MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Subject: -In the mater of petition under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of disputes arising out of non-payment of Capacity Charges / Fixed Charges for the period from 24.03.2020 to 31.05.2020 by the Respondent (MPPMCL) to the petitioner.

Petition No. 10 of 2021

ORDER

(Hearing through Video Conferencing)
(Date of Order: 18th November'2021)

M/s. Jhabua Power Ltd.
303 & 307, 3rd Floor, ABW Tower,
M.G. Road, Gurgaon - 122002 - **Petitioner**

Vs.

The Managing Director
M.P. Power Management Company Ltd.
Block No. 2, Shakti Bhawan, Jabalpur- 482008 - **Respondent**

Ms. Swapna Seshadri, Advocate Shri Janmejaya Mahapatra, Chief Executive Officer and Ms. Roopam Bansal, Manager appeared on behalf of the petitioner.

Shri Aashish Barnard, Advocate and Shri Ajasra Gupta, GM appeared on behalf of the Respondent.

M/s, Jhabua Power Limited has filed the subject petition under section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute arising out of non-payment of Capacity Charges/ Fixed Charges by the Respondent (MPPMCL) to the petitioner for the period from 24.03.2020 to 31.05.2020 by invoking 'Change in Law' provision under Power Purchase Agreement (PPA) due to Covid-19 pandemic.

2. The Petitioner, M/s Jhabua Power Limited is a generating company having 1x 600 MW coal-based Power Project at Barela-Gorakhpur, Dist. Seoni in Madhya Pradesh. The petitioner's generating unit achieved Date of Commercial Operation (CoD) on 3rd May' 2016. The Respondent, M.P. Power Management Company Ltd. (MPPMCL) is holding company of the distribution licensees in Madhya Pradesh and entered into a Power Purchase Agreement (PPA) with the petitioner on 05.01.2011.

3. The petitioner executed aforesaid Power Purchase Agreement (PPA) dated 05.01.2011 with the Respondent for supply of electricity from 30% of installed capacity of petitioner's power plant for the period of 20 years. The said PPA was subsequently amended vide first Addendum dated 30.07.2013. The petitioner executed another PPA with the Government of Madhya Pradesh on 27th June' 2011 for supply of 5% of net energy on variable charges as determined by the Commission.

4. The petitioner has also executed three PPAs with other states as given below:

Beneficiary	Type	Date of PPA	Quantum	Tenure
Kerala State Electricity Board	Long-term (Case-I)	26.12.2014	100 MW	01.10.2017 to 30.09.2042
Kerala State Electricity Board	Long-term (Case-I)	31.12.2014	115 MW	01.12.2016 to 30.09.2042
State of Bengal (through PTC)	Medium-term (Case-I)	26.10.2018	100 MW	15.03.2019 to 15.03.2022

5. The PPA executed between the petitioner and MPPMCL provides for payment of Capacity Charges / Fixed Charges, Variable Charges / Fuel Charges and any other charges by MPPMCL to the petitioner as determined by the Commission and as per the norms prescribed in the tariff regulations notified by the Commission. The Commission has passed tariff order dated 30.11.2018from COD of the generating unit till 31st March' 2019 determining the final tariff applicable for generation and sale of electricity from the petitioner to MPPMCL to the extent of 30% (210 MW) of contracted capacity in terms of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015 (Tariff Regulations, 2015). The Commission also issued Multi-Year-Tariff order for the control period FY 2019-20 to FY 2023-24 based on the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 (Tariff Regulations, 2020).

6. In the subject petition, the petitioner broadly submitted the following: -

    i. *The Petitioner's Plant achieved COD on 03.05.2016 which was witnessed by the representatives of MPPMCL and since COD, the Petitioner has been continuously supplying power to MPPMCL under the PPA at the tariff as determined by this Commission. Till 23.03.2020, the availability declared by the Petitioner was accepted in full by MPPMCL, the power was scheduled and due payments were made for the same.*

ii. *On30.03.2020, MPPMCL issued a letter to the Petitioner and invoked 'Force Majeure' Clause under the PPA and notified the event of nationwide lockdown as the force majeure event affecting the performance of obligations of MPPMCL under the PPA, for the following reasons:*

(a) *Drastic reduction in collections of revenue from retail consumers as they are unable to make payments on counters due to complete lockdown;*

(b) *Demand of state sharply decreasing due to closure of industries, shops and other major establishments due to the lockdown, forcing MPPMCL not to schedule or partly schedule power from some of the generators;*

(c) *Massive disruption in the economic activity, which is likely to affect a significant proportion of consumers' capacity to pay electricity bills on time; and*

(d) *Discoms being affected most by cash crunch being faced by public and communities.*

iii. *In the letter dated 30.03.2020, MPPMCL primarily relied on the following documents:*

a) *National Disaster Management Authority (NDMA)'s Order dated 24.03.2020 addressed to the Union Home Secretary to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country. The Guidelines issued provided for a complete lockdown in the country, while ensuring maintenance of essential services and supplies. The services of power generation, transmission and distribution, being essential in nature, were exempted from the purview of the said lockdown.*

b) *Ministry of Power, Government of India's letter dated 27.03.2020 issuing certain directions to generating companies and distribution licensees.*

Copies of the above order dated 24.03.2020 of NDMA, along with the Guidelines issued by Home Secretary and the letter dated 27.03.2020 of the Ministry of Power, Govt. of India are annexed herewith and marked collectively as Annexure C.

iv. *In furtherance to the above letter, MPPMCL addressed another letter dated 31.03.2020 informing the Petitioner that it is not desirous to avail power from the Petitioner's plant as there is no such power requirement due to massive drop in consumers demand and that the Declared Capacity (DC) is not being accepted by it till further notice. MPPMCL further stated that the date of commencement of the Force Majeure event is 24.03.2020.*

A copy of the MPPMCL's letter dated 31.03.2020 to the Petitioner is annexed herewith and marked as Annexure D.

v. *While the Petitioner was contemplating its response, the Ministry of Power, on 06.04.2020, issued a clarificatory order to its previous order dated 27.03.2020 and stated that there has been some mis-conception regarding interpretation of its previous order and that the obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. The said clarificatory order, inter-alia, reads as under:*

"Subject: Clarification to letters dated 27.03.2020 regarding Letter of Credit and 28.03.2020 regarding

…………………………………………

3. Therefore, in brief –

……

(c) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.

4. Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crises. ……"

A copy of the said clarificatory order dated 06.04.2020 issued by the Ministry of Power is annexed herewith and marked as Annexure E.

vi. *However, despite invoking the Force Majeure Clause by issuing the above-mentioned letters on 30.03.2020 and 31.03.2020, MPPMCL accepted the Petitioner's Declared Capacity on day-to-day basis from 24.03.2020 till 08.04.2020, which acts are completely contradictory to the stance taken by MPPMCL in its letters.*

vii. *Since the invocation of 'Force Majeure' Clause by MPPMCL was erroneous in nature and not born out of the provisions of the PPA, the Petitioner vide its letter dated 12.04.2020 requested MPPMCL to withdraw the said notices and ensure payment of invoices in terms of the provisions of the PPA. The Petitioner stated that the invocation of Force Majeure Clause by MPPMCL is erroneous for the reason that:*

(i) *The letter dated 24.03.2020 of NDMA does not in any way relate to inability in discharging of performance of obligations of the parties laid out under a contract or*

in the PPA. Further, the guidelines issued explicitly exempted“ power generation, transmission and distribution units and services” from the lockdown.

(ii) Since essential services, including power generation are excluded from the lockdown, the Petitioner had to keep generating power by keeping the unit ‘on bar’ and declare the availability of its Contracted Capacity to the MP-SLDC and MPPMCL. Further, it also maintained supply to its other long-term beneficiaries viz. the states of Kerala &Bengal. None of these beneficiaries have taken a stance akin to MPPMCL.

(iii) MPPMCL itself by its letter dated 30.03.2020 to Central Power Generating Stations (CPGS) requested them to maintain uninterrupted supply of power. Thus, MPPMCL cannot adopt different approaches for different generators, while all are similarly affected – by taking a punitive approach towards generators like the Petitioner and a much more adaptive approach towards CPGS, SPGS and other IPPs.

(iv) The Ministry of Power, Govt. of India vide its letter dated 06.04.2020 issued a clarification to its earlier order dated 27.03.2020 regarding Letter of Credit and has stated that the “obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges”. Thus, MPPMCL cannot abdicate from its obligations under the PPA and deny Capacity Charges to the Petitioner by refusing to accept the Declared Capacities.

(v) The Respondent has scheduled and the Petitioner has accordingly supplied power to MPPMCL on 1stand 2ndof April 2020.

The Petitioner further assured MPPMCL that it is committed to supply reliable power to them to the full contracted capacity, as per the DC submitted on a daily basis.

A copy of the Petitioner’s letter dated 12.04.2020 to MPPMCL is annexed herewith and marked as Annexure F.

viii. While the above contemporaneous correspondence was underway, MPPMCL has scheduled and has drawn electricity on 1stand 2ndof April, 2020 from the Petitioner. However, no letter or e-mail was received by the Petitioner from MPPMCL on these two dates or thereafter explaining the drawl / scheduling of power during the Force Majeure event invoked by MPPMCL itself.

ix. *In reply to the Petitioner's letter dated 20.04.2020, MPPMCL addressed a letter dated 25.04.2020 to the Petitioner stating that* ***it is not invoking force majeure conditions*** *solely on account of the restrictions imposed during the lockdown period, but in view of the reduction in demand of power faced by it from its consumers, especially the commercial/industrial consumers, in view of the lockdown, which has led it to face extreme reduction in revenue and financial liquidity. Consequently, the imposition of lockdown is preventing it from performing several of its obligations under the PPA. MPPMCL further stated that the reduction in demand squarely qualifies under force majeure and has compelled it not to schedule any power from the Petitioner's plant. Thus, under Article 11.7.1(c) of the PPA dated 05.01.2011, it is not liable to pay any tariff to the Petitioner.*

x. *MPPMCL also placed reliance on an order dated 20.04.2020 passed by the Hon'ble High Court of Delhi in O.M.P. 3697/2020, whereby the Hon'ble High Court stayed invocation of a Bank Guarantee treating COVID-19 as a force majeure event, without appreciating that the facts of the said case are not at all similar to the present case. MPPMCL further reiterated its decision of not scheduling any power and not accepting Declared Capacity from the Petitioner's generating station.*

A copy of the said letter dated 25.04.2020 of MPPMCL addressed to the Petitioner is annexed herewith and marked as Annexure G.

xi. *Upon noticing that as against the invoice value of Rs. 33.15 Crores for the monthly bill of March 2020, MPPMCL has only made a payment of Rs. 28.26 Crores and that an amount of nearly Rs. 4.89 Crores has been deducted on account of non-consideration of Declared Availability from 24.03.2020 to 31.03.2020, the Petitioner for the month wrote a protest letter on 20.04.2020 to MPPMCL stating that it had accepted daily Declared Capabilities of the Petitioner's generating station against contracted capacity during the period of 24.03.2020 to 31.03.2020, which has also been mentioned in its letter dated 20.04.2020 and thus, deduction in Fixed Charges overlooking the accepted DC sheets is wrong. The Petitioner therefore requested MPPMCL to process the balance amounts at the earliest.*

A copy of the Petitioner's letter to MPPMCL dated 20.04.2020 is annexed herewith and marked as Annexure H.

xii. *From 12.05.2020 onwards, MPPMCL continuously started scheduling and drawing power from the Petitioner's plant.*

xiii. Vide its letter dated 19.05.2020, the Petitioner reminded MPPMCL that it is yet to receive a response to its letter dated 20.04.2020 regarding denial of acknowledgement of daily DC and non-payment of Fixed Charges to the Petitioner from 24.03.2020 onwards. The Petitioner also reiterated its objections to the invocation of force majeure clause by MPPMCL, and further made a reference to the MOP's letter dated 15.05.2020 and subsequent Corrigendum dated 16.05.2020 which granted an option to the CPGS to consider offering certain rebates to Discoms for deferment of Capacity Charges for the power not scheduled, to be payable without interest, after the end of lockdown period in three equal monthly installments.

xiv. The Petitioner further stated that MPPMCL has been scheduling about 65% of contracted power to the Petitioner on a daily basis after 12.05.2020 and requested MPPMCL to acknowledge the daily DC sheets of the Petitioner and send a communication on the same to WRLDC.

A copy of the said letter dated 19.05.2020 of the Petitioner to MPPMCL, along with the MOP's letter dated 15.05.2020 and subsequent Corrigendum dated 16.05.2020 is annexed herewith and marked collectively as Annexure I.

xv. Vide its letter dated 05.06.2020, MPPMCL intimated the Petitioner of cessation of the Force Majeure event and Vis-major notification invoked by it during the period starting from 24.03.2020 till 31.05.2020 and restoration of its rights and obligations under the PPA from 01.06.2020.

A copy of the MPPMCL's letter dated 05.06.2020 is annexed herewith and marked as Annexure J.

xvi. With reference to the above letter dated 05.06.2020 and notwithstanding its objections to the invocation of the Force Majeure Clause, the Petitioner vide its letter dated 11.06.2020 protested against the method being subsequently adopted by MPPMCL for processing the Petitioner's monthly bills of April and May 2020. It stated that MPPMCL has scheduled and drawn power from the Petitioner on 01.04.2020 and 02.04.2020 and thereafter, has been continuously scheduling it since 12.05.2020. However, instead of considering the DC as per the Petitioner's declaration for the whole day in which the power was scheduled, MPPMCL is considering the normative per unit Fixed Charges for the units actually scheduled, which is not in conformity with the reason cited by MPPMCL for its inability to accept the DC and regarding invocation of the Force Majeure Clause.

xvii. *The Petitioner further stated that scheduling of power from a power station expressly means that there was demand based on the Demand-Supply position and the power was drawn from the Petitioner since it was "On-Bar".*

xviii. *In view of the above, the Petitioner proposed an interim solution to the issue for the period from 24.03.2020 to 31.05.2020 to:*

(a) *Keep the treatment of the DC of the days on which the station was not scheduled in abeyance for the time being.*

(b) *Consider the accepted Daily DC of the station for payment of Fixed Charges for the days in which the station was scheduled, regardless of the quantity (Variable Charges shall be paid as per the actual schedule).*

A copy of the said letter dated 11.06.2020 of the Petitioner to MPPMCL is annexed herewith and marked as Annexure K.

xix. *Upon receiving no response from MPPMCL, the Petitioner, vide its letter dated 13.08.2020, reiterated that MPPMCL's stand of non-consideration of the availability of the Petitioner during the period from 2.03.2020 to 31.05.2020 and deduction of Fixed Charges for the said period, despite the fact that MPPMCL had scheduled and drawn power from the Petitioner on 01.04.2020 and 02.04.2020 and thereafter continuously scheduling it since 12.05.2020, is grossly unjustified and arbitrary. The Petitioner thus, requested MPPMCL to recalculate the Fixed Charges payable to it based on the daily declaration of availability of its units during the period under consideration and release the payments accordingly.*

A copy of the Petitioner's letter dated 13.08.2020 to MPPMCL is annexed herewith and marked as Annexure L.

xx. *Vide its letter dated 04.12.2020, MPPMCL replied that it has not deducted any amount arbitrarily and the Capacity Charges have been deducted during the force majeure situation in accordance with the Force Majeure Clause 11.7.1 of the PPA, by restricting payment of Capacity Charges in proportionate to the actual scheduled quantum of power. Thus, in view of the above, Capacity Charges for the period of force majeure situation for unscheduled energy may not be paid and in case of disagreement with its decision, the Petitioner may approach this Hon'ble Commission for adjudication.*

xxi. *Since the issue has remained unresolved despite best efforts of the Petitioner and in view of the above referenced various correspondences and the letter dated 04.12.2020 from the Respondent directing the Petitioner to approach the Hon'ble Commission in case of any grievance in this regard, it may be construed that the avenues available for "Amicable Settlement" as per Article 13.5.2 are exhausted. Accordingly, the Petitioner is constrained to approach this Hon'ble Commission for adjudication of disputes under the PPA dated 05.01.2011in terms of Section 86(1)(f) of the Electricity Act, 2003.*

7. In the subject petition, the petitioner raised the following grounds:-

i. *Because there is no contractual basis for MPPMCL to claim Force Majeure as a defense for non-payment of Capacity Charges to the Petitioner under the PPA entered into between the parties. Article 11.3 which deals with Force Majeure is a detailed provision and does not by any interpretation cover the COVID-19 Pandemic to be an event or circumstance which prevents fully or partly or unavoidably delays MPPMCL from drawing electricity or performing any of its other obligations under the PPA.*

ii. *Because even as per Article 4.2of the PPA, the obligations of MPPMCL are as under:*

"4.2. Procurer's Obligations

Subject to the terms and conditions of this Agreement, the Procurer undertakes to be responsible, at its own cost and risk, for:

(i) Obtaining open access and/or connectivity for evacuation of the Contracted Capacity from the Delivery Point at least 60 (sixty) days prior to Commissioning of the first Unit;

(ii) Establishing the necessary evacuation infrastructure beyond the Delivery point required for evacuation of the Contracted Capacity at least 210 days prior to Commissioning of the first Unit;

(iii) Filing along with the Discoms, within three (3) months from the Effective Date, an appropriate petition with the Appropriate Commission seeking the approval of the said Commission of this Agreement. However, the Company shall duly furnish the requisite data, details, information and documents and assist the Procurer in such proceedings before the Appropriate Commission. Subject to the appellate remedies that may be availed by any of the Parties hereto as provided under section 111 and 125 of the

Electricity Act, 2003, the Parties agrees to implement this Agreement with such modifications to the terms thereof, as may be decided by the Appropriate Commission.

(iv) Ensuring the availability of Interconnection Facilities for evacuation of Contracted Capacity from the Delivery Point;

(v) Payment of the Tariff in accordance with Article 10;

(vi) Payment of all charges for transmission as per prevailing regulations issued by the Appropriate Commission(s) beyond the Delivery Point corresponding to Contracted Capacity;

(vii) Opening and furnishing to the Company a Letter of Credit in favour of the Company and renewing and replenishing the same in accordance with Article 10.5; and

(viii) Fulfilling other obligations undertaken by it under this Agreement.
……………………………………………………………………………………"
Going by a simple reading of the above clause, none of the above obligations had been affected or delayed by the declaration of the COVID-19 outbreak as a Pandemic.

iii. *Because the National Disaster Management Authority (NDMA), Government of India's Order dated 24.03.2020 referred by MPPMCL itself provided certain exceptions to the lockdown, one of them being generation, transmission, distribution and supply of electricity. Further, the Ministry of Power, Government of India Order dated 06.04.2020clearly specified that the liability of Fixed Charges will not be disturbed by its earlier order dated 27.03.2020.*

iv. *Because the invocation of Force Majeure itself is an afterthought. In the first letter dated 30.03.2020 issued by MPPMCL, there was no mention of the start date of the Force Majeure event. It is only, thereafter, vide letter dated 08.04.2020, MPPMCL improved its case and interpreted its earlier letter as having raised the issue of Force Majeure from 24.03.2020 onwards.*

v. *Because the lockdown was declared on 24.03.2020 with the exception of power generation, transmission and distribution services. Therefore, at no point of time after 24.03.2020, did the obligations of either the Petitioner or MPPMCL get affected by Force Majeure.*

vi. *Because it is a commercial decision of MPPMCL not to draw electricity from the Petitioner's generating station and some other private generators while continuing to insist on the Central Generating Companies to generate and maintain supply to MPPMCL. By a letter of*

even date (i.e., 30.03.2020), MPPMCL wrote to NTPC stating that NTPC is obliged to generate and maintain supply of electricity to MPPMCL despite the Force Majeure event. It cannot be that the Govt. of India orders dated 24.07.2020, 27.03.2020 and 06.04.2020 can be broken into parts, namely, the generators are not affected by Force Majeure and need to continue to generate and supply, but the distribution companies are affected by Force Majeure and have no obligation to maintain distribution and supply of electricity. Such an interpretation is illogical and cannot be entertained, since the complete chain of generation, transmission and distribution need to function simultaneously to ensure the supply of electricity (an essential service) to the customers.

vii. *Because there were no extraordinary circumstances preventing MPPMCL from schedule electricity of the Petitioner, nor are there any technical constraints in the same. It was a techno-commercial decision of MPPMCL not to schedules per the demand supply balance.*

viii. *Because the position taken by MPPMCL in its letter dated 30.03.2020, which was issued merely 6 days after the lockdown was declared, was ex-face wrong and incorrect. The billing cycle of MPPMCL to its consumers is on monthly basis and no reduction in billing could have been experienced by MPPMCL between 24.03.2020 and 30.03.2020 so as to invoke Force Majeure under the PPA.*

ix. *Because the nature of Capacity Charges /Fixed Charges itself is to ensure debt servicing and recovery of Capital Cost by the generator. In a Long-term Power Purchase Agreement, the recovery of Capacity Charges is always linked to Declared Capacity since otherwise, the generator will not be able to service the debt obligations undertaken by it for investing the Capital. Even if a single unit of electricity is not scheduled, the principle is that so long the generator is technically available and has adequate fuel and is in the position to declare availability, the Capacity Charges/Fixed Charges ought to be paid to the said generator.*

x. *Because the Petitioner was simultaneously and in the same period supplying electricity and declaring availability to its other procurers, including Kerala State Electricity Board Ltd. and the Bengal Electricity Distribution Company Limited. It cannot be that while the Petitioner continued to perform its obligations qua all the distribution companies and got paid for the Fixed Charges, only MPPMCL was affected by Force Majeure so as to avoid its obligation to pay Capacity Charges to the Petitioner.*

xi. *Because the Ministry of India, Govt. of India's order dated 06.04.2020 is extremely clear and states that the obligation to pay for Capacity Charges as per the PPA shall continue as does the obligation to pay for transmission charges. The intention of the Govt. of India even in the order dated 27.03.2020 was never that the Capacity Charges would not be honored by the*

distribution companies. It is made clear that the obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged. However, there laxation was given only on account of establishing Letter of Credit/pre-payment for scheduling the power by distribution companies to 50% cost of power instead of 100%. The bonafide of the Petitioner becomes clear by the fact that it proposed an interim arrangement for resolution of the issue to MPPMCL vide its letter dated 07.06.2020. This was the accommodation shown by the Petitioner to MPPMCL. However, there was no response at all from MPPMCL and the issue remains unresolved.

xii. *Because the conduct of MPPMCL is so perverse that after declaring Force Majeure on 30.03.2020, it scheduled electricity from the Petitioner's generating station on 01.04.2020 and 02.04.2020. On these dates, total number of 1.78 million units of electricity were scheduled by MPPMCL and were accordingly supplied by the Petitioner. Further, MPPMCL was continuously scheduling electricity from the Petitioner's plant from 12.05.2020 onwards, even though according to MPPMCL's letter dated 05.06.2020, the Force Majeure had ceased to have effect on 31.05.2020 only. It is not understood as to how a party claiming Force Majeure for a period can make exclusions for certain days as and when it is convenient for the said party while scheduling and purchasing electricity, while citing Force Majeure for the other days within the same period.*

xiii. *Because there was no perceivable change in the lockdown criteria set by the Government of India between 25th March 2020 & 1st June 2020, the difficulties as cited by the Respondent, though inadmissible, could not have improved post 1st June 2020, except for the fact that it must have realized the illegality of its action to invoke Force Majeure Clause as per PPA.*

xiv. *Because a massive drop in consumer demand could occur due to several reasons and does not mean that MPPMCL is not in a position to draw the power scheduled. The PPA does not intend the commercial difficulties of parties to be a Force Majeure. Infact, Article 11.4 of the PPA contains the following specific force major exclusions:*

"11.4. Force Majeure Exclusions

11.4.1. Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;

b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 11.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes or labour disturbance at the facilities of the Affected Party;

e. Inefficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

- *Negligent or intentional acts, errors or emissions;*
- *Failure to comply with an Indian Law; or*
- *Branch of, or default under this Agreement or any other Power Station Documents.*

………………………………………………………………………………"

If the case of MPPMCL is accepted, it would mean that a distribution company can enter into a long-term agreement based on which the generating company achieve financial closure, draws debt, invest substantial Capital Cost and sets up a generating station but with no surety of recovery of its Capacity Charges. The very fact that recovery of Fixed Charges is only linked to Declared Capacity and not scheduled energy clarifies that the recovery of Capacity Charges / Fixed Charges is integral and this right of the generator is to be protected at all times without any exceptions.

xxii. Because even as per Article 4.3.3 of the PPA which deals with the right of the generator to make available all or part of its Declared Capacity to a person other than the Procurer, such provision is circumscribed by the term "without losing the right to receive the Capacity Charges from the procurer for such unscheduled available capacity".

xxiii. Because there is no merit in the reliance placed by MPPMCL on the order dated 20.04.2020 passed by the Hon'ble High Court of Delhi with regard to invocation of a bank guarantee. An interim order does not declare the law or even create equities in the favour of any party. Every interim order would depend on the facts, establishment of prima facie case, irreparable loss & injury and balance of convenience. The said order is not a declaration or an acceptance that COVID-19 is a Force Majeure event under all contracts affecting all parties.

xxiv. Because the decision of MPPMCL to stop scheduling power is purely to avoid its obligations under the PPA. There is no basis to restrict the payment of Capacity Charges to the actual scheduled quantum of power. Infact, this concept is unknown to the electricity industry. Capacity Charges and its recovery always depends on declared availability and not on scheduled energy which is relevant for the purposes of payment of Energy Charges alone. However, by wrongly invoking the Force Majeure Clause under the PPA, MPPMCL has withheld an amount of Rs. 37.74 Crores towards Capacity Charges /

Fixed Charges payable to the Petitioner for the period 24.03.2020 to 31.05.2020. A table depicting the said computation of withheld Capacity Charges / Fixed Charges, along with applicable interest till date is annexed herewith and marked as Annexure N.

8. With the above submission the petitioner prayed the following:-

   (a) Hold that the invocation of Force Majeure Clause by MPPMCL is erroneous and against the provisions of the PPA dated 05.01.2011;

   (b) Direct MPPMCL to forthwith release an amount of Rs. 37.74 Crores towards Capacity Charges / Fixed Charges to the Petitioner for the period 24.03.2020 to 31.05.2020 wrongly withheld by MPPMCL;

   (c) Direct MPPMCL to pay interest at the rate of 1.25% per month on the above Capacity Charges wrongly withheld from the date of withholding till the date of actual payment.

9. At the motion hearing held on 23rd March 2021, Ld. Counsel who appeared for the petitioner had sought adjournment in the matter due to some personal difficulty. The matter was heard in motion hearing on 15th June 2021 (after the nationwide lockdown due to Covid-19) wherein the petition was admitted and the petitioner was directed to serve copy of petition on the Respondent. MP Power Management Company Limited (MPPMCL) was directed to file reply to the subject petition by 5th July 2021. The petitioner was also asked to file rejoinder by 15th July 2021.

10. At the next hearing held on 20th July 2021 the respondent sought 4 weeks' time extension for filing reply to the subject petition.

11. At the hearing held on 7th September 2021 the Commission had observed the following:

    i. By affidavit dated 2nd August 2021 the respondent (MPPMCL) filed its reply to the subject petition.
    ii. By affidavit dated 19th August 2021, the petitioner filed rejoinder to the reply filed by the respondent.
    iii. Ld. Counsel who appeared for the petitioner concluded their arguments.
    iv. Ld. Counsel who appeared for the Respondent sought another date for arguments.

12. At the next hearing held on 21st September' 2021, Ld. Counsels who appeared for both the parties concluded their arguments. Parties were directed to file their respective written submissions on arguments within two weeks. With the above directions, the case was reserved for order.

13. Vide letter dated 7th October' 2021, the petitioner filed its final written submission. Vide letter dated 5th October' 2021, Respondent (MPPMCL) filed its final written submission.

Submissions by the Parties:

14. By affidavit dated 2nd August' 2021, the Respondent M.P. Power Management Company Ltd. broadly submitted the following in reply to the subject petition:

    i. "*Without prejudice to the reply on merits of the case, the answering respondent No.1 most respectfully submit that the instant writ petition is not maintainable before this Commission and no proceedings can be held for adjudication U/s 86(1)(f) of Electricity Act as the petitioner has been admitted by the National Company Law Tribunal vide its order dated 27.03.2019 for corporate insolvency resolution process (CIRP) U/s 14 of the IBC Code -2016. A copy of the order dated 27.03.2019 is attached as Annexure-R-1.*

    ii. *It is submitted that virtue of the moratorium issued by the NCLT, u/s 14 of the IBC Code, the petitioner, who is the corporate debtor, before the NCLT cannot institute the instant proceedings for adjudication of dispute against the Respondent, as there is a specific bar U/s 14 (1)(b) of the IBC Code. In this regard Section 14 (1) of the IBC Code is reproduced as hereunder: -*

    "14. Moratorium –(1) Subject to provisions of sub-sections (2) and (3) on the insolvency commencement date, the Adjudication Authority shall by order declare moratorium for prohibiting all of the following namely:-

    (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

    *(b) Transferring, encumbering, **alienating or disposing of by the corporate debtor** any of its assets or **any legal right or beneficial interest** therein;*

    (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

    (d) The recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

iii. *In this regard it is submitted that perusal of Sub Clause (b) of Clause (1) of section 14 of the IBC Code, 2016, highlights that there can be no action by the corporate debtor (petitioner herein) towards alienating or disposing any of its assets "or any legal right or any beneficial interest therein".*

iv. *It is submitted that "right to sue" as exercised by the Petitioner under section 86(1)(f) of the Electricity Act, 2003 in the instant proceedings, is a legal right. It is submitted that the "Right to sue" u/s 86(1)(f) of the Electricity Act or through Arbitration Proceedings or Civil Suit is admittedly a legal right of the corporate debtor (petitioner) and by virtue of institution of the instant proceedings for adjudication of the dispute u/s 86(1)(f) of the Electricity Act, the petitioner has "alienated" its legal right to sue and has thereby also disposed its legal right to sue u/s 86(1)(f) with respect to the instant dispute for recovery of capacity charges.*

v. *It is submitted that once these proceedings u/s 86(1)(f) proceed, the outcome either shall be in favour of the petitioner or in favour of the respondents, however in both the cases, whether the petition is allowed or dismissed, the corporate debtor (petitioner herein) has "alienated and disposed" of its legal right to sue for adjudication of dispute with the respondents and has also thereby consequently alienated and disposed of its beneficial interest therein the legal right. It is submitted that section 14 of the IBC puts an embargo on any type of alienation or disposal of legal right and its not concerned with the nature of legal right. It is submitted that once the legal right to sue has been exercised by virtue of the instant proceedings then the clock cannot be set back and the alienation of the legal right and its disposal is permanent, and this is specifically prohibited during the CIRP Process.*

vi. *It is therefore submitted that the instant proceedings are barred and cannot be conducted till the operation of the moratorium order u/s 14 of the IBC Code, 2016 and which is operating currently. Therefore, no proceedings can be conducted till the cessation of the CIRP process Under Sub Section 4 of Section 14 of the IBC Code 2016.*

vii. *Without prejudice to the above submissions on the maintainability of the Petition, with respect to the merits of the case it is most respectfully submitted that it is the entire case of the Petitioner that:*

   a) *There can be no "Force Majeure" with respect to the purchase of power under the PPA as power generation and distribution were under the exempted category from the lockdown imposed due to Covid-19 by the Union of India. Further in this regard the petitioner has relied on several letters of the Union of India and the answering respondent shall deal with same in its reply below.*

b) *Therefore, on merit the submissions of the Petitioner is that there is no Force Majeure under the PPA.*

c) *The third submission by the petitioner is that even if the Force Majeure clause has been invoked by the Respondent, the petitioner is entitled for payment of its capacity charges on account of the fact that despite invoking the Force Majeure clause vide letter dated 30.03.2020 and 31.03.2020, the respondent has accepted the declared capacity (DC) issued by the petitioner on a day today basis from 24.03.2020 till 08.04.2020 and scheduled power on 1.4.2020 and 2.42020. Therefore, it is the submission of the petitioner that the instant action of the petitioner of accepting the declared capacity from 24.03.2020 till 08.04.2020 is completely contradictory to the force Majeure notices issued on 30.03.2020 & 31.03.2020.*

Distribution is Exempted from COVID-19-Lockdown-Force Majeure Under PPA

viii. *With respect to the first submission raised by the petitioner that power generation, transmission and distribution are under the exempted category as per the circular dated 24.03.2020 of the Union of India issued during the National Lockdown imposed, it is most respectfully submitted that the perusal of the said circular (at page 156 of petition) highlights that the exception from close down in Clause 1 of the order dated 24.03.2020 is only towards power generation and transmission of units and further any exceptions from Close down of any entity does not in any way establish that there was no Force Majeure Condition as the adjudication of force majeure has to be undertaken on the basis of the provisions of the PPA. It is submitted that undoubtedly, Covid-19 has been a force majeure event and therefore this Commission needs to examine the provisions of the PPA and provisions of the Contract Law for adjudication of the instant petition.*

ix. *However, without prejudice it is submitted that the supply of electricity is undoubtedly an important service, therefore, the respondent and the State DISCOMS were engaged in continuous supply of the electricity. However, as mentioned in the notice of Force Majeure dt.30.03.2020 & 31.03.2021 it has been clearly stated that as the consumption and demand of electricity has drastically reduced, therefore, there is force Majeure situation and in this light that the notice of force Majeure was issued.*

x. *However, the issuance of the Force Majeure notice does not mean the supply of electricity to the Consumers has been completely stopped. It is submitted that the Force Majeure notice was issued as there was admittedly a drastic drop in the demand of electricity and public interest mandated that the Force majeure notice is issued so that appropriate financial resources could be saved and used for efficiently. It is submitted that eventually all tariff is a pass through to the consumer and by invoking of Force Majeure as per the*

terms of the PPA the Respondent has exercised its contractual rights correctly and in accordance with public interest. It is submitted that the drastic reduction in demand due to lockdown was anticipated by the officials of the Respondent and accordingly the notice of Force Majeure was issued to not just the Petitioner but also several other generators such as JP Bina, JP Nigrie, MB Power, BLA, PTC(LANCO), PTC (Torrent), NTPC & MPPGCL. The Respondent is attaching a comparative chart showing demand of electricity during the month of April 2020 and May 2020 in comparison with the month of April-May 2019 and 2018 to demonstrate the drastic drop in demand during the lockdown. The chart is attached as Annexure-R-2.

xi. *Further reliance of the petitioner on the circular dated 27.03.2020 (at page 162) does not favour the petitioner case in any manner as the same is only limited to the opening and maintaining of letter of credit as a payment security mechanism by the distribution licensee. In this order of 27.03.2020 it was directed by the Union of India that looking to the unprecedented and force majeure situation the payment security mechanism for scheduling of power shall be at 50%.*

xii. *It is further submitted that in this order of 27.03.2020 UOI clearly held in para -3 that the Covid-19 pandemic is unprecedented and force majeure situation. It is submitted that it is the entire case of the respondent herein that the Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature and therefore, it is completely incorrect on the part of the petitioner to aver or allege that the invocation of force majeure clause is not as per the provisions of PPA. It is submitted that the Covid-19 pandemic being once in a century or life time has affected millions of public globally and when it struck India in the year 2020, there is no knowledge of kind of virus erupted and the fear in the mind of the public was unprecedented towards this unknown virus and it is perhaps for the first time in the history of independent India that a national lock-down was imposed, thus it is completely incorrect on the part of the petitioner to aver or allege that the covid-19 pandemic is not force majeure as per the provisions of the PPA.*

xiii. *It is most respectfully submitted that as per Article 11.3.1 (i) of the PPA (at page 94) the covid-19 pandemic is a natural force majeure event therefore, as per clause 11.7.1 (c)(Para-2), no tariff is payable to the petitioner at the duration of Force majeure by the Respondent.*

xiv. *Further the reliance of the petitioner on the letter dated 06.04.2020 (atPage168) and in particular at Para -3(C) of the said letter wherein the Union of India has clarified that the obligation to pay capacity charges as per the PPA shall continue. It is submitted that the*

said letter of UOI does not in any manner state that capacity charges have to be paid even if the respondent or the purchaser has invoked the force majeure clause. Further, it is reiterated that as per clause 11.7.1 (c)(Para-2) of the PPA, no tariff is payable to the petitioner at the duration of Force majeure by the Respondent.

xv. *It is submitted that a careful reading of para-3(C) of the letter dated 06.04.2020 of the Union of India highlights that the obligation to pay capacity charges is 'as per the PPA' and therefore, the Hon'ble Commission would have to examine the payment of capacity charges in terms & provisions of the PPA, which contains rights and obligations of the parties, and in the instant case, the respondent has invoked the force majeure clause under Article 11.3 of the PPA and as per Article 11.7.1(C) (Para-2), no tariff is payable to the petitioner, therefore, even reliance of the petitioner on the letter dated 06.04.2020 of the UOI is of no help to the petitioner.*

xvi. *It is further submitted the reliance of the petitioner on the letter dated 28.03.2020 (@ pg 170) issued by the Union of India issued U/s 107 of the Electricity Act is also of no help to the petitioner as firstly the letter dated 28.03.2020 clearly acknowledges that the covid-19 event is force majeure and secondly the directions given in the said letter are only in relation with reduction in the rate of late payment surcharge and do not give any direction that capacity charges has to be paid even in the event of invocation of force majeure by the Purchaser (DISCOM) under the PPA.*

xvii. *Lastly the reliance of the petitioner on the letter dated 15.05.2020 is also of no avail as it is a request to the generating company and the transmission company of the central sector by the Union of India, to offer a rebate to the distribution companies. In this regard it is most respectfully submitted that the respondent has in view of the said letter dated 15.05.2020 been successful in getting a rebate from NTPC and MP Genco to the tune of Rs147.08 Cr. & Rs. 96.42 Crores respectively.*

xviii. *It is further submitted, without prejudice, that the letters and circulars of the Union of India, cannot in any manner also be helpful to the Petitioner for the simple reason that the Hon'ble Commission is required to examine the instant dispute in accordance with the terms of the PPA, which is the contract between the parties. Further without prejudice it is submitted that event the letters of the Union of India clearly hold and state that covid-19 is a force majeure situation and secondly, payment of capacity charges has to be as per the PPA. It is submitted therefore, that the entire case of the petitioner is misconceived and not in accordance with the provisions of PPA and law applicable.*

Declared Capacity Accepted

xix. *Thirdly, with respect to the submission of the petitioner that the respondents has accepted the declared capacity of the petitioner from 24.03.2020 to 08.04.2020 and the said action on the part of the respondents is contrary to its notice of force majeure dated 30.03.2020 and 31.03.2020 it is most respectfully submitted that the averments is without any merit for the simple reason that the respondent does not accept the declared capacity and as per the regulations which are the Madhya Pradesh Balancing & Settlement Code Regulations framed by this Hon'ble Commission, and a perusal of the regulations highlights that the generator (petitioner) is required to give its declared capacity to the SLDC on a day ahead basis and SLDC accepts the DC after prudence check and issues entitlement of the MPPMCL. Thereafter, the respondent is required to give its requisition of power from the respective generators and on the basis of such requisition submitted by the respondent the SLDC issue the drawl schedule for the next date from the respective generators and intimate the same to the respective parties. It is submitted that the detailed procedure regarding the same has been mentioned in the Balancing and Settlement Code a copy of which is attached as Annexure-R-3.*

xx. *In the instant case, the respondent during the said period has not given its requisition for drawing power from the petitioner except on 01.04.2020 and 02.04.2020 and the drawl of power on 1.4.2020 and 2.4.2020 is in accordance of clause-11.6 of the PPA (duty to mitigate), and the said drawl of power on 1.4.2020 and 2.4.2020 does not in any manner amplify or demonstrate that the force majeure situation has ceased to exist. The Respondent is attaching a sample copy of requisition submitted for drawl of power from the Petitioner to SLDC on 1.07.2020to show the procedure followed by the Respondent as per the Balancing Code Regulations. A copy of the requisition for 1.07.2020 is attached as Annexure-R-4.*

xxi. *It is also pertinent to mention herein that the petitioner is not just supplying power to the respondent herein but is supplying its 52.5% of its capacity to Kerala and West Bengal therefore, in any case petitioner had to be on-bar for making supply to the other two states. It is therefore, completely incorrect for the petitioner to aver or allege that the respondents have accepted is declared capacity from 24.03.2020 to 08.04.2020. It is submitted that the Petitioner submissions in this regard are completely meritless and not in accordance with law.*

xxii. *Further with respect to the submissions of the Petitioner that the power has been drawn continuously from 12.5.2020 although the notice of cessation of notice for force majeure was issued on 5.6.2020 and the payments in full are not being made for the power drawn.*

In this regard it is mentioned that the answering respondent while drawing power from 12.5.2020 has followed the principles of MOD and most importantly has acted under clause 11.6 of the PPA (Duty to Mitigate) and as stated by MPPMCL in its letter dated 4.12.2020, has paid capacity charges in proportion to the quantum of power scheduled. It is submitted that admittedly there was a force majeure situation ongoing during the period of 12.5.2020, and as per clause 11.7 no tariff was payable to the Petitioner, however respondent has paid the capacity charges in proportion to the power scheduled as the same is just and fair.

15. By affidavit dated 19th August' 2021, the petitioner filed its rejoinder to the reply filed by the Respondent MPPMCL. The petitioner broadly submitted the following in its rejoinder:

i. *"The Respondent in the reply has contended that the Petition is not maintainable before this Hon'ble Commission as the Petitioner has been admitted by the National Company Law Tribunal ("NCLT") vide its Order dated 27.03.2019 for Corporate Insolvency Resolution Process ("CIRP") under Section 14 of Insolvency Bankruptcy Code, 2016 ("IBC, 2016").*

ii. *It is stated that merely because CIRP proceedings have been initiated against the Petitioner does not automatically bar the Petitioner from filing any Petition for recoveries of moneys illegally detained by parties against it. This is not the purport of Section 14 of the IBC, 2016. The fact that Petitioner has been admitted by the NCLT itself does not affect the Present Petition.*

iii. *A similar objection raised by another distribution licensee to whom the Petitioner supplies electricity, Kerala State Electricity Board Limited was raised in another proceeding initiated by the Petitioner before the Central Electricity Regulatory Commission ("CERC") in Petition No. 169/MP/2019. The CERC vide its Order dated 20.05.2020 rejected the objection, inter-alia, holding as under –*

"9. Before going into merits of the case, a primary contention of KSEBL objecting the maintainability of the instant Petition needs to be addressed. KSEBL has contended that the Petitioner company has been admitted to Corporate Insolvency Resolution Process pursuant to the order of NCLT, Kolkata Bench and Resolution Professional has been appointed therein. However, it was contended that the Petitioner did not disclose these facts in the Petition. Per contra, the Petitioner in its rejoinder has submitted that NCLT vide its order dated 24.7.2019, has appointed Shri Abhilash Lal as Resolution Professional, which has authorized Shri Janmejaya Mahapatra to undertake all the dealing with various authorities and the said authorization further indicates that any documents to

the above PPAs shall be executed jointly by Shri Janmejaya Mahapatra and Shri Abhilash Lal.

10. It is apparent that the insolvency proceeding against the Petitioner was admitted by NCLT prior to filing of the present Petition. Though the Resolution Professional was appointed subsequent to filing of the present Petition, the Interim Resolution Professional had been appointed on the date of admission of the Petition by the NCLT. In its Rejoinder, the Petitioner has filed the authorization letter as well as the affirmed affidavit of both the Resolution Professional [Shri Abhilash Lal as well as the person authorized by the Resolution Professional (Shri Janmejaya Mahapatra). In view of the authorization and affidavit filed by the Resolution Professional. Shri Abhilash Lal filed along with the rejoinder, we hold that the present Petition is properly authorized and is thus, maintainable. Accordingly, we now proceed to deal with the matter on merits.

Copy of the Order dated 20.05.2020 passed by the CERC is attached hereto and marked as Annexure A.

iv. The only effect of the moratorium envisaged, under Section 14 of IBC, 2016 is that no proceedings can be initiated against the Corporate Debtor to recover any amounts. There is specific bar under Section 14 (1) (b) of IBC, 2016 mentioned as under -

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: —

(a) The institution of suits or continuation of pending suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.

……"

v. It is submitted that the Petitioner (Corporate Debtor) is not alienating or disposing any legal right or beneficial interest but is claiming payment illegally withheld by the Respondent from the Petitioner. This would help in reviving the Petitioner and the same is not prohibited by Section 14 of the IBC, 2016.

vi. Further, the Petitioner relies on the following judgments of the Hon'ble High Court of Delhi where the exact issue was decided as under –

Power Grid Corporation of India v Jyoti Structures Ltd. (2018) 246 DLT 485

14. Hence for following reasons I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., ***(a)*** *'proceedings' do not mean 'all proceedings';* ***(b)*** *moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor;* ***(c)*** *continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code;* ***(d)*** *term 'including' is clarificatory of the scope and ambit of the term 'proceedings';* ***(e)*** *the term* ***'proceeding' would be restricted to the nature ofaction that follows it i.e. debt recovery action against assets of the corporate debtor****;* ***(f)*** *the use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability;* ***(g)*** *the Arbitration Act draws a distinction between proceedings under section 34 (i.e. objections to the award) and under section 36 (i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).*

SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd. (2019) 177 DRJ 473

8. The Court has considered the plaint and the written statement/counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the `corporate debtor'. Under Section 14(1)(a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor‟. A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1)(a). ***<u>When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated.</u>*** *A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.*

9. *The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the* ***Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum.*** *At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court.*

vii. *Even though the above Order dated 20.05.2020 passed by the CERC was challenged before the APTEL by KSEBL, and the Order was reversed, there was no reversal on the issue of Section 14 of the IBC, 2016 or that the CIRP process is in effect. Further, the Judgment of APTEL has been challenged by the Petitioner before the Hon'ble Supreme Court, and is being heard notwithstanding the fact that the CIRP proceeding are continuing against the Petitioner.*

viii. *In view of the above, there is no merit in the contents of Para 2 – 7 of the Reply. The Petition is clearly maintainable and stands admitted by this Hon'ble Commission.*

ix. *At Para 8 of the Reply, the Respondent has sought to summarize the case of the Petitioner. It is respectfully stated that the Respondent has misunderstood the case of the Petitioner. The Petitioner has not contended that under the PPA, there is no "force majeure" clause. The case of the Petitioner is that the declaration of nationwide lockdown by the Government of India does not amount to "force majeure" in terms the PPA entered into between the parties. The Government has considered the power sector to be an essential service and it was exempted from the Nationwide lockdown declared by the Government. The reasons for the*

same have been detailed in the Petition and the Petitioner craves leave to refer to the same in the course of arguments.

x. *With regard to the conduct of the Respondent in accepting the declared capacity issued by the Petitioner for the period from 24/03/2020 to 08/04/2020 and also scheduling electricity on 01/04/2020 to 02/04/2020, the Petitioner has made detailed submissions in the Petition and the same are not being repeated herein for the sake of brevity.*

Distribution is exempted from COVID-19 Lockdown Force Majeure under PPA.

xi. *The Respondent has sought to make certain broad brush submissions on the scope of Covid 19 which affected various activities in the entire country and was followed by the nationwide lockdown declared by the Government of India on 23/03/2020.*

xii. *It is wrong and denied that the Order dated 24/03/2020 issued by the Government of India deals only with Generation and Transmission and not with Distribution of electricity. The relevant extracts from the Order dated 24/03/2020 are being quoted here under –*

1. *Offices of the Government of India, Its Autonomous/ Subordinate Offices and Public Corporations shall remain closed.*
   Exceptions:
   Defense, central armed police forces, treasury, public utilities (including petroleum, CNG, LPG, PNG), disaster management, power generation and transmission units, post offices, National Informatics Centre, Early Warning Agencies

xiii. *The objection of the Respondent that 'Distribution' is not specifically mentioned in the above Order is hyper-technical. The case of the Petitioner is that when the authority declaring the nationwide lockdown itself is spelling out the exceptions to the same, how can contracting parties claim the benefit of "force majeure" for the activities which have been named as exception to the lockdown.*

xiv. *The Respondent is seeking to contend that merely because the Order dated 24/03/2020 makes an exception for power generation, this does not mean that there is no force majeure. According to the Respondent, the issue of force majeure is to be decided by reading the provisions of the PPA. The Respondent has described the Covid19 pandemic to be covered under Article 11.3.1 (i) of the PPA which is a natural force majeure event and accordingly, Article 11.7.1 (c) has been triggered by the Respondent to deny any tariff payments to the Petitioner.*

xv. *The above clauses referred to by the Respondent are extracted hereunder –*

11.3.1. A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Event(s)

act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

11.7. Available Relief for a Force Majeure Event
11.7.1 Subject to this Article 11:

(c) for the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurer for the Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the Company, for the duration of such Natural Force Majeure Event affecting the Company. For the balance part of the Contracted Capacity, the Procurer shall pay the Tariff to the Company, provided during such period of Natural Force Majeure Event affecting the Company, the balance part of the Power Station is declared to be Available for scheduling and despatch as per ABT for supply of power by the Company to the Procurer;

In case of a Natural Force Majeure Event affecting the Procurer, no Tariff shall be paid by the Procurer to the Company for the duration of such Natural Force Majeure Event affecting the Procurer;

xvi. *As will be clear from a reading of the above, Article 11.3.1 (i) deals with natural force majeure events lists such events to be lightening, draught, fire and explosion, earthquake, volcanic eruptions, landslide, flood, cyclone, typhoon, tornado or exceptionally adverse weather conditions which are in excess of the statistical measure for the last hundred (100) years. Even if it is accepted that this clause gives an inclusive definition of natural force majeure events, surely a lockdown declared by the Government of India or any other State*

Government cannot be a natural force majeure. If the definition is taken to be an inclusive one, the events being cited as force majeure should be ones which is ejusdem generis to the words used in the main provision.

xvii. *It is stated that by no stretch of imagination can the lockdown (with certain exceptions) be deemed to be a natural force majeure event. This submission deserves to be rejected at the threshold. The contrary, Article 11.4.1 e. specifically states that insufficiency of finance of funds or the agreement becoming onerous to perform is an exception to force majeure.*

xviii. *With regard to the applicability of Article 11.7.1 (c), the said Article deals with the available relief for of force majeure event. If the event cited by the Respondent is itself not covered under Article 11.3.1, there is no question of applicability of Article 11.7.1 (c).*

xix. *The contentions of the Respondent in Paras 10 & 11 of its Reply is self- destructive. While in Para 10, the Respondent contends that the Order dated 24/03/2020 does not mention 'distribution' but only generation & transmission of electricity, in Para 11, the Respondent is contending that it continued to distribute and supply electricity to its consumers even during the period of the lockdown. Surely, the Respondent did not do so out of the goodness of its heart but only because it understood the Order dated 24/03/2020 as prescribing distribution of electricity also to be exempt from its purview. Since electricity generation, transmission, distribution, retail sale and consumption is instantaneous, the supply of electricity to the consumers has taken place simultaneously with Generation and transmission of electricity. The Order obviously included distribution under "transmission" of electricity from the generator to the consumer.*

xx. *Merely because there was a load crash or drop in consumption from the consumers of the Respondent does not mean that this is a force majeure qua the Petitioner under the PPA. The pandemic obviously is not like earthquake, volcanic eruption, flood, cyclone, typhoon or tornado which wreaks such large scale and widespread havoc to the distribution network. Going by the logic of the Respondent, even a sudden increase in demand from consumers will amount to a force majeure under the PPA. It is submitted that such an illogical interpretation be given to a contract entered into between the commercial entities.*

xxi. *The Respondent has admitted at Para 11 of its Reply that it gave the force majeure notice to several generators, i.e., private IPPs and not Government Generators only to 'save appropriate financial resources'. This also shows that there was no force majeure affecting the Respondent receiving the electricity but the Respondent, only to manage its commercial & financial affairs claimed it as a force majeure. This is specifically prohibited by Article 11.4.1 e. of the PPA. Further, the fact that the Respondent gave the notices only to private*

IPPs shows that it was not a force majeure, in which case the Respondent would also have issued such a notice to the State / Government Generating companies.

xxii. *The general submissions made by the Respondent in Para 13 of the Reply also do not aid its case in claiming the lockdown as a force majeure under the PPA. The Respondent has relied on certain portions of the letter dated 27/03/2020 of the MOP to claim force majeure. The Petitioner has clearly demonstrated that the MOP itself clarified its letter dated 27/03/2020 by a further letter dated 06/04/2020, which reads as under –*

> *"Subject: Clarification to letters dated 27.03.2020 regarding Letter of Credit and 28.03.2020 regarding*
> *3. Therefore, in brief*
> *(c) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.*
> *4. Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crises......."*

xxiii. *Thus, there is no basis for the Respondent to continue to rely on Para 3 of the MOP letter dated 27/03/2020 and claim that it need not pay the capacity charges to the Petitioner in view of the subsequent letter dated 06/04/2020.*

xxiv. *The Respondent has further contended that the letter dated 06/04/2020 uses the term 'obligation to pay capacity charges as per the PPA'. The Petitioner has already dealt with the argument of the Respondent with regard to Article 11.3.1 (i) and 11.7.1 (c) of the PPA hereinabove. Since, the said Articles have no application, the Respondent cannot claim benefit under the same and is under obligation to pay the capacity charges to the Petitioner even in terms of a plain and simple interpretation of the PPA. The letter dated 06/04/2020 in fact clarified beyond doubt the scope of the effect of the lockdown on the power purchase agreements. Irrespective of the type of PPA, the Ministry of Power has clarified that there is an obligation on all the distribution licensees to continue to pay the capacity charges to generators. The very same dispensation should apply even the present case.*

xxv. *The Respondent has also sought to wrongly distinguish the letter dated 28/03/2020 issued by the Government of India under Section 107 of the Electricity Act to the CERC. The said letter clearly recognizes the relief which needs to be extended by generating companies to the distribution licensees even assuming but not admitting that the Covid-19 affected the rights and obligations of parties qua each other. In the said letter, the MOP has issued a policy directive with regard to reduction in the rate of late payment surcharge and clearly recognizes the extent of relief that was to be given by generators to distribution licensees.*

The letter cannot be read in the negative, namely that since there is no provision in the letter directing the distribution licensees to pay the capacity charges to generators, the distribution licensee do not have such obligations.

xxvi. *If the MOP letter is read in the manner as being suggested by the Respondent, there would have been no need for the Respondent to pay capacity charges to any generators and it should have simply raised force majeure against each and every generator with which it had the PPA. Instead, the Respondent has chosen to selectively invoke the force majeure for certain generators, which itself negates the argument being put forth by it namely, that there is no obligation on it to pay capacity charges to any generator.*

xxvii. *The further admission of the Respondent in Para 18 of its Reply that in terms of the letter dated 15/05/2020, the Respondent has been successful in getting from NTPC as well as the MP generating company also further establishes that there is an obligation on the Respondent to pay the capacity charges to all generators including the Petitioner. The limited relief given to the Respondent was by the letter dated 15/05/2020 of the Government of India and the letter dated 28/03/2020 issued under Section 107 of the Electricity Act to the CERC.*

Declared Capacity accepted

xxviii. *The Respondent has contended that it has not accepted the declared capacity of the Petitioner for the period 24/03/2020 to 10/04/2020 since there is no procedure to accept the declared capacity as per the Madhya Pradesh Balancing and Settlement Code Regulations framed by this Hon'ble Commission with the Respondent. According to the Respondent, the generator is required to give its declared capacity to the SLDC on a day ahead basis which is then accepted by the SLDC which provides the schedule/entitlement of the Respondent. The Respondent has also admitted that it is required to give its requisition of electricity from various generators based on which the SLDC issues the drawal schedule on real time basis. The Respondent has also annexed the detail procedure.*

xxix. *The Respondent has also claimed that it has not given any requisition for drawing of electricity except on 01/04/2020 and 02/04/2020, which according to it is under Article 11.6 of the PPA that provides for mitigation. The Respondent has also filed a sample copy of its requisition for 01/07/2020. The Respondent has further relied on the fact that the Petitioner is supplying 52.5% of its capacity to other states and therefore in any case the Petitioner would have to be on bar to effect supply to these States.*

xxx. *The Petitioner is now dealing with the above objections. Firstly, there is no merit in the Respondent denying the declared capacity between the period 24/03/2020 to 10/04/2020. This is a factually incorrect statement and the Respondent is put to strict proof of the statement. In fact, this Hon'ble Commission can call for the details for the period between 24/03/2020 to 10/04/2020 from the SLDC. For the period from 24/03/2020 to 31/03/2020, the Respondent was clearly accepting the DC given by the Petitioner. This is captured in the letter dated 20/04/2020 written by the Petitioner to the Respondent and placed in ANNEXURE – H to the Petition. Further, even for the period from 01/04/2020 to 10/04/2020 the Respondent continued to accept the DC of the Petitioner From 11/04/2020 to 12/05/2020, even though the Petitioner was communicating the DC to the Respondent on daily basis, there was silence on the part of the Respondent. Not even on a single day in this period, did the Respondent reject the DC given by the Petitioner. On 12/05/2020, the Respondent started scheduling the electricity without giving any consent on DC Sheet and from 13/05/2020, the Respondent reverted to the earlier procedure of giving daily acceptance of DC. Copies of the same are attached hereto and marked as Annexure B.*

xxxi. *It is extremely unfair on the part of the Respondent to make any submission to the contrary since the details for the period between 24/04/2020 to 10/04/2020 can be verified by this Hon'ble Commission by calling for the details from the SLDC.*

xxxii. *Further, there is no purpose in giving the requisition made by the Respondent on 01/07/2020 since the same is not under dispute in the present proceedings. It is also stated that the conduct of the Respondent in scheduling the electricity on 01/04/2020 and 02/04/2020 has been explained as mitigation under Article 11.6 of the PPA. Article 11.6 reads as under –*

> *11.6. Duty to perform and duty to mitigate*
> *11.6.1. To the extent not prevented by a Force Majeure Event pursuant to Article 11.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.*

xxxiii. *The Respondent cannot simply rely on the above provision without showing what was the on-ground situation on 01/04/2020 and 02/04/2020, when it scheduled the electricity of the Petitioner. The entire case of the Respondent is that the consumers are not drawing adequate power or that there was a load crash or that there is a drastic reduction in the collection of revenues. If this is cited as force majeure, it is for the Respondent to show as to how these three events were not existing on 01/04/2020 and 02/04/2020, when the electricity was scheduled by it. If indeed, the Respondent was trying to mitigate the situation*

or the effect of force majeure, and drawing electricity on the above dates is a reasonable effort for such mitigation, surely, some material would be available with the Respondent to place before this Hon'ble Commission to prove as to why it made the effort of mitigation only on 01/04/2020 and 02/04/2020 and not on other dates.

xxxiv. *Since no such material has been placed, an adverse inference needs to be drawn against the Respondent. The Respondent cannot simply make a bald statement without substantiating the same. Similarly, there is no answer by the Respondent as to why it started to draw the electricity from 12/05/2020 onwards till the notice of cessation of force majeure which was issued on 05/06/2020 except stating that it was following the merit order dispatch principle and acted as per Article 11.6 of the PPA which is the provision for mitigation.*

xxxv. *The Respondent has also stated that it has paid the capacity charges in proportion to the electricity scheduled by it from 12/05/2020 onwards even though as per Article 11.7, no tariff was to be paid by it to the Petitioner. Such conduct cannot be explained by citing mitigation. If indeed there was force majeure situation, the same cannot work in bits and pieces, as per the convenience and inconvenience of the Respondent. It is quite clear that the Respondent has invoked the bogey of force majeure simply to deny the valid payment of capacity charges of the Petitioner.*

xxxvi. *The fact that the Petitioner is supplying electricity/part of its capacity to other distribution companies, and would remain on bar also does not change the factual position since, the Petitioner has only referred to the declared capacity qua the Respondent for the period 24/03/2020 to 10/04/2020 being accepted by the Respondent. This does not include the capacity which was declared for other distribution licensees such as Kerala and West Bengal. While submitting that the Petitioner had to remain on-bar to supply power to its other beneficiaries, the Respondent did not think why the others did not invoke force majeure since they were also equally adversely affected by the national lockdown. Further, the Respondent has itself accepted the DC declared by the Petitioner from 24/03/2020 to 10/04/2020. Thereafter, from 11/04/2020 to 12/05/2020, the Respondent remain silent and effective 12/05/2020, the Respondent started scheduling the electricity. Surely, if the Respondent has taken a position that it was affected by Force Majeure, it would not have accepted any DC declared by the Petitioner for the period of claimed Force Majeure.*

xxxvii. *The Respondent simply issued the notice of force majeure on 30/03/2020, then further improved its case by another notice dated 31/03/2020. When the Petitioner pointed out the letters of MOP dated 06/04/2020 as well as direction issued by the Government of India on 28/03/2020 under Section 107 of Electricity Act, 2003, the Respondent simply did not deal with the same and maintained the position that it is suffering force majeure. When the*

Petitioner pointed out the conduct of the Respondent in accepting declared capacity for the period 24/03/2020 to 10/04/2020, the Respondent has simply denied the same without adducing any proof. Further, the Respondent is explaining its decision to schedule electricity on 01/04/2020, 02/04/2020 and from 12/05/2020 onwards as a mitigation of the force majeure. Surely, such a stand is untenable and the interpretation of the PPA cannot be based on such approbation and reprobation being pleaded by the Respondent.

xxxviii. *It is stated that there is no merit in the Reply filed. The Petitioner reiterates its prayers and request for a direction for payment of the amount withheld by the Respondent from it along with delay payments are charged at the rate of 1.25% per month till the date of such payment.*

16. Vide letter dated 7th October' 2021, petitioner filed its final written submission broadly submitted the following:

i. *The subject written submission is being filed to summarise the arguments advanced by the Petitioner – Jhabua Power Limited (herein after referred to as "Jhabua") in response to the arguments advanced by the Respondent – Madhya Pradesh Power Management Company Limited (herein after referred to as "MPPMCL") in the final hearing held on the matter on 21.09.2021.*

ii. *The Petitioner is M/s. Jhabua Power Limited is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 having set up a 600 MW coal-based power project at Barela-Gorakhpur, in Seoni, Madhya Pradesh. The Respondent, MPPMCL is the holding company of the distribution licensees in the State of Madhya Pradesh and is responsible for purchase of power from the generators.*

iii. *The case of Jhabua is that MPPMCL has wrongly withheld the Capacity Charges/Fixed Charges to be paid to Jhabua for the period from 24.03.2020 to 31.05.2020 incorrectly raising 'Force Majeure' under Article 11 of the Power Purchase Agreement (herein after referred to as "PPA") dated 05.01.2011 entered into between the parties. Jhabua is also claiming that the fixed charges be released forthwith to it along with are carrying cost of 1.25% per month till the date of payment.*

iv. *The primary argument of Jhabua is that the defence of Force Majeure raised by MPPMCL to deny the payment of Capacity Charges/Fixed Charges is against a simple reading of the terms of the PPA entered into between the parties. Neither the Covid-19 pandemic nor the declaration of nation-wide lockdown amount to 'Natural Force Majeure' as is being claimed*

by MPPMCL. The case of MPPMCL is not supported by plain reading of the various provisions of the PPA.

v. *For the sake of ease of understanding, Jhabua delineated the matter raised by MPPMCL into three issues and proceeded to respond in the hearing here as under –*

Maintainability of the petition:

vi. *MPPMCL has questioned the maintainability of the Petition despite the fact that this Hon'ble Commission had admitted the matter vide its date daily Order dated 15.06.2021. The ground taken by MPPMCL is that since Jhabua has been admitted by the National Company Law Tribunal (NCLT) for Corporate Insolvency Resolution Process (CIRP) vide NCLT (Kolkata Bench) order dated 27.03.2019, the present Petition would abate under Section 14 (1)(b) of the Insolvency Bankruptcy Court, 2016 (IBC, 2016), and would, therefore, become not maintainable.*

vii. *The objection to the maintainability of the petition on the ground of Section 14 of the IBC, 2016 is misconceived and liable to be rejected. The relevant portion from the IBC, 2016 is extracted below for ready reference –*

> *"……Section 14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*
>
> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
>
> *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor….."*

viii. *The Hon'ble Apex Court in the matter of P Mohanraj and Ors. v. M/s Shah Brothers Ispat Ltd. 2021 SCC Online SC 152, has discussed the legislative intent behind Section 14 of IBC, 2016. The legislative purpose behind enacting the moratorium clause was to prevent the government from terminating or suspending several grants, such as licences, permits, quotas, and concessions, because these grants are critical to a company's activity and maximising its value as a going concern by way of institution of a suit. There is no bar under Section 14 of the IBC, 2016 for the Corporate Debtor to institute any legal proceedings.*

ix. *MPPMCL is placing reliance the term 'legal right' in Section 14 (1) (b), equating the same to 'right to use'. The same is neither supported by any precedents nor logic. The Report of the Insolvency Law Committee published in March, 2018, defined the intent of Section 14 as follows:*

> *"……….5.2 The notes on clauses for section 14, read as follows (emphasis supplied): "the purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default" and "**the moratorium on initiation and continuation of legal proceedings, including debt enforcement action ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the corporate insolvency resolution process**." Thus, the intent does not appear to be to debar only those suits or proceedings which affect the assets of the corporate debtor, as these appear to be only one of the components that is barred………."*

x. *The intent of Section 14 is clear to bar "transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;", by way of any proceedings such as Section 13 proceedings from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, attachment of property in a civil proceeding or any other provision of law.*

xi. *More specifically, the term 'legal right' in the Section 14 (1) (b) purports rights over the assets of the Corporate Debtor such as freehold right or lease hold rights etc. The legislature does mean or intend to mean right to sue for 'legal right' in the said provision. MPPMCL cannot pick a certain word in the provision and interpret the same as per its whims and facies only for the purpose to depart from his obligations of making payments as per the PPA.*

xii. *The Hon'ble National Company Law Appellate Tribunal in the case of Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd. 2018 SCC OnLine NCLAT 296 have summarized Section 14 of IBC, 2016, to mean that the objectives of moratorium, it is only applicable upon proceedings filed against the corporate debtor and when it comes to proceedings filed by the corporate debtor, moratorium should be applicable only after considering the benefit to the corporate debtor.*

xiii. *In the above given facts and circumstances, the objection of maintainability raised by MPPMCL on the grounds of Section 14 of IBC, 2016 is baseless, unfounded and is liable to be rejected. It is respectfully submitted that the initiation of CIRP proceedings does not automatically bar Jhabua from filing any Petition for recoveries of money illegally detained by parties against it. The legislative intent behind notifying Section 14 of the IBC, 2016 is not that the entity admitted for CIRP process seizes to have the right to recover monies or challenge incorrect interpretations made by other contracting parties against it. The only effect of the moratorium under Section 14 of the IBC is that no proceedings can be initiated by others against the corporate sector for recovery of any amount.*

xiv. *The further contention of MPPMCL that by filing the present Petition, Jhabua is alienating a legal right or beneficial interest is illogical and without any merit. To the contrary, Jhabua is claiming amounts which have been illegally withheld by MPPMCL, in complete disregard to the present financial position of the company (under CIRP) on an incorrect interpretation of the PPA. This would obviously help in reviving Jhabua and is not prohibited by Section 14 of the IBC, 2016.*

xv. *The other contention of MPPMCL is that in case Jhabua succeeds in the present Petition before this Hon'ble Commission and MPPMCL wishes to challenge the same, due to the operation of the moratorium, MPPMCL would not be in a position to file an pursue an Appeal challenging and Order passed by this Hon'ble Commission. Such an indirect argument to oppose maintainability of a Petition is unprecedented and unheard-of. The issue of maintainability encompasses only two main aspects, jurisdiction and limitation. As long as these aspects are established, there can be no question of raising indirect objections to maintainability of the present Petition.*

xvi. *Even otherwise, MPPMCL's apprehensions are uncalled for. Jhabua has already cited along with its rejoinder, an example of a case which has been filed by it seeking interpretation of certain terms of another PPA entered into by it with the Kerela State Electricity Board Ltd (KSEBL), another Distribution Licensee. In this regard, Jhabua had filed a Petition No. 169/MP/2019 before the Hon'ble Central Electricity Regulatory Commission (CERC) which was allowed in Jhabua's favour vide an Order dated 25.05.2020 by the Central Commission.*

The Kerela State Electricity Board Ltd not only filed an Appeal being Appeal No. 230 of 2020 against the said Order of the Central Commission before the Hon'ble Appellate Tribunal for Electricity, but also succeeded in the Appeal vide Judgment dated 13.05.2021. As on the date of filing of the present Written Submissions, Jhabua has filed a Second Appeal challenging the Judgment dated 13.05.2021 before the Hon'ble Supreme Court in which notice has been issued. Therefore, even assuming MPPMCL's indirect argument of the correct, the Hon'ble Appellate Tribunal has not refused to entertain an Appeal against Jhabua merely because the CIRP proceedings are on.

xvii. *Jhabua also relies on the following Judgments on the interpretation of Section 14 by the Hon'ble High Court and the Hon'ble Supreme Court –*

Power Grid Corporation of India v Jyoti Structures Ltd. (2018) 246 DLT 485 14.

"……..Hence for following reasons I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., (a) 'proceedings' do not mean 'all proceedings'; (b) moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor; (c) continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code; (d) term 'including' is clarificatory of the scope and ambit of the term 'proceedings';(e) the term 'proceeding' would be restricted to the nature of action that follows it i.e. debt recovery action against assets of the corporate debtor; (f) the use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability; (g) the Arbitration Act draws a distinction between proceedings under section 34 (i.e. objections to the award) and under section 36 (i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a)…..". (Emphasis supplied)

SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd. (2019) 177 DRJ 473 8.

"……….The Court has considered the plaint and the written statement/counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the `corporate debtor'. Under Section 14(1)(a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor‟. A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims. 9. The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court…..". (Emphasis supplied)

Interpretation of Article 11 of the PPA

xviii. *For the sake of convenience, Jhabua is setting out here under the relevant portions of the Article 11 of the PPA –*

> *"……11.3.1. A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*
>
> *i. Natural Force Majeure Event(s)*
>
> *act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years…."*

xix. *The case of MPPMCL is that since in Article 11.3.1, the term 'Force Majeure' has been defined as any event or circumstance or combination thereof which fully or partly prevents or unavoidably delays and affected party in the performance of its obligations under this PPA, this itself is sufficient to cover the situation which was being faced by MPPMCL for the period 24.03.2020 to 31.05.2020, namely, a reduction in consumer demand, nonreceipt of electricity bills, crash in load et cetera. Further, MPPMCL's case is that the Covid-19 pandemic and the nation-wide lockdown get covered under Article 11.3.1 (i). – 'Natural Force Majeure events'.*

xx. *The above way to read the PPA is incorrect and the interpretation of MPPMCL does not arise from a plain reading of the terms. Article 11.3.1 – opening portion cannot be cited by either Jhabua or MPPMCL to invoke Force Majeure until and unless the event cited is specifically covered either by –*

- *i. Natural Force Majeure Event*
- *ii. Non-Natural Force Majeure Event.*

The Non-Natural Force Majeure Event are further divided into –

- *i. Direct Non-Natural Force Majeure Event &*
- *ii. In direct Non-Natural Force Majeure Event.*

The specific definitions and categories of Force Majeure have been agreed to by the contracting parties since the relief provided by the PPA in the case of each of the above is

different from each other. It is not that the relief for of Natural Force Majeure event is the same as the relief or indirect Non-Natural Force Majeure event. Therefore, the parties have specifically defined and categorised the various types of Force Majeure which may arise in the performance of the PPA and what should be the relief in case any or each of these events may arise.

xxi. *This becomes further clear by reading of Article 11.4 which deals with Force Majeure exclusions. Article 11.4 provides for a double negative; namely what Force Majeure shall not include except to the extent that they are consequences of an event of Force Majeure.*

xxii. *Therefore, MPPMCL cannot content that Article 11.3.1 opening portion itself a sufficient to invoke Force Majeure by one of the parties, if otherwise the event is not covered either under -*

i. Natural force measure event or,
ii. nonnatural force measure event.

Further, Article 11.3.1, the opening portion is not an inclusive definition but use the term 'means'. In the circumstances, unless MPPMCL can satisfy this Hon'ble Commission that its case is covered under any of the provisions of Article 11.3.1. i or Article 11.3.1. ii., it cannot claim the relief under Force Majeure.

xxiii. *The second line of argument of MPPMCL is that the Covid-19 pandemic and the subsequent nationwide lockdown-imposed amounts to a Natural Force Majeure event. Jhabua has already set out the definition hereinbefore and is not repeating the same. However, Natural Force Majeure event is an Act of God and has been described as not being limited to lightening, draught, fire and explosion, earthquakes, volcanic eruptions, landslide, flood or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years. It is well settled that when in the definition certain terms are used and thereafter there is a general term, the general term has to be construed ejusdem generis to the words used prior in the very same definition. A Natural Force Majeure event has clearly been defined by the parties as an Act of God and only includes natural phenomena of the kind described in the said Article. A lockdown declared by the Government of India surely does not fall under a Natural Force Majeure event.*

xxiv. *Jhabua also understands the lack of any other alternative for MPPMCL but to onerously seek to place its case under Article 11.3.1 i. It is only in the vent of a Natural Force Majeure event, under Article 11.7.1 (c), MPPMCL would be excused from paying the capacity charges. In the case of no other Force Majeure event, have the parties agreed that the capacity charges would not have to be paid by MPPMCL. This is also because capacity charges or fixed*

charges basically go towards debt servicing and ought to be paid to the generator till such time, that due to a Natural Force Majeure event, the entire generation facility or the transmission facility by which the procurer draws electricity gets affected. A Natural Force Majeure event such as a flood or an earthquake or a fire that would destroy the functioning of the distribution itself would only excuse MPPMCL from the payment of capacity charges. Even in the case of Non-natural Force Majeure event, either direct or indirect, Article 11.7.1 (a) & (b) would apply and the relief provided in Article 4.4, that of extension of the COD would be applicable.

xxv. *To summarise, the broad-brush submissions of MPPMCL on the scope of Covid-19 pandemic which affected various activities in the country and which was followed by the nationwide lockdown declared by the Government of India on 23.03.2020 does not amount to a natural Force Majeure event under the PPA.*

xxvi. *Merely because there was a load crash or drop in consumption from the consumers of MPPMCL does not mean that this is a Force Majeure event qua Jhabua under the PPA. The pandemic or the lockdown is obviously not like an earthquake or volcanic eruption or such natural phenomena which wreak havoc to the generation or the transmission system. In fact, if such a submission of MPPMCL is accepted, it would mean that even a sudden increase in demand from consumer will amount to a Natural Force Majeure event under the PPA. Such an illogical interpretation cannot be given to contract entered into between to commercial entities.*

xxvii. *MPPMCL in its reply has also admitted that it gave the notice of Force Majeure to several generators only to save appropriate financial resources. This also further shows that there was no Force Majeure affecting MPPMCL from receiving the electricity from Jhabua but only for its commercial and financial affairs, MPPMCL gave a notice of Force Majeure.*

xxviii. *In the hearing, MPPMCL has relied on certain portions of the letter dated 27.03.2020 of the Ministry of Power to claim Force Majeure. Jhabua has clearly demonstrated that the Ministry of Power itself clarified its letter dated 27.03.2020 by a further letter dated 06.04.2020, which reads as under –*

> *"Subject: Clarification to letters dated 27.03.2020 regarding Letter of Credit and 28.03.2020 regarding 3. Therefore, in brief (c) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. 4. Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crises......."*

xxix. *Thus, there is no basis for MPPMCL to continue to rely on Para 3 of the Ministry of Power letter dated 27.03.2020 and claim that it need not pay the capacity charges to Jhabua in view of the subsequent letter dated 06.04.2020.*

xxx. *MPPMCL further contended that the letter dated 06.04.2020 uses the term 'obligation to pay capacity charges as per the PPA'. Jhabua has already dealt with the argument of MPPMCL with regard to Article 11.3.1 (i) and 11.7.1 (c) of the PPA hereinabove. Since, the said Articles have no application, MPPMCL cannot claim benefit under the same and is under obligation to pay the capacity charges to Jhabua in terms of a plain and simple interpretation of the PPA. The letter dated 06.04.2020 in fact clarified beyond doubt the scope of the effect of the lockdown on the PPAs. Irrespective of the type of PPA, the Ministry of Power has clarified that there is an obligation on all the distribution licensees to continue to pay the capacity charges to generators. The very same dispensation should apply even the present case.*

Applicability of Section 56 of the Contract Act, 1876

xxxi. *The alternative submission of MPPMCL has been that the PPA for the period from 24.03.2020 to 31.05.2020 has been affected or frustrated and therefore as per the law laid down by the Hon'ble Supreme Court Interpreting Section 56 of the Contract Act, 1876, MPPMCL should get the benefit of Force Majeure.*

xxxii. *Section 56 of the Contract Act reads as under –*

> *"56. Agreement to do impossible act -An agreement to do an act impossible in itself is void.*
>
> ***Contract to do an act afterwards becoming impossible or unlawful.—****A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> ***Compensation for loss through non-performance of act known to be impossible or unlawful.—****Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise…."*

xxxiii. *It is respectfully submitted that MPPMCL is misleading this Hon'ble Commission by arguing that the Hon'ble Supreme Court while interpreting Section 56 has given a general liberty to courts to absolve parties from performing their contractual obligations in case of supervening circumstances. The law, in fact if to the contrary and the catena of judgements in which the principles of Section 56 have been decided are extracted hereunder for ready reference –*

(i) ***Satyabrata Ghose vs. Mungeeram Bangur & Co. and Anr.*** *[1954 SCR 310]*

"………..8. Section 56 occurs in Chapter IV of the Indian Contract Act which relates to performance of contracts and it purports to deal with one class of circumstances under which performance of a contract is excused or dispensed with on the ground of the contract being void. The section stands as follows: "An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." 9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do…………."

(ii) ***Alopi Parshad and Sons Limited v. Union of India, AIR 1960 SC 588***

Para 20-21- "A contract is not frustrated merely because the circumstances in which the contract was made, are altered. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of

consideration for performance of the contract act rates different from the stipulated rates, on some vague plea of equity."

Para 22- "There is no general liberty reserved to the courts to absolve a party from liability to perform as part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract."

(iii) ***Naihati Jute Mills Ltd vs Khyaliram Jagannath*** *[AIR 1968 SC 522]*
"5. Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by Section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. <u>But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible</u>. Courts in England have, however, evolved from time-to-time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties had no control. One of such theories is what has been called the theory of implied term as

illustrated in F.A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd. where Lord Loreburn stated:

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

He further observed:

"It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted ... Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "if that happens, of course, it is all over between us'."

9. *What is however important in cases such as the one before us is to ascertain what the parties themselves contemplated at the time of entering the contract. That the appellants were aware that licences were not issued freely is evident by the provisions of the contract themselves which provide that if the appellants failed to furnish to the respondents the import licence in November 1958, the period of shipment was to be extended up to December 1958 and the price in that event would be enhanced by 50 np. The contract further provided that if the appellants were not able to furnish the licence by December 1958, they would pay damages at the market rate prevailing on January 2, 1959 for January-February shipment goods. These clauses clearly indicate that the appellants were conscious of the difficulty of getting the licence in time and had therefore provided in the contract for excusing delay from November to December 1958 and for the appellants' liability to pay damages if they failed to procure it even in December 1958. The contract, no doubt, contained the printed term that the buyers would not be responsible for delay in delivering the licence but such delay as therein provided was to be excused only if it occurred by such reasons as an act of God, war, mobilization etc. and other force majeure. It is nobody's case that the performance became impossible by reason of such force majeure. As already stated, when the appellants applied for the licence, the authorities refused to certify their application because they held at that time stock for more than 2 months. It is therefore manifest that their application was refused because of a personal disqualification and not by reason of any force majeure. Since this was the position there is no question of the performance becoming impossible by reason of any*

change in the Government's policy which could not be foreseen by the parties. No question also would arise of importing an implied term into the contract.

(iv) ***Continental Construction Co. Ltd vs State Of Madhya Pradesh*** *1988 AIR SC 1166 -*

"……There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous……."

(v) ***Delhi Development Authority v Kenneth Builders and Developers Ltd*** *AIR 2016 SC 3026-*

".....33. if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulates that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens...."

(vi) ***Energy Watchdog Vs. CERC and Others*** *(2017) 14 SCC 80,*

The Hon'ble Supreme Court took several aspects into consideration in regard to interpretation of a PPA and held that-

"....36. The law in India has been laid down in the seminal decision of Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word "impossible" has not been used in the Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

37. In M/s Alopi Parshad & Sons Ltd. v. Union of India, 1960 (2) SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

38. Similarly, in Naihati Jute Mills Ltd. v. Hyaliram Jagannath, 1968 (1) SCR 821, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events…………..”

xxxiv. *It is most important to note in the Energy Watchdog matter, the Hon'ble Supreme Court in the context of a PPA, has held that there is no general power to court to absolve contracting parties from performing their obligations assumed under the contract. In fact, in the said case wholly unexpected change arise in coal prices was not considered by the Hon'ble Supreme Court as a Force Majeure which would frustrate the very foundation of the obligation assumed by the generating companies to supply electricity to the distribution company under a competitive bidding framework.*

xxxv. *The argument of MPPMCL goes contrary to the judgments and interpretations of the Hon'ble Supreme Court. In fact, even Article 11.4 which deals with Force Majeure exclusion states that insufficiency of funds or the contract becoming onerous to perform would not amount to Force Majeure event. Further, the settled judgments of the Hon'ble Supreme Court also confirms that an inability to pay or an unexpected change in prices et cetera do not vitiate the basis of contract and the contract should be performed by the parties.*

Conduct of MPPMCL which shows the correct interpretation of the PPA

xxxvi. *The conduct of MPPMCL in the present case clarifies beyond all doubt that there was no Force Majeure between the period 24.03.2020 to 31.05.2020. If indeed Force Majeure was preventing MPPMCL to take the electricity such Force Majeure could not be in 'bits & pieces' and applicable for certain days in the above period when the plant according to MPPMCL was falling under Merit Order Despatch (MOD).*

xxxvii. *If the pandemic or nationwide lockdown is a Force Majeure, it would have made it impossible for MPPMCL to take the electricity even on a single day throughout the above period. The fact that the generator fell in the MOD or not is relevant only for scheduling electricity and payment of variable charges but had nothing do to with withholding the fixed charges.*

xxxviii. *There is no answer given by MPPMCL to the issue of Declared Capacity being accepted by it except to rely on Article 11.5 of the PPA which requires MPPMCL to give a notice of Force Majeure and that MPPMCL had given such a notice on 30.03.2020 (Annexure B of the petition). Mere giving of notice will not detract from the conduct of MPPMCL, namely, that it continued to accept the DC and also schedule the electricity as per its commercial convenience on several dates within the period 24.03.2020 to 31.05.2020.*

xxxix. *MPPMCL cannot conveniently state that on days when it scheduled the electricity, it has paid for the same. The entitlement of capacity charges / fixed charges is based on Declared Capacity and not on the electricity scheduled by MPPMCL.*

Policy of Ministry of Power, Government of India

xl. *Even though the issue pertains to interpretation of Article 11 of the PPA, while deciding the larger issue of how the aspects of Covid-19 & Nationwide lockdown have been treated by the MOP, there are guiding principles for this Hon'ble Commission on which to decide the matter.*

xli. *MPPMCL in its communications had referred to the National Disaster Management Authority (NDMA), Government of India's Order dated 24.03.2020, for seeking refuge for non-payment of fixed charges. The very same Order provided certain clear exceptions to the lockdown, one of them being generation, transmission, distribution and supply of electricity.*

xlii. *The Ministry of Power, on 06.04.2020, issued a clarificatory order to its previous order dated 27.03.2020 and stated that there has been some misconception regarding interpretation of its previous order and that the obligation to pay for Capacity Charges as per the PPA shall*

continue, as does the obligation to pay for transmission charges. The said clarificatory order, inter-alia, reads as under:

"Subject: Clarification to letters dated 27.03.2020 regarding Letter of Credit and 28.03.2020 regarding

> *3. Therefore, in brief -*
>
> *(c) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.*
>
> *4. Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crisis.*

xliii. *The above Order is an economic policy decision of the MOP, Government of India. The Hon'ble Supreme Court in the case of* ***Small Scale Industrial Manufacturers Association Vs. UOI,*** *held that –*

> *"……127. It is further observed that in the case of a policy decision on economic matters, the courts should be very circumspect in conducting an enquiry or investigation and must be more reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the court is satisfied that there is illegality in the decision itself…."*

xliv. *Similarly, the Hon'ble Delhi High Court, very recently in the case of Polytech Trade Foundation Vs. UOIW.P.(C) 3029/2020, has held as follows:*

> *"…….30.5 The Supreme Court has also clarified that benefits, under the Disaster Management Act, cannot be extended to one party at the cost of the other, so as to permit Paul to profit at the cost of Peter. One may legitimately, in our view, extend the principle to holding that, while putting, in place, ameliorative measures under the Disaster Management Act – or, for that matter, under the Epidemic Diseases Act – the Governmental authorities had to be circumspect and have to balance the interests of all stakeholders who would be affected, one way or the other, by such dispensations. It is not permissible, in short, for the Government to play Robin Hood. Nor, for that matter, can the Court do so, at the instance of the petitioners before it, or otherwise……."*

xlv. *The conduct of MPPMCL is very clear that, they are trying to shy away from the obligations of paying the fixed charges to Jhabua citing frivolous reasons. The clarificatory order issued by the Ministry of Power dated 06.04.2020 has casted an obligation on MPPMCL to pay the*

fixed charges. As such, this Hon'ble Commission cannot interpret or decide on the economic policy decision of the Ministry of Power, Government of India, to ensure that the DISCOMS such as MPPMCL at least pay the fixed charges which is just one component of the tariff determined by the Hon'ble Commission. By virtue of the said clarificatory order, and terms of the PPA, MPPMCL is obligated to pay the fixed charges.

xlvi. *In lights of the PPA, MPPMCL cannot deny to pay the fixed charges under the garb of Force Majeure, contentions supporting the same are not being repeated for the sake of brevity. Even, the clarificatory order, mandates the payment of fixed charges.*

xlvii. *It is stated that there is no merit in the arguments advanced by MPPMCL. The Jhabua reiterates its prayers and request for a direction for payment of the amount withheld by the MPPMCL from it along with delay payments are charged at the rate of 1.25% per month till the date of such payment.*

17. Vide letter dated 5th October' 2021, the Respondent MPPMCL submitted the following in its final written submission:

i. *That, the instant petition has been filed by the petitioner u/s 86(1)(f) of the Electricity Act with a prayer that the invocation of Force Majeure and Vis-Major Clause during the Covid-19 pandemic by the Respondent for the period of 24.3.2020 to 31.5.2020 is erroneous and against the provisions of the Power Purchase Agreement dt.05.01.2011 (PPA). The Petitioner has also sought consequential prayers for payment of the capacity charges deducted for the period of 24.03.2020 to 31.05.2020 along with the interest.*

ii. *That, the petitioner in its petition has made the prayer that the invocation of the Force Majeure Clause due to Covid-19 by MPPMCL be held to be erroneous and against the provisions of the PPA dated 05/01/2011. The Petitioner has further prayed that this Hon'ble Commission may direct the respondent to release Capacity/Fixed charges for the period 24/03/2020 to 31/05/2020 amounting to Rs 37.74 crores along with 1.25% as interest till the time of payment.*

iii. *That the Answering Respondent has filed its detailed reply and the contents of the same shall be read as part and parcel of the instant written submissions. The Answering Respondent seeks to refer, rely and reiterate on the submissions made in its reply.*

On Maintainability

iv. *That, at the onset it is submitted that the instant petition filed under section 86(1)(f) of the act of 2003 is not maintainable, because the Hon'ble National Company Law Tribunal vide its order dated 29/09/2020 has imposed moratorium on the petitioner company (being a Corporate Debtor), under section 14 of the Insolvency Bankruptcy Code 2016, wherein a Corporate Insolvency Resolution Process has been initiated and the petitioner is barred to alienate or dispose off any of its assets or any legal right or beneficial interest therein under the provisions of section 14 (1)(b) of the code of 2016, by filing the instant petition, the Insolvency professional so appointed and the petitioner have gone beyond the mandate of the legislation of the Insolvency and Bankruptcy thereby striking on the very soul of that legislation and the orders of the Hon'ble NCLT.*

v. *In this regard Section 14 (1) of the IBC Code is reproduced as hereunder: -*

> *"14. Moratorium –(1) Subject to provisions of sub-sections (2) and (3) on the insolvency commencement date, the Adjudication Authority shall by order declare moratorium for prohibiting all of the following namely:-*
>
> *(e) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.*
>
> *(f) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(g) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
>
> *(h) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

vi. *In this regard it is submitted that perusal of Sub Clause (b) of Clause (1) of section 14 of the IBC Code, 2016, highlights that there can be no action by the corporate debtor (petitioner herein) towards alienating or disposing any of its assets "or any legal right or any beneficial interest therein''.*

vii. *It is submitted that "right to sue'' as exercised by the Petitioner under section 86(1)(f) of the Electricity Act, 2003 in the instant proceedings, is a legal right. It is submitted that the "Right to sue" u/s 86(1)(f) of the Electricity Act or through Arbitration Proceedings or Civil Suit is admittedly a legal right of the corporate debtor (petitioner) and by virtue of institution of the instant proceedings for adjudication of the dispute u/s 86(1)(f) of the Electricity Act, the petitioner has "alienated" its legal right to sue and has thereby also*

disposed its legal right to sue u/s86(1)(f) with respect to the instant dispute for recovery of capacity charges.

viii. *It is further submitted that, once these proceedings u/s 86(1)(f) proceed, the outcome either shall be in favour of the petitioner or in favour of the respondents, however in both the cases, whether the petition is allowed or dismissed, the corporate debtor (petitioner herein) has "alienated and disposed" of its 'legal right' to sue for adjudication of dispute with the respondents under section 86(1)(f) and has also thereby consequently alienated and disposed of its beneficial interest therein the legal right. It is submitted that section 14(1)(b) of the IBC puts an embargo on any type of alienation or disposal of legal right and it's not concerned with the nature of legal right. It is submitted that once the legal right to sue has been exercised by virtue of the instant proceedings then the clock cannot be set back and the alienation of the legal right and its disposal is permanent, and this is specifically prohibited during the CIRP Process.*

ix. *It is further submitted that the Hon'ble Supreme Court in the case of SEBI Vs Ramakrishnana 2018 17 SCC 394has while dealing with the issue of applicability of IBC Code on personal guarantor has specifically held in para 20 that section 14 refers to four matters which are prohibited once the moratorium comes into effect.*

A copy of the judgement reported in SEBI Vs Ramakrishnana 2018 17 SCC 394 is attached as Annexure-1.

x. *In this regard it is submitted that the Hon'ble Supreme Court has in the case of Mithilesh Kumari Vs. Prem Bihari (1989 [2] SCC 95) held in para 22 that "a right is a legally protected interest." It is submitted that the right under section 86(1)(f) to sue for adjudication of disputes is therefore a legally protected interest of the Petitioner and due to the provisions of section 14(1)(b) of the IBC Code the Petitioner is currently barred from alienating or disposing the said right.*

xi. *Further the Hon'ble Supreme Court in para 24 of the abovementioned has relied on an earlier judgement reported in AIR 1966 SC 1423 in the case of Dayawati Vs. Inderjit to hold that the word "suit" includes an appeal from a judgement of the suit. It is submitted that admittedly there is a moratorium u/s 14 in operation by the Hon'ble NCLT and under section 14(1)(a) no suits can be instituted against the corporate debtor (Petitioner) and also continuing suits shall remain stayed. Now when one examines the law with respect to the term "suit" it clearly appears that as per the Hon'ble Supreme Court the term "suit" also includes an appeal from the judgement in the suit. In other words, neither party can, and more particularly the Respondent, can appeal the judgement which will be passed by this*

Hon'ble Commission to the Appellate Tribunal under section 111 of the Electricity Act, 2003 in view of the embargo of section 14(1)(a) of the IBC Code. It is submitted that law does not operate in absurdity and if the submissions of the Petitioner are accepted that there is no embargo, then the Hon'ble Commission order/judgement shall be final qua the parties as neither party can appeal. The right to appeal is a statutory right under the Electricity Act, 2003 and it cannot be said to be taken away ipso facto. It is therefore submitted that the instant petition at this state is not maintainable.

xii. *It is submitted that the para 22 and 24 of the Judgement reported in 1989 [2] SCC 95) are reproduced herein below*

> *"**22**. As defined in Section 2(a) of the Act " 'benami transaction' means any transaction in which property is transferred to one person for a consideration paid or provided by another person". A transaction must, therefore, be benami irrespective of its date or duration. Section 3, subject to the exceptions, states that no person shall enter into any benami transaction. This section obviously cannot have retrospective operation. However, Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie, by or on behalf of a person claiming to be real owner of such property. This naturally relates to past transactions as well. The expression "any property held benami" is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim or action to enforce any right in respect thereof shall lie. Similarly, sub-section (2) of Section 4 nullifies the defences based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami, the real owner is bereft of any defence against the person in whose name the property is held or any other person. In other words in its sweep Section 4 envisages past benami transactions also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute. In case of a qualifying or disqualifying statute it may be necessarily retroactive. For example when a Law of Representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an Act is declaratory in nature the presumption against retrospectively is not applicable. Acts of this kind only declare. A statute in effect declaring the benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense*

there was a right to recover or resist in the real owner against the benamidar. Ubi jus ibi remedium. ***Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense it is a disabling statute.*** *All the real owners are equally affected by the disability provision irrespective of the time of creation of the right.* ***A right is a legally protected interest****. The real owner's right was hitherto protected and the Act has resulted in removal of that protection."*

*"****24****.* ***Lachmeshwar Prasad Shukul v. Keshwar Lal AIR 1941 FC 5*** *is an authority for holding that the hearing of appeal under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal, the appellate court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate court is competent to take into account legislative changes since the decision under appeal was given and its powers are not confined only to see whether the lower court's decision was correct according to the law as it stood at the time when its decision was given. Once the decree of the High Court has been appealed against, the matter became sub judice again and thereafter this Court had seisin of the whole case, though for certain purposes, e.g, execution, the decree was regarded as final and the courts below retained jurisdiction in that regard. This was followed in Shyabuddinsab v. Gadag-Betgeri Municipal Borough AIR 1955 SC 314, where after the judgment of the High Court and after grant of special leave by this Court the legislation was passed, and it was applied by this Court. Their Lordships, referring to King v. General Commissioner of Income Tax 1916 2 KB 249 and K.C Mukherjee, Official Receiver v. Ramratan Kuer AIR 1936 PC 49 rejected the contention that unless there are express words in the amending statute to the effect that the amendment shall apply to pending proceedings, it cannot affect the proceedings.* ***In Dayawati v. Inderjit AIR 1966 SC 1423 it has been held that the word "suit" includes an appeal from the judgment in the suit. The only difference between a suit and an appeal is that an appeal only reviews and corrects the proceedings in a cause already constituted but does not create the cause****. In Mohanlal Jain v. His Highness Maharaja Shri Sawai Man Singh AIR 1962 SC 73 it was observed that "a person is 'sued' not only when the plaint is filed against him, but is 'sued' also when the suit remained pending against him. The word 'sued' covers the entire proceeding in an action". In Amarjit Kaur v. Pritam Singh 1974 2 SCC 363 it was been held that an appeal is a re-hearing and in moulding relief to be granted in a case on appeal, the appellate court is entitled to take into account even facts and events which have come into existence after the passing of the decree appealed against."*

xiii. It is further submitted that as far as the submission is that it can take all actions for securing its assets even during the Moratorium and therefore the petition is maintainable. In this

regard it is submitted that the submission is erroneous for the simple reason that the Petitioner (corporate debtor) is not barred from enforcing its rights once the moratorium under section 14 (1)(b) of the IBC Code ends. Further, the moratorium is enforced to maintain a status-quo with respect to all aspects of the corporate debtor.

xiv. *It is submitted that the reliance of the Petitioner on the cases of the Ld' CERC and Hon'ble Delhi High Court is of no avail to the issue at hand. That, the question involved before the Central Electricity regulatory Commission in the matter between the petitioner and the Kerala State Electricity Board limited in petition 169/MP/2019 was with respect to the proper authority in filing the affidavit, wherein apparently the petition was filed without the concurrence of the IRP duly appointed by the NCLT.*

xv. *That, the petitioner has submitted that the power generation, transmission and distribution were under exemption under the circular dated 24.03.2020 of the Union of India issued during the National Lockdown imposed, and notice dated 30/03/2020 and 31/03/2021 issued invoking force majeure clause 11 of the PPA are prima facie illegal. It is also submitted by the Petitioner that Covid-19 is not a Force Majeure under the PPA.*

xvi. *It is most respectfully submitted that any exceptions from Close down of any entity does not in any way establish that there was no Force Majeure Condition as the adjudication of force majeure has to be undertaken on the basis of the provisions of the PPA. It is submitted and as stated in the reply in detail, the aforesaid circulars of the Union of India, does not make any explicit mention, that irrespective of what the Power purchase agreements contains in their respective clauses, the procurers shall not be authorised to invoke the clause of force Majeure for Covid-19 as they are exempted under the said circulars. It is submitted that the Petitioner is seeking to insert clauses in the circulars and the PPA where none exists. In fact the circular dated 6.4.2020 (@pg 168 of the petition) clearly states in clause 3 that the obligation to pay capacity charges shall continue as per the PPA. In other words, the terms of the PPA are supreme for the determination of payment of capacity charges and if there are provisions for non-payment of tariff due to force majeure then the same have to be adhered to and cannot be over-ridden. In the instant case the PPA admittedly has force majeure clauses and the same have been invoked by the Respondent.*

xvii. *It is submitted that undoubtedly, Covid-19 has been a force majeure event and therefore this Hon'ble Commission needs to examine the provisions of the PPA and provisions of the Contract Law (section 32 and 56) for adjudication of the instant petition. It is further an admitted fact the electricity has to be supplied to hospitals and private homes and therefore it is not the case of the Respondent that there was no supply to be made during lockdown. It is submitted that due to the lockdown there was a drop in demand due to closure of*

commercial and industrial establishment and this even of covid-19 lockdown is a force majeure event under the PPA clause 11.3.1 and 11.3.1(i) read along with clause 11.2.1 of the PPA and therefore no tariff payment is payable under clause 11.7.1 (c) for this Natural Force Majeure event.

xviii. *That, it is submitted that it is a matter of admitted fact that the petitioner was not generating electricity exclusively for the respondent and the petitioner was supplying electricity 52.5% of its capacity to Kerala and West Bengal States as well and therefore the plant was not kept operational only for the Respondent as the case is being made out to be. It is submitted that the Respondent is not concerned with the transaction between the Petitioner and other parties as the respondent had invoked the force majeure clause, the respondent was not under obligation to purchase the full contracted demand. It is submitted that the Force Majeure notice was issued as there was admittedly a drastic drop in the demand of electricity and public interest mandated that the Force majeure notice is issued so that appropriate financial resources could be saved and used for efficiently.*

xix. *It is submitted that with respect to the submission of the petitioner that the respondents has accepted the declared capacity of the petitioner from 24.03.2020 to 08.04.2020 and the said action on the part of the respondents is contrary to its notice of force majeure dated 30.03.2020 and 31.03.2020 it is most respectfully submitted that the averments is without any merit for the simple reason that the respondent does not accept the declared capacity and as per the regulations which are the Madhya Pradesh Balancing & Settlement Code Regulations framed by this Hon'ble Commission, and a perusal of the regulations highlights that the generator (petitioner) is required to give its declared capacity to the SLDC on a day ahead basis and SLDC accepts the DC after prudence check and provides entitlement of the MPPMCL. Thereafter, the respondent is required to give its requisition of power from the respective generators and on the basis of such requisition submitted by the respondent the SLDC issue the drawl schedule for the next date from the respective generators and intimate the same to the respective parties. It is submitted that the detailed procedure regarding the same has been mentioned in the Balancing and Settlement Code a copy of which is attached as and Annexure to the reply.*

xx. *In the instant case, the respondent during the said period has not given its requisition for drawing power from the petitioner except on 01.04.2020 and 02.04.2020 and the drawl of power on 1.4.2020 and 2.4.2020 is in accordance with MOD principle and the said drawl of power on 1.4.2020 and 2.4.2020 does not in any manner amplify or demonstrate that the force majeure situation has ceased to exist.*

xxi. *It is pertinent to mention that power supply is a dynamic situation and the lockdown does not mean that power shall not be supplied to hospitals etc. In fact when there was a demand the power was drawn from the Petitioner strictly as per MOD during the force majeure period.*

xxii. *It is also pertinent to mention herein that the petitioner is not just supplying power to the respondent herein but is supplying its 52.5%of its capacity to Kerala and West Bengal therefore, in any case petitioner had to be on-bar for making supply to the other two states. It is therefore, completely incorrect for the petitioner to aver or allege that the respondents have accepted its declared capacity from 24.03.2020 to 08.04.2020. It is submitted that the Petitioner submissions in this regard are completely meritless and not in accordance with law.*

xxiii. *Further with respect to the submissions of the Petitioner that the power has been drawn continuously from 12.5.2020 although the notice of cessation of notice for force majeure was issued on 5.6.2020 and the payments in full are not being made for the power drawn. In this regard it is mentioned that the answering respondent while drawing power from 12.5.2020 has followed the principles of MOD and as stated by MPPMCL in its letter dated 4.12.2020, has paid capacity charges in proportion to the quantum of power scheduled. It is submitted that admittedly there was a force majeure situation ongoing during the period of 12.5.2020, and as per clause 11.7 no tariff was payable to the Petitioner, however respondent has paid the capacity charges in proportion to the power scheduled as the same is just and fair.*

xxiv. *The Hon'ble Apex Court in the case of Satyabrata Ghose Vs. Munngeeram Bangar AIR 1954 SC 44 (@pg 46) in para 9 and 17, has, in detail, dealt with the issues pertaining to the 'Force majeure' conditions and thereby held as under in para 9 and 17:*

> *"**9**. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. <u>This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticableand unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their</u>*

<u>bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do</u>.”

*“**17**..”*

It is submitted that the Respondent states that due to the covid-19 force majeure the performance of the PPA qua the Respondent was impracticable and further there is no force majeure exclusion to this natural calamity of covid-19. Therefore as held in para 17 the force majeure exclusion would trigger if there was a clause in the PPA specifically excluding a pandemic such as covid-19 from force majeure. This not being the case it is most respectfully submitted that the force majeure clause was rightly invoked by the Respondent. A copy of the judgement Mungeeram Bangar [AIR 1954 SC 44 (@pg 46)] is attached as Annexure-3.

It is further submitted that the reliance of the Petitioner on the case of Energy Watchdog reported in 2017 (14) SCC 80 to aver that the said case has over-ridden the principles as propounded in the case of Mungeeram Bangar (AIR 1954 SC 44) is incorrect and of no avail. The Hon’ble Supreme Court in para 30-47 deals in detail with the law pertaining to force majeure and examines various case laws, including Mungeeram Bangur. It is submitted that the Hon’ble Apex Court after the detail examination of case law looks into the facts of the case before it in Energy Watchdog and holds that the an increased in coal price in Indonesia is not a force majeure event in India and therefore no force majeure can be claimed by the generators under the PPA executed with the DISCOM. Therefore, for the Petitioner to aver that the Hon’ble Apex Court in the case of Energy Watchdog has over-ridden the principles as enunciated in the case of Mungeeram Bangur is incorrect.
A copy of the judgement case of Energy Watchdog reported in 2017 (14) SCC 80 is attached as Annexure-4.

Further the Respondent seeks to also mention the law as laid down in the case of Dhanrajma Gobindram Vs. Shamji Kalidas reported in AIR 1961 SC 1285 wherein Para 17 the Hon’ble Supreme Court has while examining the issue and meaning of force majeure held as under in para 17:

*“**17**. McCardie, J. in Lebeaupin v. Crispin 1920 2 KB 714 has given an account of what is meant by “force majeure”, with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. **An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing***

party from the consequences of anything over which he has no control*. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."*

It is submitted that the Respondent does not have any control from the consequences of covid-19 on its performance and therefore it has rightly invoked the provisions of force majeure. A copy of the judgement reported in Dhanrajma Gobindram Vs. Shamji Kalidas reported in AIR 1961 SC 1285 is attached as Annexure—5.

xxv. That, to summarize the question of law raised by the petitioner, "whether the Nationwide lock down imposed by the government of India declaring the COVID 19 as pandemic was a Force majeure Event or not?", it is most humbly submitted that the instant dispute is a contractual dispute governed by the PPA dated 05/01/2011 wherein an inclusive list of Force Majeure events has been laid down, the said list is not exhaustive and gives scope for inclusion to an unprecedented event due to which the petitioner/respondent could not perform its duties as laid down in the PPA, in the instant case the lockdown had a far reaching effect and the demand for electricity had unpredictably dropped drastically, due to which the respondent could not have performed its obligation under the PPA, the liberty (exemption), granted by GoI to the officials of DISCOMs, TRANSCOMs, to freely move during the lockdown to meet power requirement, cannot be construed otherwise and forgo the fact that the Force Majeure event did existed.

Commission's Observations and Findings:

18. The issue under dispute in this petition is non-payment of Capacity Charges/ Fixed Charges by Respondent to the petitioner corresponding to the actual Plant Availability Factor (PAF) based on declared capacity (DC)for a period of 24.03.2020 to 31.05.2020.During the aforesaid period, the Respondent while invoking Force Majeure event under the provisions of PPA on account of nationwide lockdown due to Covid-19 pandemic had restricted payment of Capacity Charges / Fixed Charges to the extent of power actually scheduled by Respondent without considering the actual Plant Availability Factor (PAF) based on declared capacity (DC) of the petitioner.

19. On perusal of the contents in the subject petition and submissions made by the petitioner and Respondent, the Commission has observed the following in this matter:

i. The dispute in the subject matter occurred when the Respondent vide letter dated 30.03.2020 invoked 'Force Majeure' clause under the PPA on account of nationwide lockdown declared by the Government of India due to Covid-19 pandemic mentioning the following reasons affected the performance of obligations by the Respondent (MPPMCL) under PPA:

   a. Drastic reduction in collections of revenue from retail consumers as they are unable to make payments on counters due to complete lockdown;
   b. Demand of state sharply decreasing due to closure of industries, shops and other major establishments due to the lockdown, forcing MPPMCL not to schedule or partly schedule power from some of the generators;
   c. Massive disruption in the economic activity, which is likely to affect a significant proportion of consumers' capacity to pay electricity bills on time; and
   d. Discoms being affected most by cash crunch being faced by public and communities.

ii. While issuing the aforesaid force majeure notice vide letter dated 30/03/2020, the Respondent referred the order dated 24.03.2020 of National Disaster Management Authority (NDMA) which was addressed to the Union Home Secretary to take effective measures for ensuring social distancing to prevent spread of COVID-19 in the country. The Commission observed that the Guidelines issued by NDMA provided for a complete lockdown in the country while ensuring maintenance of essential services and supplies. In the aforesaid guidelines, the services of power generation, transmission and distribution, being essential in nature, were exempted from the purview of the said lockdown. The Respondent had also referred the Ministry of Power, Government of India's letter dated 27.03.2020 vide which certain directions were issued to generating companies and distribution licensees regarding payment security mechanism as mentioned below:

   "Considering the unprecedented and force majeure situation, it has been decided that power may be scheduled even if payment security mechanism is established for 50% of the amount for which payment security mechanism is to be otherwise established contractually."

iii. In continuation to aforesaid letter, the Respondent (MPPMCL) wrote another letter dated 31.03.2020 informing the petitioner that the Respondent is not desirous to avail power from the petitioner's power plant as there is no such power requirement due to

massive drop in consumers' demand and that the Declared Capacity (DC) is not being accepted by it till further notice. MPPMCL stated that the date of commencement of the Force Majeure event is 24.03.2020.

iv. It has further been observed that vide letter dated 06.04.2020, Ministry of Power issued a clarification to its earlier order dated 27.03.2020 mentioning that there has been some mis-conception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. The directions of MOP in aforesaid clarificatory order are summarized below:

"The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.

(a) Late payment surcharge shall apply at reduced rate only for the period between 24.03.2020 to 30.06.2020 (on those payments that become overdue during the period 24.03.2020 to 30.06.2020 and not on those payments which were already overdue before 24.03.2020) and after 30.06.2020, the delayed payment surcharge shall be payable at rates given in the PPA/Regulations.
(b) Obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges.

Efforts are also being made to infuse some liquidity in the power sector, the details of which would be shared with Discoms shortly, However, Discoms may also raise funds, if required, to meet the crises. ……"

v. The petitioner by its letter dated 12.04.2020 requested Respondent (MPPMCL) to withdraw the said notices of dated 30/03/2020 & 31/03/2020, and to make payment of invoices in terms of provisions under PPA. The petitioner stated that the invocation of Force Majeure clause by Respondent is erroneous due to following reasons:

(a) The letter dated 24.03.2020 of NDMA does not in any way relate to inability in discharging performance of obligations of the parties laid out under a contract or in the PPA. Further, the guidelines issued explicitly exempted "power generation, transmission and distribution units and services" from the lockdown.

(b) Since essential services, including power generation are excluded from the lockdown, **the Petitioner had to keep generating power by keeping the unit 'on bar' and declare the availability of its Contracted Capacity to the MP-**

SLDC and MPPMCL. Further, the petitioner also maintained supply to its other long-term beneficiaries viz. the states of Kerala &Bengal. None of these beneficiaries have taken a stance akin to MPPMCL.

(c) **MPPMCL itself by its letter dated 30.03.2020 to Central Power Generating Stations (CPGS) requested them to maintain uninterrupted supply of power.** Thus, MPPMCL cannot adopt different approaches for different generators, while all are similarly affected – by taking a punitive approach towards generators like the Petitioner and a much more adaptive approach towards CPGS, SPGS and other IPPs.

(d) The Ministry of Power, Govt. of India vide its letter dated 06.04.2020 issued a clarification to its earlier order dated 27.03.2020 regarding Letter of Credit and has stated that the **"obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges".** Thus, MPPMCL cannot abdicate from its obligations under the PPA and deny Capacity Charges to the Petitioner by refusing to accept the Declared Capacities.

(e) The Respondent has scheduled and the petitioner has accordingly supplied power to MPPMCL on 1stand 2nd April 2020.

vi. The petitioner submitted that while the above contemporaneous correspondence was underway, MPPMCL has scheduled and drawn electricity on 1stand 2nd of April, 2020 from the petitioner. However, no communication was received by the petitioner from MPPMCL on these two dates or thereafter explaining the drawl / scheduling of power during the Force Majeure event invoked by MPPMCL itself.

vii. In reply to the petitioner's letter dated 20.04.2020, MPPMCL vide letter dated 25.04.2020 stated that **it is not invoking force majeure conditions solely on account of the restrictions imposed during the lockdown period, but in view of the reduction in demand of power faced by it from its consumers**, especially the commercial/industrial consumers, in view of the lockdown, which has led it to face extreme reduction in revenue and financial liquidity. MPPMCL further mentioned that imposition of lockdown is preventing it from performing several of its obligations under the PPA. MPPMCL also stated that the reduction in demand squarely qualifies under force majeure and has compelled it not to schedule any power from the Petitioner's plant. Thus, under Article 11.7.1(c) of the PPA dated 05.01.2011, the Respondent is not liable to pay any tariff to the petitioner. The Respondent (MPPMCL) also mentioned the following in its letter to petitioner:

" In the above scenario and in view of long lasting and healthy commercial relations to be shared between Jhabua Power Ltd., and MPPMCL, denial of scheduling any power and not acceptance of Declared Capacity (DC) from your plant was sought by MPPMCL during the period of present force majeure event. Your good selves may appreciate that in view of the long tenure of the PPA, a small sacrifice on the part of Jhabua Power Ltd., may not only be in a longer public interest but shall also adhere to principles of equity, good consciousness and natural justice. It is also submitted without prejudice that public interest is paramount in such a force majeure situation and Jhabua Power Ltd. is requested to adhere to the same.

viii. The petitioner submitted that against the invoice value of Rs. 33.15 Crores for the monthly bill of March 2020, MPPMCL has only made a payment of Rs. 28.26 Crores and an amount of nearly Rs. 4.89 Crores has been deducted on account of non-consideration of Declared Availability from 24.03.2020 to 31.03.2020. The petitioner wrote a protest letter on 20.04.2020 to MPPMCL against aforesaid deduction in payment. The petitioner submitted that from 12.05.2020 onwards, the Respondent continuously started scheduling and drawing power from the petitioner's power plant.

ix. It has further been observed that Ministry of Power vide its letter dated 15.05.2020 (and subsequent amendment dated 16.05.2020) issued clarification regarding the rebate to distribution companies by central generating and transmission companies under Ministry of power for the lockdown period on account of Covid-19 pandemic mentioning the following:

"---It has been decided that all Central Public Sector Generating Companies under Ministry of Power including their Joint Ventures/Subsidiaries and Central Public Sector Transmission Companies, may consider to offer following rebate to the Distribution Companies (Discoms) for passing on to the end consumers for the lockdown period on account of Covid-19 pandemic:

i. Deferment of capacity charges for power not scheduled, to be payable without interest after the end of the lockdown period in three equal monthly installments;

ii. Rebate of about 20-25% on power supply billed (fixed charges) to Discoms and Inter-State transmission charges levied by PGCIL.

x. Vide letter dated 05.06.2020, MPPMCL intimated the petitioner of cessation of the Force Majeure event mentioned the following:

"*Vide* order dated 30.05.2020, the Union of India, Ministry of Home Affairs exercising its powers under the Disaster Management Act has directed that the lockdown shall be extended to only containment zones up to 30.6.2020,and to reopen prohibited activities in areas outside the containment zone.

Now therefore, in terms of the order dated 30/05.2020, issued by the Union of India, Ministry of Home Affairs and in terms of provisions contained in clause 11.5.2 of PPA dated 05.01.2011, M.P. Power Management Company Limited announces the cessation of force majeure and vis major situations invoked by the above-mentioned notices issued for the period from 24.03.2020 till 31.05.2020 and restoration of its rights or obligations under this agreement, with immediate effect i.e. 01.06.2020."

xi. With reference to the above MPPMCL's letter dated 05.06.2020, the petitioner vide its letter dated 11.06.2020 protested against the method being adopted by the Respondent for processing the petitioner's monthly bills of April and May 2020. The petitioner stated that the Respondent has scheduled and drawn power from the petitioner on 01.04.2020 and 02.04.2020 and thereafter, has been continuously scheduling it since 12.05.2020. However, instead of considering the Declared Capacity (DC) as per the petitioner's declaration, MPPMCL is considering the normative per unit Fixed Charges for the units actually scheduled, which is not in conformity with the reason cited by MPPMCL for its inability to accept the DC and regarding invocation of the Force Majeure Clause. The petitioner further stated that scheduling of power from a power station expressly means that there was demand based on the Demand-Supply position and the power was drawn from the petitioner since it was "On-Bar".

20. The Respondent MPPMCL in its reply to the subject petition broadly raised the following issues:

i. The moratorium issued by the NCLT, u/s 14 of the IBC Code, the petitioner, who is the corporate debtor, before the NCLT cannot institute the instant proceedings for adjudication of dispute against the Respondent, as there is a specific bar U/s 14 (1)(b) of the IBC Code. Respondent further submitted that the instant proceedings are barred and cannot be conducted till the operation of the moratorium order u/s 14 of the IBC Code, 2016 and which is operating currently. Therefore, no proceedings can be conducted till the cessation of the CIRP process Under Sub Section 4 of Section 14 of the IBC Code 2016.

ii. However, as the consumption and demand of electricity has drastically reduced, therefore, there is force majeure situation and in this light that the notice of force majeure was issued.

iii. The Covid-19 pandemic is a once in a life time pandemic and is a natural force majeure under the terms of power purchase agreement and is unprecedented in nature and therefore, it is completely incorrect on the part of the petitioner to aver or allege that the invocation of force majeure clause is not as per the provisions of PPA.

iv. As per Article 11.3.1 (i) of the PPA the covid-19 pandemic is a natural force majeure event therefore, as per clause 11.7.1 (c), no tariff is payable to the petitioner at the duration of force majeure by the Respondent.

v. With respect to the submission of the petitioner that MPPMCL has accepted the declared capacity of the petitioner from 24.03.2020 to 08.04.2020 and the said action on the part of the respondents is contrary to its notice of force majeure dated 30.03.2020 and 31.03.2020, the Respondent submitted that it does not accept the declared capacity and as per the regulations the Madhya Pradesh Balancing & Settlement Code Regulations (MPB&SC).As per the aforesaid Regulations, the generator (petitioner) is required to give its declared capacity to the SLDC on a day ahead basis and thereafter, the respondent is required to give its requisition of power from the respective generators and on the basis of such requisition submitted by the respondents the SLDC is then mandated to accept the declared capacity and issue the drawl schedule for the next date from the respective generators and intimate the same to the respective parties. It is submitted that the detailed procedure regarding the same has been mentioned in the Balancing and Settlement Code

21. In response to the aforesaid issues raised by the Respondent, the petitioner in its rejoinder submitted the following:

i. Regarding the objection raised by the Respondent based on the moratorium issued by the NCLT, u/s 14 of the IBC Code, the petitioner submitted that the similar objection raised by another distribution licensee to whom the petitioner supplies electricity i.e. Kerala State Electricity Board Limited was raised in another proceeding initiated by the petitioner before the Central Electricity Regulatory Commission in Petition No. 169/MP/2019. The CERC vide its Order dated 20.05.2020 rejected the objection raised by Kerala State Electricity Board Limited. The petitioner further submitted that the only effect of the moratorium envisaged, under Section 14 of IBC, 2016 is that no proceedings can be initiated against the Corporate Debtor to recover any amounts and there is specific bar under Section 14 (1) (b) of IBC, 2016.

ii. The petitioner further submitted that even though the above Order dated 20.05.2020 passed by the CERC was challenged before the APTEL by KSEBL, and the Order was reversed, there was no reversal on the issue of Section 14 of the IBC, 2016 or that the CIRP process is in effect. Further, the Judgment of APTEL has been challenged by the petitioner before the Hon'ble Supreme Court of India, and is being heard notwithstanding the fact that the CIRP proceeding are continuing against the petitioner.

iii. Regarding the Corporate Insolvency Resolution Process pursuant to the order of NCLT under the issue of moratorium issued by NCLT under Section 14 (1) (b) of IBC, 2016, the Central Commission observed that neither the CERC nor the Hon'ble APTEL hold this issue in another case (petitioner vs Kerala State Electricity Board Limited).

iv. With regard to force majeure events, the petitioner submitted that the declaration of nationwide lockdown by the Government of India does not amount to "force majeure" in terms of the PPA entered into between the parties. The Government has considered the power sector as an essential service and it was exempted from the Nationwide lockdown declared by the Government.

v. The petitioner submitted that Article 11.3.1 (i) of the PPA deals with natural force majeure events lists such events to be lightening, draught, fire and explosion, earthquake, volcanic eruptions, landslide, flood, cyclone, typhoon, tornado or exceptionally adverse weather conditions which are in excess of the statistical measure for the last hundred (100) years. Even if it is accepted that this clause gives an inclusive definition of natural force majeure events, a lockdown declared by the Government of India or any other State Government cannot be a natural force majeure. If the definition is taken to be an inclusive one, the events being cited as force majeure should be ones which is *ejusdem generis* to the words used in the main provision.

vi. As per the petitioner's contention that the Respondent has admitted that it gave the force majeure notice to several generators, i.e., private IPPs and not Government Generators only to 'save appropriate financial resources'. This also shows that there was no force majeure affecting the Respondent receiving the electricity but the Respondent, only to manage its commercial & financial affairs claimed it as a force majeure. This is specifically prohibited by Article 11.4.1 e. of the PPA. As per the petitioner submission that the Respondent gave the notices only to private IPPs shows that it was not a force majeure, in which case the Respondent would also have issued such a notice to the State / Government Generating companies.

22. The petition was admitted on 15.06.2021 however, before dealing this matter on merits, let us examine the issues raised by Respondent on maintainability of this petition in light of

Section 14 of Insolvency Bankruptcy Code 2016 (IBC Code 2016). Section 14 of IBC 2016 provides as under:

> *"……Section 14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*
>
> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
> *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor….."*

23. The above provision under Section 14 is to bar "transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;". The Petitioner (Corporate Debtor) is not alienating or disposing any legal right or beneficial interest but is claiming the payment withheld by the Respondent. Therefore, the contention of Respondent on maintainability of the subject petition has no merit.

24. Let us now look into the articulations regarding Force Majeure Events under Article 11 of the PPA dated 05.01.2011 executed between the parties in this matter.

11.3 Force Majeure

11.3.1. A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party has taken reasonable care or complied with Prudent Utility Practices:

(i) Natural Force Majeure Event(s)

act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclon, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

(ii) Non-Natural Force Majeure Event(s)

*1. **Direct Non-Natural Force Majeure Event(s)***

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Company or the Company's contractors; or

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the Company to perform its obligations under the Power Station Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development / operation of the Power Station, provided that a Competent Court of Law declared the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the supply of power by the Company to the Procurer, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Event(s)

a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo; revolution, riot, insurrection, terrorist or military action; or

b) radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non-Natural Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Station by the Affected Party or those employed or engaged by the Affected Party.

c) Industry wide strikes and labour disturbances having a nationwide impact in India.

11.4. Force Majeure Exclusions

11.4.1. Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;

b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 11.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d. Strikes or labour disturbance at the facilities of the Affected Party;

e. Inefficiency of finances or funds or the agreement becoming onerous to perform; and

f. Non-performance caused by, or connected with, the Affected Party's:

- *Negligent or intentional acts, errors or emissions;*
- *Failure to comply with an Indian Law; or*
- *Branch of, or default under this Agreement or any other Power Station Documents.*

25. On perusal of the aforesaid conditions, the events for Natural force majeure as articulated under PPA are act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years. When in a definition certain terms are used and thereafter there is a general term the general term has to be construed to the words used prior in the very same definition. However, in the instant case, the reasons enumerated by the Respondent like sharp decrease in demand due to closure of industries, shops and other major establishments due to the lockdown and disruption in the economic activity caused reduction in collections of revenue by the Respondent from the consumers does not fall under the events/conditions for natural force majeure under clause 11.3.1 of the PPA. Further, Article 11.4 which deals with Force Majeure exclusion states that the conditions like insufficiency of funds or the agreement becoming onerous to perform would not include under Force Majeure event.

26. National Disaster Management Authority (NDMA)'s Order dated 24.03.2020 was issued to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country. The Guidelines issued provided for a complete lockdown in the country, while ensuring maintenance of essential services and supplies. The services of power generation, transmission and distribution, being essential in nature, were exempted from the purview of the said lockdown.

27. The Commission observed that Ministry of Power, Government of India's vide letter dated 27.03.2020 issued certain directions to generating companies and distribution licensees regarding payment security mechanism. Vide letter dated 06.04.2020, the Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and stated that there has been some mis-conception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges by the procurer as per the PPA shall continue, as does the obligation to pay for transmission charges.

28. Moreover, the recovery of Capacity (Fixed) Charges by the generating companies under the disputed period shall governed in accordance to the provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020. Therefore, let us look into the provisions under Generation Tariff Regulations, 2020 for recovery of capacity Charges by the Generator:

> *"The fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these Regulations, and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share / allocation in the capacity of the generating station. The capacity charge shall be recovered under two segments of the year, i.e. High Demand Season (period of three months) and Low Demand Season (period of remaining nine months), and within each season in two parts viz, Capacity Charge for Peak Hours of the month and Capacity Charge for Off-Peak hours of the month as follows ---- :*
>
> *Normative Plant Availability Factor for "Peak" and "Off-Peak" Hours in a month shall be equivalent to the NAPAF specified in Regulation 49 of these Regulations.*
>
> *The Plant Availability Factor achieved for a Month (PAFM) shall be computed in accordance with the following formula:*
>
> $$\text{PAFM} = 1000\ x \sum_{i=1}^{N} \frac{DCi}{[N\ x\ IC\ x\ (100 - Aux)]}\ \%$$
>
> *Where,*
> *AUX= Normative auxiliary energy consumption in percentage.*
> *DCi = Average declared capacity (in ex-bus MW), for the 1th day of the period i.e. the month or the year as the case may be, as certified by the concerned load dispatch centre after the day is over.*
> *IC = Installed Capacity (in MW) of the generating station*
> *N = Number of days during the period*

Note: *DCi and IC shall exclude the capacity of generating units not declared under commercial operation. In case of a change in IC during the concerned period, its average value shall be taken.*

29. As per the above provisions under the Tariff Regulations, 2020, the Capacity (fixed) Charges are payable to the generator based on the actual plant availability factor with reference to normative plant availability factor. The actual plant availability factor is to be determined based on the declared capacity of the generating unit/station on day ahead basis in terms of the provisions under the Regulations. However, the Respondent while invoking force majeure clause has computed Capacity (fixed) Charges for the petitioner's plant based on scheduled Power, which are not in accordance to the aforesaid provisions under MPERC Tariff Regulations.

30. In view of the foregoing observations, the Commission has found that the reasons/conditions for invocation of Force Majeure clause by MPPMCL are not in accordance to the provisions of the PPA dated 05.01.2011 (and the applicable Regulations). Therefore, the prayer in the subject petition is allowed and the Respondent is directed to pay the Capacity Charges / Fixed Charges for the period of 24.03.2020 to 31.05.2020 alongwith late payment surcharge in accordance to the provisions under the MPERC Tariff Regulations, 2020, the PPA executed between the parties read with Commission's order dated 5th April' 2020regarding reduction of Late Payment Surcharge (LPS).With the above observations and directions, the subject petition is disposed of.

(Shashi Bhushan Pathak)	**(Mukul Dhariwal)**	**(S.P.S. Parihar)**
Member	**Member**	**Chairman**