

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram:
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of order: 30th September, 2022

Petition No. 40/MP/2022

In the matter of:

Petition under Section 79(1)(a) and (f) of the Electricity Act, 2003.

And

In the matter of

NTPC Limited
NTPC Bhawan,
Core – 7, Scope Complex 7,
Institutional Area, Lodhi Road,
New Delhi 110 003.

... Petitioner

Versus

1. Meghalaya Power Distribution Corporation Limited,
Secretariat Hills, Shillong,
Meghalaya – 793 001.

2. Meghalaya Energy Corporation Limited,
Lumjingshai, Short Round Road,
Shillong, Meghalaya – 790 001.

... Respondents

And

In the matter of

Petition No. 47/MP/2022 along with IA No. 5/IA/2022

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 7 of the Power Purchase Agreement dated 13.7.2007 entered into between the National Thermal Power Corporation and the predecessor in interest of the Petitioners i.e. Meghalaya State Electricity Board.

And

in the matter of



1. Meghalaya Power Distribution Corporation Limited,
Lumjingshai, Short Round Road,
Shillong – 793 001, Meghalaya

2. Meghalaya Energy Corporation Limited,
Lumjingshai, Short Round Road,
Shillong – 793 001, Meghalaya

...Petitioners

Versus

NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110 003.

...Respondent

Parties Present

Ms. Swapna Seshadri, Advocate, NTPC
Shri Anand K Ganesan, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC
Shri Jai Dhanani, Advocate, NTPC
Shri Amit Kumar, Advocate General, MePDCL
Shri Shaurya Sahay, Advocate, MePDCL

ORDER

Since both the above cross Petitions raise a common issue, they have been clubbed together for adjudication.

2. The Petition No. 40/MP/2022 has been filed by NTPC Limited ('NTPC') under Section 79(1)(a) and (f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking the following reliefs against Meghalaya Power Distribution Corporation Limited and Meghalaya Energy Corporation Limited:

"a. Set aside the letter dated 16.4.2021 issued by the Respondents as being wrongful and incorrect;

b. Direct the Respondents to be bound by the MoP allocation dated 13.10.2008 and the PPA entered into between the parties;

c. Direct the Respondents to forthwith release an amounts of Rs. 531 crores to the Petitioner;



d. Direct the Respondents to clarify the factual aspects of filing the Petition before this Commission as per the statement of Respondents made before the Hon'ble Commercial Court, Shilling in Commercial Case No. 2 of 2021;

e. After ascertaining the factual position, impose heavy costs on the Respondents for misleading both NTPC as well as judicial authorities to obtain unfair protection against invocation of LC;

f. Pass such further order(s) as deemed fit and proper....”

3. Meghalaya Power Distribution Company Limited ('MePDCL') and Meghalaya Energy Corporation Limited ('MeECL') have jointly filed the Petition No. 47/MP/2022 along with IA No. 5/IA/2022 under Section 79(1)(f) of the Act read with the Power Purchase Agreement ('PPA') dated 13.7.2007 entered into between NTPC and the predecessor in interest of MePDCL and MeECL i.e. Meghalaya State Electricity Board ('MSEB') seeking the following prayers:

“a. Appoint an Arbitrator in exercise of powers under Section 79 (1)(f) of the Electricity Act, 2003 for adjudication of disputes between the Petitioner and Respondent arising out of an in relation to the Power Purchase Agreement dated 13.07.2007;
OR

b. Hold and declare that the Petitioner was not required to make payment of 'capacity charges' to the Respondent on and after 15.05.2015 i.e. when the Petitioners surrendered its entire allocation under the PPA dated 13.07.2007 till 16.04.2021 i.e. when the PPA was terminated by the Petitioner; and

c. Consequently hold and declare that the Petitioner is entitled to refund an amount of INR. 495,18,69,043.00 paid by the Petitioner to the Respondent from 01.04.2016 to 16.04.2021 as fixed/capacity charges along with interest at 18% per annum till date of payment; and

d. Hold and declare that the PPA dated 13.07.2007 stood terminated and dissolved vide letter dated 16.04.2021 on account of economic unviability;

e. Hold and declare that the Respondent is not entitled to invoke and forfeit the Letter of Credit bearing Documentary Credit No. 0270RLC210001 dated 08.03.2021 in favour of NTPC equivalent to the tune of Rs. 18,92,00,000/- (Rs. Eighteen Crore Ninety Two Lakhs);

f. Consequently, direct the Respondent to return to the Petitioner Letter of Credit bearing Documentary Credit No. 0270RLC210001 dated 08.03.2021;

g. Grant any other relief which this Commission may deem fit in the facts and circumstances of the case....”



4. MePDCL and MeECL have also filed IA No. 5/IA/2022 in the aforesaid Petition seeking the following reliefs:

“1. Allow the present application seeking ex-parte interim relief and pass an order injuncting the Respondent No.1 from invocation of the Letter of Credit of amount of Rs. 18,92,000/- bearing Documentary Credit No. 0270RLC210001 dated 08.03.2021 issued by Respondent No.2 on instructions of the Petitioner No.1 pending adjudication of the instant petition; and

2. Allow the present application seeking ex-parte interim relief and pass an order restraining the Respondent from taking any coercive measures against the Petitioner in terms of the Letter of Respondent No.1 dated 15.04.2021 bearing No. NTPC/ER-IIHQ/2021/MeECL/1 pending adjudication of the instant petition; and

3. Allow the present application seeking ex-parte Ad interim injunction restraining the Respondents from executing regulation of power under its letter dated 04.05.2021 during the pendency of the present proceedings;

4. Allow the present application seeking ex-parte Ad interim injunction restraining the Respondents from executing regulation of power under its letter dated 04.08.2021 during the pendency of the present proceedings;

5. Allow the present application seeking ex-parte interim relief and pass an order restraining the Respondent No.1 from taking any coercive measures in the nature of Regulation of power to the State of Meghalaya or any regulating/ restricting any Short Term Open Access (STOA) by the Petitioners pending adjudication of the instant petition; and

6. Allow the present application seeking ex-parte interim relief and pass an order restraining the Respondent No.1 from taking any other coercive measures against the Petitioners for recovery of any ‘purported dues’ under the Power Purchase Agreement dated 13.07.2007 pending adjudication of the instant petition; and

7. Pass any other/further order(s) and/or direction(s) as this Court may deem fit and proper in the favour of the Petitioner company and against the Respondents in the interest of justice. ...”

Brief Background of the case

5. NTPC is a generating company within the meaning of Section 2(28) of the Act, which has, among the others, set-up 750 MW (3x250 MW) Bongaigaon Thermal Power Station (‘BTPS’) in the State of Assam. MePDCL and MeECL are the entities formed upon the unbundling of the erstwhile MSEB and as per the said unbundling scheme, the function of the distribution of electricity in the State of Meghalaya came to be vested in MePDCL - a wholly owned subsidiary of MeECL.

6. On 13.7.2007, MSEB and NTPC entered into a PPA for purchase and sale of capacity and energy from the BTPS on terms and conditions specified in the said PPA. As per the PPA, the final allocation of power from BTPS among various customers of North Eastern Region and adjoining States (including MSEB) was to be decided by the Government of India/Competent authority in accordance with the applicable guidelines issued from time to time subject to signing of PPA by the Bulk Power Customers. It has also been specified therein that such allocation of power along with various terms and conditions mentioned therein shall form an integral part of the PPA. On 13.10.2008, the Ministry of Power, Government of India ("MoP") allocated the share in the installed capacity of the NTPC's BTPS among the various beneficiaries and MSEB came to be allocated @ 7.08% of the installed capacity, that is about 53 MW out of the total capacity of 750 MW. Unit - I (250 MW) of the BTPS achieved the commercial operation on 1.4.2016. However, prior to the above, the Power Department, Government of Meghalaya vide its letter dated 15.5.2015 requested the MoP to arrange for the necessary order(s) for surrendering the entire allocation of 53 MW of power from BTPS temporarily without any levy of fixed charges upto the year 2021. It was stated therein that after having reviewed the availability vis-à-vis the demand situation, the State had adequate power to meet its requirement upto year 2021. Thereafter, the Power Department, Government of Meghalaya, after NTPC having informed about the commercial operation of Unit I w.e.f. 1.4.2016 and the allocated share of MSEB from the said Unit to the tune of 18 MW, once again wrote to MoP proposing the surrender of this share of 18 MW from BTPS and for issuance of necessary order in this regard. However, the MoP vide its letter dated 19.5.2016 communicated to all the State Govts./Discoms that the MoP has received various communications by the States for surrendering their allocated share of power from the Central Generating Stations and the States have been requested to give their consent to avail such power so that it can be re-allocated. In the said communication, the Ministry of Power also stated that as on that date, no request for re-allocation was pending and accordingly, the surrendered power could not be re-allocated to some other beneficiaries and hence, the fixed charge liabilities continued to be with original beneficiaries.

7. Subsequently, the Unit-II of BTPS was commissioned on 1.11.2017 whereas the Unit-III was commissioned on 26.3.2019. While initially there appeared to be some differences in submissions of the parties with regard to the procurement of power from BTPS by MePDCL, what is undisputed is that NTPC continued to declare its availability and on that basis continued to claim the capacity charges and MePDCL did make payments towards the dues concerning the BTPS, albeit in-part. Pursuant to the letter of NTPC dated 6.1.2021, MeECL also established the Letter of Credit dated 8.3.2021 for an amount of Rs. 18.92 crore. Thereafter, certain correspondences were also exchanged between the parties with regard to the total outstanding dues including the formulation of definite liquidation plan for clearance of such dues.

8. Thereafter, on 16.4.2021, MePDCL issued the notice for termination of PPA with immediate effect and further invoking the Dispute Resolution process therein with regard to its claims for refund of entire fixed/capacity charges paid by it along with damages suffered by it on account of levy of fixed/capacity charges w.e.f. 15.5.2015 till the date of issuance of notice. Immediately thereafter on 22.4.2021, MePDCL also filed Arb. Comm. Case No. 2 of 2021 before the Commercial Court, Shillong under Section 9 of the Arbitration and Conciliation Act, 1996. MePDCL also filed Commercial Misc. Case No. 6 of 2021 seeking ex-parte ad-interim injunction which was allowed by the Court vide its order dated 22.4.2021 restraining NTPC from invocation of Letter of Credit (LC). NTPC vide its letter dated 24.4.2021 replied to the MePDCL's notice dated 16.4.2021 and refuted the termination of the PPA by MePDCL on unilateral basis. NTPC also filed Commercial Misc. Case No. 8 of 2021 under Order 39 Rule 4 of the Code of Civil Procedure, 1908 for vacation of stay granted vide order dated 22.4.2021. However, the said case came to be dismissed by the Commercial Court vide its order dated 11.5.2021. NTPC also proceeded to file Arbitration Appeal No.1 of 2021 before the Hon'ble High Court of Meghalaya challenging the aforesaid order of the Commercial Court dated 11.5.2021, however, the said appeal was dismissed by the Hon'ble High Court vide order

dated 6.7.2021. In the meantime, NTPC had also issued another notice to MeECL on 4.5.2021 to clear the outstanding dues failing which it would be constrained to regulate the power supply to MeECL as per the provisions of the Central Electricity Regulatory Commission (Regulations of Power Supply) Regulations, 2010. The said notice was also challenged by the MePDCL by Commercial Misc. Case No. 9 of 2021 wherein the Hon'ble Commercial Court vide order dated 7.5.2021 granted ad-interim stay on the execution of the said notice till the next date of hearing. In the meanwhile, MPDCL and MeECL filed a Petition before the Commission under Section 79(1)(f) of the Act read with Article 7 of the PPA dated 13.7.2007 seeking appointment of arbitrator for adjudication of disputes between the Petitioners and Respondent NTPC arising out of and in relation to the said PPA. When the Commercial Case No. 2 of 2021 was listed before the Hon'ble Commercial Court, Shillong on 25.11.2021, MePDCL and MeECL informed the Court that they have already filed an appropriate Petition before an appropriate forum i.e. this Commission under Section 79(1)(f) of the Act. Ultimately, the Hon'ble Commercial Court disposed of the Commercial Case No.2 of 2021 vide order dated 30.11.2021 by taking into the account the submission of learned Advocate General appearing for MePDCL and MeECL that they having filed a Petition before this Commission seeking statutory remedy and by directing the parties to maintain the status quo till MePDCL is given an opportunity of effective hearing on an application filed by it before this Commission.

9. NTPC also filed a Petition under Section 79(1)(f) of the Act for setting aside the notice dated 16.4.2021 issued by MePDCL for termination of PPA and invocation of the dispute resolution process under clause 7.1 of the PPA and seeking a direction to MePDCL and MeECL to be bound by the allocation by MoP and the provisions of the PPA. In the said Petition, NTPC has stated that despite the order of the Hon'ble Commercial Court dated 30.11.2021, MePDCL and MeECL did not move any application/letter for listing of their Petition before the Commission nor NTPC was served any copy of the Petition or mapped on the e-filing portal of the Commission. It is stated that NTPC also wrote a letter dated 14.12.2021 to

MePDCL to serve it a copy of the Petition filed before the Commission and for getting the said matter listed at the earliest. However, NTPC did not receive any reply/response thereon.

10. The Petition filed by NTPC was registered as Petition No.40/MP/2022 and the Petition filed by MePDCL and MeECL were registered as Petition No.47/MP/2022. The parties have completed their pleadings.

11. The dispute involved in both Petitions pertains to the validity of the termination of the PPA dated 13.7.2007 by MePDCL & MeECL and consequently, their liability to make payment of capacity charges in respect of NTPC's BTPS generating station. Since the pleadings of the parties in both the cross Petitions bear some repetitions, it would be more appropriate and concise to list out only the gist of the submissions as advanced by the both the sides in support of their respective prayers.

12. MePDCL & MeECL in their Petition, reply/ rejoinder and the written submissions have mainly put forth the following submissions/grounds:

Reference of dispute to Arbitration

(a) The dispute between the parties arises out of and in relation to the PPA dated 13.7.2007 as executed between NTPC and MSEB and since the dispute concerns the interpretation of the PPA and computation of losses to the parties which can effectively be done only in arbitration after leading the evidence, the Commission may refer the present dispute to arbitration. In the present matter, for deciding the disputes, evidence etc. is required which is best suited for civil proceedings viz. arbitration and not before this Commission. Even prayers (c) and (d) are purely pecuniary claims, which cannot be decided in these proceedings and would require leading of evidence which can be done effectively only in arbitration. Reliance has been placed on the judgment of Hon'ble Supreme Court in the case of T.N. Generation & Distribution Corp. Ltd. v. PPN Power Generating Co. (P) Ltd., [(2014) 11 SCC 53] wherein the Apex Court has held that the Commission has to exercise its discretion of referring the dispute to arbitration reasonably and not arbitrarily.

Levy of Capacity Charges and termination of PPA

(b) There is no provision in the PPA which enjoins MePDCL to pay capacity charges even after surrendering its allocation of power. MePDCL surrendered its allocated power vide its communication dated 15.5.2015 (i.e. even before the commissioning of Unit I of BTPS) and again on 20.4.2016. However, there has been no response from NTPC to the above letters and fixed charges have been levied and extracted out of MePDCL despite surrendering its allocation. There is no provision in the PPA which provides for levy of capacity charges despite the surrender of the allocated power. As per the stipulations contained in the Section 37 of the Indian Contract Act, 1872, NTPC being party to the PPA, its entitlements were circumscribed by the provisions of the PPA and not otherwise and therefore, the entitlement to receive the capacity charges has to be established from the provisions of contract which admittedly does not have any such provision.

(c) Clause 2.2.6 of the PPA, which is relied upon by NTPC, governs only the situation that non-drawl on allocation after surrendering the same is not a 'default' within Clause 2.1.6 and therefore, there is no occasion to impose such a levy. Clauses 2.2.3, 2.2.4, 2.2.5 & 2.2.6 pertain to the default only when MePDCL has defaulted by not paying dues or opening of LC, etc. Clause 2.2.6 does not apply to a situation where there is no default as contemplated under Clause 2.2.4 i.e. no default of dues/opening of LC of adequate amount. Clause 2.2.6 does not deal with a situation where the allocated power is surrendered by MePDCL.

(d) As such, there is no provision in the PPA which obliges MePDCL to pay fixed charges for delay committed by NTPC/Ministry of Power in re-allocating the power. Subsequent to filing of the Petition, on 28.3.2022, 53 MW power surrendered by MePDCL has been transferred to Tamil Nadu by the Ministry of Power, Government of India for a period of 5 years. On 24.4.2022, the remaining unallocated share of Meghalaya has also been allocated to Uttarakhand for a period of one year by the MoP.

(e) Upon surrendering the allocated power, MePDCL is not liable to pay capacity charges under the Tariff Regulations, 2019 as it is no more a beneficiary in terms of Regulation 3(8) of the Tariff Regulations. *Sine qua non* for being a beneficiary is to be a distribution licensee who is purchasing power under the PPA. In the present case, MePDCL surrendered the power in 2015 even before the commissioning of the Project.

(f) The levy of capacity charges is limited to the meeting the fixed cost of operation and not beyond. As per Regulation 42 and Regulation 55 of the Tariff Regulations 2019, the capacity charges are proportionate to the share of allocation. MePDCL having surrendered the allocation on 15.5.2015, after such surrender no cost is being incurred by NTPC towards the share of allocation of MePDCL.



(g) If the contention of NTPC is accepted, it would create a situation that despite surrender of allocation by a purchase, there would be no requirement or incentive for Ministry of Power to re-allocate the surrendered share of power for any number of months or years and NTPC can continue to levy and recover such capacity charges from the purchaser. Ad-indefinitum levy of capacity charges tantamount to unjust enrichment and violative of Section 73 and Section 74 of the Indian Contract Act, 1872. Levy of capacity charges on MePDCL is not against any actual cost/ or loss incurred and is, therefore, hit by the aforesaid Sections of the Indian Contract Act. The levy of capacity charges, without any service, is also opposed to public policy and is unconscionable and barred by Section 23 of the Indian Contract Act. Even the late payment surcharge of 18% is exorbitant and is not justified as there is no proportionate cost incurred by NTPC towards the same and the same would amount to over-compensation.

(h) Without prejudice to the above, there is no iota of reasoning which explains why the surrendered power was not re-allocated since 15.5.2015. NTPC/Ministry of Power was under the responsibility to re-allocate the power within the reasonable period after the surrender. The same cannot be done on the sweet will of NTPC/Ministry. The Central Government has the responsibility to re-allocate the surrendered share and by not doing so immediately, it has failed to mitigate losses. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Anr., [AIR 1962 SC 366]. Whether the NTPC has suffered the loss or not or whether the recovery of capacity charges is against the said loss or not are triable matters best suited for determination by the civil proceedings viz. arbitration.

(i) It is also unclear as to on what basis NTPC has levied the capacity charges inasmuch as 53 MW was to be allocated to MSEB after the BTPS become fully operational which happened in 2019 only. NTPC has not produced any documents to show actual allocation of power to Meghalaya apart from the letter dated 13.10.2008 which states that 53 MW would be allocated to Meghalaya. It has also not been clarified as to how much power was actually allocated to Meghalaya from 2016 onwards as only one unit of 250 MW became operational in 2016. NTPC cannot levy fixed charges on the basis of the fact that 53 MW was allocated to Meghalaya as the same was to be allocated to Meghalaya when the entire 750 MW became fully operational only in 2019. NTPC has also not produced any documents to show that on what basis the allocated capacity was increased by about 4.8 % (i.e. approx. 35 MW) as the Petitioner was allocated only 53 MW vide letter dated 13.10.2008 by the Government of India.

(j) MePDCL has inherent right of terminating the contract and there is no provision which bars it from terminating the contract because the excessive delay committed by NTPC in

commissioning of the project and the consequent economic unviability in the purchase of power from BTPS due to delay committed by NTPC of about 5 years in commissioning the first unit of BTPS. Levy of fixed charges despite the surrender of power also entitles MePDCL to terminate the contract as such contract is one-sided and allows NTPC to benefit from its delay in commissioning the project and not re-allocating the power after the surrender.

(k) MePDCL is also entitled to terminate the PPA as per Section 55 of the Contract Act due to failure of NTPC to commission the project in time. There is a breach of representation regarding timely operationalization of the project, which came up only in 2015 as against the expected schedule of 2011. MePDCL is also entitled to terminate the PPA on account of economic unviability and under the principle of business efficacy. In this regard, reliance has been placed on judgements of Hon'ble Supreme Court in the cases of Adani Power (Mundra) Ltd. v. GERC and Ors., [2019 SCC Online SC 813] and Nabha Power Ltd. v. PSPCL, [(2018) 11 SCC 508]. The termination of the PPA is under the principle of business efficacy which lays down an unexpressed term that has to be read in to the contract if a prudent businessman would have agreed to such a clause. The termination of contract is such a clause that any of the parties would have incorporated in the PPA as the said clause is fundamental and incorporation of such a clause is obvious and goes without saying. In the present case, no prudent business person would have agreed to ad-indefinitum payment of capacity charges despite the surrender of allocated power before commissioning of the project whose operation was delayed due to the defaults of the other side.

(l) Even otherwise, PPA is frustrated under Section 56 of the Indian Contract Act, 1872 due to impossibility to perform the contract. Clause 8 of the PPA provides for Force Majeure and consequent voiding of the contract due to any supervening circumstances which is beyond the control of the parties. The first unit of the BTPS was commissioned in 2016 when it was expected to be commissioned in 2011. Such excessive delay committed by NTPC in operationalizing the unit frustrates the contract and MePDCL cannot be forced to continue with the PPA because of such excessive delays on the part of NTPC. Moreover, the excessive delay in re-allocating the power from 2015 onwards on the part of Ministry of Power is beyond the control of MePDCL. The inaction on the part of the Government of India in re-allocating the power is a force majeure event which frustrates the contract and makes it void.

(m) The termination was also necessitated since the power purchase cost in respect of the BTPS was approximately Rs. 5/kWh as against Rs. 2-3/kWh elsewhere. MePDCL was compelled to terminate the unviable PPA and the termination of the PPA had taken place



in the larger public interest and in exercise of the doctrine of necessity. Even otherwise, there is no loss or prejudice has been caused to NTPC consequent upon the termination. The private interest of NTPC must give way to the public interest. In this regard, reliance has been placed on the judgments of Hon'ble Supreme Court in the case of Friends Colony Development Committee v. State of Orissa, [(2004) 8 SCC 733] and STO v. Shree Durga Oil Mills [(1998) 1 SCC 572].

(n) The contention of NTPC that there has been intermittent purchase of power in 2016 & 2021 and therefore the same amounts to acquiesce and the surrender and termination letters are of no effect is erroneous. Even before commissioning of the first unit of BTPS, MeDPCL had surrendered the allocated power vide letter dated 15.5.2015, which was further reiterated by its letter dated 20.4.2016 after commissioning of the first unit of BTPS. No purchase was made in April, 2017 to January, 2021 which was clear evidence that MeDPCL did not want to continue with the PPA. It is trite that only conduct which leads to estoppel in terms of Section 115 of the Evidence Act, 1872 can stop the parties. The intermittent purchase of power does not assume any significance as the conduct of the Petitioner clearly shows that it wanted to surrender the allocated power and did not wish to continue with the PPA. NTPC has accepted the surrender of power by MePDCL in 2022 by re-allocating the power to the States of Tamil Nadu and Uttarakhand and thus, the conduct of NTPC to re-allocate the power despite the intermittent purchase of power shows that such purchase is of no effect and does not create any estoppel. In the present matter, the question is not of acquiescence of MePDCL but of the inordinate delay committed by NTPC and the benefits that NTPC is seeking to achieve out of its wrong in failure to start the project in time and failure of NTPC/MoP to re-allocate the power. The reliance has also been placed on the judgment of Hon'ble Supreme Court in the case of Tamil Nadu Electricity Board v. N. Raju Reddiar, [(1996) 4 SCC 551].

(o) Levy of capacity charges is a levy in terrorem and by way of penalty without any obligation to pay the same under the PPA. Such levy is not against any actual loss suffered by NTPC and therefore, is violative of Section 74 of the Contract Act. In this regard, reliance has been placed on the judgments of Hon'ble Supreme Court in the case of Union of India v. Raman Iron Factory, [AIR 1974 SC 1265] and Kailash Nath Associated v. DDA [(2015) 4 SCC 136]. The Hon'ble Supreme Court in BSNL v. Reliance Communications Ltd., [(2011) 1 SCC 394] has explained that when the amount stipulated is in terrorem or forces a party to perform the contract, it would amount to penalty. Merely because NTPC claims that the right to receive capacity charges is as per the applicable laws, the same cannot be levied without passing the fundamental pre-requisite of first, proof of breach; second proof

of loss due to breach and finally, penalty would be as per actual loss suffered. None of these conditions are met in the present case.

(p) Once the entire allocation of MePDCL has already been surrendered, there exists no legal or factual basis to levy capacity/fixed charges inasmuch as surrender of allocation would mean that the allocation is freed up and that the same shall not have to be made available to the said purchaser. It is for the NTPC and MoP to ensure re-allocation of the same forthwith. The interpretation of the Tariff Regulations in a manner that absolves or even disincentivises the MoP/NTPC from re-allocating the surrendered power is liable to be rejected as the same would render the exercise of re-allocation of power otiose. Reading the regulation as not placing any reasonable time limit for re-allocation of power by Central Government would result in absurd consequences where the purchaser, despite surrender of the allocation, shall continue to retain financial burden of capacity charges. This would be contrary to the basic principle of interpretation that requires a statute to be construed so as to give sensible meaning to them. In this regard reliance has been placed on the judgments of Hon'ble Supreme Court in the cases of Padubidri D Shenoy v. Indian Airlines Ltd. and Anr, [AIR 2009 SC (Supp) 1921], Gurudevdatla VKSSS Maryadit and Anr. v. State of Maharashtra [AIR 2001 SC 1980], State of Jharkhand v. Govind Singh [AIR 2005 SC 294], MRF Ltd. v. Manohar Parrikar, [(2010) 11 SCC 374], Union of India and Ors. v. A. K. Pandey [(2009) 10 SCC 552], Jaswant Singh Mathura Singh and Anr. v. Ahmedabad Municipal Corporation and Ors. [1992 Supp (1) SCC 5] and Banwari Dass v. Sumer Chand [(1974) 4 SCC 817].

13. NTPC in its Petition, reply/ rejoinder and the written submissions has mainly put forth the following submissions/grounds:

(a) MePDCL and MeECL knowing fully well that the power to adjudicate the disputes between a generating company and the distribution licensee rests with this Commission in terms of Section 79(1)(f) of the Act read with judgment of Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., [2008 4 SCC 755] still chose to file an arbitration application before the Hon'ble Commercial Court and obtained an *ex-parte* interim order dated 11.5.2021. All evidence and submissions of NTPC and MePDCL and MeECL are based on admitted documents which have been placed before the Commission. Since there is no evidence to be given on affidavits, cross-examination, etc., the Commission can decide the matter based on the documents and judgments relied on by both parties.

(b) The contentions that MePDCL is not required to make payment of capacity charges on and after 15.5.2015 (when it chose to surrender its entire allocation) till 16.4.2021 i.e. when the PPA was terminated and the Article 2.2.6 of the PPA does not authorise levy of capacity charges after surrender of allocation are misplaced. Simple reading of the Article 2.2 of the PPA reflects that such contentions are bereft of merits. The writing of letter to Ministry of Power, Government of India requesting for re-allocation of power cannot be termed as final and binding on the parties till such time the request is accepted by the Ministry of Power as has been done on 28.2.2022 and 24.2.2022.

(c) When the Central Government has the power to allocate/re-allocate/de-allocate the electricity being set-up and generated by the Central Sector Generating companies like NTPC then it is only the Central Government which can prescribed the conditions of exit or allocation/de-allocation/re-allocation from such PPAs. This does not mean that the PPA and the obligations under the same i.e. payment of capacity charges would continue till perpetuity. NTPC is not claiming that the electricity once allocated can never be de-allocated.

(d) The allocation of electricity by the Ministry of Power, Government of India is not unilateral and is based on a request made by the State for such allocation. The contract/PPA in such cases comes into existence when the State/licensee request for power allocation and the MoP, Gol allocates the power. The PPA signed also reflects this position and states that the PPA would be valid subject to the allocation of electricity by the MoP, Gol. The allocation/ re-allocation/ de-allocation of the electricity by the MoP, Gol can only be done when an alternative procurer is identified. Therefore, MePDCL and MeECL cannot unilaterally terminate the PPA just after requesting for reallocation of power by Gol, MoP vide its letter dated 15.5.2015.

(e) The release of the procurer from its obligations under the PPA would be subject to the MoP, Gol being able to allocate/ re-allocate/de-allocate the power, fully or partially, to any other person and would be limited to the period for which allocation/re-allocation/de-allocation fructifies. Further, the allocation/re-allocation/de-allocation is possible only in the event and to the extent the Central Government is able to identify an alternative procurer. Therefore, the procurer who has surrendered power continues to be bound by the obligations incurred under the PPA till such time and to the extent other procurer undertakes to honour the obligations of the procurer surrendering the power.

(f) In terms of the Tariff Regulations, 2014 and Tariff Regulations, 2019, capacity charges are payable to ensure that the allocated power is made available to a beneficiary as and when such demand is raised. Regulation 42 and Regulations 55 of the Tariff Regulations,

2019 clearly provide for the manner of levy and recovery of capacity charges based on the allocated capacity. Such allocation cannot be unilaterally surrendered by the purchaser.

(g) The reliance placed upon the judgments of Hon'ble Supreme Court in the cases of Padubidri D Shenoy v. Indian Airlines Ltd. and Anr., [AIR 2009 SC (Supp) 1921], Gurudevdatla VKSS Maryadit and Anr. v. State of Maharashtra, [AIR 2001 SC 1980], State of Jharkhand v. Govind Singh, [AIR 2005 SC 294], Manohar Parrikar [(2110) 11 SCC 374], Union of India and Ors. v. A K Pandey, [(2009) 10 SCC 552], Jaswant Singh Mathura Singh and Ors. [(1992) Supp (I) SCC 5] and Banwari Dass v. Sumer Chand [(1974) 4 SCC 817] are misplaced. In fact, the said judgments support the case of NTPC as this Commission in various cases while applying the basic principle of interpretation has ruled in favour of NTPC.

(h) Reliance placed on the judgment of Hon'ble Supreme Court in the case of Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Anr. [AIR 1962 SC 366] is also misplaced as no breach of contract on the part of NTPC has taken place in the facts and circumstances of the present case. NTPC is seeking specific performance of the PPA by MePDCL and MeECL and not claiming any damages for breach as being argued by them. A claim for capacity charges of a generating station which has been set up on the basis of allocation by MoP, GoI at the instance of MePDCL and MeECL cannot by any means be equated to a claim for damages.

(i) MePDCL and MeECL can also not contend that they will breach the contract, but NTPC will have to be satisfied by suing for damages for such breach. This is because a party cannot take advantage of its own wrong. NTPC is entitled to seek specific performance. In this regard, reliance has been placed on the principle decided by the APTEL in judgment dated 6.8.2021 in Appeal No. 43 of 2020 & batch – UPPCL v. UPERC and Bajaj Energy Ltd.

(j) Cancellation or termination of the PPAs executed based on the allocation of power made by the Central Government seriously affects the scheme of investment in the infrastructure such as the power generation by the Central Public Sector Units (CPSUs), the investment made by the CPSUs are to be serviced and that when a procurer decided to unilaterally terminate the PPAs, the CPSUs are seriously prejudiced.

(k) Capacity charges are meant to cover the total fixed cost for the generating station i.e. interest on loan, return on equity, loan repayment provision for depreciation/ amortization, fixed O & M cost and tax, etc. and if the same is not paid, it will cause great prejudice to the generating station. Further, MePDCL as the procurer had a right to allocated capacity under the PPAs at all times and correspondingly, has the obligation to pay the 'capacity

charges' for the power allocated even in case of non-scheduling of power of its own violation.

(l) The contention in regard to non-payment of capacity charges is contrary to the basis scheme of tariff payment under the cost plus tariff determination as per Section 62 of the Act and also as per the Tariff Regulations notified by the Commission. The basic concept of the tariff determination and tariff liability of a purchase of electricity is that there is an obligation to pay the capacity charges so long as the generator has declared available capacity, namely, till the power is no allocated/ reallocated /de-allocated by the MoP, GoI in the present case notwithstanding that the purchase of electricity schedules the capacity offered by the generator or not. The generator having made upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needs to be serviced during the lifetime of the generating station through the payment of annual fixed charges. Such annual fixed charges are determined with reference to the specific tariff elements as provided in the applicable Tariff Regulations and have nothing to do with the quantum of actual energy generated by a generating company.

(m) The annual capacity charges are payable so long as the generator makes available the capacity by necessary declaration to the specified extent, namely, the capacity allocated by the MoP, GoI in the present case. This scheme is for the payment of capacity charges not only in the present case but universally in the case of all generating companies and this has been the consistent practice followed in the past many years. The same is recognized and provided for in the Tariff Regulations of this Commission.

(n) The tariff in the case of NTPC is governed by Section 79(1)(a) read with Sections 61, 62 & 64 of the Act and to be determined by this Commission. The parties have not agreed to any bilateral tariff in the PPA. The tariff itself being determined by the Commission, the manner of recovery would also be governed by the Tariff Regulations, 2019. NTPC does not need to independently establish from the PPA that it is entitled to receive capacity charges. Therefore, the hyper-technical argument of MePDCL and MeECL that NTPC is not entitled to claim capacity charges as per the PPA deserves to be rejected.

(o) MePDCL has also contended that the exorbitantly high and economically unviable power cost of BTPS is the force majeure event which led to invoking Article 8 of the PPA. Firstly, the tariff of BTPS is decided by this Commission in the tariff petitions and it cannot be termed as exorbitantly high or economically unviable. Secondly, to term the cost of power as a force majeure event is completely unacceptable. The phrase "or any other such reason beyond the control of the concerned party" as used in Article 8 has to be read ejusden generic with the words used in the former part of the provision and should be

related to aspect like war, rebellion, riot, lock-out, forces of nature, accident and act of God, etc. A non-willingness to purchase the electricity or tariff determined at a particular level cannot by any stretch of imagination be equated to 'force majeure' under the PPA.

(p) MePDCL has also relied on Section 23 of the Contract Act to contend that the PPA would become unreasonable and against the public policy if the same becomes a non-terminable contract. The PPA is neither unconscionable nor in perpetuity. It is just that neither NTPC nor MePDCL have the right to terminate the contract since it is only the MoP which can reallocate the electricity. The judgment in Adani Power (Mundra) Ltd. v. GERC and Ors., [2019 SCC Online SC 813] and Nabha Power Ltd. v. PSPCL [(2018) 11 SCC] have not application in the present case. In the said judgments, the Hon'ble Supreme Court was considering whether there should be a limited implied term in a contract so that the contract makes business sense. In the present case, the contract is a result of allocation of electricity made by MoP and there is no need to imply any term to make it efficacies. The contract as worded can be implemented without implying any term.

(q) Similarly, the judgment in Rajasthan Breweries Ltd. v. Stroh Brewery Company, [2000 SCC OnLine Del 481] has no application. It was a case of purely commercial contract in private law being considered by the Hon'ble Delhi High Court. The principle laid down is that from the very nature of the agreement it could be terminated without assigning any reason or serving a notice. Unlike the case considered by the Delhi High Court, the present PPA is a result of the request by the State of Meghalaya to MoP for share in BTPS based on which the investment approval for setting up of the generating station had been obtained by NTPC. NTPC's fixed charges cannot be prejudiced and therefore, till the reallocation of the electricity, MePDCL and MeECL will be liable to pay the same.

(r) Allocation of power by the MoP is a sovereign function under Article 74 of the Constitution of India and this function has not been delegated to any other authority either while framing of legislation, namely, the Act or by any other executive action.

(s) NTPC has not committed any default under the PPA and the delay in achievement of the date of commercial operation in case of BTPS has already been adjudicated upon by the Commission by way of a tariff determination process under Sections 61, 62 & 64 of the Act. The Commission by its order dated 22.5.2017 decided the COD of Unit I as 1.4.2016, as against the time overrun of 1886 days. The Commission has also condoned a period of 1303 days which is a judicial recognition of the fact that the delay in achieving the COD was for reason beyond the control of NTPC. MePDC & MeECL were parties in the aforesaid tariff determination process and had full opportunity to raise any objection adducing proper evidence on the issue of time as well as cost overruns and therefore, for MePDCL and

MeECL to allege the very same aspects in their letter dated 16.4.2021 to terminate the PPA is unjustified and illogical.

(t) Till the period of re-allocation, neither party could unilaterally claim that it would not be bound by the PPA. MePDCL & MeECL cannot therefore term the levy of capacity charges by NTPC for the period from 1.4.2016 till 28.3.2022 (53 MW) and for the period from 1.4.2016 to 23.4.2022 (35 MW) as either illegal or arbitrary or without authority of law. The position with regard to the PPAs entered into pursuant to the allocation of power by Ministry of Power, Government of India is already settled by the Commission in its order dated 31.3.2017 in Petition No. 182/MP/2015 (TPDDL v. NTPC and Ors.) and order dated 9.3.2017 in Petition No. 20/MP/2017 (Kanti Bijlee Utpadan Nigam Ltd. v. Central Transmission Utility and Ors.) and also by judgment dated 12.10.2017 of Competition Commission of India in Case No. 20 of 2017 in the case of TPDDL v. NTPC and Ors.

(u) MePDCL and MeECL cannot act in a manner contrary to the regulations framed and earlier orders passed by the Commission. In the Tariff Regulations as framed for the various control periods, the MoP allocations have been treated on higher pedestal as compared to the PPAs and this Commission has held that the obligation/ liability of licensees to pay the 'capacity charges' can be foreclosed only if MoP re-allocates the power from one licensee to another.

(v) The allocation of electricity by the MoP, Gol is not unilateral and based on request made by the State requesting such allocation. The contract/PPA in such cases comes into existence when the State/licensee request for the power allocation and the Central Government allocates the power. The entitlements of MePDCL & MeECL were circumscribed by the allocation of power by MoP, Gol and no other consideration. If MoP allocates the electricity, there is no option to Central Generating Company to either sign or refuse to sign the PPA. The PPA signed also reflects this position and states that the PPA would be valid subject to allocation of electricity by the Central Government.

(w) As per the Section 37 of the Indian Contract Act, 1872, the parties to a contract are under obligation to either perform or offer to perform the promise which have been agreed upon under the contract. Section 2(b) of the Contract Act defines the meaning of promise as a proposal made by the offer or which has been accepted by the offeree. Thus, each party is under a legal obligation to perform his obligation which has been agreed upon under the terms of the contract. There is no allegation that NTPC has not performed its part of the contract. To the contrary, the cancellation or termination of PPA by MePDCL & MeECL on unilateral basis is not in accordance with either the PPA, or the Tariff Regulations or the scheme of allocation of power by the Central Government.

(x) MoP allocation is incorporated by reference in the PPA and it is well settled by various judgments of the Hon'ble Supreme Court that when the provisions of one statute/ document are incorporated by reference to another statute / document, then it is as if the content of the statute/document referred as bodily lifted and incorporated in the latter statute/ document. In this regard, the reliance has been placed on the judgment of Hon'ble Supreme Court in the case of Bharat Co. Op. Bank (Mumbai) Ltd. v. Co. Op. Bank Employees Union, [(2007) 4 SCC 685].

Hearing dated 17.2.2022, 21.4.2022 and 14.6.2022

14. The matters were heard at length on 17.2.2022, 21.4.2022 and 14.6.2022. On 17.2.2022, after hearing the learned counsel for the both the sides, the Petitions were admitted and parties were directed to maintain the *status quo* till the next date of hearing. Moreover, both the sides were directed to furnish the details as to (i) month-wise details of quantum of energy requisitioned, scheduled and despatched from the BTPS under the PPA till date, (ii) month-wise details of total amount billed (breakup of various sub-heads and late payment charges, if any) by NTPC to MePDCL as per the provisions of the PPA pertaining to BTPS till date, and (iii) Month-wise details of corresponding total payment made by MePDCL as per the provisions of the PPA pertaining to BTPS till date and outstanding dues till date, along with break-up of principal and late payment surcharge. The aforesaid details were furnished by NTPC vide its affidavit dated 8.3.2022 whereas MePDCL & MeECL furnished the aforesaid details vide affidavit dated 20.4.2022.

15. Thereafter, the matters were heard on 21.4.2022 and finally on 14.6.2022. After hearing the learned counsel for the parties on 14.6.2022, the matters were reserved for order and further keeping view the substantial outstanding dues, the Commission vide Record of Proceedings for the said hearing by an interim order directed MePDCL

to make payment of 25% of the outstanding principal amount to NTPC within three weeks which was to be subject to the outcome of the present petitions.

Analysis and Decision

16. We have considered the submissions made by the parties. Prior to the dealing the primary dispute(s) between the parties, it would be pertinent to address the certain ancillary prayers made by both the sides. Firstly, NTPC in its Petition No. 40/MP/2022 has prayed to direct MePDCL and MeECL to clarify the factual aspect of filing of the Petition before this Commission as per their statement before the Hon'ble Commercial Court, Shillong in Commercial Case No. 2 of 2021 and after ascertaining the said factual position, impose a heavy cost on MePDCL & MeECL for misleading both NTPC as well as the judicial authorities to obtain unfair protection against invocation of LC. We are of view that since such statements have not been made before this commission, this Commission is not inclined to examine the issue raised by NTPC in this regard.

17. Secondly, MePDCL & MeECL have also prayed to appoint the arbitrator in exercise of the power under Section 79(1)(f) of the Act for adjudication of the dispute between the parties as arising out of and in relation to the PPA. NTPC has opposed reference of the matter for arbitration.

18. We have considered the submissions made by the parties. It is now well settled that the adjudication of the disputes between the licensee and the generating company can only be done by the Appropriate Commission or the arbitrator appointed by it. The basic tenet for invoking alternate dispute resolution being "there exist elements of settlement which may be acceptable to the parties". Furthermore, it is noticed that

MePDCL & MeECL have made the prayer of appointing the arbitrator as only an alternative relief and the parties have in fact gone ahead and filed their pleadings on merits. We further find that the issue raised before us are simply contractual issue based on the admitted set of facts, and hence any reference for arbitration would be a futile exercise, as no element of settlement exist. Accordingly, the prayer of MePDCL & MeECL to appoint the arbitrator in the matter is hereby disallowed and consequently, the Commission proceeds to deal with the primary issue(s) involved in the matters.

19. Based on the submissions made by the parties in their pleadings and during the course of hearings of these matters, the following issues arise for our consideration:

Issue No.1: Whether MePDCL is liable to pay the capacity charges to NTPC despite surrendering its share of allocation of power in BTPS? and

Issue No.2: Whether the termination of the PPA dated 13.7.2007 by MePDCL is valid?

Both the above issues are discussed in the subsequent paragraphs.

Issue No. 1: Whether MePDCL is liable to pay the capacity charges to NTPC despite surrendering its share of allocation of power in BTPS?

20. MePDCL and MeECL have submitted that even prior to the commissioning of the first Unit of BTPS, they had surrendered the allocation from BTPS vide the letter dated 15.5.2015 and the said aspect was again reiterated by them vide letter dated 20.4.2016. It is submitted that there is no provision in the PPA which provides for levy of capacity charges on them despite surrendering of the allocation. The clause 2.2.6 of the PPA, which contemplates the payment of capacity charges and is relied upon by NTPC, governs only the situation of payment of capacity charges in situation of default and in the instant case, that is - non-drawl of allocation after the surrender - is

not a 'default' within the said clause. It is also submitted that NTPC's reliance on the Commission's Tariff Regulations 2019 to assert the liability of capacity charges is also misplaced as sine qua non for being 'Beneficiary' under Regulation 3(8) of Tariff Regulations, 2019 is to be a distribution licensee who is purchasing power under the PPA. However, in the present case, MePDCL and MeECL, having surrendered the allocation from BTPS, are no longer a beneficiary and thus, there is no question of application the said regulations on them. It is also submitted that in any case, the levy of capacity charges are proportionate to the share of allocation and upon surrender of the allocation, no cost is being incurred by NTPC towards the share of their allocation. MePDCL & MeECL have also contended that the ad-indefinitum levy of capacity charges tantamount to unjust enrichment and contrary to the Sections 73, 74 and 23 of the Indian Contract Act. It is also submitted that upon the surrender of the power, NTPC/MoP was responsible for re-allocation of power within the reasonable time and to mitigate the losses and failure on their part to do so cannot result in penalising MePDCL & MeECL by levy of capacity charges. In this regard, the reliance has also been placed on the judgment of Hon'ble Supreme Court in the case of Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Anr., [AIR 1962 SC 366].

21. *Per contra*, NTPC has submitted that merely writing of a letter to the MoP requesting for re-allocation cannot be termed as final and binding on the parties till such time the request is accepted by the MoP and it is able to re-allocate. It has been submitted that when the Central Government has the power to allocate/re-allocate/de-allocate the power from the Central Generating Companies like NTPC, then it is only the Central Government which can prescribe the conditions of exit or allocation/de-allocation/re-allocation from such PPAs. Till the period of re-allocation, neither party could unilaterally claim that it would not be bound by the PPA. Pertinently, the

allocation of power by the MoP is not unilateral but based on a request made by the State requesting such allocation. The contract/PPA in such cases comes in to existence when the State/licensee request for such allocation and the MoP allocates such power. The release of the procurer from its obligations under the PPA would be subject to the MoP being able to allocate/re-allocate/de-allocate the power, fully or partially, to any other person/procurer and the procurer who has surrendered power continues to be bound by the obligations incurred under the PPA till such time and to the extent other procurer undertakes to honour the obligations of the procurer surrendering the power. NTPC has submitted that above position with regard to the PPAs entered into pursuant to the allocation of power by MoP is already settled by the Commission in its order dated 31.3.2017 in Petition No. 182/MP/2015 and order dated 9.3.2017 in Petition No. 20/MP/2017. It has been further submitted that in the Tariff Regulations framed by the Commission also, the MoP allocation has been treated on higher pedestal as compared to the other PPAs and it has been held that the obligation/liability to pay the capacity charges can be foreclosed only if MoP re-allocates the power from one licensee to another. NTPC has contended that the above principle of liability to pay the capacity charges till MoP allocates/re-allocates/de-allocates the electricity has also been clearly incorporated in the PPA. Reliance placed by the Respondents on the judgment of Hon'ble Supreme Court in the case of Murlidhar Chiranjilal v. Harischandra Dwarkadas and Anr. [AIR 1962 SC 366] is misplaced as in the instant case there is no breach of contract on the part of NTPC.

22. We have considered the submissions made by the parties. While there cannot be any dispute about the fact that the Power Department, Government of Meghalaya vide its letters dated 15.5.2015 (prior to the commissioning of Unit I of BTPS) and 20.4.2016 (soon after the commissioning of Unit I of BTPS w.e.f 1.4.2016) had

conveyed to the MoP for temporarily surrendering of its allocation from BTPS till 2021 keeping in view the State's power availability vis-à-vis the demand situation and for issuance of necessary orders in this regard, what is pertinent and crucial to note is the letter of MoP dated 19.5.2016 noting such requests made by the various States including that of the Government of Meghalaya. In the said letter, the MoP has clearly observed that till the time the surrendered capacities from the various Central Government Stations by the States are to be re-allocated to the other States, the fixed charges (capacity charges) liability will continue to be with the original beneficiaries. The relevant extract of the said letter dated 19.5.2016 of the MoP reads as under:

"2. Various communications have been received in this Ministry by the States for surrendering their allocated power from Central Generating Stations (CGSs). As on date, around 4,700 MW power has been surrendered by various States to be re-allocated to other beneficiaries. The list of such references has been hosted on the Ministry of Power's website. States have also been requested to give their consent to avail such power so that it can be re-allocated. As on date no such request for re-allocation is pending with the Ministry. Accordingly, this power could not be re-allocated to some other beneficiaries. Hence, the fixed charge liabilities continued to be with the original beneficiaries....."

It is also relevant to note that the parties to the PPA dated 13.7.2007 have specifically agreed that the final allocation of power from BTPS among various customers of North Eastern Region and adjoining States shall be as decided by the Government of India/competent authorities in accordance with the applicable guidelines issued from time to time and such allocation of power along with various terms and conditions mentioned therein shall form an integral part of the PPA. The allocation letter of the MoP dated 13.10.2008, amongst the others, also specifies that the allocation will be further subject to tariff notification and the other directions /guidelines issued by the Government of India/this Commission from time to time. Therefore, the direction of the MoP under letter dated 19.5.2016 resting the liability of fixed charges/ capacity charges upon the original beneficiaries (MePDC/ MeECL in

the present case) until the re-allocation has to be read as part and parcel of the agreement between the parties.

23. Even otherwise, such liability of capacity charges upon the original beneficiaries until re-allocations by the MoP also flows from the provisions of this Commission's Tariff Regulations and in fact from the provisions of the PPA dated 13.7.2007. The Tariff Regulations, 2019 of this Commission, which apply in all cases where the tariff for a generating station or unit thereof is required to be determined by the Commission under Section 62 read with Section 79 of the Act – which includes the NTPC's BTPS – provide as under:

“(8) ‘Beneficiary’ in relation to a generating station covered under clauses (a) or (b) of sub-Section 1 of Section 79 of the Act, means a distribution licensee who is purchasing electricity generated at such generating station by entering into a Power Purchase Agreement either directly or through a trading licensee on payment of capacity charges and energy charges;

Provided that where the distribution licensee is procuring power through a trading licensee, the arrangement shall be secured by the trading licensee through back to back power purchase agreement and power sale agreement.

Provided further that beneficiary shall also include any person who has been allocated capacity in any inter-State generating station by Government of India.

.....

42. Computation and Payment of Capacity Charge for Thermal Generating Stations:

(1) The fixed cost of a thermal generating station shall be computed on annual basis based on the norms specified under these regulations and recovered on monthly basis under capacity charge. Payment of the capacity charge for a thermal generating station shall be shared by the beneficiaries of the generating station as per their percentage shares for the month (inclusive of any allocation out of the unallocated capacity) in the installed capacity of the generating station...

.....

55. Billing and Payment of charges:

(1) Bills shall be raised for capacity charge and energy charge by the generating company and for transmission charge by the transmission licensee on monthly basis in accordance with these regulations, and payments shall be made by the beneficiaries or the long term customers directly to the generating company or the transmission licensees, as the case may be:.....

(2) Payment of the capacity charge for a thermal generating station shall be shared by the beneficiaries of the generating station as per their percentage shares for the month (inclusive of any allocation out of the unallocated capacity) in the installed capacity of the generating station.....

Note 1

Shares or allocations of each beneficiary in the total capacity of Central sector generating stations shall be as determined by the Central Government, inclusive of any allocation made out of the unallocated capacity. The shares shall be applied in percentages of installed capacity and shall normally remain constant during a month. Based on the decision of the Central Government, the changes in allocation shall be communicated by the Member-Secretary, Regional Power Committee in advance, at least three days prior to beginning of a calendar month, except in case of an emergency calling for an urgent change in allocations out of unallocated capacity. The total capacity share of a beneficiary would be sum of its capacity share plus allocation out of the unallocated portion. In the absence of any specific allocation of unallocated power by the Central Government, the unallocated power shall be added to the allocated shares in the same proportion as the allocated shares.

Note 2

The beneficiaries may propose surrendering part of their allocated firm share to other States within or outside the region. In such cases, depending upon the technical feasibility of power transfer and specific agreements reached by the generating company with other States within or outside the region for such transfers, the shares of the beneficiaries maybe re-allocated by the Central Government for a specific period (in complete months) from the beginning of a calendar month. When such reallocations are made, the beneficiaries who surrender the share shall not be liable to pay capacity charges for the surrendered share. The capacity charges for the capacity surrendered and reallocated as above shall be paid by the State(s) to whom the surrendered capacity is allocated. Except for the period of reallocation of capacity as above, the beneficiaries of the generating station shall continue to pay the full capacity charges as per allocated capacity shares...

The above provisions clearly specify that the payment of capacity charges for thermal generating station shall be shared by the beneficiaries as per their percentage shares for the month (inclusive of any allocation out of the unallocated capacity) in the installed capacity of the generating station. Moreover, the Commission has also recognised that the shares or allocation of each beneficiary in the total capacity of CGSs shall be as determined by the Central Government and has further specified that while a beneficiary may propose to surrender the part of their allocated firm share, the original beneficiary shall continue to pay the full capacity charges as per the allocated capacity shares, until the re-allocation such share/capacity by the Central Government. While the above quoted provisions are extracted from the Tariff Regulations, 2019 applicable for the control period 2019-24, the similar provisions are

also contained in the Tariff Regulations, 2014 applicable for the control period 2014-19.

24. It has been placed before us that the similar findings have also been given by the Commission in its earlier orders. Relevant extracts of these orders are extracted as under:

(i) Order dated 18.4.2017 in Petition No. 223/MP/2015 in the matter of TPDDL v. NTPC and Ors.

“24. The Petitioner has sought directions to Central Government to re-allocate the power allocated to the Petitioners to other States. MoP has made its position clear about the policy of allocation and re-allocation of power from the Central Generating Stations including NTPC, NHPC and THDC It is entirely within the purview of the Central Government to allocate or reallocate power from the Central Generating Stations to the beneficiaries and the same being not covered under regulation of tariff under Section 79(1)(a) of the Act cannot be subject to adjudication under Section 79(1)(f) of the Act by this Commission. Therefore, the prayer of the Petitioner for issue of directions to the Central Government to allocate the Petitioners entire share of power from the generating stations of NTPC, NHPC and THDC to power deficit States/Utilities cannot be entertained as the same is beyond the scope of the power vested in the Commission under Section 79 (1) (a) and (f) of the Act. However, the Petitioner may approach the Central Government with its grievance for redressal.

25. The Petitioner has also submitted that in terms of Regulation 42 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff Regulations), the Petitioner can seek a direction from this Commission to Central Government to allocate the shares of Petitioner in the generating stations of NTPC, NHPC and THDC to others. As per Note 2 under Regulation 42 of the 2014 Tariff Regulations, the beneficiaries intending to surrender part of their share of power to other States inside or outside the regions shall have to approach the Central Government for re-allocation of power and only after reallocation by Central Government, the liability for payment of fixed charges during the period of re-allocation will be governed by the said provision. This provision does not enable the Commission to issue directions to the Central Government for reallocation of power of the Petitioner to other State (s).

26. The Petitioner has sought directions/advice of the Central Commission under Section 79 (2) of the Act to allocate the Petitioner" s entire firm share of the powers to other deficit States/Utilities. The Commission is of the view that no such advice can be issued in the proceedings initiated by a contracting party (in this case, the Petitioner) against the other contracting parties (in this case NTPC, NHPC and THDC). Under subsection (2) of Section 79 of the Act, the Commission is required to advise the Central Government on formulation of National Electricity Policy and Tariff Policy and matters of common importance namely, promotion of competition, investment, efficiency and economy in activities of the electricity industry. The Petitioner is seeking

a statutory advice to the Central Government for reallocation of power allocated to the Petitioner from the Central Generating Station of NTPC to any other party. In our view, statutory advice can be rendered by the Commission to the Government in the matters concerning overall interest of the electricity industry and cannot be invoked to address the individual grievances of a particular entity. In our view, the Commission cannot render any statutory advice on the subject to the Central Government.”

(ii) Order dated 9.3.2017 in Petition No. 20/MP/2017 in the matter of Kantji Bijlee Utpadan Nigam Limited v. Central Transmission Utilities and Ors.

“33.....It is pertinent to note that allocation of power and de-allocation of power among the beneficiaries from the Central Generating Stations is vested with MoP, Gol and is not within the control of the Petitioner. Cancellation of the LTA on account of failure of the beneficiaries to sign the LTA Agreements pending decision on their request for deallocation of power will virtually amount to cancellation of PPAs with concerned beneficiaries even before decision of Ministry of Power, Gol. Considering the fact that signing of the LTA Agreements by the beneficiaries is linked to the decision of MoP, Gol for deallocation of shares of the existing beneficiaries and reallocation of shares to new beneficiaries, it will not be appropriate to cancel the LTA. In Order to ensure that PGCIL does not suffer in recovery of its transmission charges, we have permitted PGCIL to operationalize the LTA and recover the transmission charges in terms of the provision of the PPAs till the LTA Agreements are signed after re-allocation of power.

34. The Commission in Order dated 18.4.2017 in Petition No. 223/MP/2015 (Tata Power Delhi Distribution Ltd-vs- NTPC Ltd & Ors). has, inter-alia, held as under :

.....

35. The Commission in the above Order has clarified that as per Note 2 under Regulation 42 of the 2014 Tariff Regulations, the beneficiaries intending to surrender part of their share of power to other States inside or outside the regions shall have to approach the Central Government for re-allocation of power and only after reallocation by Central Government, the liability for payment of fixed charges for the period of re-allocation will be shifted to beneficiaries to whom power has been reallocated. Accordingly, we direct that till the time new allocatees are allocated the surrendered power generated from MTPS Stage-II by the respective beneficiaries, it will be the liability of concerned beneficiaries to make payment to the capacity contracted in terms of their respective PPAs.....”

25. MePDCL & MeECL have argued against the applicability of the above provisions on the ground that upon their surrender of allocation, they ceased to be beneficiary. However, the above argument is misplaced. As already noted above, the share or allocation of each beneficiary including any changes thereof is to be made by the Central Government and till the re-allocation of the surrendered share by the



Central Government to another beneficiary, the original beneficiary is liable to the payment of capacity charges as per the allocated share. Merely upon the unilateral surrender of allocation, MePDCL/MeECL does not cease to be a beneficiary of the BTPS. The definition of the 'Beneficiary' in relation to a generating station covered under Section 79(1)(a) or (b) of the Act includes a distribution licensee which is to purchase the electricity by entering into the PPA as well as any person who has been allocated capacity in Inter-State Generating Station by the Government of India. It is pertinent to note that even after the said surrendering of its allocation, MePDCL & MeECL had continued to schedule power from BTPS for entire financial year 2016-17 and from November, 2021 onwards and even the claimed termination of the PPA took place only vide their letter dated 16.4.2021. Therefore, the argument of MePDCL and MeECL that upon surrender of the allocation, they ceased to be beneficiary as defined under the Tariff Regulations of this Commission deserves to be rejected. We find that even the said termination was made half-heartedly, as the power was being scheduled even after the said surrender.

26. MePDCL and MeECL have also vehemently argued that there is no provision in the PPA which requires them to pay the capacity charges even after surrendering of the allocated power and clause 2.2.6 of the PPA, which has been relied upon by NTPC is not attracted to the present case as non-drawl of the power after surrendering of the allocation cannot be considered as 'default' within the said clause of the PPA. In the foregoing paragraphs, the Commission has already observed the liability of payment of capacity charges on the original beneficiaries till the re-allocation of such share by the Central Government in terms of the prevalent Tariff Regulations of this Commission – a delegated legislation and as such there may not be any need to examine the arising of such liability in terms of provisions of PPA in view of the settled

ratio as laid down by the Hon'ble Supreme Court in the case of PTC v. CERC, [(2010) 4 SCC 603], that a regulation under Section 178 of the Act, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities. However, for the sake of completeness, we may also deal with above contention and examine the provisions the PPA dated 13.7.2007 as entered into between the parties. The extract of the relevant clauses of the PPA read as under:

“2.2 Allocation of power

2.2.1 Final allocation of power from Bongaigaon TPS amongst various customers of NER and adjoining states shall be as decided by GOI/Competent authority in accordance with the applicable guidelines issued from time to time subject to signing of PPA by the Bulk Power Customers. Such allocation of power along with various terms and conditions mentioned therein shall form an integral part of this agreement.

2.2.2 Fifteen percent capacity of the Station shall be kept unallocated at the disposal of the Govt. of India and shall be subject to allocation from time to time as per the decision of the Ministry of power, GOI. Out of this unallocated capacity, balance if any, after such allocation by GOI shall be deemed to have been allocated to various Bulk power Customers in proportion to their allocated shares subject to the provision at para2.2.3.

2.2.3 The right of MeSEB to draw power against the above allocation shall be limited to the amount of LC opened and maintained by them.

2.2.4 Notwithstanding the obligations of MeSEB to pay all the dues as per this Agreement, in the event of default in opening of LC of adequate amount in favour of NTPC or payment of bills beyond a period of 60 days of billing, NTPC shall be entitled to regulate/divert the share of MeSEB to any other Bulk Power Customer(s) as per the provisions of generic procedure for regulation of power supply issued by CERC or any other competent authority from time to time read with the provisions of TPA till the time default is set right.

2.2.5 In case of default in payment of bills a period of 90 days of billing, NTPC shall have the right to reallocate power to other Bulk power Customer(s).

2.2.6 In case of default, MeSEB shall continue to be liable to pay the capacity Charges in proportion to its allocation during the period of regulation/ diversion of power till the power is reallocated to other Bulk power Customer(s).

.....

5.0 TARIFF

5.1 Terms and conditions:

5.1.1 The Tariff for the electricity supplied from the Station would be as determined by CERC or any other Competent Authority authorized from time to time.”

Perusal of the above clauses reveals that the parties have agreed that till the final allocation of power from BTPS among the various customers of NER and

adjoining States shall be as decided by the Gol/competent authority in accordance with the applicable guidelines. Thus, the PPA clearly recognizes that the allocation from BTPS shall be decided by the Gol/competent authority and therefore the plea of the MePDCL & MeECL has no legs to stand since they cannot unilaterally surrender such allocation and renounce the obligations corresponding to such capacity prior to the re-allocation of such capacity by the MoP. If the procurer/bulk consumer had such liberty with itself to decide upon retaining/surrendering the allocation from the generating station/BTPS, then there would not have been any need to incorporate such clause in the PPA which vests the authority of allocation of power to the Government of India.

27. Further, the parties have also agreed to that allocation of power along with the various terms and conditions mentioned therein shall form an integral part of the PPA. As already noted above, the allocation letter of MoP dated 19.5.2016 also stipulates that the allocation will be further subject to tariff notification and the other directions/guidelines issued by the Government of India/this Commission from time to time and therefore, by virtue of the above clause of the PPA importing the terms and conditions of the allocation as part of the PPA, the direction of the MoP dated 19.5.2016 as well as the terms and conditions of the tariff as notified by the Commission in its Tariff Regulations also form part of the PPA, requiring the original beneficiary to pay for the capacity charges till such time its share is re-allocated by the Central Government. Even Clause 2.2.6 of the PPA, albeit triggers in the event of default on part of MePDCL/MeECL, also reflects the underlying intent of the agreement that procurer/bulk purchaser shall require to pay the capacity charges in proportion to the allocation till such time the power is reallocated to the other procurer/bulk purchaser.

28. MePDCL & MeECL have contended that such ad-indefinitum levy of capacity charges tantamount to unjust enrichment and violative of Section 73 and Section 74 of the Contract Act. It has been also submitted that after surrender of allocation, no cost is being incurred by NTPC towards the share of allocation of MePDCL & MeECL and therefore, levy of capacity charges being not against any actual cost/loss incurred and in-terrorem amount to penalty, which is hit by the above Sections of the Contract Act. It has been further submitted that such levy of capacity charge without any service is against the public policy and barred by Section 23 of the Contract Act. We have considered the submissions made by MePDCL & MeECL and our analysis may be appreciated on two counts (A) terming the capacity charges payable to the generator as penalty or damages is, in our view, entirely misplaced and comes from the flawed understanding of the principles of tariff. Capacity charges are a component of tariff only which enables the generating company to recover the fixed charges incurred by it in running the generating station and the recovery of such charges are linked to availability of such generating station and independent of the scheduling of the energy by the beneficiary of the generating station. It is pertinent to note that non-payment of capacity charges by the beneficiary results into the under/non- recovery of the annual fixed charges of a generating station, which comprise of various components such as interest on loan, depreciation, interest on working capital and O&M expenses, etc. and such expenses are incurred by the generating station irrespective of whether the beneficiary schedules the power from the generating station or not. Hence, the arguments of MePDCL & MeECL that levy of capacity charges amount to a penalty; that such charges are not against any actual loss or cost and that their levy is opposed to public policy deserve to be rejected and the various authorities relied upon by



MePDCL & MeECL in support of the above arguments are also not relevant and applicable to the present case.

29. MePDCL & MeECL have further argued that upon surrender of allocation by them, it was the obligation of MoP/NTPC to re-allocate the power and to mitigate the losses and their failure to do so cannot result in penalising them by levy of capacity charges. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in in the case of Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Anr., [AIR 1962 SC 366]. It has also been contended that there is inexplicable delay on the part of MoP/NTPC in re-allocation of power after the surrender by MePDCL & MeECL. We have noted the aforesaid submissions of MePDCL & MeECL. However, we do not find any force in them inasmuch as even after the surrender of the allocation, they continued to draw the power from BTPS for entire financial year 2016-17 and again from November, 2021 onwards. The authority cited by MePDCL & MeECL in support relates to the principles of damages with regard to the Section 73 of the Contract Act, however, in the foregoing paragraphs, we have already held that the levy of capacity charges cannot be equated with penalty or damages. Furthermore, in view of specific provision under Section 74 of the Indian Contract Act, proof of any actual damage is not required, if the contract contains a specific stipulation. Hence, in our view, the said decision of the Hon'ble Supreme Court does not come to any aid to MePDCL & MeECL in the present case. In any event, it is noticed from the details of month-wise amount billed along with break-up of sub-head as furnished by MePDCL & MeECL themselves vide affidavit dated 20.4.2022 that NTPC has passed on the benefits/gains from sale of Un-Requisitioned Surplus (URS) from the BTPS to them in the monthly invoices. Hence, MePDCL & MeECL cannot be heard as saying that NTPC did not take any steps to mitigate the losses and sale the power not scheduled by them.

30. In view of the foregoing observations, we hold that MePDCL and MeECL are liable to pay the capacity charges until their share/allocation in BTPS came to be re-allocated by the MoP vide letters dated 28.3.2022 and 24.4.2022.

Issue No. 2: Whether the termination of the PPA dated 13.7.2007 by MePDCL is valid?

31. MePDCL & MeECL have prayed for a declaration to the effect that the PPA dated 13.7.2007 stood terminated and dissolved in terms of its letter dated 16.4.2021. It has been submitted that they have an inherent right to terminate the PPA and there is no provision which bars them from terminating the PPA on account of the excessive delays committed by NTPC in commissioning of BTPS and the consequent economic unviability in purchase of power from BTPS. It has been submitted that there is breach of representation on the part of NTPC with regard to the timely operationalization of the BTPS as was expected in the year 2011 but came to be operationalized only in 2016. It is also submitted that MePDCL is entitled to terminate the PPA on the principle of business efficacy as per which an unexpressed term has to be read into the contract if a prudent businessman would have agreed to such a clause and termination of contract is such a clause that any of the parties would have incorporated in the PPA as it being fundamental clause. In this regard, reliance has been placed on the judgments of Hon'ble Supreme Court in the case of Adani Power (Mundra) Ltd .v. GERC, [(2019) 19 SCC 9] and the judgment of Hon'ble Delhi High Court in the case of Rajasthan Breweries Ltd. v. Stroh Brewery Company, [2000 SCC OnLine Del 481]. It has been contended that PPA also stood frustrated under Section 56 of the Contract Act read with Clause 8 of the PPA (Force Majeure) as it was impossible to perform the contract on account of the excessive delays on part of NTPC in commissioning of BTPS, economic unviability and delays in re-allocation of the power. It has been

submitted that MePDCL was compelled to terminate on account of unviable PPA and such termination has taken place in the larger public interest and in the exercise of the doctrine of necessity.

32. *Per contra*, NTPC has submitted that there is no provision in the PPA which gives a right to either party to unilaterally terminate the PPA prematurely as the PPA comes into existence when the State/Discom requests for the power allocation and the MoP allocates the power. NTPC has submitted that the PPA was signed between the parties based on the allocation made by the MoP and the same continues to be valid between the parties subject to the allocation/deallocation/reallocation by the MoP. It has been further submitted that the purported cancellation or termination of the PPA on unilateral basis is alien to the process of allocation and de-allocation of power by Ministry of Power, Central Government and it seriously affects the scheme of investment in the infrastructure such as power generation by the Central Public Sector Units. It is not correct that the PPA can be unilaterally terminated on the ground of high tariff determined by the Commission. It has been submitted that Clause 5.1.1 of PPA clearly provides that the tariff would be as per the determination of this Commission and this determination cannot be used as a ground to terminate the PPA. In any event, high and unviable power cost of BTPS as claimed by MePDCL cannot fall within the Article 8 (Force Majeure) of the PPA. It has also been submitted that judgment in *Adani Power (Mundra) Ltd. v. GERC & Ors.* as relied upon by MePDCL has no application in the present case. In the present case, the contract is a result of the allocation of electricity by MoP and there is no need to imply any terms. Similarly, the judgment in the case of *Rajasthan Breweries Ltd. v. Stroh Brewery Company*, [2000 SCC OnLine Del 481] also does not apply to the facts of the present case as it was the case of a purely commercial contract in private law being considered by

Hon'ble Delhi High Court whereas the present PPA is the result of the request of State of Meghalaya to the MoP for share in BTPS and based on which the investment approval for setting up of the BTPS had been obtained by NTPC.

33. We have considered the submissions made by the parties. As already noted above, the parties to the PPA have specifically agreed that final allocation of power from BTPS shall be decided by the Central Government and such allocation of power along with various terms and conditions mentioned therein shall form an integral part of this agreement. Hence, in our view, prior to the re-allocation of the MePDCL's share in BTPS by the MoP, MePDCL cannot proceed to unilaterally terminate the PPA. Moreover, as per Clause 11 of the PPA, the agreement has to come into force from the date of its signing for all intent and purposes and to remain operative upto completion of twenty five years from the date of commercial operation of the last unit of the BTPS unless it is specifically extended on mutually agreed terms. Concededly, there is no provision in the PPA enabling the MePDCL to terminate the PPA and for this very reason, it has, among the others, sought to rely upon the inherent right of the party to terminate the PPA. However, the said argument also cannot come to any aid to MePDCL as the agreement between the parties is not a private commercial contract but a regulated contract, which as seen above, imports therein the terms and conditions in relation to the allocation of power by the Central Government as well as the provisions of this Commission's Tariff Regulations and therefore, the obligations of a party arising in terms thereof cannot be simply renounced by citing the inherent right of party or right arising out of an unexpressed term in the PPA.

34. As rightly pointed out by NTPC, the allocation of power to MePDCL & MeECL from BTPS had not been forced upon them but had been given only based on their

requisition. It is only upon having assurance of the executed PPAs and the allocation of power being made by the MoP, NTPC proceeds to implement such capital extensive projects and upon coming up of project, the procurer, which has been given allocation by the Central Government, cannot be unilaterally allowed to exit the agreement *dehors* the provisions therein, jeopardising the entire scheme of investment and recovery of tariff of project.

35. MePDCL & MeECL have also pleaded the frustration of agreement on the ground of impossibility of the performance on account of delay in commissioning of the BTPS rendering the cost of power unviable. However, the said arguments are, in our view, misplaced and nothing but an afterthought. The conduct of MePDCL & MeECL in procuring the power from BTPS for entire financial year 2016-17 and again from November, 2021 onwards and making of payments (albeit in parts) while acknowledging the outstanding dues without any reservation itself repel their contention about the impossibility of the performance. It may also be noted that under the PPA, the parties have agreed that the tariff would be as determined by the Commission. Accordingly, the Commission in its order dated 22.5.2017 in Petition No. 45/GT/2016 had proceeded to determine the tariff for Unit I of BTPS as per the provisions the Tariff Regulations, 2014. In the said order, the Commission also took cognizance of time overrun aspect of the BTPS and accordingly, proceeded to determine the tariff strictly in accordance with the provisions of the Tariff Regulations, 2014. It is pertinent to note that MeECL was party to the said proceedings, however, no objection/ reply was filed by MeECL in regard to its concern of time & cost overruns as sought to be raised only in the year 2021 while seeking to unilaterally terminate the agreement. In any case, once the parties having agreed to the tariff as determined by this Commission, then tariff as determined in accordance with the prevalent Tariff

Regulations cannot be a valid ground to terminate the PPA especially when the PPA at Clause 6.1.5 specifically provides that “*non-acceptance of tariff determined/ approved by CERC or any other competent authority shall not be a valid ground for dispute.*”

36. Section 37 of the Indian Contract Act provides that “the parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused---“. Section 62 requires assent of both the parties in respect of any novation, alteration or rescission of the contract. Thus, any unilateral termination is ***non est*** in the eyes of law.

37. In view of the foregoing observations, we also hold that action of termination of PPA dated 13.7.2007 by MePDCL vide letter dated 16.4.2021 is invalid and accordingly, the said letter is set-aside.

38. In view of the forgoing findings, the Petition No. 40/MP/2022 and Petition No. 47/MP/2022 along with IA No. 5/IA/2022 are disposed of.

Sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member