

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 78/MP/2018

Coram:

Shri P. K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I. S. Jha, Member

Date of Order: 13th of January, 2020

In the matter of

Petition for unilateral surrender of 400 MW power by MPPMCL from Mejia TPS & Chandrapura TPS of DVC in violation of provisions of PPA

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 the Respondent-MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 3.3.2006 read with the Regulations and Orders of this Commission;
- (b) Declare that MPPMCL shall not be entitled to treat the PPA having been terminated from February 2018 contrary to the terms of the PPA dated 3.3.2016;
- (c) hold that the Respondent-MPPMCL liable to pay the Tariff to the DVC namely the fixed charges and Energy Charges for the quantum of electricity scheduled by MPPMCL and deemed fixed charges for the quantum of electricity declared available by the DVC but not scheduled by the Respondent-MPPMCL;
- (d) Direct that the Respondent-MPPMCL to pay the amount of Rs. 437.32 crore due and outstanding to the DVC as on 1.2.2018;
- (e) Award the cost of proceedings;
- (f) 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 Mejia Thermal Power Station Units 5 & 6 (MTPS) and Chandrapura Thermal Power Station Units 7 & 8 (CTPS). DVC declared COD of Unit 5 & 6 of MTPS on 29.2.2008 and 24.9.2008 respectively and the COD of Unit 7 & 8 of CTPS on 2.11.2011 and 15.7.2011 respectively. The commencement of supply of electricity from MTPS and CTPS started from February, 2008 and November, 2011 respectively.

3. DVC entered into a PPA dated 3.3.2006 with MPPMCL for generation and sale of 400 MW from MTPS and CTPS on the terms and conditions contained in the PPA. As

per the provisions of the PPA, the period of generation and sale of electricity to MPPMCL from MTPS and CTPS is 25 years from the date of commencement of supply which period may be extended beyond 25 years on mutual terms and conditions agreed between the parties. The PPA further provided that either party shall have the 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.

4. MPPMCL vide its letter dated 28.2.2017 gave a notice to DVC for termination of the PPA dated 3.3.2006 w.e.f. 1.3.2018 and also subsequently confirmed to foreclose the PPA w.e.f. 1.3.2018 vide its letter dated 28.2.2018 in accordance with Recital D of the PPA on the ground that the State of Madhya Pradesh is surplus in availability of electricity. After the issue of the said letter, the parties have held discussions and deliberations with regard to the claim of MPPMCL to terminate the PPA for purchase of power from MTPS and CTPS under the PPA dated 3.3.2006. The said discussions and deliberations did not yield any amicable solution. Accordingly, DVC has filed the present petition for adjudication of the dispute between DVC and MPPMCL.

Submission of DVC

5. DVC has submitted that in terms of Recital 'B' of the PPA dated 3.3.2006, DVC has agreed to sell and MPPMCL has agreed to purchase 400 MW of electricity for a period of 25 years from the date of commencement of supply on mutually agreed terms and conditions between the parties. Recital B further provides that either party will be at liberty to review the agreement of 5 years block each. Recital 'B' 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. Recital 'D' of the PPA provides that either party may foreclose the agreement by giving one year prior notice before the expiry of each 5 years block without any liability on either side. DVC has submitted that Recitals 'B' and 'D' incorporated in the PPA clearly establish the intentions of the parties at the time when the PPA was concluded i.e. either party can foreclose and terminate the PPA earlier to 25 years duration in the manner provided in Recital 'D'. DVC has submitted that there has been no mutual agreement between DVC and MPPMCL for earlier termination of the agreement and there has been no notice from MPPMCL proposing any discussion between the parties in regard to the review of the PPA after span of 5 years' time block. DVC has submitted that MPPMCL is legally bound to purchase 400 MW of electricity from DVC's MTPS and CTPS as per the terms of the PPA dated 3.3.2006. DVC has submitted that in the event MPPMCL does not take the quantum of electricity declared available by DVC, MPPMCL is required to pay the deemed fixed charges i.e. capacity charges to DVC for such quantum of electricity as determined by the Commission for MTPS and CTPS. DVC has submitted that despite the above clear position, MPPMCL has sought to terminate the PPA dated 3.3.2006 w.e.f. 1.3.2018 vide letter dated 28.2.2017 and subsequently confirmed to foreclose the PPA w.e.f. 1.3.2018 vide letter dated 20.2.2018. DVC has submitted that MPPMCL is bound to purchase and fulfill its obligation to purchase the contracted quantum of power from MTPS and CTPS in terms of the PPA dated 3.3.2006. DVC has submitted that agreement between the parties cannot be terminated unilaterally by MPPMCL except as provided in the PPA dated 3.3.2006. DVC has submitted that the stand taken by MPPMCL that it is entitled to

terminate the PPA dated 3.3.2006 at any time prior to expiry of 5 years' time block in regard to both MTPS and CTPS unilaterally is wrong and is contrary to the terms and conditions contained in the PPA. DVC has submitted that in the facts and circumstances of the case, it is entitled to a declaration in the present proceeding that the PPA dated 3.3.2006 is subsisting and shall continue to subsist with each of the parties bound by the rights and obligations provided under the PPA and MPPMCL is not entitled unilaterally terminate the PPA except as provided for in the PPA. DVC has sought a further declaration that MPPMCL shall be liable to pay the tariff for the quantum of electricity made available by DVC towards the contracted capacity of 400 MW from MTPS and CTPS. 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 in terms of the 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 Vs. Essar Power Limited [(2008) 4 SCC 755].

Preliminary Objection of MPPMCL on maintainability of the petition

6. MPPMCL vide its affidavit dated 30.7.2018 has filed preliminary objection with regard to the maintainability of the Petition on the ground that as per Clause 6 of the PPA, there is an arbitration agreement between DVC and MPPMCL and therefore, the instant dispute has to be adjudicated/referred to the Arbitration Tribunal. MPPMCL in this connection has relied upon Section 5 and amended provisions of Section 8 of Arbitration and Conciliation Act, 1996 and has submitted that as per the said provision, the Commission should refer the parties to arbitration notwithstanding any judgment or

order or decree passed by the Supreme Court or the High Court etc. MPPMCL has also submitted that the judgment of the Hon'ble Supreme Court in GUVNL case was rendered prior to the amendment to Section 8 of the Arbitration and Conciliation Act, 1996 and therefore, the said judgment is not applicable to the facts and circumstances of the present case. MPPMCL has submitted that the present petition is not maintainable for adjudication before this Commission and the Commission may refer the matter to Arbitration Tribunal in accordance with the Clause 6 of the PPA dated 3.3.2006 read with Sections 5 and 8 of the Arbitration and Conciliation Act, 1996. DVC in its affidavit dated 24.12.2018 has submitted that the adjudication provisions provided under the Electricity Act, 2003 supersedes the bilateral arbitration provisions contained in the PPA and therefore, notwithstanding the existence of arbitration clause in the PPA, the dispute between the parties shall be adjudicated by the Commission under Section 79 (1)(f) of the Act or by the Arbitrator to be appointed by the Commission'

7. The Commission after hearing both the parties on the maintainability of the Petition vide combined order date 26.7.2019 in Petition No. 236/MP/2017 and 78/MP/2018 decided 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 MPPMCL was also directed to file its reply on merit.

Reply of MPPMCL on merit

8. MPPMCL vide its affidavit dated 9.9.2019 has submitted that relief sought by the DVC cannot be granted for the simple reason that DVC has not specifically challenged

the notice of foreclosure/termination dated 28.2.2017 and therefore, the said notice cannot be set aside by the Commission. MPPMCL has further submitted that DVC through the reliefs is seeking specific performance of the PPA dated 3.3.2006. MPPMCL has submitted that as per Section 14 of the Specific Relief Act (as amended), 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 relief sought by DVC ought to be rejected. MPPMCL has further submitted that Recital 'B' of the PPA dated 3.3.2006 provides that the duration of the PPA shall be 25 years which may be extended on mutually agreed terms and conditions and either party can review the agreement after a span of 5 years block. Further, Recital 'D' of the PPA dated 3.3.2006 provides that either party may foreclose the PPA by giving one year prior notice before expiry of 5 years block without any liability on either side. According to MPPMCL, the date of commencement of supply of electricity under the PPA was 22.8.2008 and the first 5 years block period ended in 28.2.2013 and the second 5 years block period ended on 28.2.2018. In terms of Recital 'D', MPPMCL has given a one year prior notice for foreclosure of the PPA and discontinuation of purchase of power from DVC w.e.f. 1.3.2018. MPPMCL has submitted that while DVC is admitting that date of foreclosure of MTPS is February, 2018, DVC is insisting on the date of foreclosure of CTPS as November, 2021, whereas as per Recital D read with Clause 11 of the PPA, the date of foreclosure in both cases is February, 2018. MPPMCL has submitted that there is no illegality in the notice of foreclosure dated 28.2.2017 issued by MPPMCL and accordingly, the PPA dated 3.3.2006 stands foreclosed as on 28.2.2018 without any liabilities.

Submissions during the hearing

9. Learned Senior Counsel appearing on behalf of the Petitioner has submitted that the PPA dated 3.3.2006 is a common PPA for sale and purchase of power for a quantum of 200 MW each from MTPS and CTPS. Learned Senior Counsel submitted that under Recital B, there is a liberty to review agreement after a period of five years time block from the date of commencement of supply on mutually agreed terms and conditions. Learned Senior Counsel submitted that in the absence of mutually agreed terms and conditions, there cannot be any termination of PPA under Recital B on the ground of unilateral review of the Agreement or unilateral decision of MPPMCL to foreclose the agreement. Learned Senior Counsel submitted that under Recital D, either party has the right to foreclose the agreement by giving one year prior notice before expiry of each of the five year time block. Learned Senior Counsel submitted that MPPMCL has given notice of foreclosure in terms of Recital D of the PPA dated 3.3.2006 on 28.2.2017 which is one year prior to the ending of five year time block. Learned Senior Counsel submitted that five years time block has to be computed from February 2008 in respect of MTPS, the said date being the date of commencement of supply from MTPS. Learned senior Counsel clarified that DVC has not claimed any continuation of the PPA in so far as MTPS is concerned and the exercise of foreclosure by MPPMCL being in accordance with Recital D, the PPA stood terminated on 1.3.2018. Learned Senior Counsel submitted that in case of CTPS, the five year time block expires only in November 2011, the date of commencement of supply being November 2011 and therefore, the notice dated 28.2.2017 given by MPPMCL to terminate the agreement for CTPS with effect from 1.3.2018 is contrary to Recital B and

D of the PPA and accordingly, the said notice is void and non-enforceable. Learned senior counsel further submitted that MPPMCL is required to fulfill the obligations under the PPA in regard to MTPS till 1.3.2018 including and in particular the repayment of capacity charges where the electricity is not scheduled and payment of full tariff including capacity charges and variable charges where electricity is scheduled. Learned Senior Counsel submitted that in regard to CTPS, PPA continues as before as there cannot be any valid foreclosure based on the said notice dated 28.2.2017 and MPPMCL is obligated to perform its obligations/liabilities at all times even after the date of the said notice. Learned Senior Counsel has further submitted that MPPMCL is also liable to pay delayed payment surcharge in accordance with the Tariff Regulations, 2014 and 2019.

10. Learned counsel for MPPMCL has submitted that the PPA dated 3.3.2006 was foreclosed/terminated vide notice of termination cum foreclosure dated 28.2.2017. Since the foreclosure notice dated 28.2.2017 has not been challenged in the instant Petition and the Petitioner has only sought certain declarations, such declaration cannot be granted in view of the provisions of Section 37 of 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 submitted that while the Petitioner has sought two declarations in the Petition, it ought to have also sought the further relief of setting-aside the termination notice dated 28.2.2017 in the absence of which no relief can be granted to the Petitioner on account of bar under proviso to

Section 34 of the Specific Relief Act. Learned Counsel 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 is not specifically enforceable and therefore, no relief for specific performance of the contract as is being sought by the Petitioner in its reliefs 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 has submitted that Recital D of the PPA dated 3.3.2006 is crystal clear in its terms as it give either party (Petitioner/ Respondent) an option to foreclose the agreement by giving one year prior notice before the expiry of each 5 year block without any liability on either side. As per Clause 11 of the PPA, the terms and conditions of the PPA came into force from the date of commencement of supply. Since the date of commencement of supply was 28.2.2008, the first 5 years block period expired on 28.2.2013 and the second 5 years block period expired on 28.2.2018. accordingly, MPPMCL issued a one year prior notice on 28.2.2017 as per Recital D on 28.2.2017 informing that the PPA would stand foreclose after one year and MPPMCL shall stop purchasing power from 1.3.2018. Learned Counsel submitted that DVC's contention that the date of foreclosure for CTPS is November, 2021 is not correct since Clause 11 of the PPA does not provide for different effective dates for the different units for the enforcement of the PPA.

11. Learned Senior Counsel for DVC submitted that MPPMCL is wrongly alleging that termination notice has not been challenged and DVC is seeking merely declaratory reliefs. DVC has specifically prayed in prayer (b) that MPPMCL shall not be entitled to treat the PPA having been terminated from February 2018 contrary to the provisions of

the PPA dated 3.3.2006. 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 and does not support the case of MPPMCL. Learned Senior Counsel submitted that Section 14 (1) (d) of the Specific Relief Act provides "the contract which is in its nature determinable" cannot be enforced" and since the PPA dated 3.3.2006 cannot be said to be by nature determinable, Section 14(1)(d) is not applicable. Learned Senior Counsel submitted the 5 year time block each from the date of commencement of supply would have to be applied to CTPS and MTPS in the PPA dated 3.3.2006 w.e.f. the commencement of supply separately for each of the two stations i.e. November, 2011 and February, 2008 respectively. Learned Senior Counsel submitted that MPPMCL is required to pay the fixed charges for the electricity not scheduled by MPPMCL which is consistent with the principles of damages provided in Section 73 and 74 of the Indian Contract Act, 1872 and the Tariff Regulations of the Commission. Learned Senior Counsel submitted that MPPMCL during the hearing raised the issue that DVC has not suffered any loss or has not shown that it has suffered loss or has not mitigated the loss which is of no relevance as DVC is only required to establish the legal injury which is distinct from the quantum of loss to be proved. In this connection, learned Senior Counsel relied on a number of decisions of the Hon'ble Supreme Court and submitted that there is no necessity for DVC to prove the actual loss as alleged by MPPMCL.

Analysis and Decision

12. 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?

13. MPPMCL vide its letter dated 28.2.2017 had given a notice under Recital 'B' and 'D' of the PPA dated 3.3.2006 for termination of the PPA with effect from 1.3.2018 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 3.3.2006 as having been terminated from February, 2018 contrary to the terms of the PPA. 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 3.3.2006 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 the PPA dated 3.3.2006 was foreclosed/terminated vide notice of termination cum foreclosure dated 28.2.2017. DVC has not challenged the termination notice dated 28.2.2017 and has only sought certain declarations from the Commission. 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 dated 3.3.2006 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 submitted that the PPA dated 3.3.2006 contains an additional clause of Recital 'D' which provides for a right to foreclose by either party to the agreement by giving one year prior notice before expiry of each of the 5 year time block. The Petitioner has submitted that in case of MTPS, MPPMCL had given a notice of foreclosure in terms of Recital 'D' of the PPA dated 3.3.2006 on 28.2.2017 which was one year prior to the ending of the 5 years time block. The 5 years time block has to be computed from February, 2008 i.e. commencement of supply from MTPS and the second 5 years time block expires in February, 2018. Therefore, the said foreclosure by MPPMCL being in accordance with the Recital 'D', the PPA stood terminated on 1.3.2018. Accordingly, DVC has not claimed any continues of PPA insofar as MTPS is concerned. DVC has further submitted that in case of CTPS, 5 years time blocks expire in November, 2021, i.e. 5 years from the commencement of power supply w.e.f. November, 2011. DVC has submitted that the notice dated 28.2.2017 given by MPPMCL to terminate the agreement for CTPS w.e.f. 1.3.2018 is contrary to the Recital 'B' and 'D' of the PPA dated 3.3.2006 and is therefore, void and enforceable. According to DVC, PPA in respect of supply of power from CTPS continues as before and MPPMCL is obligated to perform its obligations/liabilities at all times even after the date of notice, i.e. 28.2.2017. The Petitioner has submitted that DVC has specifically prayed in Prayer (b) for a declaration that MPPMCL shall not be entitled to treat the PPA having been terminated and the said prayer is correct in view of the fact that notice of termination being contrary

to the provisions of the PPA, the same is to be treated as non-estand is to be declared as void. DVC has further submitted that the PPA entered into between the parties dated 3.3.2006 provides for no termination except at the end of 5 years time block as stated in Recital 'D', therefore, the contract cannot be said to be by nature determinable. DVC has further submitted that the 5 years time block each from the date of commencement of supply would have to be applied to CTPS and MTPS under the PPA dated 3.3.2006w.e.f. the commencement of supply separately for each of the two stations i.e. November, 2011 and February, 2008 respectively.

14. We have considered the submissions of the parties. DVC and MPPMCL entered into PPA dated 3.3.2006 for supply of 400 MW electricity from MTPS and CTPS 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) MPSEB, is desirous to purchase 400 MW power (200 MW from MTPS Units 5 & 6 plus 200 MW from CTPS Units 7 & 8) round the clock basis from DVC and DVC is desirous of selling 400 Mw power from its units of MTPS Unit 5 & 6 and CTPS unit 7 & 8 round the clock basis on mutually agreed terms and conditions. The delivery point for sale of this power by DVC to MPSEB 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 commencement of power supply 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 MPSEB at the above delivery point.

(D) Either party may foreclose the Agreement by giving one year prior notice before expiry of each 5 years block, without any liability on either side. However, both the parties have to perform their respective obligation/liabilities prior to said foreclosure.”

As per Recital A above, MPPMCL was desirous of purchasing 400 MW power round the clock from DVC (200 MW from MTPS Units 5 & 6 and 200 MW from CTPS Units 7 & 8) and DVC was desirous of selling said power on mutually agreed terms and conditions. As per Recital B, the duration of the PPA was for a period of 25 years from the date of commencement of supply 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. Recital C provides that without prejudice to technical constraints, DVC shall supply power to MPPMCL on scheduled basis. Recital D provides that either party may foreclose the PPA by giving a prior notice of one year before expiry of each 5 year block, without any liability from either side.

15. MPPMCL by exercising its power under Recital D has given a notice dated 28.2.2017 to DVC to terminate the PPA dated 3.3.2006, effective from 1.3.2018. vide its letter dated 2.5.2017 has given a notice to DVC for termination of the PPA w.e.f. 15.5.2017. DVC vide its letter dated 30.5.2017 offered a concession of 12 paise per unit in fixed cost provided MPPMCL accepts the supply of 400 MW power for five years. DVC vide its letter dated 9.11.2017 rejected the notice of termination of the PPA given by MPPMCL. MPPMCL vide its letter dated 20.12.2017 clarified that the supply of power shall be discontinued from MTPS with effect from February 2018. As regards

CTPS, MPPMCL clarified that as per clause 11 of the PPA, the effective date is 28.2.2008 and therefore, supply shall be discontinued from February 2018.

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 3.3.2006.”

In the second part of prayer(b) in para 19 of the petition, DVC has sought a declaration that “MPPMCL shall not be entitled to treat the PPA having been terminated from February 2018 contrary to the terms of the PPA dated 3.3.2006.” In our view, the very foundation of the petition of DVC is the termination/foreclosure notice of 28.2.2017 and DVC has made specific averments in this regard in the petition as well as in the prayer. Without going into the merit of the submissions and prayer of DVC, it can be concluded that the termination/foreclosure notice has been challenged and the objection of MPPMCL to the contrary 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) Declare that the Respondent-MPPCL shall have the obligations to pay for the contracted capacity in terms of the provisions of the PPA dated 3.3.2006 read with the regulations and orders of the Commission.
- (b) Declare that MPPMCL shall not be entitled to treat the PPA having been terminated from February 2018 contrary to the terms of the PPA dated 3.3.2006.
- (c) Hold that Respondent-MPPMCL is liable to pay the Tariff to DVC namely fixed charges and energy charges for the quantum of electricity scheduled by MPPMCL and deemed fixed charges for the quantum of electricity declared available by DVC but not scheduled by the Respondent-MPPMCL.

In addition to the declaratory reliefs as mentioned above, DVC has sought a direction to MPPMCL to pay the amount of Rs.437.32 crores due and outstanding to the DVC as on 01.02.2018.

20. 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. 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 dated 3.3.2006 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.

22. Section 14 9(d) of the Specific Relief Act [Section 14(c) prior to the Amendment Act of 2018] is extracted as under:-

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 and the same being for rendering personal service, the provisions of Section 14(1)(c) [analogous provision in Article 14(1)(d) after the amendment] are attracted and the contract cannot be enforced. In the present case, though the PPA is for a period of 25 years, there is provision for termination/foreclosure by either party after every 5 years block without any liability to the other side. Further, the PPA is not for personal service but for supply of electricity on payment of tariff. Therefore, the facts of the present case are distinguishable from the facts of the case in Indian Oil Corporation Limited Vs. Amritsar Gas Service and Others. The Petitioner has accepted the notice of termination in respect of MTPS and accordingly, the PPA stands terminated qua the 200 MW power from MTPS with effect from 1.3.2018. In respect of CTPS, there is disagreement between the parties with regard to the effective date. If the effective date is decided as 28.2.2008, the PPA would stand terminated qua 200 MW capacity from CTPS with effect from 1.3.2018. If the date of actual commencement of supply from CTPS is recognized to calculate 5 years block, then PPA qua CTPS would stand terminated/foreclosed in the year 2021 and necessary consequence in terms of the PPA would follow.

24. In view of the above analysis, we are of the view that the provisions of neither Section 34 nor Section 14(1)(d) of the Specific Relief Act would stand on the way to consider and grant reliefs to the Petitioner as 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 3.3.2006?

25. MPPMCL has given a notice of termination/foreclosure vide its letter dated 28.2.2017. Relying upon the provisions of Recitals B and D and clause 11 of the PPA dated 3.3.2006, MPPMCL has stated that the agreement is effective from 28.2.2008 which is the date of supply of power under the PPA and since the State of Madhya Pradesh is surplus in power, MPPMCL has given the notice under Recital D to terminate the PPA with effect from 1.3.2018. Relevant portion of the notice dated 28.2.2017 is extracted as under:

“In PPA, there is a provision under the Recital D to foreclose the agreement by giving one year prior notice before expiry of each five years block without any liability on either side. As per the above provisions, this option would now be available by giving a one-year notice for foreclosure at the end of the second 5 years block ending on 28th February, 2018. Hence, MPPMCL issuing a notice for foreclosing the aforesaid PPA dated 3rd March, 2006 read with 14th May, 2007 executed for availing 400 MW power, i.e., 200 MW each from Mejia Thermal Power Station (MTPS Unit 5 & 6) and Chandrapur Thermal Power Station (CTPS Unit 7 & 8) between erstwhile MPSEB, w.e.f. 1st March, 2018 onwards.”

26. DVC has submitted that the five years block each from the date of commencement of supply would have to be applied to CTPS and MTPS under the PPA dated 3.3.2006 with effect from the commencement of supply separately for each of the two stations i.e. November 2011 and February 2008 respectively. DVC has submitted that in case of MTPS, MPPMCL had given a notice of foreclosure in terms of Recital D of the PPA dated 28.2.2017 which was one year prior to the ending of the 5 year time

block which has to be computed from February 2008 i.e. the commencement of supply from MTPS. DVC has submitted that it has not claimed any continuation of the PPA in so far as MTPS is concerned and the said exercise of foreclosure by MPPMCL being in accordance with the Recital D, the PPA qua MTPS stood terminated on 1.3.2008. DVC has further submitted that in case of CTPS, five years time block expires only in November 2021, since the commencement of supply of power from CTPS started in November 2011. DVC has further submitted that the notice dated 28.2.2017 given by MPPMCL purported to terminate the PPA for CTPS with effect from 1.3.2018 is contrary to Recital B and D of the PPA dated 3.3.2006 and is, therefore, void and unenforceable.

27. MPPMCL has submitted that the PPA dated 3.3.2006 does not provide for different effective dates for the two units each of MTPS and CTPS and the PPA becomes effective from the date of commencement of supply which is 28.2.2008. Therefore, the submission of DVC that while MTPS stands foreclosed on 1.3.2018, the CTPS does not stand closed is not correct.

28. We have considered the submissions of the parties. Though there is agreement between the parties that the PPA could be foreclosed after each five years block after giving a prior notice of one year, the parties differ with regard to the date of commencement of electricity in terms of the PPA. Let us discuss some of the important provisions of the PPA. Clause 11 of the PPA dated 3.3.2006 defines "Effective Date and Duration of the Agreement" as under:

"11. Effective Date and Duration of Agreement:

Notwithstanding anything to the contrary contained in this Agreement, the Agreement shall come into force from the date of commencement of supply and all purposes and

intents shall remain operative initially upto a period of 25 years and may be reviewed to any other period based on mutually agreed terms and conditions.”

29. The question for consideration is whether the date of commencement of supply for the purpose of the PPA shall be February, 2008 when the power was supplied from MTPS or shall be different for MTPS and CTPS since the power was supplied from CTPS in November, 2011. It is a settled position of law that the contract has to be considered as a whole in order to ascertain the intentions of the parties entering into the contract. In this connection, the following judgments of the Hon’ble Supreme Court are referred:

(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."

30. 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.

31. Recital A of the PPA dated 3.3.2006 provides that MPSEB (predecessor of MPPMCL) was desirous to purchase 400 MW power (200 MW from MTPS Units 5 & 6 and 200 MW from CTPS Units 7 & 8) round the clock basis from DVC, and DVC is desirous of selling 400 MW power from its Units MTPS 5 & 6 and CTPS 7 & 8 round the clock basis on mutually agreed terms and conditions. Even though there is one PPA, the parties have agreed for supply of power from two generating stations of DVC. Further, Clause 2.1 of the PPA provides that the quantum of supply of power shall be 400 MW (200 MW from MTPS and 200 MW from CTPS) round the clock power. Third para under Clause 4.1 provides that “MPSEB shall be liable to pay capacity (fixed) charges proportion to their contracted power i.e. 200 MW from MTPS Unit 5 & 6 and 200 MW from CTPS Unit 7 & 8 out of total capacity of MTPS Units 5 & 6 (2X250 MW) and CTPS Units 7 & 8 (2X250 MW) in terms of target availability as per CERC norms”. Thus for the purpose of quantum of contracted power, their scheduling and payment of

fixed charges, the parties are envisaged MTPS and CTPS as two different generating stations. Since the commercial operation of both the generating stations are different, the commencement of supply of power is bound to start on different dates from both the generating stations. Even though there is a common PPA for supply of power from both the generating stations, the dates of commencement and cessation of supply of power in case of both the generating stations shall be different. If we consider the date of commencement of supply of MTPS for the purpose of determination of the term of the PPA, the supply of power from CTPS will be for a period of 22 years and not for a period of 25 years as envisaged in the PPA. Further, this will lead to under-recovery of capacity charges by CTPS. Therefore, in our view, the commencement of supply of power shall be considered differently in case of MTPS and CTPS with reference to the commercial operation of their respective units. We are of the view that the second time year block in case of CTPS shall end on completion of 10 years of supply w.e.f. November, 2011. In our view, MPPMCL cannot terminate the PPA qua CTPS before November, 2011.

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

32. In the light of our findings that the second five years block in case of CTPS shall be completed in November, 2021, DVC shall be entitled to supply power to MPPMCL till November, 2021. MPPMCL shall be liable to pay the fixed charges where the power is not scheduled and both fixed charges and energy charges where the power is scheduled from CTPS. 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 payments of outstanding dues are made.

33. 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 28.2.2017 is in accordance with the provisions of Recital D of the PPA dated 3.3.2006 and accordingly, the PPA qua the contracted capacity from MTPS shall stand terminated w.e.f. 1st March, 2018. However, the PPA dated 3.3.2006 qua the contracted capacity from CTPS is still valid and the termination notice is held to be void in respect of contracted capacity from CTPS. Consequently, MPPMCL is liable to schedule the contracted capacity from CTPS and make payment therefor in terms of the PPA dated 3.3.2006 to DVC.

(c) MPPMCL is directed to pay the outstanding dues to DVC in terms of our order with applicable rate of interest as per the Tariff Regulations of the Commission till the payment of outstanding dues are made.

34. Petition No. 78/MP/2018 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson