

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 236/MP/2017

Coram:

Shri P. K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I. S. Jha, Member

Date of Order: 10th of January, 2020

In the matter of

Petition against the decision of MPPMCL for Unilateral surrender of 100 MW from DSTPS in violation of provision of PPA between DVC & MPPMCL

AND

In the matter of

Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata

.....PETITIONER

Vs

Madhya Pradesh Power Management Company Limited
Shakti Bhawan, Vidyut Nagar
Rampur, Jabalpur
Madhya Pradesh-482008

.... RESPONDENT

Parties Present:

- 1) Shri M.G. Ramachandran, Senior Advocate, DVC
- 2) Shri Shubham Arya, Advocate, DVC
- 3) Ms. Tanya Sareen, Advocate, DVC
- 4) Ms. Anushree Bardhan, Advocate, DVC
- 5) Shri Ashish Anand Bernard, Advocate, MPPMCL
- 6) Shri Paramhans, Advocate, MPPMCL

ORDER

The Petitioner Damodar Valley Corporation (DVC) has filed the present petition seeking the following reliefs against the Respondent, Madhya Pradesh Power Management Company Limited (MPPMCL):

“(a) Declare that MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 14.5.2007 read with the Regulations and Orders of this Commission for the entire duration of the PPA and declare that MPPMCL shall not be entitled to treat the PPA having been terminated;

(b) Declare that DVC shall be entitled to interest for the delayed payment at the rate of 1.5% per month as provided in the Tariff Regulations of this Commission;

(c) Direct MPPMCL to pay the outstanding amount due as on date together with interest at the rate of 1.5% per month and further pay all recurring amounts due to MPPMCL in failure;

(d) Pass interim orders in terms of the prayer (c) above;

(e) Pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.”

Facts of the Case

2. DVC established Durgapur Steel Thermal Power Station (DSTPS) consisting of two Units of 500 MW each. DVC declared the COD of the 1st and 2nd Units of the generating station on 15.5.2012 and 5.3.2013 respectively. Supply of electricity from the 1st Unit of the generating station commenced w.e.f. July, 2012.

3. DVC had entered into a Power Purchase Agreement (PPA) dated 14.5.2007 with MPPMCL for generation and sale of 100 MW from the DSTPS on the terms and conditions contained in the said PPA. As per the provisions of the PPA, the period of supply of 100 MW of electricity by DVC to MPPMCL is for 25 years from the date of commercial operation of Unit 1 of the generating station, which period may be extended beyond 25 years on mutually agreed terms and conditions. The PPA further provides



that either party would be at liberty to review the agreement after span of 5 years block each from the date of commencement of supply of mutually agreed terms and conditions.

4. About 12 days before the completion of the period of 5 years from the date of commencement of supply of power from Unit 1 of the generating station, MPPMCL vide its letter dated 2.5.2017 expressed its intention to review the terms of the PPA as per the provisions of Recital 'B' on the ground that State Madhya Pradesh is surplus in power which has led to non-scheduling of entire contracted capacity from DSTPS and gave a notice to DVC for termination of PPA at the end of 5 years block ending on 14.5.2017. DVC vide its letter dated 12.5.2017 rejected the notice of termination stating that the said termination was not acceptable to DVC as the same was not on mutually agreed terms and conditions as required under Recital B of the PPA.

5. MPPMCL vide its letter dated 2.6.2017 requested DVC to take up the matter with CTU for surrender of the LTA corresponding to the capacity covered under the PPA which was terminated by MPPMCL vide its notice dated 2.5.2017. DVC vide its letter dated 22.6.2017 rejected the request of MPPMCL. Thereafter, a number of correspondences have taken place between DVC and MPPMCL. DVC vide its letter dated 21.8.2017 raised a bill on MPPMCL for payment of capacity charges based on the declared capacity for scheduling of power from DSTPS. Since the issues between the parties remained unresolved, DVC has filed the present petition seeking the reliefs as mentioned in para 1 of this order.

Submissions of DVC

6. DVC has submitted that as per Recital 'B' of the PPA dated 14.5.2007, either party will be at liberty to review the agreement after span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions. DVC has submitted that unless the parties mutually agree, the PPA shall remain valid for a duration of 25 years from the date of commercial operation i.e. from 15.5.2012 till May, 2037. DVC has further submitted that since there has been no mutual agreement between DVC and MPPMCL for earlier termination of the agreement in terms of Recital 'B' of the PPA and there is no other provision in the PPA giving right to either party to terminate the PPA by giving any specified notice or otherwise, MPPMCL is legally bound to purchase 100 MW electricity from DSTPS and failure to do so on the part of MPPMCL is a breach of the PPA dated 14.5.2007. DVC has submitted that in case MPPMCL does not take the contracted quantum of electricity declared available by DVC, MPPMCL is required to pay the deemed fixed charges i.e. capacity charges to DVC. DVC has averred that despite clear position in the PPA, MPPMCL has purported to terminate the PPA dated 14.5.2007 vide letter dated 2.5.2017 on the basis of Recital 'B' by citing that the State of Madhya Pradesh is surplus in electricity availability. In the petition, DVC has sought a declaration that the PPA dated 14.5.2007 is subsisting and shall continue to subsist with each of the parties bound by the rights and obligations provided under the PPA for the entire duration of 25 years and MPPMCL is not entitled to unilaterally terminate the PPA either after the expiry of any 5 year time block or otherwise and a further declaration that MPPMCL is liable to pay the tariff for the quantum of electricity made available by DVC towards the contracted capacity of 100

MW from DSTPS. DVC has further submitted that the dispute between DVC and MPPMCL has to be adjudicated by the Commission and the arbitration clause provided under the PPA for dispute resolution under the bilateral arbitration in terms of Arbitration and Conciliation Act, 1996 is not to be given effect to in view of the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited V Essar Power Limited [(2008) 4 SCC 755].

Preliminary Objection of MPPMCL on maintainability of the petition

7. MPPMCL vide its affidavit dated 3.7.2018 filed preliminary objection to the maintainability of the petition on the ground that as per Clause 7 of the PPA dated 14.5.2007, there is an Arbitration Agreement between DVC and MPPMCL and therefore, the dispute has to be adjudicated/referred to an Arbitration Tribunal as per the Arbitration Agreement entered between the parties. MPPMCL in this connection relied upon amended provisions of Section 8 of the Arbitration and Conciliation Act, 1996 and submitted that as per the said provision, the Commission has to refer the parties to arbitration notwithstanding any judgment or order or decree passed by the Supreme Court or the High Court etc.

8. The Commission after hearing both the parties on the maintainability of the petition decided vide a combined order dated 26.7.2019 in Petition Nos. 236/MP/2017 and 78/MP/2018 that the petitions are maintainable and the Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of Section 79 (1) (f) read with Section 79 (1)(a) of the Act. The Respondent was directed to file its reply on merit.

Reply of MPPMCL on merit

9. MPPMCL vide its affidavit dated 9.9.2019 has submitted that DVC is not entitled to any relief for the following reasons:

(a) DVC has not specifically challenged the notice of termination dated 2.5.2017 issued by the Respondent for terminating the PPA dated 14.5.2007 and has sought merely declaratory reliefs in its relief clause. In the absence of any challenge, notice dated 2.5.2017 cannot be set aside by the Commission.

(b) DVC through the reliefs sought in the petition is seeking specific performance of the PPA dated 14.5.2007. As per Section 14 of the Specific Relief Act, 1963, specific performance of an agreement cannot be granted in respect of contracts which are determinable or for which money is an adequate compensation and therefore, the reliefs sought by DVC have to be rejected.

(c) As per Recital 'B' of the PPA dated 14.5.2007, either party can review the agreement after span of 5 years block. The duration to review the terms of the PPA available to the parties (including termination) cannot be made dependent on the consent of the opposite party as that would render the entire clause unworkable. Therefore, if a party reviews the working and terms of the PPA and upon review, if it seeks certain changes in the PPA or termination of the PPA, then it can exercise that option without the consent of the other party.

(d) MPPMCL in exercise of its power in Recital 'B' of the PPA dated 14.5.2007 has issued a notice on 2.5.2014 informing DVC about the reasons for review of the

PPA and termination of the PPA. Since no mutual agreement is required in exercising the option given to either party in Recital 'B', there is no illegality in the notice of termination dated 2.5.2017 issued by MPPMCL.

Submissions during the hearing

10. Learned Senior Counsel appearing on behalf of the Petitioner submitted that as per Recital 'B' of the PPA dated 14.5.2007 unless the parties mutually agree, the PPA will be valid for a duration of 25 years from the date of commercial operation. Except for the said provision, there is no other provision in the PPA giving a right to either party to terminate the PPA by giving any specified notice or otherwise. Since there has been no mutual agreement between DVC and MPPMCL for an earlier termination of the agreement and even there is no notice from MPPMCL proposing any mutual discussion between the parties in regard to review of the PPA after a span of 5 year time block, MPPMCL is legally bound to purchase 100 MW electricity from the generating station of DVC and in the event, MPPMCL fails to take that quantum of electricity made available by DVC, MPPMCL is required to pay the deemed fixed charges i.e. capacity charges to DVC. Learned Senior Counsel further submitted that MPPMCL is also liable to pay late payment surcharge at the rate of 1.5% per month as specified in the Regulations notified by the Commission. Learned Senior Counsel submitted that there is no clause for foreclosure of the agreement in PPA dated 14.5.2007 unlike the case of PPA dated 3.3.2006 between the same parties which contains Recital 'D' enabling either party to foreclose the agreement by giving one year prior notice before expiry of each 5 years block.

11. Learned Counsel for the Respondent MPPMCL submitted that the termination notice dated 2.5.2017 has not been challenged in the present petition and the Petitioner has only sought certain declarations from the Commission which cannot be granted in view of the bar contained in proviso to Section 34 of the Specific Relief Act, 1963. Learned counsel submitted that the Hon'ble Supreme Court in case of Venkataraja and Ors. Vs. Vidyane Doureradjaperumal and Ors. [2014 (14) SCC 502] has clearly interpreted the proviso to Section 34 of the Specific Relief Act and has held that a declaratory suit without consequential relief is not maintainable. Learned counsel further submitted that the PPA dated 14.5.2007 is a determinable contract and in accordance with the provisions of Section 14(1)(d) of the Specific Relief Act, 1963, a determinable contract is not specifically enforceable and therefore, no relief for specific performance of the terms of the PPA as sought by the Petitioner can be granted. In this connection, learned counsel cited judgment of the Hon'ble Supreme Court in Indian Oil Corporation Limited vs. Amritsar Gas Service and Ors. [(1991) 1 SCC 533]. Learned counsel submitted that Recital 'B' of the PPA dated 14.5.2007 is crystal clear in its terms as it give either party option to review an agreement at the end of 5 year block and such option cannot be made dependable on the consent of the opposite party as that would make the said clause unworkable. Learned Counsel emphasized that option to review the PPA itself includes the right to terminate the PPA and no mutual agreement is required in exercising the option of termination by either party. Learned counsel submitted that there is no illegality in termination notice dated 2.5.2017 issued by MPPMCL. Learned counsel also submitted that as per clause 5.11 of the PPA, the

Petitioner has the right to allocate the power to any other party and therefore, no specific can be granted to the Petitioner.

12. Learned Senior Counsel for the Petitioner submitted that MPPMCL is wrongly alleging that DVC has not challenged the termination notice and is merely seeking declaratory reliefs. Learned Senior Counsel submitted that DVC has specifically prayed in second part of prayer (a) that MPPMCL shall not be entitled to treat the PPA having been terminated and the said prayer is the correct prayer since the notice of termination being contrary to the provisions of the PPA is to be treated as non-est and therefore, to be declared as not valid. Learned Senior Counsel submitted that the reliance placed by MPPMCL on the decision of the Hon'ble Supreme court in Indian Oil Corporation Vs. Amritsar Gas Service and Ors. [(1991) 11 SCC 533] is misplaced as it deals with section 14, and not with section 34 of the Specific Relief Act and therefore, does not support the case of MPPMCL. Learned Senior Counsel further submitted that clause (a) of sub-section 1 of Section 14 of the Specific Relief Act which provides that the "contract for non-performance of which compensation in money is an adequate relief cannot be specifically enforced" has been deleted by the Amendment Act of 2018 and therefore, reliance on the said provision by MPPMCL is wrong and misplaced. With reference to Section 14(1)(d) of the Specific Relief Act, learned Senior Counsel submitted that the PPA entered into between the parties cannot be said to be by nature determinable and therefore, reliance on the said provision by the Respondent is misplaced. In response to the argument of MPPMCL that the Recital 'D' regarding foreclosure in PPA dated 3.3.2006 is superfluous and its absence in the PPA dated 14.5.2007 does not preclude either party to foreclose or terminate the PPA in terms of

Recital 'B', learned Senior Counsel submitted that such an argument is seriously flawed as Recital 'D' in the PPA dated 3.3.2006 is a specific clause for foreclosure or termination and in the absence of similar clause in PPA dated 14.5.2007, the said PPA cannot be terminated or foreclosed even at the end of 5 year block each from the date of commencement of supply. Learned Senior Counsel submitted that MPPMCL is required to pay the fixed charges for the electricity not scheduled by it which is consistent with the principles of damages provided in Sections 73 and 74 of the Indian Contract Act, 1872 and the Tariff Regulations of the Commission. In response to the submission of the learned Counsel for MPPMCL that DVC has not suffered any loss, learned Senior Counsel relying on a number of decisions of the Hon'ble Supreme Court submitted that there is no necessity for DVC to prove the actual loss as alleged by MPPMCL. Learned Senior Counsel further submitted that failure on the part of MPPMCL to purchase 100 MW of electricity from DSTPS is a breach of the PPA dated 14.5.2007. In this connection, learned Senior Counsel relied upon certain judgments of the Hon'ble Supreme Court and High Courts.

Analysis and Decision

13. We have considered the submissions of the Petitioner DVC and the Respondent MPPMCL. The following issues arise for our consideration:

- (a) Whether the prayers of the Petitioner are not maintainable in view of the bars in Sections 34 and 14 of the Specific Relief Act, 1963?
- (b) Whether the notice of termination given by MPPMCL to the Petitioner is legally sustainable in terms of the provisions of the PPA dated 14.5.2007?

(c) Whether DVC is entitled to the reliefs prayed for in the Petition?

Issue No. (a): Whether the prayers of the Petitioner are not maintainable in view of the bars in proviso to Section 34 and clause (d) of sub-section (1) of Section 14 of the Specific Relief Act, 1963?

14. MPPMCL vide its letter dated 2.5.2017 had given a notice under Recital 'B' of the PPA dated 14.5.2007 for termination of the PPA on the ground that the State of Madhya Pradesh is surplus in availability of power. DVC has sought a declaration that MPPMCL cannot be entitled to treat the PPA dated 14.5.2017 as having been terminated in the absence of any provision in the PPA for such termination. DVC has also sought a declaration that MPPMCL shall have the obligation to pay the contracted capacity in terms of the provisions of the PPA dated 14.5.2007 read with Regulations and Orders of the Commission for the entire duration of the PPA along with interest for delayed payment as per the applicable Tariff Regulations. MPPMCL has submitted that DVC has not challenged the termination notice dated 2.5.2017 and in view of the specific bar under proviso to Section 34 of Specific Relief Act, 1963, the prayers of DVC cannot be sustained. MPPMCL has further submitted that the PPA is a determinable contract and in accordance with the provisions of Section 14 (1)(d) of the Specific Relief Act, 1963, a determinable contract cannot be specifically enforceable and therefore, no relief for specific performance of the PPA as sought by the Petitioner can be granted in the present petition. The Petitioner has refuted the submissions of MPPMCL on the ground that its case is neither covered under proviso to Section 34 nor under Section 14 (1)(d) of the Specific Relief Act, 1963. According to the Petitioner, it is entitled to declaration in its favour for payment of fixed charges by MPPMCL for the electricity declared for scheduling by DVC but not availed by MPPMCL.

15. We have considered the submissions of the parties. DVC and MPPMCL entered into PPA dated 14.5.2007 for supply of 100 MW electricity from DSTPS for a period of 25 years from the date of commercial operation of the generating station. The Recitals of the PPA are extracted as under:-

“(A) MP TRADECO is desirous to purchase 100 MW scheduled power on round the clock basis from DVC and DVC is desirous of selling the same power on scheduled basis on mutually agreed terms and conditions under the provisions of CERC Regulations as detailed in clause 2.1 of this Agreement, subject to availability, from its units at Durgapur Steel TPS (2X500 MW) under the proposed capacity addition programme during XIth Plan. The delivery point for sale of this power by DVC to MP TRADECO shall mean the Commercial Metering Point at DVC Bus at DVC periphery.

(B) The duration of above agreement will be for 25 years from date of commercial operation of the respective power stations and may be extended based on mutually agreed terms and conditions. However, either party will be at liberty to review the agreement after a span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions.

(C) Without prejudice to the technical constraints, all reasonable efforts will be made by DVC to supply the power on scheduled basis to MP TRADECO at the above delivery point.”

As per Recital B above, the duration of the PPA is 25 years from the date of commercial operation of DSTPS, which may be extended based on the mutually agreed terms and conditions. The said Recital further provides that either party will be at liberty to review the agreement after a span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions. Therefore, the review of the agreement after span of 5 years block each would have to be on mutually agreed terms and conditions between DVC and MPPMCL. MPPMCL vide its letter dated 2.5.2017 has given a notice to DVC for termination of the PPA w.e.f. 15.5.2017 which has been rejected by DVC in its letter dated 12.5.2017 on the ground that there is no provision in the PPA explicitly providing for the termination of the PPA by either party.

16. MPPMCL has submitted that DVC has not specifically challenged the termination notice dated 2.5.2017 and has sought certain declarations which cannot be granted in view of the bars imposed by proviso to Section 34 of the Specific Relief Act, 1963. Let us first consider whether the termination notice has been challenged by DVC or not. In para 12 of the petition, DVC has stated as under:

“12. DVC states that the stand taken by MPPMCL that it is entitled to terminate the PPA dated 14.5.2007 at any time prior to May 2037 unilaterally and even in the absence of consent by DVC is wrong and is contrary to the terms and conditions contained in the PPA dated 14.5.2007.....”

In the second part of prayer(a) in para 21 of the petition, DVC has sought a declaration that “MPPMCL shall not be entitled to treat the PPA having been terminated.” In our view, the very foundation of the petition of DVC is the termination notice of 2.5.2007 and DVC has made specific averments in this regard in the petition as well as in the prayer. Therefore, the objection of MPPMCL that DVC has not challenged the notice of termination cannot be sustained.

17. Next we consider whether Section 34 of the Specific Relief Act constitutes any bar for grant of relief to the Petitioner as sought in the petition. The said section is extracted as under:-

“34. Discretion of court as to declaration of status or right:

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

18. Section 34 of the Specific Relief Act, 1963 requires the following conditions to be fulfilled to enable the court to grant declaratory reliefs:

- (a) The plaintiff must be a person entitled to any legal character or to any right as to the property;
- (b) The defendant must be a person denying, or interested to deny, the plaintiff's title to such character or right;
- (c) The declaration sued must be a declaration that the plaintiff is entitled to a legal character or to the right to property; and
- (d) Where the plaintiff is able to seek further relief than a mere declaration of title, he must seek such relief.

If any one of the first three conditions is not fulfilled, then the suit should be dismissed. If the first three conditions are fulfilled, but the fourth condition is not, the court shall not make the declaration sued for.

19. In the present petition, DVC is seeking the following declaratory reliefs:

- (a) MPPCL shall have the obligations to pay for the contracted capacity in terms of the provisions of the PPA dated 14.5.2007 read with the regulations and orders of the Commission for the entire duration of the PPA.
- (b) MPPMCL shall not be entitled to treat the PPA having been terminated.

(c) DVC shall be entitled to interest for the delayed payment @ 1.5% per month as per the Tariff Regulations.

In addition to the declaratory reliefs as mentioned above, DVC has sought a direction to MPPMCL to pay all outstanding amount due as on date with interest @ 1.5% per month and pay all recurring amounts due to MPPMCL in future.

20. As per the PPA dated 14.5.2007, DVC is entitled to supply 100 MW of electricity to MPPMCL on payment for such capacity for a period of 25 years and in case delayed payment, is entitled to interest @1.5% in terms of the Tariff Regulations of the Commission. The Respondent, MPPMCL is denying the right of DVC to supply 100 MW of electricity to MPPMCL for a period of 25 years by giving a notice of termination dated 2.5.2017. DVC is seeking a declaration that in terms of the PPA dated 14.5.2007, it is entitled to supply electricity for 25 years and receive the payment therefor and the notice of termination is non-est in the eyes of law and in terms of the PPA. Therefore, the first three requirements have been fulfilled by DVC. Additionally, DVC is seeking the consequential relief in the form of payment of all outstanding dues with interest. The requirement of last proviso to Section 34 of the Specific Relief Act is also fulfilled. In our view, the proviso to Section 34 of the Specific Relief Act does not operate as a bar in the present case since DVC has sought consequential reliefs in the form of payment of outstanding dues in furtherance of the declaratory reliefs sought in the petition. MPPMCL has placed reliance on the judgement of the Hon'ble Supreme Court in the matter Venkataraja and Others Vs. Vidyane Dourreradjaperumal and Ors [2014(14)SCC 502]. In that case, the suit for declaration of title over the suit land was filed but without

claiming consequential relief of possession by eviction of tenants in possession of suit land which was possible. It was held by the Hon'ble Supreme Court that in view of the bar enshrined in proviso to Section 34 of the Specific Relief Act, the suit filed by the appellant-plaintiff is not maintainable, as they did not claim consequential relief. The present case is distinguishable from the Venkataraja Case as the Petitioner has sought declaratory relief as well as consequential relief as discussed above. Accordingly, the objection of MPPMCL is overruled.

21. MPPMCL has further submitted that the PPA is a determinable contract and in accordance with the provisions of Section 14 (1)(d) of the Specific Relief Act, 1963, a determinable contract cannot be specifically enforced and therefore, the Petitioner is not entitled to any relief for specific performance of the contract as prayed for. MPPMCL has relied on the judgement of the Hon'ble Supreme Court in the case of Indian Oil Corporation Limited Vs. Amritsar Gas Service and Others [(1991) 1 SCC 533] and has contended that as per the said judgement, the contracts which are determinable in nature are not enforceable as per clause (c) of sub-section (1) of section 14 of the Specific Relief Act [clause (d) after Amendment Act of 2018]. The Petitioner has submitted that the PPA entered into between the parties does not provide for any termination and therefore, the PPA cannot be said to be by nature determinable. The Petitioner has further submitted that as held by the Appellate Tribunal, the PPA entered into between the parties for purchase of power on a long term basis is not determinable.

the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14 (1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

As per the above judgement, since the finding of the Arbitrator is that the Distribution Partnership though for an indefinite period till it is terminated in accordance with clauses 27 and 28 of the Agreement and is, therefore, revocable, the provisions of Section 14(1)(c) [analogous provision in Article 14(1)(d) after the amendment] is attracted and the contract cannot be enforced. The present case is distinguishable since the PPA is for a period of 25 years and there is no provision for revocation or termination of PPA. Therefore, the PPA is not determinable and can be enforced.

23. In view of the above analysis, we are of the view that the provisions of neither Section 34 nor Section 14 (d) of the Specific Relief Act create legal hurdle for the Commission to consider and grant relief prayed for in the Petition.

Issue No.(b): Whether the notice of termination given by MPPMCL to the Petitioner is legally sustainable in terms of the provisions of the PPA dated 14.5.2007?

24. MPPMCL has submitted that Recital B of the PPA dated 14.5.2007 empowers either party to review the PPA (including its termination) at the end of each 5 years block and exercise of such option cannot be made subject to the consent of the opposite party. According to MPPMCL, no mutual agreement is required in exercising the option of termination by either party. If the termination of the PPA by the either party

is made subject to the consent of the opposite party it would render Recital 'B' of the PPA unworkable. MPPMCL has submitted that no mutual agreement is required for exercising the option by either party pursuant to Recital B of the PPA dated 14.5.2007. MPPMCL has submitted that as per clause 5.11 of the PPA, the Petitioner has a right to allocate power to any other party and therefore, no specific relief can be granted to the Petitioner. MPPMCL has submitted that there is no illegality in the notice of termination issued by MPPMCL.

25. The Petitioner has submitted that Recital 'B' the PPA dated 14.5.2007 deals with the review of the PPA after a period of 5 years block. The review could be for a number of reasons and not necessarily for termination of the PPA. Recital B provides that review can be sought by either party but the same shall be implemented only if both the parties mutually agree on the terms and conditions to be substituted. The Petitioner has submitted that Recital 'B' is not a clause for foreclosure or termination of the PPA.

26. We have considered the submissions of the parties. Recital 'B' of the PPA dated 14.5.2007 provides as under:

"B) The duration of above agreement will be for 25 years from the date commercial operation of the respective power station and may be extended based on mutually agreed terms and conditions. However, either party will be at liberty to review the Agreement after a span of 5 years blocks each from the date of commencement of supply on mutually agreed terms and conditions."

As per the above provisions, the validity of the PPA is for the period of 25 years from the date of commercial operation of the DSTPS which can be extended on mutually agreed terms and conditions. Either party has the liberty to review the agreement after 5 years block each from the date of commencement of supply on

mutually agreed terms and conditions. In other words, the review of the PPA cannot take place if it is proposed by one party but not accepted by the other party. MPPMCL has submitted that the purpose of review of the PPA by either party as envisaged in Recital B would be defeated if such review is made contingent on the mutual agreement of the other party. In other words, MPPMCL seeks to alter the provisions of the PPA to be terminable at the instance of either party without the consent of the other party. In our view, such an interpretation is not permissible in law. In this connection, we intend to refer to the following judgements of the Hon'ble Supreme Court:

- (a) In the case of Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond & Gem Development Corporation Ltd. & Anr. [(2013) 5 SCC 470], Hon'ble Supreme Court observed as under:

“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.]”

- (b) In DLF Universal Ltd. v. Town and Country Planning Deptt., [(2010) 14 SCC 1]

Hon'ble Supreme Court held as under:

“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 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.”

(c) The Hon’ble Supreme Court in the case of Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC [(2016) 4 SCC 126] observed as under:

“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 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.”

27. From the above judgments, following principles emerge for interpretation of contract:

(a) 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.

(b) The terms of the contract will have to be understood in the way the parties wanted and intended them to be. 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.

(c) Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time of the contract so formed. The joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

28. The parties to the PPA dated 14.5.2007 i.e. DVC and MPPMCL have entered into a contract for supply of 100 MW power from DSTPS for a period of 25 years from the date of commercial operation of the generating station. Recital B enables either party to review the PPA after a span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions. Review of the PPA may also include termination of the PPA. Any review of the PPA including its termination has to be on terms and conditions mutually agreed between the parties. There is no other provision in the PPA which deals with termination of the PPA. Parties to the PPA have bound themselves for supply of 100 MW electricity by DVC to MPPMCL for a period of 25 years and early termination or foreclosure of the PPA can take place if it is mutually agreed. Therefore, early termination of the PPA before expiry of 25 years at the instance of either party without the mutual agreement of other party is not permissible. Clause 5.10 of the PPA enables DVC to divert the power to other

beneficiary(ies) in case of default in payment of all dues beyond 60 days or default in opening of LC of adequate amount by MPPMCL. Clause 5.11 enables DVC to allocate the power to other beneficiary(ies) if the default continues beyond 90 days. As per clause 9 of the PPA, in case of default under clause 5.11, DVC with a prior notice of 15 days, shall intimate RLDC to suspend transaction. The nodal RLDC shall commence suspension after 15 days and transactions shall be scheduled after all outstanding dues are settled. During the period of allocation to other beneficiaries, MPPMCL shall have the liability to pay the capacity charges in proportion to allocation to other beneficiary(ies). Thus, the PPA contains no provision which enables MPPMCL to either terminate the PPA or not to schedule power in terms of the PPA. The intention behind the terms and conditions of the PPA is clear i.e. DVC has the liability to supply and MPPMCL has the right to receive supply of 100 MW electricity for a period of 25 years without any provision for termination or foreclosure of PPA except with mutually agreed terms and conditions. Neither party can repudiate its contractual liability before 25 years or unless the PPA is terminated/foreclosed with mutually agreed terms and conditions. That being the case, Recital B cannot be read down to enable either party to unilaterally terminate the PPA as sought by MPPMCL. If the provision of Recital B is interpreted to enable either party to terminate the PPA without the mutual agreement of the other party, that will do violence to the provisions of the PPA and joint intent of the parties at the time of the signing of the PPA.

29. Since the PPA dated 14.5.2007 does not allow either party to unilaterally terminate the PPA before expiry of 25 years from the date of commercial operation of DSTPS without the concurrence of the other party through the mutually agreed terms

and conditions, the termination notice dated 2.5.2017 issued by MPPMCL is in violation of the provisions of the PPA and cannot be given effect to and is, accordingly, held to be void. Consequently, PPA cannot be terminated on the basis of the said notice. Accordingly, PPA dated 14.5.2007 continues to remain valid and in subsistence till completion of 25 years from the date of commercial operation of DSTPS or till the PPA is terminated by both parties through mutually agreed terms and conditions whichever is earlier.

Issue No.(c): Whether DVC is entitled to the reliefs prayed for in the Petition?

30. After having held that the PPA dated 14.5.2007 between DVC and MPPMCL continues to subsist, the parties to the PPA are bound by the terms and conditions of the PPA. MPPMCL in its letter dated 2.5.2017 had given the notice for termination of the PPA at the end of 5 years block ending on 14.5.2017. Consequently, MPPMCL is not scheduling the power w.e.f. 15.5.2017. Since we have held that PPA dated 14.5.2007 is subsisting and is binding on both the parties, MPPMCL shall be liable to pay the capacity charges till the power is scheduled by MPPMCL and after scheduling of power, it shall be liable to pay both capacity charges and energy charges by due date of each month. Further, DVC shall be entitled to late payment surcharge in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 and 2019 till the outstanding payments are made.

31. The summary of our findings in this order are as under:-

- (a) Proviso to Section 34 and Section 14 (1)(d) of the Specific Relief Act do not stand on the way to grant the relief sought by DVC in the present petition.

(b) The termination notice dated 2.5.2017 is not in accordance with the provisions of the PPA dated 14.5.2007 and is accordingly, held to be void. Consequently, MPPMCL is liable to schedule the contracted capacity and make payment therefor in terms of the PPA dated 14.5.2007 to DVC.

(c) MPPMCL is directed to pay the capacity charges to DVC w.e.f. 15.5.2017 with applicable rate of interest as per the Tariff Regulations of the Commission till the payment of outstanding dues are made.

33. Petition No. 236/MP/2017 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson