



**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**

4<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

SATURDAY, THE THIRTIETH DAY OF MARCH  
TWO THOUSAND NINETEEN

:Present:

**Justice G. Bhavani Prasad, Chairman**  
**Dr. P. Raghu, Member**  
**Sri P. Rama Mohan, Member**

O.P. No. 33 of 2017 & O.P. No. 34 of 2017

**O.P.No.33 of 2017**

**Between:**

M/s. NSL Sugars Limited

... **Petitioner**

**A N D**

Andhra Pradesh Power Coordination Committee & others

... **Respondents**

**O.P.No.34 of 2017**

**Between:**

M/s. NSL Sugars (Tungabhadra) Limited

... **Petitioner**

**A N D**

Andhra Pradesh Power Coordination Committee & others

... **Respondents**

These Original Petitions have come up for hearing finally on 01-12-2018 in the presence of Sri K. Gopal Choudary, learned counsel representing Sri Challa Gunaranjan, learned counsel for the petitioners and Sri P. Shiva Rao, learned Standing Counsel for the respondents. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

## **COMMON ORDER**

O.P.No.33 of 2017 is a petition to declare the deduction of compensation by the respondents for the failure to apply for the corridor under STOA for May and June, 2015 as illegal and to direct them to refund Rs.28,21,032/- and to declare not treating the shortfall in supply of power from 16-03-2016 to 26-05-2016 as on account of change in law under *force majeure* under article 3.11 of the Power Purchase Agreement as illegal and to direct the respondents to refund Rs.1,04,95,066/- and to direct the respondents to refund Rs.1,33,16,098/- with interest for the delayed payments and other appropriate reliefs.

2. The case of the petitioner is that it is engaged in the business of manufacturing and sale of sugar and allied products and established bagasse based cogeneration plant of 26 MW capacity at Koppa, Mandya District, Karnataka. The 2<sup>nd</sup> respondent issued a Purchase Order (LOI) to the petitioner's unit on 09-10-2014 for supply of power during 29-05-2015 to 26-05-2016 during which a total of 82.35 MW of power was supplied. In pursuance of the Purchase Order, a Short Term Power Purchase Agreement dated 28-10-2014 was entered into between the petitioner and the 2<sup>nd</sup> respondent, who represents itself and the 3<sup>rd</sup> respondent also. Article 3.3 of the agreement makes the trader / generator apply for MTOA (Medium Term Open Access) with PGCIL as per the CERC regulations prior to five months and not later than one year. In the event of the generator / trader not getting the corridor approved for full quantum, they have to book the corridor under STOA (Short Term Open Access) for the balance quantum. If the generator defaults, it is liable to forfeit the EMD (Earnest Money Deposit) and compensation of 85% on the shortfall of LOI quantum. The corridor has to be booked before 31-10-2014 and 28-02-2015 for the flow of power from May, 2015 and before 31-03-2015 for the flow

of power for June, 2015. Both parties would ensure the actual scheduling not to deviate by more than 15% of the contracted power and if the deviation from procurer's side is more than 15% of the contracted energy for which open access has been allocated on monthly basis, procurer has to pay compensation at 20% of the tariff per kWh for the quantum of shortfall in excess of the permitted deviation of 15% while continuing to pay open access charges as per the contract. If the deviation from seller's side is more than 15% of the contracted energy, the seller shall pay compensation at 20% of the tariff per kWh to the procurer for the quantum of shortfall in excess of the permitted deviation. The compensation for interstate sources will be calculated based on the energy supplied at regional periphery for STOA approvals and at injecting point for MTOA approvals. The compensation will be levied on yearly basis of 85% of cumulative corridor approved quantity. But the compensation will be calculated on running monthly average basis and will be reconciled on annual average basis at the end of contract period. *Force Majeure* event shall mean any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of transmission / grid or any events or circumstances such as acts of God or exceptionally adverse weather conditions or acts of terrorism etc., and the contracted power will be treated as subjected to the reduced demand. The petitioner booked the corridor for 12.15 MW. The 1<sup>st</sup> respondent addressed on 08-04-2015 reducing the price from Rs.5.95 per kWh to Rs.5.90 per kWh due to surplus power availability. The respondents did not take supply of power from the petitioner in May and June, 2015. The petitioner, ready for supplying power from 29-05-2015, requested the APSLDC for consent to apply for the corridor from 23-04-2015 with seven reminders, but there was no response. The 2<sup>nd</sup> respondent issued an amendment order dated 10-06-2015 for the period from 29-05-2015 to 26-05-2016,

while agreeing to take the liability towards the reduction/surrender of booked open access quantity. The petitioner obtained revised MTOA permission for 8.51 MW and STOA permission for the remaining power. After the annual maintenance from 01-07-2015 to 26-07-2015, the petitioner was supplying the power to the respondents from 27-07-2015 and was sending weekly invoices.

3. While so, due to failure of monsoon and drought, the State of Karnataka suffered a major power crisis apart from non-availability of corridors for import of energy. The Government of Karnataka issued G.O.No.EN 11 PPT 2015 Bangalore dated 16-09-2015 invoking Section 11 of the Electricity Act, 2003 and directed all the generators in the State to run their plants to full exportable capacity and pump energy to the State grid with immediate effect to bridge the demand and supply gap. The Karnataka SLDC by a letter dated 18-09-2015 cancelled the STOA permission but not MTOA permission. The petitioner requested Karnataka SLDC to withdraw the cancellation but in vain. The petitioner supplied 8.51 MW from 01-08-2015 to 15-03-2016 but in view of the Section 11 order which was not revoked between 16-03-2016 and 26-05-2016, the petitioner informed that it can supply only the MTOA booked quantum of 8.51 MW but not the full quantum of 16.38 MW as the STOA permission for the balance power of 7.87 MW was cancelled by Karnataka SLDC. This was requested to be treated as *Force Majeure* and not liable to levy of any compensation and imposition of Section 11 order is change of law under article 3.11 *Force Majeure* which is an inclusive clause. The restrictions were withdrawn with effect from 01-06-2016. The respondents did not respond to the said request of the petitioner. They were crediting the amounts to the same bank account towards the bills of the petitioner and its subsidiary, NSL Sugars (Tungabhadra) Limited. The officers of the 1<sup>st</sup> respondent orally informed about the amounts deducted towards

short supply of power from March to May, 2016. As the Purchase Order and the Short Term Power Purchase Agreement specify that any change in law should be treated as *Force Majeure* and the contracted power should be deemed to be reduced during the period of transmission constraints, no compensation can be levied or deducted from March to May, 2016, which is illegal. The petitioner raised an Invoice as per clause 3.3 of the Power Purchase Agreement reconciling the compensation payable/receivable on 01-11-2016, but the 2<sup>nd</sup> respondent paid only part of the amount. The respondents ignored the absence of any consent for supply of power till 30-06-2015 even after execution of the Power Purchase Agreement and deducted Rs.28,21,032/- for non-booking the corridor. The respondents, who did not consent for booking the corridor and who did not schedule the power, defaulted, which amounts to 100% back down by the respondents for May and June, 2015 for which the petitioner is entitled to compensation on 85% of the quantum as per article 3.3 (d). The shortfall in STOA quantum from March to May, 2016 was due to change of law under *Force Majeure* condition, making the petitioner not liable for any compensation.

4. In the order dated 11-07-2014 in A.No.181 of 2013, the Hon'ble Appellate Tribunal for Electricity referred to a party, who did not perform his obligations under the contract being not entitled to claim compensation from the other party. The petitioner requested by a letter dated 10-04-2017 to convene a meeting for resolving the disputes, for which, there was no response and hence the petition.

5. The respondents 1 to 4 in their counter extracted the terms and conditions of their tender No.182/14 dated 17-07-2014 about the duty to apply for a corridor throughout the contract period, in default of which compensation will be levied on the

shortfall of 85% of LOI quantum. Actual scheduling also shall not deviate by more than 15%. The compensation will be levied on yearly basis of 85% of cumulative corridor approved quantity calculated on running monthly average basis. *Force Majeure* events included any restrictions imposed by RLDC/SLDC in scheduling of power and any events or circumstances such as act of God causing disruption of the system. Change of Law includes any change in transmission charges and open access charges or change in taxes etc. The petitioner, who participated in the tender, accepted all the terms and conditions. The 4<sup>th</sup> respondent issued a Purchase Order / LOI to the petitioner dated 09-10-2014 and there was a Power Purchase Agreement between the petitioner and the distribution companies dated 28-10-2014. Terms and conditions were duly incorporated as per the tender and as per the CERC regulations. Subsequently, amendment orders dated 08-04-2015 and 10-06-2015 were issued reducing the quantum to 70% and the rate to Rs.5.90 per kWh. Final quantum to be supplied was 16.38 MW for three spells and 8.51 MW for one spell. PGCIL granted MTOA at 12.15 MW from 01-07-2015 to 31-07-2015 and 8.51 MW from 01-08-2015 to 26-05-2016 with the balance suppliable under short term open access. 20% of tariff is leviable as compensation in case of the generator not applying for corridor or deviating from scheduling by more than 15% or the procurer similarly is deviating in scheduling. In May and June, 2015, the petitioner applied to APSLDC for concurrence for scheduling of full LOI quantity and in July, 2015 and March to May, 2016, the petitioner did not apply for corridor for the entire LOI quantity and hence compensation was levied on it for the net shortfall on running monthly average basis, reconciled on annual average basis at the end of contract period. AP distribution companies also paid for backing down the quantity by more than 15% on annual average basis. The claims for backing down made by

the petitioner were incorrect and they were restricted to Rs.44,31,663/- to the actual backing down. In fact, corridor was not approved by SLDC for May and June, 2015. Section 11 orders of the State Government were not included in the *Force Majeure* clause and it cannot be accepted. Hence, the respondents desired that the petition be dismissed with costs.

6. The petitioner filed a reply to the counter contending that the respondents are evading to pay compensation though they did not give consent for booking the corridor. They neither procured the contracted power nor gave any back down instructions for reduction in the quantum in May and June, 2015. The petitioner was forced to stop the generation as it could not sell to third parties and incurred financial loss. The compensation paid by the respondents became payable excluding the compensation for the disputed period. The total compensation becomes Rs.72,52,695/-. The respondents are squarely responsible for non-issue of consent to avoid the process of corridor booking and scheduling and SLDC which is not a party to the LOI or PPA cannot be dragged into the dispute. The order under Section 11 amounts to change in law. The respondents cannot claim compensation for non-booking the corridor for March to May, 2016, as they did not avail the full quantum booked under MTOA during the period.

7. While so, the petitioner filed I.A.No.6 of 2018 requesting for grant of leave to raise an additional ground of impossibility of performance of the contract under Section 56 of the Indian Contract Act, 1872, due to Section 11 orders resulting in cancellation of STOA permission at the instance of KSLDC.

8. In their additional reply to the additional grounds, the respondents claimed that Section 11 orders had no effect on the existing contracts and the State

Government has no power to direct not to supply power as per the existing contracts. The petitioner could have challenged that order under article 226 of the Constitution of India and having failed to do so, it cannot be relieved of its obligations. In the absence of any reason for the petitioner for not taking recourse to supply power from other sources, Section 56 of the Indian Contract Act, 1872 does not apply and the Interlocutory Application was liable to be dismissed with costs.

**9.** This Commission passed orders on 02-06-2018 in I.A.No.6 of 2018 as follows:

“The Interlocutory Application is with a request to grant leave to the applicant to raise an additional ground under Section 56 of the Indian Contract Act, 1872 on the ground of impossibility of performance of the contract. In the counter in the I.A., the entitlement of the applicant to the said additional ground is questioned but the right of the applicant to raise an additional ground is not seriously in dispute. To enable a comprehensive determination of the questions in issue between the parties in the main petition, it will be in the interests of justice to permit the applicant to raise the additional plea, which can be met by the respondents by filing an appropriate additional counter. Hence, I.A.No.6 of 2018 is allowed. The applicant is permitted to raise an additional ground in support of its claims under Section 56 of the Indian Contract Act, 1872 relating to the impossibility of performance of the contract. The respondents may file their additional counter in reply to the additional ground now permitted to be raised, by the next date of hearing.”

**10.** The respondents filed an additional counter affidavit stating about the general practice governing the maintenance of load generation, balance and the detailed



position during October, 2015 and March to May, 2016 about purchases of power, over drawal from southern grid, payment of deviation charges and load relief to consumers. In case of loss of any generation from generating stations, the actual loss or damage may be in the form of additional amounts paid for high cost supply or reduced supply to the consumers or payment of deviation charges in case of over drawal from the grid and the financial loss due to purchase of power from M/s. Lanco Kondapalli during March and April, 2016 was Rs.1.1309 crores and the compensation was levied on the petitioner and M/s. NSL Sugars (Tungabhadra) Limited at the pre-estimated loss of 20% of Rs.5.90 per kWh, which came to Rs.1.145265 crores on the petitioner and Rs.0.358837 crores on M/s. NSL Sugars (Tungabhadra) Limited. Proof of actual loss or damage is not required for claiming liquidated damages due to breach of contract, when a genuine pre-estimate of loss was fixed by both the parties. Short term purchase of power at high cost was to avoid power deficit situation and if they also default, planning of power procurement gets derailed. Hence, the respondents desired the petition to be dismissed with costs.

**11.** The petitioner filed a reply to the additional counter affidavit claiming that the respondents admitted that there was no additional power purchase on a dynamic basis due to non-supply of STOA quantum by M/s. NSL Sugars from its cogeneration plants during Section 11 restrictions by the Government of Karnataka. The purchases from M/s. Lanco Kondapalli etc., cannot be linked to non-supply by the petitioner and the respondents did not demonstrate specifically that any purchases were to compensate for the deficit of power on account of petitioner's non-supply. In fact, the respondents issued backing down instructions to the MTOA quantum of the petitioner. The respondents failed to discharge the burden of proof

on these financial aspects. Short supply of STOA quantum by the petitioner was 21.28 MU. The respondents purchased 348.79 MU from M/s. Lanco Kondapally, JSW and IEX. The hypothetical loss assessed by the respondents was neither established nor legally sustainable and the respondents cannot claim any damages outside the scope of the contract.

**12.** The petitioner also filed a further additional affidavit stating that prayers (a) and (c) in para 20 of the main petition are claiming compensation for failure to purchase power and not for refund and they may be considered appropriately. Prayer (b) may be considered in tune with the additional ground taken in I.A.No.6 of 2018.

**13.** The respondents filed common written submissions in O.P.No.33 of 2017 and O.P.No.34 of 2017 reiterating their pleas in respect of the two issues raised in both the petitions about payment of compensation for non-issue of consent and refund of compensation due to Section 11 order. The petitioner filed a Memo on 27-03-2019 clarifying the reliefs sought for.

**14.** O.P.No.34 of 2017 is a petition by M/s. NSL Sugars (Tungabhadra) Limited against the same respondents in O.P.No.33 of 2017 to declare the respondents not treating the shortfall in supply of power from 01-10-2015 to 14-10-2015 and 16-04-2016 to 26-05-2016 as on account of change in law under *Force Majeure* events in terms of article 3.11 of the Power Purchase Agreement as illegal and to direct them to refund an amount of Rs.35,88,371/- deducted from the weekly power bills and also to direct the respondents to reconcile the compensation payable or receivable as per the invoice of the petitioner and refund Rs.35,88,371/- along with

applicable interest for the delayed payment as calculated by the petitioner and other appropriate orders.

**15.** The petitioner is a sister concern of the petitioner in O.P.No.33 of 2017 and the contents of the petition more or less reflect broadly similar facts and circumstances with the bagasse based cogeneration plant of a capacity of 28.2 MW located in the sugar factory premises at Desanur, Ballari District, Karnataka, being given a Purchase Order (LOI) by the 2<sup>nd</sup> respondent on 09-10-2014 for supply of power from 29-05-2015 to 26-05-2016 in the quantities specified. A Short Term Power Purchase Agreement dated 28-10-2014 also followed suit with similar terms and conditions as in the other case and there was a price reduction from Rs.5.95 per kWh to Rs.5.90 per kWh as in the other case. The quantum of power supply was amended by an order dated 10-06-2015 under which the respondents agreed to take the liability to refund/surrender of booked open access quantity of 4.77 MW. The MTOA permission for 11.14 MW was obtained by the petitioner and STOA permission for the balance was being obtained from time to time. There was a Section 11 order in this case also under G.O.No.EN 11 PPT 2015 Bangalore dated 16-09-2015 and the Karnataka SLDC by a letter dated 18-09-2015 cancelled STOA permission but not MTOA permission. The petitioner was able to supply the contract quantum of 11.14 MW agreed between the parties through MTOA corridor and for the subsequent period from 01-10-2015 to 14-10-2015 and 16-04-2016 to 26-05-2016 in which 16.96 MW had to be supplied. The petitioner had to inform the 2<sup>nd</sup> respondent vide letters dated 25-04-2016 and 29-04-2016 that only MTOA quantum of 11.14 MW can be supplied but not the full quantum, as STOA for the balance 5.82 MW was cancelled by the Karnataka SLDC. Similar contentions as in the other case about change of law and *Force Majeure* were raised due to the

restrictions in force upto 01-06-2016. The respondents did not respond and the 1<sup>st</sup> respondent made payments in *lump sum* for both the petitioners and the 1<sup>st</sup> respondent's officers orally informed that for the months of October, 2015 and April and May, 2016, an amount of Rs.19,61,387/-, Rs.21,01,486/- and Rs.36,42,575/- were deducted respectively as compensation for the short supply of power. For the same reasons as in O.P.No.33 of 2017, the deductions were contended to be illegal and the petitioner claimed to have reconciled the compensation payable and receivable on 01-11-2016 when it raised an invoice for the net payable amount of Rs.1,37,79,998/-. The 2<sup>nd</sup> respondent paid part of the amount after reconciliation and the officers of the 2<sup>nd</sup> respondent orally informed that they deducted Rs.4,94,382/-, Rs.6,81,804/- and Rs.24,12,184/- towards compensation for October, 2015 and April and May, 2016 for not booking the corridor. The impact of change of law and *Force Majeure* was not considered and the requests for convening a meeting for resolving the disputes, were in vain. Hence, the petition.

**16.** The respondents in a counter similar to that filed in O.P.No.33 of 2017 claimed that the Purchase Order / Letter of Intent issued on 09-10-2014 in F-NSL (T) /D.No.301/14 was for supply of power during the same period from 29-05-2015 to 26-05-2016 at Rs.5.95 per kWh for a quantum of 24.23 MW each from 29-05-2015 to 31-05-2015, 21-06-2015 to 14-10-2015 and 16-04-2016 to 26-05-2016 and for a quantum of 15.91 MW from 15-10-2015 to 15-04-2016. A Power Purchase Agreement in consequence was entered on 28-10-2014 for short term supply incorporating a compensation clause in tune with the tender and time frames were stipulated for applying for corridor under MTOA and STOA as per CERC Regulations. Subsequently the amendment orders dated 08-04-2015 and 10-06-2015 were issued in view of the prevailing conditions at that time in the State,

reducing the quantum to 70% and the rate to Rs.5.90 kWh with the consent of the petitioner. The other terms and conditions remained unaltered and the quantum of supply was limited to 16.96 MW each for three spells and 11.14 MW for one spell. MTOA for supply of power was granted by PGCIL at 15.91 MW from 01-07-2015 to 31-07-2015 and 11.14 MW from 01-08-2015 to 26-05-2016. The ordered quantity thus had to be supplied in six spells under MTOA and STOA respectively as shown in the petition. The compensation clause provides for levying compensation at 20% of the tariff on the seller and procurer for deviations in scheduling by more than 15% and on the seller for failing to apply for corridor for full ordered quantity, on which compensation shall be payable on the shortfall of 85% of LOI quantum. In October, 2015, April and May, 2016, the petitioner did not apply for corridor for entire LOI quantity and compensation was levied at a total of Rs.35,88,371/- for a quantum of 30,40,992 kWh shortfall. The compensation was levied on running monthly average basis for deviations in supply and the same was reconciled on annual average basis at Rs.51,81,149/- for a shortfall of 43,90,804 kWh. The orders under Section 11 issued by the State Government are not included under Change in Law under *Force Majeure* clause and compensation was levied on the petitioner for not applying full LOI quantity during October, 2015 and April and May, 2016. Hence, the respondents sought for dismissal of the petition with costs.

**17.** The petitioner in its reply to the counter stated that there was no subsisting STOA permission during October, 2015 and April and May, 2016 as STOA permission for September, 2015 was cancelled by the Karnataka SLDC and no further STOA permissions were granted in view of Section 11 order dated 16-09-2015 by the Government of Karnataka. The respondents are liable to refund the deducted amounts and article 3.11 of the Power Purchase Agreement is an

inclusive clause which covers an invocation of Section 11 also. The petitioner is bound under law to comply with the directions by Government of Karnataka under Section 11, which becomes *Force Majeure* event and which amounts to change in law. The respondents who did not avail full quantum booked under MTOA in October, 2015, April and May, 2016 cannot claim compensation for non-booking of the corridor and in fact they paid compensation to the petitioner for the deviation. Hence, the petitioner sought for allowing the petition as prayed for.

**18.** The petitioner filed I.A.No.7 of 2018 for grant of leave to raise the ground of impossibility to perform the contract under Section 56 of the Indian Contract Act, 1872 and in view of the orders under Section 11 of the Electricity Act, 2003, the contract was frustrated due to impossibility.

**19.** This Commission passed orders on 02-06-2018 in I.A.No.7 of 2018 as follows:

“The Interlocutory Application is with a request to grant leave to the applicant to raise an additional ground under Section 56 of the Indian Contract Act, 1872 on the ground of impossibility of performance of the contract. In the counter in the I.A., the entitlement of the applicant to the said additional ground is questioned but the right of the applicant to raise an additional ground is not seriously in dispute. To enable a comprehensive determination of the questions in issue between the parties in the main petition, it will be in the interests of justice to permit the applicant to raise the additional plea, which can be met by the respondents by filing an appropriate additional counter. Hence, I.A.No.7 of 2018 is allowed. The applicant is permitted to raise an additional ground in support of its claims under Section 56 of the

Indian Contract Act, 1872 relating to the impossibility of performance of the contract. The respondents may file their additional counter in reply to the additional ground now permitted to be raised, by the next date of hearing.”

**20.** The respondents 1 to 4 in their additional reply to the additional grounds stated that the order under Section 11 passed by the Government of Karnataka would have no effect on the existing contracts and the State Government has no power under the law to direct the generators not to supply power as per the terms of the existing contracts. The petitioner, who failed in challenging the said order under article 226 of the Constitution of India deliberately, is not relieved of its contractual obligations. The contracted capacity of power should have been supplied from any other source.

**21.** The respondents 1 to 4 filed an additional counter stating that for maintenance of load generation balance and to compensate between loss of generation and increase in demand, purchases of power from bilateral sources generally are tied up well in advance based on the demand supply forecast especially for supply of power during summer. Similarly purchase of power from power exchanges or from high cost IPPs etc., over drawal from southern grid, load relief / load shedding to the consumers also have to be resorted to. During the months of October, 2015 and March to May, 2016, the AP DISCOMs purchased power from M/s. Lanco Kondapalli etc., and had overdrawn from southern grid and paid deviation charges and also issued load relief to the consumers, the details of which were given in the additional counter in O.P.No.33 of 2017 also. The consequent compensation as per pre-estimated loss was also stated therein and the respondents desired the dismissal of the petition for the same reasons.

**22.** The petitioner filed a reply to the additional counter contending that the case of the petitioner herein is about not loss of generation, but its inability to supply a part of power due to Section 11 orders. No additional power purchase was made on a dynamic basis by the respondents due to non-supply of STOA quantum by the petitioners and the power purchase from Lanco Kondapalli and others or over draws from the power grid cannot be attributed to non-supply of STOA quantum by NSL Sugars (Tungabhadra). The Power Purchase Agreement with Lanco Kondapalli etc., are subsequent to Section 11 orders and in fact, when the respondents issued back down instructions to MTOA quantum of power from the petitioner, the question of procuring power from STOA does not arise and the respondents have to demonstrate that it was due to the petitioner's inability to supply under STOA that they were constrained to procure power from others. While short supply of STOA quantum by the petitioner was 21.28 MU, the respondents purchased nearly 348.79 MU from Lanco Kondapalli, JSW and IEX. The loss alleged and assessed is itself more hypothetical and the respondents cannot claim any damages outside the scope of their contract.

**23.** The petitioner also filed further additional affidavit requesting to read prayer (a) in the main petition in tune with the additional ground raised in I.A.No.7 of 2018.

**24.** The points that arise for consideration are:

- (i) Whether the respondents are entitled to deduct any compensation due to the failure of the petitioners in applying for corridor under STOA during the relevant period ?



- (ii) Whether Section 11 order by the Government of Karnataka has to be treated as change in law under *Force Majeure* of the Power Purchase Agreements ?
- (iii) Whether any amounts deducted from the power bills due to the petitioners by the respondents have to be refunded and if so, with any interest and if so, at what rate ?
- (iv) To what relief ?

**25. The Factual Matrix discernible from the documents filed:**

The communications from the 2<sup>nd</sup> respondent herein in both the petitions on behalf of the respondents 2 and 3 in both the petitions dated 09-10-2014 to both the petitioners respectively dealt with the original and revised offers made by the petitioners and the negotiations held between the parties on 16-08-2014 for purchase of RTC power on firm basis during the period from 29-05-2015 to 26-05-2016. The tenders floated by the utilities on 17-07-2014 for short term supply of power led to the bids, revised offers, negotiations and the ultimate orders for supply of power from both the petitioners to the AP Discoms. The rate at delivery point was Rs.5.95 per kWh and the quantum was 23.4 MW each for three spells and 12.15 MW for one spell for the petitioner in O.P.No.33 of 2017, while the quantum was 24.23 MW each for three spells and 15.91 MW for one spell for the petitioner in O.P.No.34 of 2017. The compensation clause in both the orders makes it obligatory for the trader/generator to apply initially for MTOA with PGCIL as per the provisions of the CERC regulations and in the event of not getting the corridor approved for full quantum, the trader/generator has to book corridor under STOA for the balance quantum. If the trader/generator did not apply for MTOA and subsequent advance

STOA, the trader/generator is liable to forfeit the EMD and pay compensation of 85% on the shortfall of LOI quantum. The *Force Majeure* clause in both the orders was identical which included occurrence of events like any restriction imposed by RLDC/SLDC in scheduling of power due to breakdown of transmission/grid constraint and other events which are specifically described. It was also specified about a Change in Law, which was stated to include change in charges, taxes and statutory inspections. These orders led to the respective short term Power Purchase Agreements and they contained similar clauses. The petitioners applied for and obtained MTOA for 15.91 MW and 12.15 MW from the PGCIL (Power Grid Corporation of India Limited) on applying for the same on 22-12-2014 as evidenced from the letters of PGCIL dated 10-02-2015. The period from which, MTOA was granted was 01-07-2015 and 26-05-2016 for drawal of power by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent by a letter dated 08-04-2014 intimated about the decision to cancel certain orders based on merit order criteria, as they will witness surplus condition from June, 2015 to May, 2016 and the petitioners were requested to reduce the prices of their LOI to Rs.5.90 per kWh. Then, the 2<sup>nd</sup> respondent issued amendment orders dated 10-06-2015 reducing the quantum to be supplied and accordingly the petitioners got the MTOA quantum reduced by PGCIL as per the letters of PGCIL dated 10-02-2015. Subsequently, proceedings were issued by the Government of Karnataka on 16-09-2015 stating that due to severe drought and fluctuations in hydro, renewable and thermal energy, impediments were faced in procuring power for meeting the demand supply gap notwithstanding the measures taken to tide over the crisis and therefore only option left was to tap the power from intrastate generators, as there are many open access generators within the State who were exporting power outside the State through short term open access and

power exchange. Therefore, the State Government has issued Order No.EN 11 PPT 2015 Bangalore dated 16-09-2015 directing in public interest with immediate effect and until further orders, that all the generators in the State of Karnataka shall operate and maintain their generating stations to maximum exportable capacity and pump energy to the State grid for utilization within the State grid to bridge the demand supply gap. The petitioners intimated the 2<sup>nd</sup> respondent on 16-03-2016 and 25-04-2016 respectively that due to the restrictions imposed by the Government of Karnataka, which were still in force and they were unable to supply additional power over 8.51 MW and 11.14 MW respectively under MTOA till the end of the contract period. They expressed that their inability to supply the full quantum of power of 16.386 MW and 16.96 MW from 16-03-2016 to 16-04-2016 respectively, was due to circumstances beyond their control falling under *Force Majeure* condition under article 3.11 of the Power Purchase Agreements. Subsequently, Government of Karnataka withdrew the directions under Section 11 on 30-05-2016. On 14-09-2016, the petitioners have informed the 1<sup>st</sup> respondent that they were receiving *lump sum* payments for both the petitioners together due to which they were unable to make out the exact outstanding payable to each company. While providing details of invoices of the two companies, the petitioners therefore requested for breakup for the payments made and also to release the outstanding amounts. The petitioners have also sent the compensation penalty invoices for the period from 29-05-2015 to 26-05-2016 claiming the total amount payable after reconciliation to be Rs.3,09,15,234/- and Rs.1,37,79,998/- respectively. By a letter dated 10-04-2017, the petitioner in O.P.No.33 of 2017 disputed the deduction of compensation of Rs.28,21,032/- for not booking corridor for May and June, 2015 and Rs.1,04,95,066/- for short supply and non-booking corridor under STOA for March to

May, 2016. APSLDC and APPCC did not give consent for booking the corridor under STOA in spite of requests from 23-04-2015 and the inability to supply power was for reasons attributable to the respondents. This constitutes default by the buyers who are liable to compensate the sellers. Similarly, Section 11 orders of the Government of Karnataka were intimated to the respondents and another fifteen days out of 01-07-2015 to 26-07-2015 have to be deducted towards annual maintenance for statutory inspection of the boiler. Any dispute was requested to be settled through convening a joint meeting. Similarly, the petitioner in O.P.No.34 of 2017 disputed the deduction of compensation of Rs.35,88,371/- for non-booking of the corridor under STOA for April and May, 2016, as their inability to supply was due to the statutory order under Section 11 beyond the control of the petitioner, which is a *Force Majeure* condition. This petitioner also requested to convene a joint meeting for settling the dispute.

**26.** The documents filed along with reply of the petitioner to the counter of respondents in O.P.No.33 of 2017 show that Karnataka Power Transmission Corporation Limited gave effect to Section 11 order of the State Government of Karnataka from 16-09-2015 withdrawing / cancelling of the MTOA / STOA consents and NOCs with immediate effect. The request of the petitioner in O.P.No.33 of 2017 through letters dated 18-09-2015 and 23-09-2015 was to continue the existing NOCs issued against the Power Purchase Agreements and withdraw the cancellation orders. Identical letters of request dated 18-09-2015 to continue the existing NOCs under the existing Power Purchase Agreements were addressed by the petitioner in O.P.No.34 of 2017 also. Though prayer (a) in O.P.No.33 of 2017 is as though the respondents deducted compensation due to the alleged failure of applying the corridor under STOA for the months of May and June, 2015, making them liable to

refund Rs.28,21,032/- adjusted towards compensation for that period, ultimately in the additional affidavit filed on behalf of the petitioner on 24-07-2018, it was stated that it was a typographical mistake to claim that the respondents/Discoms deducted such an amount towards compensation for that period. While the claim of the respondents in the counter that they did not deduct any amount towards compensation for the months of May and June, 2015 is thus admitted, the petitioner sought to claim in the additional affidavit that it is claiming compensation from the respondents for the said period on account of their failure to purchase power in that period by arranging necessary consent from the SLDC for obtaining STOA. The petitioner filed a further Memo before the Commission on 27-03-2019 stating about the power that could have been supplied by the petitioner if STOA consent was there between 29-05-2015 to 10-06-2015, which would have been Rs.51,10,560/- (Rs.11,79,360/- + Rs.39,31,200/-). Thus, the amount of Rs.28,21,032/- claimed in prayer (a) of O.P.No.33 of 2017 was towards the value of that power that the petitioner could have been able to supply if STOA consent was there.

**27. Point No.(i):** It is true that the copies of emails from the petitioner to the respondents from 23-04-2015 to 26-05-2015 show that the petitioner was seeking the concurrences from APSLDC for booking the corridor with SRLDC on FCFS basis and the respondents do not claim to have ever communicated such concurrence to the petitioners or SLDC or SRLDC. However, there are no specifications either in the purchase orders dated 09-10-2014 or the Power Purchase Agreements making it obligatory for the respondents to give such concurrence but stipulations are as though it is for the petitioner to apply for MTOA and subsequent STOA without specifying any corresponding obligation on the part of the respondents in this regard.

Obviously the petitioners did not book the corridor under STOA on three months advance basis.

**28.** While the generator is liable to forfeit the EMD and to pay a compensation of 85% on the shortfall of the LOI quantum under the compensation clause for not applying for, booking and getting approved the corridor for MTOA and STOA as agreed, compensation is also provided for deviating by more than 15% from the actual scheduling. The communications from the PGCIL disclosed that the petitioners applied for MTOA permission as per the contract and got the MTOA quantum revised as per the revised orders from the respondents. The reminders from the petitioners for providing APSLDC concurrence for STOA corridor did not appear to have borne fruit and the failure to give such concurrences may indicate that the failure to get STOA corridor was not solely due to the default of the petitioners, but may also be due to the noncooperation of the respondents.

**29.** At any rate, the respondents stated in their counter that the alleged deduction of Rs.28,21,032/- towards compensation for the alleged failure of the petitioners in applying for corridor under STOA for the months of May and June, 2015 is false and baseless. The entitlement of the petitioner to compensation for the months of May and June, 2015 for not procuring contracted power in those two months is thus not very clear vis-à-vis the availability or otherwise of the corridor in May and June, 2015, while the respondents themselves reduced and restricted the contracted quantity. The claims of the respondents about their having to purchase power from Lanco Kondapalli, JSW PTC and IEX and to overdraw from southern grid paying deviation charges and also to issue load relief to consumers were not linked by any substantive material as directly and substantially the result of the default of the

petitioners in fulfilling their contractual obligations and the imposition of any compensation on any such ground will be due to a remote and distant cause. The claim for compensation for the failure of the respondents to arrange consent from SLDC for STOA during May and June, 2015 does not appear to be based on any term or condition or reference in the purchase orders or Power Purchase Agreements and if both the parties contributed to the blame, each has to bear the consequences thereof on their own.

**30.** In fact, the SLDC of Karnataka operated by Karnataka Thermal Power Corporation Limited specifically intimated the petitioners by a letter dated 18-09-2015 that as per Section 11 orders dated 16-09-2015, they were withdrawing / cancelling all the MTOA/STOA consents and NOCs issued by them with immediate effect until further orders. The petitioners had addressed letters dated 18-09-2015 and 23-09-2015 immediately not to apply these directions to sugar cogeneration units, that the directions do not apply to them and that the concluded Power Purchase Agreements be respected. These requests of the petitioners fell in a deaf ear and it could not have been considered that they have not made any attempt to get over the statutory prohibition.

**31.** As in O.P.No.33 of 2017, the petitioner in O.P.No.34 of 2017 also produced similar communications between the parties which are similar in content and substance. However, the claim in O.P.No.34 of 2017 was solely about the compensation deducted in spite of a *Force Majeure* event and not on any other ground. The quantum of amount in this case also is not in dispute and while the entitlement of the petitioner to such amount of Rs.35,88,371/- is the subject of discussion in Point No.(ii), there is no claim for any other compensation or refund by

the petitioner in O.P.No.34 of 2017. In the absence of approved open access by SRLDC, the liability to pay compensation may not arise under the purchase order dated 09-10-2014 which specifically refers to approval of the open access as a pre-condition and hence it is also doubtful whether the absence of consent/concurrence of SLDC can be considered as 100% backing down then the petitioner could not be compelled to take recourse to alternate sources of supply as taking such alternate sources can only be optional and not compulsory on the language of the purchase order/Power Purchase Agreement while no circumstances have been shown to justify imposition of any compensation on the respondents except to the extent they admitted.

**32.** Thus the respondents are not proved to have deducted any compensation due to failure of the petitioners in applying for corridor under STOA during the relevant period and they are not proved to be liable to pay the sum of Rs.28,21,032/- claimed in prayer (a) of O.P.No.33 of 2017 to the petitioner therein on any other ground, while the petitioner in O.P.No.34 of 2017 made no similar claim, which claim is confined to the consequences of Section 11 order.

**33. Point No.(ii):** The proceedings of the Government of Karnataka dated 16-09-2015 referring to G.O.E.No.11 PPT 2015 gave the back ground for the order in detail in the preamble. The failed monsoon, severe drought, shut down of two major generation units with a capacity of 1200 MW, fluctuating exchange rate, corridor constraint, delay in capacity addition etc., were stated to have resulted in a huge demand supply gap in spite of all possible measures and efforts leading to heavy scheduled and unscheduled load shedding and a power crisis. The State Government, therefore, took recourse to Section 11 of the Electricity Act, 2003 as



done in the previous years to avail power from open access intrastate generators exporting power outside the State through power exchange and short term open access. Therefore, as a matter of policy, in public interest, to mitigate severe power crisis in the State, the State Government issued directions in exercise of the powers under Section 11 of the Electricity Act, 2003 that all the generators in the State of Karnataka have to run their plants to full exportable capacity and pump energy to the State grid for utilization within the State grid to bridge the demand supply gap. This order under Section 11 was lifted only with effect from 01-06-2016 on the extraordinary situation ceasing to exist, through the Government Order No.EN 11 PPT 2015 dated 30-05-2016. This fact that both the petitioners were totally prohibited from exporting any power outside Karnataka from 16-09-2015 to 01-06-2016 by virtue of the statutory orders under Section 11 from the State Government is admitted. However, the respondents seek to contend that the petitioners could have challenged the Section 11 orders under article 226 of the Constitution of India and as they failed completely to take recourse to such relief, they were not relieved of their obligation under their existing contracts with the respondents.

**34.** The petitioners could not have reasonably believed in the possible efficacy of such a course of action of approaching the Hon'ble High Court of Karnataka through a Writ is evident from the fact that an identical statutory order under identical circumstances was upheld by the Hon'ble High Court of Karnataka in ILR 2010 Karnataka 2620 between GMR Energy Limited & another Vs Government of Karnataka & others, which was also followed by their Lordships of the Hon'ble Division Bench in another batch of Writ Petitions on the same day. In the cases before the Hon'ble High Court of Karnataka, orders of the Karnataka State

Government under Section 11 of the Electricity Act, 2003 dated 30-12-2008 were under challenge. The Hon'ble Division Bench considered the words "such other circumstances" occurring in the meaning of "extraordinary circumstances" defined in the Explanation to Section 11 (1) and on elaborate discussion, found that the circumstances set out in the order impugned before them constitute extraordinary circumstances justifying the exercise of power under Section 11 of the Act in public interest. The Hon'ble High Court also pointed out that open access is not an unbridled or absolute right but is subject to the transmission constraints and maintaining security of the grid and when it is subject to other provisions of the Act, it is subject to Section 11 which overrides Section 42. It does not mean that a right is conferred on them obviously to supply electricity to a consumer or a licensee of their choice and that such a right cannot be curtailed under any circumstances. The Hon'ble High Court, therefore, concluded that in case of dire need, in public interest, the Government should have the power to intervene to tide over a situation which is rightly described as "extraordinary circumstances" and to that extent private interest should yield to public interest. Accordingly a Section 11 order of the Karnataka Government which is in *pari materia* with an identical order herein was upheld. In W.P.No.2703 of 2009 and batch, their Lordships of the same Division Bench followed the earlier decision and held with reference to the statute and the regulations that once the State passes order under Section 11, the State Load Despatch Centre granting concurrence for open access would not arise and hence the order dated 22-01-2009 passed by the Central Electricity Regulatory Commission directing to grant concurrence to open access was quashed.

**35.** These two decisions of the Hon'ble Division Bench of the Karnataka High Court are stated to be continuing in force and not deviated from subsequently by the Hon'ble High Court and if so, either of the parties herein could not have been even remotely persuaded to faintly believe in the scope for any challenge to the Section 11 order in question herein, had they resorted to competent legal advice or even otherwise. Apart from the fact that even otherwise, a person cannot be found fault with for not taking any recourse to a challenge against a statutory order by a competent authority, the failure of the petitioners herein to take recourse to article 226 of the Constitution of India against this order on any ground like such an order being incompetent against the existing contracts, cannot prejudice or nullify the legal rights and consequences that flow from such a statutory order in favour of the petitioners.

**36.** The respondents along with a Memo dated 29-03-2019 invited attention to an order of the A.P. High Court dated 22-04-2014 in W.P.M.P.Nos.13133 and 13134 of 2014 in W.P.No.10464 of 2014 wherein the decision of the Karnataka High Court in GMR Energy Limited Vs Government of Karnataka above referred to was not relied on as an appeal against the judgment is pending before the Hon'ble Supreme Court in Civil Appeal Nos.3888 and 89 of 2011, following the principle laid down by the Hon'ble Supreme Court that when an appeal is entertained by the Hon'ble Supreme Court, the judgment of the Hon'ble High Court is in jeopardy. There can be absolutely no doubt about the principle but the question herein is whether a Division Bench judgment of the Karnataka High Court continuing in force in that State and not deviated from by that Court so far continues to be binding in that State, though it might be in jeopardy due to a pending appeal before the Hon'ble Supreme Court even without any stay or suspension of the judgment. Even assuming that the

judgment is in jeopardy for any such reason, the preponderance of probabilities in such a background is that the petitioners would not have been, in the ordinary and natural course of circumstances, successful in securing an interim or final order against Section 11 order. At any rate, the Division Bench judgments provide enough justification for the petitioners for not seeking any remedy under article 226. Even otherwise, the compliance by the petitioners with the statutory order without challenge cannot subject them to any legal disability or liability and cannot in any manner prejudice their legal rights otherwise available to them due to compliance with the statutory order without questioning the same.

**37.** The purchase orders dated 09-10-2014 and the consequential Power Purchase Agreements make it clear that the quantum of power agreed will be supplied only matching with the open access granted and subject to the transmission constraints/*Force Majeure*. *Force Majeure* was defined to mean events of any restrictions imposed by RLDC/SLDC in scheduling of power due to breakdown of transmission/grid constraint etc., and the same shall be treated as *Force Majeure* without any liability on either side. While *Force Majeure* was worded as an exclusive definition, change in law was clearly stated as an inclusive definition and as already stated the obligation to supply power was subject to transmission constraints/*Force Majeure*. In *Energy Watchdog and others Vs Central Electricity Regulatory Commission and others* reported in Manu/SC/0408/2017, the Hon'ble Supreme Court was dealing with *Force Majeure* exclusions and concluded that the *Force Majeure* clause does not exhaust the possibility of unforeseen events outside natural or unnatural events and if there was dislodging of the fundamental basis of the contract or a frustrating event, the decision of the parties is so changed that they were hindered or prevented from carrying out the contract. A fundamental alteration

and not mere onerous nature of performance will amount to a frustrating event. The Hon'ble Supreme Court also interpreted the impact of change in law with reference to the stipulations in the Power Purchase Agreements therein and concluded that a change in Indian law would certainly qualify as a change in law. The statutory order under Section 11 issued by the Karnataka Government had brought about a fundamental change in the position of the parties preventing the petitioners from carrying their part of contracts by operation of law/Section 11/the statutory order.

**38.** If a restriction imposed by RLDC / SLDC or a transmission constraint or a grid constraint led to treating an event as *Force Majeure* without any liability on either side and if a change in law includes any change in charges and taxes or statutory inspections, there is absolutely no justification for not considering a restriction imposed by a statutory order as a *Force Majeure* event or a change in law. In fact, the Section 11 order is binding on the SLDC/RLDC concerned and can even be considered as restriction which is bound to be imposed by them or a transmission constraint or grid constraint. In fact, the petitioners informed the respondents about the Section 11 orders leading to their inability to supply the full quantum of power and to treat the short supply under STOA quantum for that reason as a *Force Majeure* event not levying any compensation. The petitioners also subsequently communicated their opposition to deduction of any compensation on this count as quantified in the petitions respectively. The respondents in their pleadings have not specifically controverted the quantification of compensation so deducted as claimed by the petitioners. While admittedly the said deduction of compensation for that reason was from the amount payable to the petitioners for the power supplied by them, the petitioners will therefore be entitled under such circumstances for refund of the said amount.

39. Hence, it has to be concluded on this point that Section 11 order of the Government of Karnataka has to be treated as change in law under *Force Majeure* of the Power Purchase Agreements.

40. **Point No.(iii):** While the above discussion leads to the grant of refund of the amounts claimed by the petitioner in O.P.No.33 of 2017 to the extent of prayer (b) and the petitioner in O.P.No.34 of 2017 to the extent of prayer (a), the petitioners also claimed that the amounts claimed by them have to be refunded to them with applicable interest. The petitioners did not state the applicability of any interest to be under any provision or principle of law or the contractual rights and obligations between the parties or in any other manner. The purchase orders and the Power Purchase Agreements may be referring to rebate for prompt payment and surcharge for late payment but not to any interest. There was no demand in writing preceding these petitions for payment of any interest to bring in the principles of the Interest Act, 1978 and a close perusal of the facts and circumstances of the two cases as discussed above show that neither party is totally responsible for the situation nor is totally free from blame. As the post litigation interest, more so, in the absence of any contractual or legal obligation, is in the judicial discretion of the adjudicating forum as per the accepted principles of law, it will be reasonable and just not to award any interest on the amounts granted herein. For the same reasons, it is in the interests of justice to direct the parties to bear their own costs in these petitions.

41. **Point No.(iv):** The petitioners shall be entitled to monetary relief against the respondents accordingly to the extent of part of their claims.

In the result, O.P.No.33 of 2017 is allowed to the extent of directing the respondents to refund an amount of Rs.1,04,95,066/- to the petitioner therein without any interest and costs and O.P.No.34 of 2017 is allowed to the extent of directing the respondents to refund an amount of Rs.35,88,371/- to the petitioner therein without any interest and costs. The rest of the claims in both the Original Petitions are dismissed. The Original Petitions are ordered accordingly.

This order is corrected and signed on this the **30<sup>th</sup> day of March, 2019.**

**Sd/-**  
**P. Rama Mohan**  
Member

**Sd/-**  
**Dr. P. Raghu**  
Member

**Sd/-**  
**Justice G. Bhavani Prasad**  
Chairman