, this Agreement shall automatically terminate and thereafter, the Seller shall have no further Capacity Charge liability towards the Procurer. Provided further, the Procurer shall have the right to terminate this Agreement even before the expiry of such three year period provided on such termination, the future Capacity Charge liability of the Seller shall cease immediately. D E F
- (b) in case the Contracted Capacity from a Power Station is more than or equal to 50% of the installed capacity of such Power Station, the Lenders may exercise or the Procurer may require the Lenders to exercise their substitution rights and other rights provided to them, if any, under Financing Agreements and the Procurer would have no objection to the G H

- A Lenders exercising their rights if it is in consonance with provisions of Schedule 14. Alternatively, in case the Lenders do not exercise their rights as mentioned herein above, the Capacity Charge of the Seller shall be reduced by 20% for the period of Seller Event of Default and the Procurer may terminate this Agreement and the provisions of Article 14.3.4 (a) shall apply mutatis mutandis.
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C **14.4 Termination for Procurer Events of Default**

- 14.4.1 Upon the occurrence and continuation of any Procurer Event of Default pursuant to Article 14.2 (i), the seller shall follow the remedies provided under Article 11.5.2.
- D 14.4.2 Without in any manner affecting the rights of the Seller under Article 14.4.1, on the occurrence of any Procurer Event of Default specified in Article 14.2 the Seller shall have the right to deliver to the Procurer a Seller Preliminary Default Notice, which notice shall specify in reasonable detail the circumstances giving rise to its issue.
- E 14.4.3 Following the issue of a Seller Preliminary Default Notice, the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply.
- F 14.4.4 During the Consultation Period, the Parties shall continue to perform their respective obligations under this Agreement.
- G 14.4.5. (i) After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the Contracted Capacity and associated Available Capacity to any
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third party of his choice. Provided the Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that in such three year period, in case the Seller is able to sell electricity to any third party at a net price at the Delivery Point which is in excess of the Energy Charges, then such excess realization will reduce the Capacity Charge payments due from the Procurer. For the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three-year period. During such period, the Seller shall use its best effort to sell the Contracted Capacity and associated Available Capacity generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the Seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not at a price less than the Tariff, without obtaining the prior written consent of the Procurer. Such request for consent would be responded to within a maximum period of three (3) days failing which it would be deemed that the Procurer has given his consent. Provided further that at the end of the three-year period, this Agreement shall automatically terminate and thereafter, the Procurer shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement even before the expiry of such three year period provided on such termination, the future Capacity Charge liability of the Procurer shall cease immediately.”

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A 15. Before we proceed to consider the rival submissions, it will be appropriate to refer to certain judgments of this Court on the interpretation of clauses of the contract between the parties.

B 16. This Court in the case of *Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond & Gem Development Corporation Ltd. & Anr.* reported in (2013) 5 SCC 470 observed thus:

C “23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [*Vide United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, (2004) 8 SCC 644, and *Polymat India (P) Ltd. v. National Insurance Co. Ltd.*, (2005) 9 SCC 174.]

D 24. In *DLF Universal Ltd. v. Town and Country Planning Deptt.*, (2010) 14 SCC 1, this Court held: (SCC pp. 14-15, paras 13-15)

E “13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties’ private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by

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the joint intent of the parties at the time of the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. A

14. As is stated in *Anson's Law of Contract* : B

‘a basic principle of the common law of contract is that the parties are free to determine for themselves what primary obligations they will accept.... Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.’ C

15. The Court assumes:

‘that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency... In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly.’ “ D

17. This Court in the case of *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC* reported in (2016) 4 SCC 126 observed thus: E

“10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose H

A is certainly important, and in the third category of the documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the ground norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.”

C 18. Recently, this Court had an occasion to consider the issue with regard to interpretation of certain clauses of PPA, in the case of *Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (PSPCL) and Anr.* reported in 2018 (11) SCC 508. The Court referred to various English and Australian judgments as well as the judgments by this Court on the issue. We do not wish to burden this judgment with all the English and Australian judgments reproduced in the said judgment. However, it will be relevant to refer to the following passage of the decision of the Privy Council in the case of *Attorney General of Belize vs. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC): reproduced in *Nabha Power Ltd.*

E “17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.”

F 19. We may also gainfully reproduce certain judgments which have been reproduced in the case of *Nabha Power Ltd.* (supra).

G “46. There were, once again, parallel developments in India during this period in various High Courts but the views of this Court can be found expression in *Dhanrajamal Gobindram v. Shamji Kalidas and Co.*, (1961) 3 SCR 1020: AIR 1961 SC 1285 (AIR pp. 1291 – 92, para 19)

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“19. Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of courts is to give a meaning, if possible. This was laid down by the House of Lords in *Hillas & Co. v. Arcos Ltd.* {1932 All ER Rep 494 (HL)}, and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* {1959 AC 133 : (1958) 2 WLR 688 (HL)}. There, the clause was “This bill of lading”, whereas the document to which it referred was a charter-party. Viscount Simonds summarised at AC p. 158 all the rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.”

47. In *Union of India v. D.N. Revri & Co.* {(1976) 4 SCC 147}, P.N. Bhagwati, J. (as he then was), speaking for the Bench of two Judges said in para 7 as under : (SCC p. 151)

“7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. ...”

48. Lastly, in *Satya Jain v. Anis Ahmed Rushdie* {(2013) 8 SCC 131}, Ranjan Gogoi, J., elucidated the well-established principles of the classic test of business efficacy to achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under: (SCC pp. 143-44, paras 33-35)

“33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the

- A result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in *The Moorcock* {(1889) LR 14 PD 64 (CA)}. This test requires that a term can only be
- B implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied – the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following
- C passage from the opinion of Bowen, L.J. in *The Moorcock* {(1889) LR 14 PD 64 (CA)} sums up the position : (PD p. 68)
- D ‘..... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.’
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- F 34. Though in an entirely different context, this Court in *United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera* {(2008) 10 SCC 404} had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations : (SCC p. 434)
- G ‘51. ... “... ‘Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would
- H testily suppress him with a common “Oh, of course!”’ *Shirlaw*

v. Southern Foundaries (1926) Ltd. {(1939) 2 KB 206 : (1939) 2 All ER 113 (CA)}, KB p. 227. A

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“...An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.” B
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Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board {(1973) 1 WLR 601 : (1973) 2 All ER 260 (HL)}, WLR p. 609 C-D : All ER p. 268 a-b.’ (emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. ...” D

After reproducing the paras from earlier judgment, this Court through Sanjay Kishan Kaul, J. observed thus: E

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock {(1889) LR 14 PD 64 (CA)}* test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [*Shirlaw v. Southern Foundries (1926) Ltd. {(1939) 2 KB 206 : (1939) 2 All ER 113 (CA)}*]. F
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This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings {1977 UKPC 13 : (1977) 180 CLR 266 (Aus)}* requiring the requisite conditions to be satisfied : (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. H

- A the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* {(1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)} and *Attorney General of Belize v. Belize Telecom Ltd.* {(2009) 1 WLR 1988 (PC)}. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties.
- C The multi-clause contract *inter se* the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

20. It could thus be seen that it is more than well settled that the
- D clauses in the agreement ought to be given the plain, literal and grammatical meaning of the expression used in the same. No doubt, that the courts will also try to gather as to what intention the parties wanted to give them. As has been held by Ranjan Gogoi, J. (as His Lordship then was) the principle of business efficacy could be invoked only if by a plain literal interpretation of the term in the agreement or the contract,
- E it is not possible to achieve the result or the consequence intended by the parties acting as prudent businessmen. This test requires that a term can only be implied, if it is necessary to give business efficacy to the contract, to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business
- F sense without the term, the courts will not imply the same. It is amply clear that courts can imply a clause only if it is found that the plain and literal meaning given to the expression used in the terms is not in a position to make out the intention of the parties. Reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto.
- G An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying, a term
- H necessary to give business efficacy to the contract, a term which,

although tacit, forms part of the contract. As held in the case of *Nabha Power Ltd.* (supra), for invoking the business efficacy test and carving out an implied condition, not expressly found in the language of the contract, the following five conditions will have to be satisfied: A

- (1) Reasonable and equitable;
- (2) Necessary to give business efficacy to the contract; B
- (3) It goes without saying i.e. the Officious Bystander Test;
- (4) Capable of clear expression; and
- (5) Must not contradict any express term of the contract. C

21. We have to examine the present case and the correctness or otherwise of the judgment and order passed by the Appellate Tribunal by applying the aforesaid tests.

22. We have hereinbefore reproduced Articles 3 and 4 of the PPA. Article 3 provides for conditions subsequent to be satisfied by the seller and the procurer. Clause (ii) of Article 3.1.2 requires the seller to have executed FSA and provided the copies of the same to the procurer within 12 months from the effective date or 14 months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the procurer's failure to comply with its obligations under the PPA or by any force majeure event. Article 3.4 provides for consequences of non-fulfilment of conditions under Article 3.1; sub-clauses (i) and (ii) of Article 3.4.2 specifically provide that if fulfilment of any of the conditions specified in Article 3.1.2 is delayed beyond the period of 3 months and the seller fails to furnish any additional performance guarantee to the procurer or if the seller after furnishing additional performance guarantee to the procurer fails to fulfil the conditions specified in Article 3.1.2 for a period of 8 months beyond the period specified therein, both the procurer or the seller shall have the right to terminate the agreement by giving a notice to the other party in writing of at least 7 days. The only requirement is that in the event of termination either by the procurer or the seller, the seller shall be liable to pay the procurer an amount equivalent to Rs. 10 lakhs per MW of the contracted capacity as liquidated damages. It is thus clear that in the event of non-compliance with any of the requirements as provided in Article 3.1.2 within the period specified in the said Article, an option is available both to the seller or the procurer to terminate the PPA. The D
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- A only requirement is that, in either of the situations, the liability would be only on the seller to pay the liquidated damages at the rate of Rs. 10 lakhs per MW.

23. The Appellate Tribunal has held that only in the event there is an agreement between the parties that any of the terms specified in Article 3.1.2 is violated, the provisions of Article 3.4.2 can be invoked.
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24. It will be relevant to quote certain observations made in the judgment of the Appellate Tribunal which are as follows:

- C “85. The perusal of Article 3.1.2 of the PPA would make it clear that the Appellant undertook to perform the condition subsequent to the execution of the Power Purchase Agreement. The Seller’s right to terminate the Power Purchase Agreement as mentioned above can only arise upon the Procurer’s default in complying with its obligation under Article 3.1.2.

- D ...
- 89.(iii) Article 3.4.2 provides a situation under which the Power Purchase Agreement can be terminated either by the Procurer or by the Seller only when the events provided in Article 3.4.2 (i) and (ii) arise or occur. Although Article 3.4.2 appears to provide a right to both the parties to terminate the PPA on happening of such events specified in Article 3.4.2 (i) and (ii), the same has to be read and interpreted along with the other Articles of the PPA. Article 3.4.2 further provides that the Seller shall be liable to pay the Procurer an amount of Rs.10 Lakhs per MW as liquidated damages if the Procurer or the Seller elects to terminate the agreement on happening of events specified in the earlier part of the Article 3.4.2. From the reading of the said Article 3.4.2, it is clear that either party can terminate the PPA, if the events specified in Article 3.4.2 (i) and (ii) occur and in case of such termination by either party, the Seller alone has the obligation to pay liquidated damages.
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- 89(vi) If the seller fails to fulfill the conditions specified in Article 3.1.2, the right to terminate under Article 3.4.2 is invoked by the Procurer. Similarly, the ability of either party to terminate the PPA under Article 3.4.2 will arise only if both the parties accept
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happening of events specified under Article 3.4.2 (i) and (ii). In other words, the termination by the Seller under Article 3.4.2 is possible if both the parties agree to the happening of the events contemplated therein and the Seller is willing to pay the liquidated damages if a dispute arises regarding the event of termination.” A

25. The aforesaid observations of the Appellate Tribunal, in our view, depict a totally erroneous approach. A harmonious reading of Article 3.4.2 and Article 3.1.2 clearly indicates that in the event of non-compliance of any of the conditions as stipulated in Article 3.1.2 within the period prescribed thereunder, either of the parties, i.e., the seller or the procurer have the right to terminate the contract. However, in either of the events, it is the seller’s liability to pay the liquidated damages at the rate of Rs. 10 lakhs per Mega Watt. B C

26. We are of the considered view that the finding of the Appellate Tribunal that the provisions under Article 3.4.2 of the PPA can be invoked only when there is an agreement between the parties that there is violation of any of the conditions specified in Article 3.1.2 of the PPA is totally incorrect. If such an argument is accepted, it will amount to inserting a totally new condition in Article 3.4.2 of the PPA and would amount to re-writing the contract between the parties; it would do total violence to the provisions of Article 3.4.2 of the PPA. It cannot be said to be a condition which is either reasonable or equitable; it also cannot be said to be a condition which is necessary to give business efficacy to the contract; it also cannot be said to be a test which justifies the Officious Bystander Test; it also cannot be said to be a condition which is capable of the clear expression; it is also not a condition which does not contradict any expressed terms of the contract. On the contrary, is a condition which would totally change the tenor of Article 3.4.2 of the PPA. We are, therefore, of the considered view that the Appellate Tribunal has grossly erred in coming to the conclusion that Article 3.4.2 of the PPA could be invoked only in the event that there is an agreement with regard to violation of any of the conditions in Article 3.1.2. D E F

27. The Tribunal, while arriving at its finding, has held that agreement has to be read as a whole and if it is read as whole and if Articles 3.4.2 and 3.1.2 and Article 14 are harmoniously read, then the only conclusion that can be drawn is that provisions of Article 3.4.2 can be invoked, only if there is an agreement between the parties, that the conditions specified G

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- A in Article 3.1.2 have not been complied with. Let us test the correctness of this finding.

28. The Constitution Bench of this Court in the case of *Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal and others* reported in AIR 1962 SC 1044, while construing the entries in the List in

- B Schedule VII of the Constitution has observed thus:

- C “8The Rule of construction adopted by that decision for the purpose of harmonizing the two apparently conflicting entries in the two Lists would equally apply to an apparent conflict between two entries in the same List. Patanjali Sastri, J., as he then was, held in *State of Bombay v. Narothamdas Jethabhai*, 1951 SCR 51 : (AIR 1951 SC69) that the words “administration of justice” and “constitution and organization of all courts” in item one of List II of the Seventh Schedule to the Government of India Act, 1935 must be understood in a restricted sense excluding from their scope “jurisdiction and powers of courts” specifically dealt with in item 2 of List II. In the words of the learned Judge, if such a construction was not given “the wider construction of entry 1 would deprive entry 2 of all its contents and reduce it to useless lumber.” This rule of construction has not been dissented from in any of the subsequent decisions of this Court. It may, therefore, be taken as a well settled rule of construction that every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory.”

- F Though the aforesaid observations are made while construing the entries in the List in Schedule VII and though while interpreting the clauses in the agreement the strict principle of interpretation would not be applicable, the Court can borrow the said principle while interpreting the same. It has been held by this Court that every attempt has to be made to harmonize apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory.

- G 29. Again, while interpreting the provisions of Section 47 and Order XXI, Rule 2 of the CPC, this Court in the case of *Sultana Begum vs. Prem Chand Jain* reported in AIR 1997 SC 1006, has observed thus:

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“12..... On a conspectus of the case law indicated above, the following principles are clearly discernible: A

- (1) It is the duty of the Courts to avoid a head on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonize them. B
- (2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the Court, in spite of its efforts finds it impossible to effect reconciliation between them.
- (3) It has to be borne in mind by all the Courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of “harmonious construction”. C D
- (4) The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a “dead letter” or “useless lumber” is not harmonious construction.
- (5) To harmonize is not to destroy any statutory provision or to render it otiose.” E

(emphasis given)

It could thus be seen that this Court has clearly held that to harmonize is not to destroy any statutory provision or to render it otiose. This principle has been reiterated in the case of *Anwar Hasan Khan vs. Mohammed Shafi and others* reported in AIR 2001 SC 2984. While considering the provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, this Court observed thus : F

“8. It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute has to be gathered from the text, the nature of subject-matter and the purpose of intention of the statute. It is cardinal principle of construction of statute that effort should be made in construing its provisions by avoiding the conflict and adopting a harmonious construction. The statute or rules made G H

- A thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provision to a “dead letter” is not harmonious construction.....”
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30. Applying the aforesaid principles to various clauses of the agreement, an attempt has to be made to harmoniously read the provisions of Articles 3.1.2, 3.4.2 and 14.1, 14.2, 14.3 and 14.4. An attempt has also to be made to give effect to all the provisions. If so read, it will be clear that Article 14 deals with various eventualities in which procurer or the seller can terminate the agreement. Article 14.1 provides for termination in the event of various defaults committed by the seller. Article 14.3 provides for procedure to be followed in cases of default by the seller. Article 14.2 provides various grounds with regard to default by procurer. The procedure for termination in cases of default by the procurer has been provided in Article 14.4. Perusal of grounds stated in Articles 14.1 and 14.2 would reveal that these are general in nature. Per contra, provisions of Article 3.4.2 would reveal that termination under this Article can be made only if there is non-compliance with any of the conditions in Article 3.1.2. The power is available to both procurer and seller. However, in either of the cases i.e. termination by seller or termination by procurer, there is a specific provision of damages at the rate of Rs 10 lakhs per MW, whereas consequences of the termination in Articles 14.1 and 14.2 are totally different. As such, effect will have to be given to both the provisions, which are independent of each other.

- F 31. We find, that both the Commission and the Appellate Tribunal have grossly erred in arriving at finding that termination can be effected under Article 3.4.2 only if there is an agreement with regard to non-compliance of condition under Article 3.4.2 by both the parties. If the finding of the Appellate Tribunal is accepted, it will be amounting to making provisions of Article 3.4.2 a dead letter and rendering them otiose.
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32. We further find that the Commission as well as the Appellate Tribunal has lost sight of one another important principle of law. This Court in the case of *J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of Uttar Pradesh*, reported in AIR 1961 SC 1170, while

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construing the provisions of Clause 5(a) and Clause 23 of the U.P. Industrial Disputes Act and the U.P. Government Order issued under the U.P. Industrial Disputes Act, has observed thus :

“(10) Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that cl. 5(a) has no application in a case where a special provisions of cl. 23 are applicable.”

33. The said principle has been reiterated by this Court in its judgment in the case of *Maharashtra State Board of Secondary and Higher Secondary Education and Ors. Vs. Paritosh Bhupeshkumar Sheth and Ors.* reported in (1984) 4 SCC 27. Para 20 of the said judgment reads thus:

“20. We consider that the above approach made by the High Court is totally fallacious and is vitiated by its failure to follow the well established doctrine of interpretation that the provisions contained in a statutory enactment or in rules/regulations framed thereunder have to be so construed as to be in harmony with each other and that where under a specific section or rule a particular subject has received special treatment, such special provision will exclude the applicability of any general provision which might otherwise cover the said topic.....”

34. In the present case, the perusal of various Articles would reveal that provisions under Article 14 are general in nature. The provision under Article 3.4.2 is specific, only to be invoked in the case of non-compliance with any of the conditions as provided under Article 3.1.2. As such, the special provision made in Article 3.4.2 will exclude the applicability of general provisions contained in Article 14 of the contract.

35. After considering the legal position, let us examine some of the factual aspects of the matter. It would be relevant to note that in the bid dated 2.01.2007 submitted by the appellant, it is clearly mentioned that the project is based on coal supply from the GMDC.

36. It will also be relevant to refer to Clause 1.2 of Annexure 3 to the bid document which gives details of the proposed project. Clause 1.2 reads as follows:

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A “1.2 Fuel:

The lead member, Adani Enterprises Ltd. has tied up the indigenous coal requirement of the Project with GMDC, who has been allocated Morga II coal block in the State of Chhatisgarh. Further with a view to ensure supply of fuel with optimum techno-commercial parameters, we have also tied up supply of imported coal with M/s Coal Orbis Trading GMBH, Germany and M/s Kowa Company Ltd. and accordingly executed separate MoUs with them dated 9th Sept 2006 and 21st Dec 2006 respectively.”

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C 37. In the brief summary of the Project given in the said bid document, it has been specifically mentioned by the appellant that the bid was submitted on the basis of indigenous coal supply committed by the GMDC. The bid documents also form part of the PPA between the parties.

D 38. It will be relevant to note that after the communication dated 15.11.2008 by the appellant to the procurer thereby conveying its intention to terminate the PPA in the wake of pending FSA with the GMDC for supply of power under bid No. 2, the Managing Director of Gujarat Urja Vikas Nigam Ltd., the procurer, had addressed a communication to the Principal Secretary, Energy and Petrochemicals Department, Government of Gujarat, requesting it to issue suitable directions since the issue regarding allocation of coal from the mines allocated to the GMDC was within the purview of Government of Gujarat. Thereafter, on 27.02.2009 the Deputy Secretary of the Industries and Mines Department, Government of Gujarat, addressed a communication to the Managing Director of the GMDC. It will be relevant to record the following part of the said letter.

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“(b) So far as Naini block is concerned, GMDC had already given a commitment for supply of coal from Morga-II mines to M/s. Adani Ltd., for a 1000 MW plant on the basis of which M/s. Adani submitted their bid in the competitive tariff bid to GUVNL at Gujarat bus-bar. Considering this aspect and the full availability to the state, 50% block may be given M/s. Adani Ltd and remaining 50% block may be given to Torrent Power Ltd., to exclusively provide power for Gujarat’s need. M/s. Adani and M/s. TPL have to sell power generated from Naini Block exclusively to GUVNL. No merchant sale is to be allowed to anyone else.

2. You are now, therefore requested to go for coal allotment from Morga block with M/s. KSK by way of the detailed FSA and to give 50% coal from Naini block to M/s. Adani and remaining 50% coal to M/s. Torrent Power Ltd., as mentioned above.” A

39. It could thus be clearly seen that even the Government of Gujarat has also clearly indicated that the bid submitted by the appellant in the competitive bid was on the basis of the commitment for supply of coal from Morga-II mines by the GMDC. It has, therefore, requested the Managing Director, GMDC to give 50 per cent of coal from Morga block to the appellant. The State Government had, therefore, requested that the Managing Director of the GMDC to go for coal allotment from Morga block. B C

40. It will also be relevant to note that on 30.12.2009, the Executive (Finance) of the procurer has addressed a letter to the Principal Secretary, Energy and Petrochemicals Department, Government of Gujarat, referring to the letter issued by the appellant on 28.12.2009. After referring to Article 3.4.2 of the PPA, it is stated in the said communication as under: D

“In light of above circumstances Government of Gujarat is requested to impress upon M/s.APL to withdraw the Notice of Termination of PPA dated 2nd February, 2007, executed with GUVNL, for supply of 1000 MW under bid specification no.02/LTPP/2006 and also impress upon GMDC for prompt necessary action for execution of FSA with M/s. APL to ensure supply of 1000 MW power to GUVNL at competitive rate to meet future demand of the state. Further Government of Gujarat is requested to kindly issue suitable directives to GUVNL for further necessary action in the matter.” E F

41. It could thus be seen that, even the procurer was aware that the bid of the appellant was on the basis of the commitment by the GMDC to supply the indigenous coal.

42. In view of the aforesaid, it could be seen that the appellant as well as the procurer and also the Government of Gujarat clearly understood that the bid submitted by the appellant was on the basis of the commitment of the GMDC to supply indigenous coal to it. It will be pertinent to mention that the appellant had sent notices intimating its intention to terminate the PPA on account of non-finalisation of FSA G H

- A with the GMDC and also terminate the contract much prior to commissioning of the project and commencement of power supply to the procurer. Annexure III to the PPA would itself show that expected commercial date of operation is January, 2012, whereas termination is *vide* notice dated 28.12.2009. The materials placed on record would reveal that the appellant has supplied the power at the rate of Rs. 2.35
- B per unit (as per bid) after the PPA was terminated by it, to abide by the directions issued by the Commission. It may not be out of place to mention that the appellant was a successful bidder in respect of the two bids i.e. bid No. 1 and bid No. 2. Insofar as bid No. 2, which is the subject matter of the present proceedings, the bid of the appellant was accepted at the
- C rate of Rs. 2.35 per unit whereas in the same bidding process, bid of the appellant for bid No. 1 was accepted at the rate of Rs. 2.89 per unit. The said Project was to be executed on the basis of imported coal supply. It is thus clear that the parties were very much aware that bid of the purchaser for bid No. 1 which was at a much lower price than the price for bid No. 2 was on account of the commitment to the appellant from
- D the GMDC that it would supply indigenous coal to it.

43. In that view of the matter, after the GMDC resiling from its commitment and refusing to enter into FSA with the appellant, the appellant was justified in invoking Article 3.4.2 of the PPA, in view of
- E non-compliance of Condition No. (ii) in Article 3.1.2 since it had failed to produce the Fuel Supply Agreement. It will also be relevant to refer to Paragraph 70 of the judgment of the Appellate Tribunal. Paragraph 70 reads as under:

- “Admittedly, the Seller, the Appellant mentioned in the bid documents that “Adani Enterprises Limited has tied-up indigenous coal requirements of the project with the Gujarat Mineral Development Corporation, who has been allocated Morga-II Block in the State of Chhatisgarh”. The Appellant has also mentioned in the bid documents that with a view to ensure the supply of fuel, they have tied-up supply of imported coal with two foreign
- F Companies and accordingly executed separate Memorandum of Understanding with them dated 9.9.2006 and 21.12.2006.”
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44. In the light of the aforesaid finding, we fail to understand as to how the Appellate Tribunal has come to a finding that the bid of the appellant was not on the basis of the commitment by the GMDC to

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supply indigenous coal. We are of the considered view that the Appellate Tribunal has erred both on facts and in law. We are of the considered view that the appellant was entitled in law as well as on facts to invoke Article 3.4.2 of the PPA and terminate the agreement. A

45. Having held that the termination was legal and valid the question arises as to what relief is to be granted to the appellant. On the basis of the Order of the Commission and the Appellate Tribunal, the appellant is continuing supply of electricity to the respondent No. 2, the procurer, though it is the contention of the appellant that it has been sustaining losses by doing so. B

46. It will be relevant to refer to certain subsequent developments. The appellant had approached this Court by Interlocutory Application No. 4 of 2015 for the following reliefs: C

“(a) to stay the operation of the impugned judgment dated 7.9.2011 and suspend further supply of electricity in terms of the PPA during the pendency of this Appeal. D

(b) in the alternative to prayer (a) above, during the pendency of the accompanying Civil Appeal the Hon’ble Court may direct the Respondent(s) to pay the tariff as per CERC norms for tariff on cost plus basis; and also make the payment from the date of the supply of power under the PPA of the differential amount between the PPA tariff and the tariff as per CERC norms for tariff on cost plus basis on the such terms and condition as this Hon’ble court deems fit as just and proper.” E

47. The said application came up for consideration before the Bench consisting of J. Chelameswar, and Abhay Manohar Sapre, JJ. It appears that in the said I.A. an affidavit dated 23.11.2015 came to be filed on behalf of the respondent No. 2, the procurer. It will be relevant to note the averments made in the affidavit quoted in the Order dated 3.12.2015 passed by this Court. F

“15. I submit that, without prejudice to the rights of the Respondent No.2 to contest the present appeal, the answering Respondent with the approval of Government of Gujarat has already shown its willingness to pay compensatory tariff prospectively (from next month of CERC order i.e. March 2014) subject to paras G

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A 12 and 13 above to resolve the issue by making suitable adjustments in tariff which till date is not implemented because of non acceptance by Appellant and other stakeholders.

16. I say that without prejudice to its rights in the present appeals the Respondent No.2 is willing to implement the decisions of State Govt. for paying compensatory tariff prospectively (from next month of CERC order i.e. March 2014) to resolve the issue by making suitable adjustment in tariff on the directions of the Hon'ble Court. ...”

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48. This Court after hearing the parties observed that insofar as the question of permitting the supplier/procurer to pay the compensatory tariff, as indicated in its counter affidavit is concerned, it requires no permission from this Court and it was for the supplier/procurer to take a decision in accordance with law.

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49. Once we hold that termination is valid and legal, question would arise as to at what rate the appellant is entitled to compensatory tariff from the date of supply of power. Undisputedly, even after the PPA was validly terminated, the appellant continued to take the project to its logical end. After commissioning of the project, it has started supplying electricity to the procurer in accordance with the decision of the Commission and the Appellate Tribunal. The appellant must have incurred huge expenditure on the same. In order to do economic justice, on the principle of business efficacy, the appellant would be entitled for adjustment of cost of the project and would also be entitled to the interest on the expenditure incurred by it for completion of the project. The expenditure towards running of the project after obtaining the coal from the open market would also be required to be taken into consideration. The appellant would also be entitled to the interest on the delay of payment after it receives payment upon determination of the rate which would be determined by the Central Electricity Regulatory Commission (“CERC” for short). However, we find that it will not be appropriate for us to go into that exercise.

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50. Section 62 of the Electricity Act, 2003, provides entire mechanism for determination of the tariff by the CERC. It will also be relevant to note that the CERC (Terms and Conditions of Tariff) Regulations 2009 also consider various factors which are required to be taken into consideration by the CERC while determining the compensatory tariff. We find that it will be appropriate to relegate the

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parties to CERC for determination of the compensatory tariff payable to the appellant from the date of termination of the PPA. After such determination, the procurer would be entitled to adjust the amount if already paid in accordance with affidavit dated 23.11.2015, from the amount so determined by the CERC. A

51. Hence, the following order: B

- (i) The appeal is allowed.
- (ii) The notice of termination of the PPA dated 28.12.2009 is held to be legal and valid. It is also declared that the PPA stood validly terminated with effect from 04.01.2010. C
- (iii) The appellant would be at liberty to approach the CERC for determination of the compensatory tariff, including various aspects mentioned in paragraph 49, payable to it from the date of supply of electricity by it to the procurer. The CERC is directed to decide the said issue in the light of what has been observed by us hereinabove and in the light of the provisions of Section 62 of the Electricity Act so also the CERC (Terms and Conditions of Tariff) Regulations, 2009 within a period of three months from the appellant's approaching it. D E
- (iv) The procurer shall make the payment to the appellant as determined by the CERC within a period of three months from the date of its determination.
- (v) The procurer would be entitled to adjust the amount if already paid by it in pursuance of its affidavit dated 23.11.2015 from the amount so determined by the supplier. The procurer shall be entitled to adjust the balance amount recoverable by it from the appellant towards liquidated damages of Rs. 100 Crore. F
- (vi) No order as to cost. G