PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 37 of 2018
Date of Order: 12.09.2019

Petition under Section 86(1) (f) and other provisions of the Electricity Act, 2003 for quashing of notices dated 25.05.2018 and 26.06.2018.

AND

In the matter of : GVK Power(Goindwal Sahib) Limited, Paigah House, 156-159, Sardar Patel Road, Secunderabad.-540 003. ….Petitioner

Versus

Punjab State Power Corporation Ltd., The Mall, Patiala. ... Respondent

Present Ms. Kusumjit Sidhu, Chairperson
Sh. S.S. Sarna, Member
Ms. Anjuli Chandra, Member

ORDER

GVK Power (Goindwal Sahib) Limited ("**GVK**") filed the present petition seeking quashing of the notices dated 25.05.2018 and 26.06.2018. Punjab State Power Corporation Limited (**"PSPCL"**) issued notice dated 25.05.2018 demanding a sum of Rs 55,03,70,295 as penalty for having availability below 75% during the contract year FY 2017-18 for its 2x250 MW Thermal Power Station located at Goindwal Sahib, Punjab ("**Project**"). PSPCL issued Procurer Preliminary Default Notice dated 26.06.2018 in terms of Article 14.3.1 of the Amended and Restated Power Purchase Agreement dated 26.05.2009 ("**PPA**") executed between GVK and PSPCL, alleging a Seller Event of Default for

the average availability of the Project being below 65% for FY 2017-18.

2. GVK filed an Interim Application No. 1108 of 2018 on 24.09.2018 before the Appellate Tribunal for Electricity ("***Tribunal***") in Appeal No. 218 of 2018 seeking stay of Notice dated 26.06.2018. The Tribunal, vide its Order dated 24.09.2018, disposed of the Interim Application No. 1108 of 2018 and permitted GVK to approach this Commission with directions that this issue be decided expeditiously within 4 weeks from date of the Order. The matter was taken up by the Commission and vide Order dated 22.10.2018 PSPCL was directed to file reply and in the meantime operation of the notice dated 26.06.2018 issued by PSPCL to GVK was stayed. PSPCL filed reply vide memo no. 5949 dated 31.10.2018 and GVK filed rejoinder to the reply of letter dated 04.12.2018. GVK, vide letter dated 10.12.2018, filed additional documents in addition to its rejoinder. The matter was heard on 11.12.2018 and the stay granted vide Order dated 22.10.2018 was extended till final disposal of the matter. After hearing the parties on 07.08.2019, Order was reserved vide Order dated 09.08.2019. During the hearing both the parties requested to file written submissions. PSPCL filed its written submissions vide memo no. 5564 dated 22.08.2019 reiterating its earlier submissions and referred to certain judgments in support of its contentions. GVK submitted its written submissions dated 23.08.2019 reiterating its earlier submissions and also referred to judgments in support of its contentions.

3. The brief background of the case is that:

3.1 On 26.05.2009, GVK entered into the Restated and Amended Power Purchase Agreement ("**PPA**") with PSPCL for supply of power from the Project. The identified source of coal for the Project was the Tokisud Captive Coal Block. However, on 24.08.2014, Hon'ble Supreme Court of India by its judgment in Manohar Lal Sharma vs the Principal Secretary &Ors. [(2014) 9 SCC 516] and subsequent Cancellation Order on 24.09.2014, cancelled all coal linkages and coal blocks/mines allotted by the Standing Linkage Committee including GVK's Tokisud Captive Coal Block. GVK pleaded force majeure in petition No. 33 of 2015 and while some pleas were sent for arbitration, the issue regarding alternative coal was retained by the Commission for adjudication. On 1.02.2016. The Commission issued the following Order:-

".....*The Commission is of the considered opinion that under the circumstances, arrangement of coal for a period of 2 to 2.5 years as an interim measure made by the petitioner is sufficient for the time being. The Commission is of the view that the petitioner may declare the CoD of the Project, if it otherwise meets with and satisfies the terms & conditions of the PPA and qualifies in terms of the State Grid Code, Indian Electricity Grid Code and other statutory requirements. In the meanwhile, the petitioner is directed to make sincere and concerted efforts to arrange long term source of coal for the entire term of the PPA and keep PSPCL informed of the developments in this regard at reasonable intervals. As*

regards the cost to be allowed for the interim coal arranged by the petitioner, the Commission is of the view that in the PPA the same was not to exceed the cost of coal sourced by PSPCL from its captive Pachhawara Coal Block. PSPCL in its letter dated 20.01.2016 has proposed the energy charges for power to be supplied by the Project with the interim arrangement of coal as the minimum landed cost of coal being received by thermal power plants of PSPCL from Coal India Ltd. As per the information available with the Commission, even though the Pachhawara Coal Block has been re-allotted to PSPCL, the same is yet to become operational. Accordingly, the Commission holds that the petitioner shall be paid, the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month, alongwith the actual transportation charges paid by the petitioner to the Indian railways for transporting the coal to the Project from the port / mine in case of imported / domestic coal as the case may be or the actual cost of coal procured by the petitioner, whichever is less. PSPCL may, if it so desires, participate in their interim coal procurement process undertaken by the petitioner who shall extend full co-operation in this regard to PSPCL.

The Commission holds that this arrangement is purely temporary and the petitioner will arrange the long term linkage of coal at the earliest or successfully bid for a mine in the bidding to be conducted by Govt. of India in near future and keep PSPCL abreast of the latest developments in this

regard from time to time. The Commission further holds that the above decision will not in any way affect or prejudice the arbitration proceedings and / or decision in the arbitration proceedings."

This was challenged in appeal by PSPCL vide appeal No. 68 and 69 of 2016. The matter is sub-judice.

3.2 The Arbitration Tribunal has given its award holding that the cancellation of the coal block is an event of force majeure and change in law. This matter has also been challenged by PSPCL before the District and commercial Court, Patiala. This matter is also sub-judice.

3.3 GVK commissioned unit-I of the project on 06.04.2016 and unit-II on 16.04.2016. A year later on 26.06.2017 PSPCL issued notice to GVK levying a penalty of Rs. 1,13,37,88,189 for having availability less than 75% in the FY 2016-17. This was challenged by GVK vide petition No. 45 of 2017. The Commission decided this petition against GVK vide Order dated 21.05.2018. GVK then filed appeal No. 218 of 2018 before the APTEL.

3.4 Since this matter is about penalty imposed on GVK for not achieving 75% and 65% availability, It would be appropriate to reproduce the relevant clauses. The amended and Restated PPA contains the following clauses regarding penalty for not achieving 75% and 65% availability.

Article 1.2 of Schedule 6 : Tariff

"Monthly Tariff Payment

1.2.1 Components of Monthly Tariff Payment

The Monthly Bill for any Month in a Contract Year shall consist of the following: Monthly Capacity Charge Payment in accordance with Article 1.2.2 below;

i) Monthly Energy Charge for Scheduled Energy in accordance with Article 1.2.3 below;

ii) Incentive Payment determined in accordance with Article 1.2.4 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);

iii) Penalty Payment determined in accordance with Article 1.2.5 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);

iv) Penalty Payment determined in accordance with Article 1.2.8 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year)"

"1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year

In case the Availability for a Contract Year is less than 75% the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh) for all months in the Contract Year applied on the energy (in kwh) corresponding to the differences between 75% and

Availability during such Contract Year.

Article 14.3 Procedure for cases of Seller Event of Default

"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 (90) days or such longer period as the Parties may agree, shall apply.

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.

14.3.4 Within a period of seven (7) days following the expiry of the Consultation Period 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, 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 Lenders exercising their rights if it is in consonance with provisions of Schedule 10. 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."

4. GVK's Submissions

PSPCL issued a notice to GVK on 25.05.2018 for not achieving 75% availability in the contract year 2017-18. GVK submitted that the two parties had agreed on the payment in instalments of the penalty of Rs 55,03,70,295. However, having issued this notice and the two parties having agreed to the payment of the penalty in instalments, PSPCL could not have issued the Procurer Preliminary Default notice dated 26.06.2018 to GVK for achieving availability less than 65% for FY 2017-18.

Counsel for GVK submitted that after the Commission's judgment dated 01.02.2016 in petition No. 33 of 2015, GVK tried to procure coal from Africa and other sources, but was **obstructed** in these efforts by PSPCL. Eventually GVK was successful in the e-auction held in Sep 2017 under Scheme to Harness & Allocate Koyla (Coal) Transparently in India, 2017 (SHAKTI) and was provisionally allotted (SP) 1.7 MTPA of G 11 grade coal from CIL in Jharkhand and 6300 TPA of G6 grade coal from SECL Korea Rewa in Chattisgarh. On 01.02.18 GVK and PSPCL executed the supplementary PPA to include this coal and supply of coal under Shakti 2017 commenced on 01.03.2018.

GVK contended that:-

i) PSPCL cannot exercise its rights to alternate reliefs simultaneously. PSPCL has recovered penalties from GVK for low availability for FY 2016-17 by way of Notice dated 29.09.2017 and FY 2017-18 in terms of Clause 1.2.1(iv) and

Clause 1.2.5 of Schedule 6 of the Restated and Amended PPA for low availability of the Project as under:

Particulars	***FY 2016-17***	***FY 2017-18***
Penalty for availability Below 75 %	Rs.1,13,37,88,189	Rs.55,03,70,295
Interest against penalty for the period	Rs.10,62,32,935	Rs.1,57,69,007
Total Levy	Rs.1,24,00,21,124	Rs.56,61,39,302
Amount recovered as on date	Rs.124, 00, 21,124	Rs.23, 59.17,127
Total amounts recovered as on date - Rs 147,59,38,251		

In terms of Clause 1.2.5 of Schedule 6 of the PPA, the penalty amount for low availability is calculated at the rate of 20% simple capacity charge for all months in a contract year corresponding to the difference between 75% and availability during such period. Once PSPCL has levied such penalty and recovered the same, it cannot at the same time seek recourse under Article 14.3.4 of the PPA seeking *inter-alia*, reduction of capacity charge by 20% for the same period. It was submitted that PSPCL cannot choose to exercise both its alternative rights against GVK for the same alleged default.

ii) GVK submitted that in terms of doctrine of election, PSPCL may only elect to exercise one of its rights against GVK's alleged default under the PPA as held by the Hon'ble Supreme Court in the following cases:

a) Beepathumma and Ors. v. V.S. Kadambolithaya and Ors. 1964 (5) SCR 836:

> *"20. The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland -*

"That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."

(see Maitland's Lectures on Equity, Lecture 18) The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows:

"Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.....

That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

(b) *KaramKapahi and Ors vs Lal Chand Public Charitable Trust* 2010 (4) UJ 1783:

65. In the old equity case of Streatfield v. Streatfield (White and Tudor's Leading Cases in Equity, 9th Edition, Volume I, 1928) this principle has been discussed in words which are so apt and elegant that I better quote them:

Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both (f). The principle is stated thus in Jarman on Wills (g): "That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it" (h). The principle of the doctrine of election is now well settled.

c) This has been confirmed by the Hon'ble Supreme Court in *Mumbai International Airport (P) Ltd vs Golden Chariot Airport* reported as (2010) 10 SCC 422, as under:

> **"***56. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in Benjamin Scarf v. Alfred George Jardine (1881-82) 7 AC 345, wherein the learned Lord formulated "...a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act...the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election***.***
>
> *…*
>
> *59. In Harrison vs. Wells, 1966 (3) All ER 524, Salmon LJ, in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Lord Justice Salmon byholding "it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forw*ard and seek to evade his obligations under the lease by denying that the purported landlord was the landlord"."

Therefore, PSPCL could not exercise both rights i.e. levy penalty amounts calculated at the rate of 20% of the capacity charges for availability less than 75% of the Project for FY 2017-18 under clause 1.2.1(iv) and clause 1.2.5 of schedule 6 of the restated and amended PPA and also seek a further

reduction of capacity charges to the tune of 20% for the same period for the default of availability less than 65% in consecutive months as per Article 14.3.

iii) According to GVK Article 14.3 envisages that upon the occurrence of any Seller Event of Default, PSPCL will send a Preliminary Default Notice specifying reasonable details and the circumstances in which the said notice was issued. Thereafter, a 90-day consultation period commences during which parties are to consult in order to resolve/remedy the event of default. PSPCL has a right against GVK for recovering penalty or seek substitution of GVK by lenders or have the capacity charges reduced by 20% for the period of default, In the present case, Since PSPCL has already levied penalty for low availability in FY 2017-18 and GVK has paid the same, therefore PSPCL cannot invoke Article 14.3 for the same period of default and seek reduction of capacity charges by a further 20%.

iv) GVK's counsel denied PSPCL's contentions that the scope of applicability of Clause 1.2.5 of Schedule 6 and Article 14.1 (iv) read with Article 14.3.4 are different on account of the fact that Clause 1.2.5 of Schedule 6 refers to "contract year" and Article 14 (iv) makes reference to 12 consecutive months or shortfall in 12 months spread over any 36 months Counsel submitted that Article 14.1(iv) refers to "*Average Availability of sixty five percent (65%)*" and not month wise as contended by PSPCL. In the event PSPCL's contentions are accepted by this Commission, then the words *"Average Availability"* in Article 14.1(iv) will be rendered redundant.

Furthermore, PSPCL's contention that the rights under the Restated and Amended PPA are not in derogation of each other but are to be exercised in addition to one another is misplaced. Article 14.3 is a general provision in which one of the defaults is low availability of the Project. On the other hand, Clause 1.2.5 of Schedule 6 is a specific provision on low availability. Therefore, once PSPCL has levied penalty in terms of Clause 1.2.5 of Schedule 6 of the Restated and Amended PPA, application of Article 14.3 is precluded. Such interpretation is in line with the principle, that a specific provision of the contract overrides the general provision.

v) *PSPCL has not demonstrated actual loss incurred on account of alleged shortfall in availability.* GVK contended that PSPCL has failed to demonstrate actual loss caused to it on account of the alleged low availability of the Project. No evidence has been shown by PSPCL that it had to procure power from alternate sources to bridge the shortfall in supply of power. It is settled law that even if a provision/clause of an agreement provides for penalty, the same has to be considered on account of the actual loss caused to the party and compensation/penalty is to be granted accordingly. In cases wherein provisions provide for penalty amounts to be imposed on account of breach of contract, a mere claim of damages does not give rise to debt until the liability is adjudicated and damages are assessed by a Court as held by the Hon'ble Supreme Court of India in the case of *Fateh Chand vs Balkishan Das*, reported as(1964) 1 SCR 515, as under:

"15. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class.

The measure of damages in the case of breach of a stipulation by way of penalty is by s. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

Similarly, in the case of Union of India (UOI) vs. Raman Iron Foundry and Ors. reported as (1974) 2 SCC 231, it was held as under:

9. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages

under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties : a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eoinstanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due From the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages.

Further, the Hon'ble Supreme Court in Kailash Nath Associates vs. Delhi Development Authority as (2015) 4 SCC 136 held as under:

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

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

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

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

4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

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

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

In view of the above observations of the Hon'ble Supreme Court, GVK submitted that PSPCL is required to quantify and prove the loss it has incurred on account of the alleged non-availability of the Project. Evidence of actual damage suffered is *sine qua non* for even stipulations of penalty. But, PSPCL has not placed on record any material or evidence to quantify the damages being claimed from GVK. PSPCL in its reply has merely made a bald statement that penalty amounts are for the purpose of procuring electricity from alternate sources to meet the demand in the state of Punjab.

vi) Counsel for GVK submitted that PSPCL cannot take mutually destructive pleas by way of Appeal No. 68 & 69 of 2016. PSPCL had challenged Order dated 01.02.2016 passed by this Commission during pendency of the Arbitral proceedings, putting in place an interim arrangement for procurement of coal from alternate sources. In the said Appeals, PSPCL has, inter-alia challenged the commissioning of the Project on the ground that the Project could not have been commissioned without tying up a long-term source of coal for the entire duration of the PPA. Therefore, on one hand, PSPCL has challenged the commissioning of the Project and on the other hand PSPCL has:

i) Levied penalties for low availability of the Project on GVK for FY 2016-17 and FY 2017-18

ii) Recovered the same by way of monthly deductions from amounts due and payable from GVK

iii) Claimed Seller's Event of Default on part of GVK by way of Notice dated 26.06.2018.

PSPCL cannot approbate and reprobate, assume inconsistent stands or blow hot and cold to the detriment of GVK, as held by the Hon'ble Supreme Court of India in the following judgments:

a) *Mumbai International Airport Pvt Ltd vs Golden Chariot Airport and Anr (2010) 10 SCC 422* (45, 49, 50).

b) Joint Action Committee of Air India Pilot's Association of India and Others vs Director General of Civil Aviation and Others (2011) 5 SCC 435 (10-12)

c) *Judgment dated 08.10.2018 in Civil Appeal No. 10322 of 2018 titledSuzuki ParasrampuriaSuitingsPvt. Ltd. v. The official liquidator of Mahendra Petrochemicals Ltd* (12-13).

vii) It was submitted by GVK that low availability of the Project is for reasons beyond its control and that PSPCL is wrong in its contention that GVK had sought permission of the Commission to declare COD of the Project and same was granted by way of Order dated 01.02.2016. GVK submitted that it did not seek permission from the Commission to declare COD nor did this Hon'ble Commission accord such permission to GVK as evident from the following observations in Order dated 01.02.2016:

"….The Commission is of the view that the petitioner may declare the CoD of the Project, if it otherwise meets with and satisfies the terms & conditions of the PPA and qualifies in terms of the State Grid Code, Indian Electricity Grid Code and other statutory requirements…."

viii) GVK contended that no provision requires GVK to seek the Commission's permission under law or in terms of the PPA to declare the COD of the Project. GVK was not precluded from declaring COD as long as it satisfied the terms and conditions of the PPA and qualifies in terms of the State Grid Code, Indian Electricity Grid Code and other statutory requirements. The commissioning of the Project was not premised on having a long-term source of coal for the Project. The issue of low availability of the Project in the year FY 2017-18 is a direct consequence of the following:

(i) Cancellation of captive coal block allocated to GVK under the PPA, being Force Maejure events as held by the Arbitral Tribunal constituted by this Commission in its award dated 10.04.2017 as under

"141. The last question would be "did the Claimant had any control over the Coal Order or enactment of Coal Act". Clearly the answer would be NO. Claimant had no control over passing of the Coal Order and subsequent enactment of Coal Act. Therefore, acquisition of Coal Blocks by GoIas a result of Coal Order and subsequent enactment of Coal Act squarely fits into the term "Force Majeure" defined by Restated and Amended PPA

142. In the light of above we hold that Cancellation of Coal Blocks pursuant to the judgment of the Supreme Court on 25.08.2014 and Promulgation of Ordinance are a Change in Law Events, according to Article 13 of Power Purchase Agreement as well as a Force Majeure Events, according to Article 12 of Power Purchase Agreement

146. ….We have already decided that the issues relating to "Change in Law" and "Force Majeure" in favour of the Claimant viz., Cancellation of Coal Blocks pursuant to Coal Judgment and Order of Hon"ble Supreme Court and

subsequent Promulgation of Ordinance are "Change in Law" events as well as "Force Majeure" events."

ii) PSPCL's actions in obstructing the procurement of coal by GVK from alternate sources.

ix) Referring to the Arbitral Award dated 10.04.2017, GVK pointed out that in terms of the amended Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**), there is no automatic stay on the enforcement of an arbitral award upon filing of an Application under Section 34 of the Arbitration Act. The award remains in force and of binding efficacy in terms of the Hon'ble Supreme Court's judgment in *Board of Control for Cricket in India vs Kochi Cricket Pvt. Ltd and etc*. reported as (2018) 6 SCC 287) (paras 5,6,18,25, 27,63, 65). Therefore, the findings of the Arbitral Award dated 10.04.2017 ought to be given effect to. Accordingly, once non-availability of fuel has been held as a Force Majeure Event, GVK is relieved of its obligations to the extent performance of obligations were affected by Force Majeure in terms of Article 12.7 of the PPA.

x) GVK stated that since non-availability of fuel has been held to be a Force Majeure Event, GVK is excused from performance of its obligations under the PPA till such time that fuel is available. Therefore, the period for which fuel was unavailable must be included in computation of availability of the Project that in spite the best efforts on part of GVK to secure long-term linkage of coal in accordance with the Commission's directions in Order dated 01.02.2016, the long-term linkage of coal was finalized only on 01.02.2018

pursuant to the signing of the Supplementary PPA. The supply of coal under Shakti 2017 commenced only in March 2018. Therefore, the period during which there was no long term linkage of coal in the FY 2017-18 ought to be omitted while computing availability of the Project.

xi) GVK stated that PSPCL has wrongly contended that the Arbitral Tribunal constituted by this Hon'ble Commission was only dealing with the issue "*whether the non-availability of firm source, cancellation of coal block would entitle GVK to postpone the COD of the generating station*". The Arbitral Tribunal was constituted vide order dated 12.08.2015, to decide upon the following issues, as under:

(a) Declare that the Cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Change in Law Event in terms of Article 13 of the PPA.

(b) Declare that the Promulgation of the Ordinance is a Change in Law event in terms of Article 13 of the PPA.

(c) Declare that the Cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Force Majeure Event in terms of Article 12 of the PPA.

(d) Declare that the Promulgation of the Ordinance is a Force Majeure Event in terms of Article 12 of the PPA.

(e) Devise an alternate mechanism for the sourcing of Fuel in terms of the suggestions provided by the Petitioner in Paragraph 109 to 115 above including necessary amendments to the Amended and Restated PPA.

(f) Grant consequential extension of SCOD till the issue of procurement of fuel is decided by this Commission.

…

xii) The Arbitral Tribunal in its award dated 10.04.2017 has noted and held

> ***"****We have already decided that the issues relating to "Change in Law" and "Force Majeure" in favour of the Claimant viz., Cancellation of Coal Blocks pursuant to Coal Judgment and Order of Hon'ble Supreme Court and subsequent Promulgation of Ordinance are "Change in Law" events as well as "Force Majeure" events. Accordingly, the Claimant/Petitioner is entitled for extension of SCOD from date of Coal Order till COD is actually achieved. Parties to bear their respective costs."*

It is evident from the foregoing that the issue of shortage of coal in the operating period of the Project was specifically raised before the Hon'ble Tribunal. The Arbitral Tribunal noted that GVK could not generate electricity in the absence of coal. Therefore, in terms of the relief sought in Petition No. 33 of 2015, as well as this Commission's order dated 12.08.2015 and the Award dated 10.04.2017, it is evident that the relief for declaration of cancellation of coal blocks amounting to an event of force majeure is separate from the consequential relief of extension of SCOD. The Arbitral Tribunal has decided issue no. (c) in terms of Paragraph 142 quoted above, and the issue no. (f) has been consequently decided in favour of GVK for extension of SCOD.

xiii) GVK submitted that the reasoning and the judgment of the Arbitral Tribunal cannot be limited in terms of the consequential relief, since the Arbitral Tribunal arrived at the finding of force majeure after careful consideration of the facts and circumstances in the present case. Accordingly,

once non-availability of fuel, as a result of cancellation of coal blocks has been held to be a Force Majeure Event, the said finding would also be applicable to the non-availability of coal during operating period. GVK therefore submitted that it was relieved of its obligations to the extent of performance of obligations were affected by Force Majeure in terms of Article 12.7 of the PPA, as under:

"*12.7 Available Relief for a Force Majeure Event*

Subject to this Article 12:

(a) no Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered 'or delayed due to a Force Majeure Event;"

Since the low availability is due to unavailability of coal as a result of the cancellation of coal block that was allocated to GVK, GVK's obligation as per Paragraph 1.2.5 of Schedule 6 of the PPA and any default as per Article 14.1(iv) ought to be excused on account of the Arbitral Tribunal's findings on force majeure. It is submitted that non-availability of coal has been held to be force majeure and the force majeure provisions would be applicable to non-availability of coal during the operating period as well. The findings on the issue of force majeure are binding on this Commission and the same ought to be given effect in terms of the BCCI Case.

xiv) PSPCL's contention that GVK cannot claim shortage of coal since GVK had proceeded with the commissioning of the Project is misplaced. It is submitted that while GVK had represented that it had arranged means for sourcing coal for

about 2 to 2.5 years, the same could not be utilised due to the interference and inaction of PSPCL. It was submitted that contrary to PSPCL's contention, this Commission did not specifically approve the quantity of coal to be procured by GVK. It is submitted that GVK could not procure the coal as a result of PSPCL's own inactions. When GVK approached it on 10.03.16, 14.04.16, 04.05.16, 16 and 17 06,16, and 31.03.17, PSPCL either refused to participate or laid conditions or did not reply. GVK in any case went ahead and procured coal even though it had to incur penalties.

xv) In this context, it is pertinent to note that GVK had procured imported coal from June 2018 onwards in order to achieve 100% availability as requested by PSPCL vide letter dated 28.05.2018 on account of paddy season. The coal allocation under Shakti 2017 being sufficient only for 62% PLF. It is submitted that GVK had sought PSPCL's permission for using imported coal vide letter dated 12.06.2018 and letter dated 27.06.2018. However, PSPCL has not paid any amounts for such imported coal procured by GVK, contending that PSPCL has not authorized the same.

xvi) In view of the foregoing, it was submitted that PSPCL has obstructed the process of procurement of coal, and the non-availability of fuel has occurred due to PSPCL's unwarranted intervention to procure coal from alternate sources. In the circumstances, PSPCL cannot be allowed to take advantage of its own wrong by seeking to reduce capacity charges by a further 20% for the period of default or seek substitution of

GVK as per the case law in the following cases:-

a) *Nirmala Anand v. Advent Corporation (P) Ltd, (2002) 5 SCC 481* at para 45:

b) *Eureka Forbes v. Allahabad Bank, (2010) 6 SCC 193 at para 66:*

xvii) GVK submitted that this Commission, by way of its Order dated 21.05.2018 in Petition No. 45 of 2017 has held that the shortfall in availability of the Project during FY 16-17 was on account of GVK and accordingly upheld the penalty of Rs.1,13,37,88,189 levied by PSPCL on GVK in terms of Clause 1.2.1(iv) of Schedule 6 read with Clause 1.2.5 of the PPA.

xviii) GVK submitted that Substitution of GVK would be contrary to the principles enshrined in Section 61 of the Electricity Act, *2003.* GVK has undertaken significant investment in commissioning and operating the Project and has corresponding debt repayment obligations. Accordingly, in the event of the exercise of substitution rights by the Lenders, GVK will be ousted from its own Project. Alternatively, the capacity charges of GVK would be reduced by a further 20% at the option of PSPCL. It is submitted that the such substitution and ousting of GVK or reduction in capacity charges, would be contrary to the principles of efficiency, good performance and optimum investment, especially when PSPCL has already recovered penalties from GVK for shortfall in availability for the years FY 2016-17 and FY 2017-18.

5. PSPCL's Submissions.

i) According to PSPCL the dispute raised by the petitioner is that the availability fell below 65% due to non-availability of coal, which is alleged to be either due to force majeure reasons or alleged actions/in-action on the part of PSPCL. The petitioner has further alleged that since the right under Article 1.2.5 of schedule 6 of the PPA has been exercised for levy of penalty for short-availability, there cannot be any exercise of right under Article 14.3.4 read with Article 14.1 (iv) of the PPA. The rights provided in various clauses of the PPA are not in derogation of one another. Clause 1.2.5 of schedule 6 or Article 14.3 read with clause 14.1 (iv) of the PPA do not provide that the rights would be in the alternative or exercise of right under one clause precludes the exercise of the rights under the other clause. The scope and applicability of the said provisions of the PPA are completely different and do not even overlap in their operation. Clause 1.2.5 of schedule 6 the PPA applies for shortfall in availability for a contract year being less than 75%. The expression "contract year" used in the above clause is defined under the PPA as a financial year beginning form April 1 to March 31. In terms of the above provision in the PPA, if during the contract year, the availability falls, the penalty in terms of the said clause 1.2.5 of schedule 6 is payable. This clause applies when for the contract year as a whole, the availability of 75% is not reached. As against the above, the scope of applicability of Article 14.3.4 read with Article 14.1 (iv) of the PPA is completely different. The expression used in Article

14.1 (iv) is the failure to reach average availability of 65% for a period of 12 consecutive months. In terms of the above, the shortfall in availability needs to be there for each month and for consecutive period of 12 months. In case of non consecutive months the shortfall in 12 months spreads over any 36 months. The scope of applicability of Article 14.1 (iv) is not a contract year. The consecutive period of 12 months could be partly within one contract year and partly within another contract year. This by itself, establishes that the scope and applicability of Article 14.1 (iv) read with Article 14.3.4 is completely different from that of Clause 1.2.5 of schedule 6 of the PPA.

ii) The amount in terms of clause 1.2.5 of schedule 6 is liquidated in nature and is not subject to any adjudication on the question of calculation. The said amount is primarily for the purpose that PSPCL is required to procure power from various sources to meet the demand in the state as inadequate generation by the generator would result in PSPCL having to procure electricity from other sources. The amount is by way of reduction in tariff payable for the year in question. The tariff that the petitioner is entitled to get in the year in question is itself reduced on account of the lower generation by the petitioner. The petitioner was liable to raise the monthly invoice for the month of April 2018 after including the quantum of penalty for the year 2017-18, in terms of clause 1.2.1 of schedule 6 to PPA. In view of the failure in the part of the petitioner to comply with the said provision in the PPA, PSPCL by communication dated

25.05.2018 stated that the bill for the month of April 2018 would be admitted considering the penalty amount of about Rs. 55 Crores in terms of Article 1.2.5 read with Article 1.2.1 (iv) of schedule 6 to the PPA. The petitioner by communication dated 5.06.2018 sought for accommodation from PSPCL for recovery of the said penalty over a period of 10 months. Considering the request of the petitioner PSPCL agreed to recover the penalty amount of Rs. 55 Crores over a period of 10 months in equal monthly instalments together with interest. In terms of the above, there is already an arrangement between the parties in regard to recovery of penalty in terms of Article 1.2.5 of schedule 6 of PPA. Having taken the accommodation from PSPCL, the petitioner now cannot deny its liability to pay in terms of Article 1.2.5 of schedule 6 to the PPA.

iii) With regard to the notice issued under Article 14.3.4 of the PPA it is not in dispute between the parties that the average availability of power for the 12 consecutive months from April, 2017 to March, 2018 was less than 65%. It cannot be the contention of the petitioner that the contractual rights and Article 14.3.4 ought not to be exercised merely because it will cause hardship to the petitioner or otherwise that the lenders have a right to substitute the project, In fact there is even an alternative provided that in case the lenders do not substitute the project, the capacity charges for the period in issue would be reduced by 20%.

iv) On the contention of the petitioner that the generation was inadequate due to non-availability of coal, it is stated that the

petitioner has sought the specific direction from the Commission seeking permission to commission the generating station and begin generation of electricity without having a firm coal supply agreement. The arbitral tribunal was only dealing with the issue whether the non availability of firm source, cancellation of coal block, would entitle the petitioner to postpone the COD of the generating station. The arbitral tribunal has granted leave to the petitioner by holding that the scheduled COD should be postponed till the date of actual COD on account of cancellation of the Coal block. Therefore, the petitioner was not required to declare COD and could have postponed the COD till such time the coal source was available, without payment of any liquidated damages to PSPCL. On the other hand, with the position of Coal availability fully known, the petitioner sought to declare COD based on interim arrangement of coal. The said proposal of the petitioner was objected to by PSPCL on the specific grounds that the petitioner cannot declare COD of the project without having the firm source of coal supply as per the terms of the PPA. However, the petitioner declared commercial operation of the generating station to begin generation of electricity based on interim arrangement of coal, which was allowed by the Commission subject to the concurrence of PSPCL in the interim coal procurement process. The petitioner took the conscious decision to proceed with the COD of the project and cannot now take the position that the generation is not possible due to non availability of coal. There is no change in the factual or legal

position since when the petitioner took the decision to declare COD. Therefore there cannot be any force majeure as claimed by the petitioner.

v) The contention of the petitioner that PSPCL has prevented the procurement of coal is also baseless and misconceived. The petitioner had represented before the Commission that it had made arrangements for procurement of coal for the interim measure and for 2 to 2.5 years. It was on this basis that permission for COD on the interim coal arrangement was approved by the Commission vide order dated 01.02.2016. Having taken the specific approval for the Commission, it is not open to the petitioner to plead non-availability of coal as a force majeure event. For future procurement the Commission permitted PSPCL to participate specifically stating that "PSPCL may, if it so desires, participate in their interim coal procurement process undertaken by the petitioner who shall extend full co-operation in this regard to PSPCL."

vi) The contention of the petitioner that PSPCL in the meeting on 15.03.2016 had required the return of coal is false and contrary to the facts on record. On the other hand the discussion between the parties with regard to future procurement from Coal India sources through e-auction in response to the letter dated 14.04.2016 of the petitioner PSPCL vide letter dated 3.05.2017 and with reference to the meeting held on 15.03.2017 stated that alternate coal may be procured through open press tender. It is unbelievable for the petitioner to contend that based on an oral discussion

with junior Office an entire ship was sent back to the prejudice of the petitioner with nothing on record. This is also established by the fact that petitioner has procured coal from other sources in the year without any approval from PSPCL. It is not the case of the petitioner that no coal is procured unless specifically approved by PSPCL. The petitioner did not off-take the coal as shipped for its own reasons possible on account of non-availability of funds, it was in no manner attributable to PSPCL. The Commission has already put in place a detail mechanism for procurement of alternative Coal by TSPL and NPL. PSPCL had only communicated to the petitioner vide letter dated 03.05.2016 that the coal may be procured in terms of process of procurement followed for other IPPs i.e NPL and TSPL. There can be no objection whatsoever for PSPCL in suggesting that the petitioner may follow the same procedure in the present case also.

vii) PSPCL has paid the tariff in terms of the Order of the Commission. PSPCL has not taken the position that no tariff would be payable as the coal procurement is not proper. The attempt of the petitioner to attribute the non-availability of coal to PSPCL is not justified.

viii) The allegation regarding the coal allocation under the Shakti scheme is also misconceived. PSPCL has fully cooperated with the petitioner with regard to amendment of the PPA for the purposes of the allocation of coal under the Shakti scheme. The supplemental PPA as agreed between the parties has been executed. The sole consideration for the allocation of coal under the Shakti scheme was that a

discount is to be provided to the procurer. PSPCL has challenged the declaration of COD of the generating station by the petitioner. This however, does not mean that COD is not to be accepted in the mean time or that penalty for short availability does not arise. There is no merit in the petition and the same is liable to be dismissed with exemplary costs.

6. Observations, Findings and Decision

6.1.1 The Commission has examined the petition, the reply submitted by PSPCL, the rejoinder filed by GVK, additional submissions/ documents and the written submissions filed by the parties. GVK has prayed as under:

a) Quash the Impugned Notices dated 25.05.2018 and 26.06.2018; and

b) Direct PSPCL not to take any coercive steps till such time this petition is decided.

In the IA filed by GVK alongwith the petition for interim stay, GVK has prayed as under:

a) Grant ad-interim stay on operation of Notice dated 26.06.2018; and

b) Direct PSPCL to not take any coercive steps in furtherance of the Notice dated 26.06.2018, till the present petition is disposed of.

6.1.2 PSPCL issued notices dated 25.05.2018 and 26.06.2018 to GVK. The notice dated 25.05.2018 pertains to penalty levied by PSPCL on GVK for having project availability below 75% during the Contract Year FY 2017-18 and the notice dated 26.06.2018

pertains to Procurer's Preliminary Default Notice in terms of Article 14.3 of the PPA alleging a Seller Event of Default for the Average Availability of the project being below 65% for FY 2017-18. GVK has contended that the low availability of the project is a direct consequence of the cancellation of captive coal block allocated to GVK, being force majeure event and PSPCL's actions in obstructing the procurement of coal by GVK from alternate sources.

6.2 Notice dated 25.05.2018

6.2.1 GVK has submitted that the Commission has already passed an Order dated 21.05.2018 in a petition (45 of 2017) filed by GVK challenging a notice dated 29.06.2017 issued by PSPCL for low availability of the project for FY 2016-17, wherein the Commission has upheld that the low availability of the project is on account of GVK being unsuccessful in procuring coal. GVK has pleaded that non-availability of fuel has been held to be a force majeure event by the Arbitral Tribunal and further that GVK was unable to procure coal on account of actions of PSPCL. The Commission notes that the same arguments were put forth by GVK in petition no. 45 of 2017. Pursuant to the Order dated 01.02.2016 passed by the Commission in petition no. 33 of 2015 and petition no. 65 of 2013 wherein the Commission allowed GVK to declare COD of the project considering the submissions of GVK that it had arranged the coal sufficient for 2 to 2.5 years as an interim measure, further directing GVK to make long-term arrangements for coal. GVK declared COD of Unit-1 and Unit-2 on 06.04.2016 and 16.04.2016 respectively. No order was given by the Commission to interfere with the coal supply of 2.5 years

arranged by GVK. Thus, there was no reason for GVK to refuse delivery of coal already ordered. GVK has not submitted sufficient documentary evidence in support of its claim of PSPCL not allowing it to take delivery.

6.2.2 GVK also made efforts to procure coal from other sources and participated in e-auctions without any involvement of PSPCL and succeeded. Therefore it cannot be said that GVK was unable to procure coal due to actions of PSPCL. Accordingly, the Commission holds that GVK was not successful in arranging sufficient quantum of coal for its plant to be available for more than 75% in FY 2017-18 and the availability was only 42.1482 %.

6.2.3 **The Commission notes that clause 1.2.5 of Schedule 6 of the Amended and Restated PPA dated 26.05.2009 relating to Contract Year Penalty for Availability below 75% during the Contract Year provides that in case the Availability for a Contract Year is less than 75%, the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh) for all months in the Contract Year applied on the energy (in kWh) corresponding to the difference between 75% and Availability during such Contract Year. The Commission further notes that clause 1.2.1 of Schedule 6 of the PPA provides that penalty payment determined in accordance with clause 1.2.5 is applicable on annual basis and is to be included in the Monthly Tariff Bill for the first month of the next Contract Year. Accordingly, GVK was required to include the penalty amount due to Availability below 75% during the Contract Year 2017-18, in the bill raised for the month of April, 2018 but GVK did not do so.**

Consequently, PSPCL issued notice dated 25.05.2018 to GVK to recover the penalty on account of Availability below 75% during the Contract Year 2017-18. In response to the same, GVK vide letter dated 05.06.2018 requested PSPCL to recover the penalty amount in ten equal monthly instalments @ Rs. 5,50,37,029.50 with applicability of late payment surcharge as per the PPA. PSPCL vide letter dated 14.06.2018 accepted the said proposal of GVK. As submitted by GVK on 04.12.2018, it has already paid the amount of Rs. 23,59,17,127/- for the said penalty alongwith late payment surcharge.

6.2.4 **In view of the above, the Commission holds that the penalty imposed by PSPCL on GVK on account of Availability below 75% during the Contract Year 2017-18 is payable in terms of the PPA. As such, the prayer of GVK to quash the notice dated 25.05.2018 issued by PSPCL to GVK is not allowed.**

6.3 Notice dated 26.06.2018

6.3.1 GVK submitted that in terms of clause 1.2.5 of Schedule 6 of the PPA, the penalty amount for low availability is calculated at the rate of 20% of the capacity charge for all months in a Contract Year corresponding to the difference between 75% and availability during such period. Once PSPCL has levied such amounts and recovered the same, it cannot at the same time seek recourse under Article 14.3.4 of the PPA seeking *inter-alia*, reduction of capacity charge by 20% for the same period. GVK further submitted that in terms of Doctrine of Election, PSPCL may only elect for exercise of one of its rights against GVK's alleged default

under the PPA. PSPCL cannot exercise both rights i.e. levy penalty amounts calculated at the rate of 20% of the capacity charge for low availability of the Project and also seek a further reduction of capacity charges to the tune of 20% for the same period of the alleged default. GVK in support of its submissions has referred to the decisions of Hon'ble Supreme Court of India in the case of C. Beepathumma and Ors. Vs. V.S. Kadambolithaya and Ors.1964 (5) SCR 836, Karam Kapahi and Ors Vs. Lal Chand Public Charitable Trust 2010 (4) UJ 1783 and Mumbai International Airport (P) Ltd. Vs. Golden Chariot Airport reported as (2010) 10 SCC 422.

6.3.2 GVK further submitted that even if a provision/clause of an agreement provides for penalty, the same has to be considered in light of the actual loss caused to the party and compensation/penalty is to be granted accordingly. The mere claim of damages does not give rise to debt until the liability is adjudicated and damages are assessed by a Court as held by the Hon'ble Supreme Court of India in the case of Fateh Chand Vs. Balkishan Das, reported as (1964) 1 SCR 515, Union of India (UOI) Vs. Raman Iron Foundry and Ors. reported as (1974) 2 SCC 231 and Kailash Nath Associates vs. Delhi Development Authority reported as (2015) 4 SCC 136. PSPCL is required to quantify and prove the loss it has incurred on account of the alleged non-availability of the Project. GVK submitted that PSPCL has not placed on record any evidence or documents in support of its contention that penalty amounts are for the purpose of procuring electricity from alternate sources to meet the demand in the State of Punjab.

6.3.3 PSPCL submitted that clause 1.2.5 of Schedule 6 or Article 14.3.4 read with clause 14.1(iv) of the PPA do not provide that the rights would be in the alternative. Various clauses of the PPA are not in derogation of one another, but to be exercised in addition to one another. Clause 1.2.5 of Schedule 6 to the PPA applies for shortfall in availability for a Contract Year being less than 75% whereas the scope of applicability of Article 14.1(iv) is not a Contract Year. The consecutive period of 12 months could be partly within one Contract Year and partly within another Contract Year. In the instant case, the consecutive period of 12 months is from April, 2017 to March, 2018 which matches with the Contract Year.

The amount payable in terms of clause 1.2.5 of Schedule 6 of the PPA has been provided in a liquidated form so that there is no need for calculating actual loss. The same was in the knowledge of both the parties in terms of the PPA signed by them. The Average Availability of power below 65% from April, 2017 to March, 2018 is not disputed between GVK and PSPCL. The contention of GVK that PSPCL has obstructed the procurement of coal is baseless. The action of PSPCL challenging the declaration of COD by GVK before Hon'ble APTEL does not mean that the tariff be continuously paid to GVK but no penalty for short availability etc. be imposed. PSPCL denied having objected to procurement of coal by GVK.

6.3.4 Clause 1.2 of Schedule 6 and Article 14 of the amended and restated PPA dated 26.05.2009 provide as under:

"6 SCHEDULE 6: TARIFF

……..

1.2 Monthly Tariff Payment

1.2.1 Components of Monthly Tariff Payment

……..

iv. Penalty Payment determined in accordance with Article 1.2.5 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);

……..

1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year

In case the Availability for a Contract Year is less than 75%, the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh) for all months in the Contract Year applied on the energy (in kwh) corresponding to the difference between 75% and Availability during such Contract Year.

……..

14 ARTICLE 14: EVENTS OF DEFAULT AND TERMINATION

14.1 Seller Event of Default

……..

iv) after Commercial Operation Date of all the Units of the Power Station, the Seller fails to achieve Average Availability of sixty five percent (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

……..

14.3 Procedure for cases of Seller Event of Default

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 (90) days or such longer period as the Parties may agree, shall apply.

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.

14.3.4 Within a period of seven (7) days following the expiry of the Consultation Period 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, 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 Lenders exercising their rights if it is in consonance with provisions of Schedule 10. 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."

A plain reading of the above two provisions reveals that the penalty under clause 1.2.5 of Schedule 6 of the PPA is leviable in case the Availability for a Contract Year is less than 75%. The penalty is to be paid by GVK at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh) for all months in the Contract Year applied on the energy (in kWh) corresponding to the difference between 75% and Availability during such Contract Year. This penalty is to be calculated by the seller, in this case GVK, for achieving availability less than 75% in the Contract year in accordance with the terms of the PPA, and has to form part of the monthly bill presented to the procurer, in the same way as GVK would calculate an incentive and include the same in the monthly bill. PSPCL has issued the notice only because GVK failed in

its obligation to include this penalty in the first bill of the next Contract year it presented to PSPCL. The second notice under Article 14 is what the procurer, in this case PSPCL, has a right to issue if the availability falls below 65% in a given set of circumstances. Since PSPCL has only issued the first notice because GVK did not follow the procedure for monthly tariff billing, the question of doctrine of election does not arise at all. Secondly, in case of Seller Event of Default under Article 14, the Capacity Charge is to be reduced by 20% (after following the procedure as envisaged under clause 14.3.2 to 14.3.4) for the period of Seller Event of Default i.e. when the Seller fails to achieve Average Availability of sixty five percent (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. Thus, the scope of applicability of Article 14.1 (iv) is not a contract year. The consecutive period of twelve months could be partly within one contract year and partly within another contract year. However, it so happens that in the instant case, the default period of 12 consecutive months from April, 2017 to March, 2018 under Article 14 is the same as the Contract Year FY 2017-18 under clause 1.2.5 of Schedule 6 of the PPA and was continuing on the date of Notice dated 26.06.2018. Considering the above, the Commission is of the considered view that the penalty provisions under clause 1.2.5 of Schedule 6 of the PPA and consequences of Seller Event of Default under Article 14.1(iv) read with Article 14.3.4 of the PPA are independent of each other and do not overlap.

Accordingly, the Commission holds that the notice issued by PSPCL on 26.06.2018 under Article 14.3 is not liable to be quashed. Consequently, Doctrine of Election has no applicability in the instant case as also the supporting case law quoted by GVK.

GVK has referred to various judgments in the written submissions in support of its claim, which are distinguishable from the facts and circumstances of the matter in hand. Further, Section 73 of the Indian Contract Act, 1872 provides that when a Contract has been broken, if a sum is named in the Contract as the amount to be paid in case of such breach, or if the Contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be the penalty stipulated for.

Therefore if the compensation named in the Contract is pre-estimate of loss which the parties knew when they made the contract, there is no question of proving such loss and such affected party is not required to lead any evidence to prove actual loss suffered by him.

6.3.5 GVK filed IA No. 1108 of 2018 in respect of the aforementioned notice dated 26.06.2018 issued by PSPCL, in Appeal No. 218 of 2018 pending before Hon'ble APTEL wherein GVK has impugned the Order dated 21.05.2018 passed by the Commission in petition no. 45 of 2017 deciding that the penalty imposed by PSPCL on GVK on account of Availability below 75%

during the first Contract Year 2016-17 is payable in terms of the PPA. On 24.09.2018, Hon'ble APTEL dismissed the IA as withdrawn and further held that if GVK approaches the State Commission challenging the impugned notice dated 26.06.2018, the State Commission shall hear the application, if any, for interim relief, and shall dispose of the same as expeditiously as possible and not later than four weeks from the date of filing of the application. On 26.09.2018, GVK during the hearing of other petitions filed this petition alongwith IA for interim stay and the Commission fixed the date of hearing for admission of the same as 12.10.2018. However, the hearing was held on 18.10.2018 and the Commission vide Order dated 22.10.2018 admitted the petition and stayed the operation of the notice dated 26.06.2018 upto 20.11.2018 which was later on extended till final disposal of the matter.

6.3.6 As per Article 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 following which, the consultation period of 90 days or such longer period as the parties may agree, shall apply. GVK approached Hon'ble APTEL by way of filing IA No. 1108 of 2018 and Hon'ble APTEL vide Order dated 24.09.2018 i.e. 90th day from the issue of notice dated 26.06.2018 by PSPCL, dismissed the IA as withdrawn alongwith directions as brought out above. It has been further provided under Article 14.3.4 of the PPA that within a period of 7 days following the expiry of the consultation period of 90 days, the lenders may exercise or 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 lenders exercising their rights if it is in consonance with provisions of Schedule 10. It has been further provided under Article 14.3.4 that alternatively, in case the lenders do not exercise their rights as mentioned above, the Capacity Charge of the Seller shall be reduced by 20% for the period of Seller Event of Default.

6.3.7 **The aforementioned Order of Hon'ble APTEL dated 24.09.2018 was pronounced on the 90th day after the issue of notice dated 26.06.2018 by PSPCL. GVK approached this Commission on 26.09.2018 and the Commission granted the stay on the said notice vide interim Order dated 22.10.2018 which is continuing as on date. PSPCL did not take further action envisaged to be taken in the next 7 days after the consultation period of 90 days is over to contact the lenders etc. till 22.10.2018, when the Commission granted the stay on notice dated 26.06.2018. Considering the above, the Commission finds no reason to continue the stay on the operation of notice dated 26.06.2018 and hereby vacates the same. The said notice as already been held above is not liable to be quashed. PSPCL is free to take further action under the relevant Article(s) of the PPA with regard to the aforesaid Seller Event of Default. The case laws quoted by GVK in support on the issue of levy and payment of penalty stating that the same has to be considered in light of the actual loss caused to the party and compensation/penalty is to be granted accordingly, would not to be applicable as the said notice dated 26.06.2018 is in respect of a Seller Event of**

Default with a specific provision for a specific purpose in the PPA.

The petition and IA are disposed of in terms of the above.

Sd/-	Sd/-	Sd/-
(Anjuli Chandra)	**(S.S. Sarna)**	**(Kusumjit Sidhu)**
Member	**Member**	**Chairperson**

Chandigarh

Dated: **12.09.2019**