IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

EXECUTION PETITION NO. 12 OF 2023 & IA NO. 1671 OF 2024 & IA NO. 1068 OF 2024 & IA NO. 666 OF 2024

Dated: 17th January, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

1. Ratnagiri Gas and Power Private Limited
Through its Additional General Manager (Commercial)
2nd Floor, Block no. 2, IGL Complex,
Plot No. 2B, Sector 126, Expressway,
Noida – 2103014, U.P.

Registered Office at:
NTPC Bhawan, Core-7, SCOPE Complex
7, Institutional Area, Lodi Road,
New Delhi – 110003. … Petitioner No. 1

VERSUS

1. Maharashtra State Electricity Distribution Company Limited
Through its Chief Engineer (Power Purchase),
Plot No. G-9, Prakashgad, Bandra (E)
Prof. Anant Kanekar Marg
Mumbai, Maharashtra – 400051. ... Respondent No.1

2. Central Electricity Regulatory Commission
Through its Secretary,
3rd & 4th Floor, Chanderlok Building
36, Janpath, new Delhi – 110001. ... Respondent No.2

3. Old Address:
Electricity Department
Through its Secretary,
Government of Goa, Panaji, PIN 403001
Registered Office at:
Vidyut Bhavan, 3rd Floor, Panaji, Goa.

New Address:

Electricity Department
Through its Chief Engineer,
Government of Goa, Panaji, PIN 403001
Registered Office at:
Vidyut Bhavan, 3rd Floor, Panaji, Goa. ... Respondent No.3

4. Old Address:
Electricity Department
Through its Secretary,
Administration of Daman & Diu,
Daman-396210
Registered Office at:
220/66 KV Magarwada Substation,
Magarwada, Moti Daman - 396220

New Address:
Electricity Department
Through its Executive Engineer (Electricity,
Administration of Daman & Diu,
Daman - 396210 … Respondent No. 4

5. **Electricity Department**
Through its Secretary,
Administration of Dadra & Nagar Haveli
PIN – 396230
Registered Office at:
DNH Power Distribution Corporation Limited,
Vidhyut Bhavan, 66 KV Road,
Near Secretariat, Amli,
Silvassa – 396230, U.T of Dadar &
Nagar Haveli. … Respondent No. 5

Counsel on record for the Petitioner	:	Anand K. Ganesan Swapna Seshadri Ritu Apurva Amal Nair Ashabari Basu Thakur Karthikeyan M. Sarthak Sareen
Counsel on record for the Respondent(s)	:	Udit Gupta Anup jain Vyom Chaturvedi Prachi Gupta Divya Hirawat

Kalyani Jha
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Sagnik Maitra for Res.1

O R D E R

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The rival contestants in this Execution Petition are Ratnagiri Gas and Power Private Limited (RGPPL-the Execution Petitioner) which is a subsidiary of NTPC Ltd a Central Government Public Sector Undertaking. The respondent in this Execution Petition is Maharashtra State Electricity Distribution Company Ltd, a company incorporated and registered under the Companies Act,1956 (a Government of Maharashtra utility). The Government of Maharashtra has sought to implead itself in these Execution Proceedings to oppose grant of the relief sought by the Execution Petitioner (RGPPL) herein.

While NTPC Ltd. is said to hold more than 86% of the share capital of RGPPL, the remaining around 14% is said to be held by Maharashtra State Electricity Board Holding Company Ltd. RGPPL was formed in the year 2005 to take over the partially completed assets of Dabhol Power Project Ltd. owned by Dabhol Power Company Ltd. The National Company Law Appellate Tribunal, by its order dated 28.02.2018, is said to have approved the demerger plan of the power block and the R-LNG terminal of the said company, and the scheme is said to have been made effective from March 26, 2018. It is after several rounds of discussions between various entities including with the Government of India and the Government of Maharashtra that NTPC Ltd. took over RGPPL.

This Petition has been filed by RGPPL, under Section 120(3) of the Electricity Act, seeking execution of the order passed by this Tribunal in its Judgment in Appeal No. 261 of 2013 dated 22.04.2015. The reliefs sought in the said EP are (a) to allow the Execution Petition; (b) to issue appropriate order(s)/direction(s) to MSEDCL to comply and act upon the findings/ directions of this Tribunal vide Judgement date 22.04.2015 in Appeal No. 261 of 2013; (c) to direct MSEDCL to make payment of Rs. 66,96,47,83,132/- as on November 2023, towards outstanding dues including capacity charges, Late Payment Charges etc. in terms of the PPA and in compliance of the Judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, and/or (d) attach the bank account of MSEDCL to secure enforcement of the Judgement and Order passed by this Tribunal in Appeal No.261 of 2013 dated 22.04.2015.

The jurisdiction of this Tribunal, under Section 120(3) of the Electricity Act, is invoked by the Petitioner contending that, despite their letters to the 1st Respondent-MSEDCL requesting it to comply with the afore-said Judgment of this Tribunal, MSEDCL did not make payment of the charges required to be paid by them under the PPA, including capacity charges; a sum totalling to Rs.66,96,47,83,132/-, representing the outstanding dues towards capacity charges, is payable by the 1st Respondent to the Petitioner along with Late Payment Surcharge with respect to the invoices raised by the Petitioner on a monthly basis from 2013 till November 2023 for the declared availability in terms of the PPA, and the categorical findings/directions in the Judgement of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. According to the Petitioner, the total amounts due and payable to them by MSEDCL are as detailed in Annexures Y and Z to the said Petition.

II. BACKGROUND FACTS:

A PPA was executed between the Petitioner-RGPPL and the 1st Respondent-MSEDCL on 10.04.2007, the terms of which was to remain in force for a period of 25 years from the Commercial Operation Date i.e from 19.05.2009 till 18.05.2034. Clause 5.2 of the said PPA relates to capacity charges, and Clause (i) thereunder stipulates that the Annual Capacity Charge of the Power Block for supply of power from the station worked out to Rs.1446.451 Crores per annum based on capacity charge of 96 paise/ KWH finalized at the time of asset takeover by the Petitioner; this Capacity Charge of 96 paise/ KWH was increased to 98.5 paise/ KWH pursuant to discussions under the aegis of the Government of India; and this Capacity Charge of 98.5 paise/ KWH was subject to further review and finalization by the Government of India and the Government of Maharashtra pursuant to the ongoing restructuring exercise under consideration by the Government of India to ensure project viability. Clause 5.2(ii) stipulated that any additional taxes to be paid and/ or expenditure to be incurred or payment to be made to comply with the statutory provisions on account of change in law, and further to replace the equipment on account of obsolescence, which were not a part of normal O & M and which directly impacted plants safety and/ or materially impacted plant operation, shall be additionally paid by MSEDCL through tariff as per the approval of the CERC.

According to the Petitioner, the capacity charges on levelized basis is of 98.5 paise/ KWH, the total Annual Capacity Charges worked out to Rs.1484.12 Crores per annum; Full Capacity Charges was payable at 80% of 2150 MW (i.e. 1720 MW) declared capacity on annualized basis, and declared capacity, lower than this, was to be recovered on pro-rata basis after COD Blocks/ Station; and MSEDCL shall pay capacity charges in proportion to the allocation of power from RGPPL. While 7.6 MMSCMD of gas was allocated to the Petitioner from RIL's KG D6 Block and 0.9 MMSCMD from ONGC's marginal gas fields, gas supply from KG D6 basin started declining

from September 2011 and eventually stopped on 01.03.2013. Supply of gas from ONGC field continued but with a reduced quantum.

The Petitioner entered into an arrangement with Gas Authority of India Limited in December 2011 for supply of Re-gassified Liquefied Natural Gas ("RLNG" for short), and then filed Petition No. 166/MP/2012 before the CERC requesting it (a) to resolve the issues arising out of non-availability of domestic gas of the required quantum, and the reservations of beneficiaries to allow the Petitioner to enter into contracts for available alternate fuel i.e. RLNG and consequences thereof; (b) revise the "Normative Annual Plant Availability Factor" for the Petitioner for full fixed cost recovery at the actually achieved NAPAF level till fuel supply was restored to the allocated/ contracted quantity with the consequential order for the payment of fixed charges, and (c) direct the beneficiaries to pay the fixed charges due to the Petitioner.

The said Petition No. 166/MP/2012 was disposed of by CERC by its order dated 30.07.2013. In the said order, the CERC noted that, according to RGPPL, it had made all efforts within its power and control to source natural gas required for the operation of the generating station at the full capacity, but without any fruitful results; they had, therefore, entered into a contract for the purchase of RLNG on 'take and pay' basis; MSEDCL had relied upon Article 5.9 of the PPA which inter-alia provided that the contracting terms and price of gas supply to RGPPL had to be agreed to between RGPPL and MSEDCL; and, therefore, MSEDCL was not agreeable to requisition power generated by using RLNG or to compute the capacity so declared towards APAF.

The CERC observed that the interpretation placed by MSEDCL, on Article 5.9, was not sustainable since it negated the provisions of Article 4.3 of the PPA; it was established principle of interpretation of contracts that the contract should be read as a whole, and the different provisions of the contract were to be harmoniously interpreted so that effect was given to each one of them, and no part

of the contract became otiose; this principle needed to be adhered to while interpreting Articles 4.3 and 5.9 of the PPA; when Article 5.9 was so interpreted, it would mean that the consent of MSEDCL on the contracting terms of supply of gas and its price was needed to enable it to examine the implications on payment of variable charge; the agreement between RGPPL and MSEDCL, on the contracting terms and price for supply of fuel to RGPPL, as provided under Article 5.9, was not a necessary condition for declaration of capacity of the generating station under Article 4.3 of the PPA; declaration of capacity under Article 4.3 of the PPA was independent of the provisions of Article 5.9, and was not dependent on any other factor, such as price of fuel, etc; recovery of fixed charges was to be governed by the declared capacity of the generating station; while making arrangement for supply of fuel for the generating station was the responsibility of RGPPL, RGPPL had made arrangements for supply of RLNG since it was not able to arrange supply of domestic gas because of the overall shortage of gas in the country; MSEDCL, in its discretion, may not schedule the capacity declared on RLNG since it had implications on the variable charges; however, it could not disown its liability to pay the fixed charges when RGPPL declared capacity, based on RLNG as the primary fuel, was in accordance with Article 4.3 of the PPA; any declaration of capacity by RGPPL, based on RLNG as the primary fuel, qualified for the computation of availability of the generating station for recovery of the fixed charges; accordingly, fixed charge recovery was to be made by RGPPL based on availability after accounting for declaration of capacity on RLNG; and, in view of the above finding, they did not consider it necessary to get into the issues of relaxation of NAPAF already approved by the Commission or the admissibility of invoking Force Majeure clause by RGPPL.

Pursuant to the afore-said order of the CERC, in Petition No. 166/MP/2012 dated 30.07.2013, the Petitioner-RGPPL claims to have started declaring capacity on RLNG with effect from 13.08.2013. It is their grievance that MSEDCL did not schedule power. resulting in its plant not being operated as the total schedule from all the other beneficiaries was lower than the technical minimum requirement to run the plant. According to the Petitioner,

the beneficiaries, including MSEDCL, declined to make payment for the declared capacity including Capacity Charges in terms of both the PPA and the order of the CERC dated 30.07.2013.

Aggrieved by the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, MSEDCL filed Appeal No. 261 of 2013 before this Tribunal. When the said Appeal was pending adjudication before this Tribunal, MSEDCL issued letter dated 08.05.2014 seeking to terminate the PPA with effect from 01.04.2014, alleging higher cost of generation at the Petitioner-RPPGL's plant. The said letter of MSEDCL records that, in terms of the PPA dated 10.04.2007, generation of power by RGPPL was based upon sourcing of gas and the approval of the said source by MSEDCL; and, since the petitioner had not been able to enter into a Gas Supply Agreement, the commercial terms of which were acceptable to MSEDCL, it was not viable for MSEDCL to accept supply of power from the alternate source (RLNG) in the light of the increased cost.

In reply thereto, RGPPL, vide letter dated 22.05.2014, informed MSEDCL that termination of the PPA was without merit, and its outstanding dues should be paid in accordance with the terms and conditions of the PPA. Again, vide letter dated 03.06.2014, RGPPL informed MSEDCL that the purported termination of the PPA dated 10.04.2007 was illegal, and MSEDCL should clear its outstanding dues. Thereafter, by its letter dated 25.07.2014, MSEDCL informed RGPPL that they had terminated the PPA and they had no liability towards them. According to RGPPL, all power blocks of their project were brought under dry preservation from 13.09.2014, and they stopped declaring capacity on RLNG / domestic gas till June 2016 which they claimed was as a direct result of MSEDCL's refusal to make contractual payments to them. They, however, continued to raise supplementary bills towards Late Payment Surcharge and other statutory fees.

In Appeal No. 261 of 2013, this Tribunal framed the following two issues: (i) whether the impugned order is erroneous being based on incorrect reading of the provisions of PPA dated 10.04.2007 particularly clause 4.3 and 5.9?; and (ii) whether the appellant is required to pay capacity charge when the appellant does not give consent to GSA/ GTA?

In its judgement, in Appeal No. 261 of 2013 dated 22.04.2015, this Tribunal, after taking note of the rival contentions and the relevant provisions of the PPA, observed that Article 4.3 of the PPA, dealing with declared capacity, clearly provided that the primary fuel for RGPPL was LNG/ natural gas or R-LNG; normally capacity of the station was to be declared on gas and/ or R-LNG for all the three power blocks; however, if agreed by the distribution licensee, the power generating company i.e. RGPPL should make arrangements of liquid fuels for the quantum required by a distribution licensee; and, in such a case, the capacity of liquid fuel shall also be taken into account for the purpose of available declared capacity and PLF calculation, till the time liquid fuel(s) stock agreed/ requisitioned by the distribution licensee was available at the site; it was clear from Article 4.3 that the primary fuel for RGPPL, as a power generation, was LNG, Natural gas or R-LNG, and the normal capacity of the generating station should be declared on Gas or R-LNG; consent of, or agreement by, the distribution licensee was required only when the power generator should make arrangements of liquid fuel(s) for the quantum required by MSEDCL; Article 4.3 clearly provided that, if the power generator had to arrange the liquid fuel(s), then only the agreement or consent or approval of MSEDCL was required; in the present case due to heavy scarcity of domestic gas, RGPPL, as a power generating company, had to change the nature of primary fuel namely LNG/ Natural gas to R-LNG; LNG or Natural gas or R-LNG were all covered by the definition of primary fuels; there was only a shift from one source of primary fuel, namely natural gas to another fuel, namely R-LNG; hence the consent or approval of

the Appellant-distribution licensee (MSEDCL) was not required to be obtained prior to entering into the GSA/ GTA between the power generator and the gas supplier, namely GAIL.

This Tribunal further observed that this was not a case of change from LNG/ Natural Gas or R-LNG to liquid fuel, but was a case of change of inter se primary fuel; Article 4.3 did not require the consent or approval of MSEDCL to enable RGPPL to enter into a contract for GSA/ GTA with the gas supplier, namely GAIL; since there was a heavy shortage of domestic gas at the relevant time, and MSEDCL was not agreeing to schedule power for the declared availability, RGPPL was left with no other option except to enter into GSA/ GTA with GAIL in order to generate electricity for which purpose the plant was set up after a lot of effort between the State Government, the Government of India and different other institutions to meet the requirements of electricity of the State as well as the Centre.

This Tribunal, thereafter, held that the Central Commission, in the impugned order, had given cogent and sufficient reasons to arrive at the said conclusion and MSEDCL had rightly been held liable to pay capacity charges even if it did not consent for a GSA/GTA to be entered into between RGPPL and GAIL; RGPPL had rightly been held entitled to the capacity charges when it remained in a position to generate electricity and, accordingly, had declared necessary availability of electricity when MSEDCL had chosen not to schedule quantum of electricity on the declared availability; this aspect, decided by Central Commission in the impugned order, had nothing to do with the relaxation of NAPAF for the non-availability of gas decided by the Central Commission in the earlier order; thus, MSEDCL had rightly been held to be under the obligation to pay capacity charges so long as RGPPL had declared available capacity, irrespective of whether MSEDCL scheduled the capacity offered by RGPPL; since RGPPL had made upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needed to be serviced during the life time of the

generating station through payment of annual fixed charges, because such annual fixed charges are determined with respect to specific tariff elements provided therefor, namely, Tariff Regulations 2009 in the present case; thus the Central Commission, in the impugned order, had rightly refused to exonerate MSEDCL from paying the capacity / fixed charges only because MSEDCL had refused to give consent to RGPPL to enter into GSA/GTA with the gas supplier; if MSEDCL did not wish to take electricity based on R-LNG, they were required to compensate RGPPL with capacity charges in relation to the quantum of electricity for the total declared availability made by RGPPL on gas and/or R-LNG; since the declared capacity was in accordance with Article 4.3 of the PPA, the capacity charges, as provided in Article 5.2 of the PPA, were payable; they were unable to accept the contention of MSEDCL that prior approval of MSEDCL, in terms of Article 5.9 of the PPA for entering into GSA/GTA, was required to be taken because such agreements had financial implications on MSEDCL; in the present case, RGPPL had only shifted the fuel source from natural gas to R-LNG which were the primary fuels, and no such consent or approval of MSEDCL was required; and the contention of MSEDCL could have been accepted in case there was a change of primary fuel, namely from LNG/Natural gas or RLNG to liquid fuel.

This Tribunal did not find any perversity or infirmity in any of the findings recorded in the impugned order by the Central Commission, and approved the findings recorded in the impugned order as there was no reason to deviate from such findings; since there was an agreement between RGPPL and the gas supplier, which was based on 'Take or Pay' principle, any charge on account of the principle of Take or Pay was not to be passed on to MSEDCL; this was not a case of gas supply agreement/ GSA based on the principle of Take and Pay; and, hence, they did not find any infirmity in the impugned order.

Para 16, and the order thereafter, of the judgement of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, read thus:-

"16. Thus both the issues are decided against the appellant and the instant appeal is liable to be dismissed. ***We clearly hold that the***

appellant distribution licensee is required to pay capacity charges to the respondent No.2, power generating company even if the appellant does not given consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel."

ORDER

This instant appeal i.e. Appeal No. 261 of 2013 is hereby dismissed and the impugned order dated 30th July, 2013 passed in Petition No. 166/MP/2012 is hereby upheld. ***Further, the appellant is under obligation to pay capacity charges to respondent No.2, power generating company, even if the appellant does not give consent to GSA/GTA because the appellant in place of natural gas or fuel is using R-LNG (primary fuel)."***

(emphasis supplied)

Aggrieved by the afore-said judgement of this Tribunal, MSEDCL had initially filed Civil Appeal No. 4228 of 2015 before the Supreme Court. In its order, in Civil Appeal No. 4228 of 2015 dated 13.05.2015, the Supreme Court observed that the question raised in the said appeal appeared to be academic at that stage, in the absence of any coercive steps being taken against MSEDCL for recovery. The Supreme Court declined to entertain the appeal at that stage but, however, granted liberty to MSEDCL to move the Supreme Court once again in the event it became so necessary.

Thereafter, RGPPL filed EP No. 18 of 2022 (DFR No. 510 of 2022) in Appeal No. 261 of 2013 before this Tribunal which, by order dated 25.11.2022, issued notice returnable on 12.01.2023. Soon thereafter, MSEDCL filed Civil Appeal No. 1922 of 2023 against the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. In the said Civil Appeal, MSEDCL, for the first time, stated that, on 08.05.2014, it had terminated the

PPA with RGPPL with effect from 01.04.2014, ie the date on which the last GSA duly approved by MSEDCL had expired, and because no GSA had since been approved by MSEDCL in terms of Clause 5.9 of the PPA. A copy of the termination notice was also annexed, with the Civil Appeal, as Annexure A-12.

By its interim order dated 06.02.2023, the Supreme Court, while condoning the delay in filing the appeal, directed that, pending final orders being passed therein, no coercive steps shall be taken against MSEDCL in the execution proceedings. In its order in EP No. 18 of 2022 dated 20.04.2023, this Tribunal recorded the submission, urged on behalf of the Execution Petitioner, that the order, execution of which was sought, had been stayed by the Supreme Court, and then observed that, as this Tribunal had earlier dismissed another Execution Petition granting the petitioner therein liberty to file a fresh execution petition, if need be, after the Supreme Court hears and decides the appeal, a similar liberty be granted to the Execution Petitioner in EP No. 18 of 2022 which was dismissed as withdrawn.

In its order, in Civil Appeal No. 1922 of 2023 dated 09.11.2023, the Supreme Court noted that RGPPL had filed Execution Petition before this Tribunal seeking payment of Rs. 5287.76 Crores, together with Rs. 1826 Crores, in accordance with the order of this Tribunal dated 22.05.2013; notice was issued in the Execution Petition by order dated 25.11.2022; in its order dated 30.07.2023, the CERC had, among others, held that (xi) the Appellant (MSEDCL) was liable to pay fixed charges on the capacity declared, by the first Respondent (RGPPL), based on RLNG; APTEL had held that MSEDCL had been rightly ordered to pay capacity charges, notwithstanding the fact that they had not consented to the GSA/GTA with GAIL, and had dismissed the appeal; in the present case, CERC and APTEL had correctly held that GSA/GTA with GAIL was permissible by the terms of the contract, and the

consent or approval of the Appellant (MSEDCL) was irrelevant; clause 5.9 and Clause 4.3 operated in different spheres, and the requirements of the former could not be foisted on an arrangement permissible by the latter; capacity charges, mandated under Clause 5.2, hinged on the declared capacity that the Station was capable of delivering to its beneficiaries; energy charges, on the other hand, was payable only against the actual energy delivered; the appellant's liability for the former was actual delivery agnostic; and it arose as long as the declared capacity was made in terms of Clause 4.3.

After referring to Clause 2.2.2 of the PPA, the Supreme Court observed that, bearing in mind the background of establishment of the first respondent (RGPPL) and the shortfall of domestic gas for reasons beyond the control of the first respondent (RGPPL), such a deviation from the plain terms was not merited, and militated against business efficacy as it had a detrimental impact on the viability of the first respondent (RGPPL). While dismissing the appeal, the Supreme Court observed that the Execution Proceedings, pursuant to the above-mentioned Execution Petition before APTEL, be continued.

Aggrieved thereby, MSEDCL filed review petition in RP© No. 1997 of 2023 before the Supreme Court. In the said review petition, MSEDCL placed great emphasis on the fact that they had terminated the PPA. Under the head "*RE termination of the PPA has not been considered despite attaining finality*", MSEDCL stated that the order of the Supreme Court, review of which was sought, had failed to address the fact that MSEDCL had terminated the PPA on 08.05.2014 with effect from 01.04.2014 ie immediately after expiry of the last GSA duly approved by MSEDCL, since no consent had been sought for any GSA from MSEDCL (as was required in Article 5.9 of the said PPA); continuing the PPA thereafter, without GSA, would not have served any useful purpose; the judgment under review did not even discuss this aspect;

the judgment of the Supreme Court under review had failed to consider that the said PPA was a determinable contract, and that RGPPL had not challenged termination of the PPA before any forum till date; the said termination had attained finality; and therefore, without prejudice to the contentions raised in the review petition, MSEDCL could not be saddled with any lability towards capacity charges from 01.04.2014, particularly considering that there was/is no valid contract in existence between the parties from 01.04.2014.

In its order, in Review Petitions (Civil) No. 1997 of 2023 in Civil Appeal Nos. 1992 of 2023 dated 19.03.2024, the Supreme Court held that, having perused the review petitions, there was no error apparent on the face of record; no case for review, under Order 47 Rule 1 of the Supreme Court Rules 2013, had been established; and the review petition was, therefore, dismissed.

After elaborate submissions were put forth by Learned Senior Counsel on either side, orders were reserved in E.P No. 12 of 2023 on 13.08.2024. During the pendency of E.P No. 12 of 2023 before this Tribunal, MSEDCL filed Writ Petition (L) No. 24685/2024 before the High Court of Bombay, seeking, amongst others, directions for setting aside the invoices raised by RGPPL against MSEDCL and to restrain them from issuing any further invoices under the terminated PPA dated 10.4.2007, and from uploading any further invoices on the PRAAPTI portal seeking payments thereof. The Bombay High Court, by its order dated 8.8.2024, disposed of the said Writ Petition directing MSEDCL to file their Petition before the CERC by 14th August 2024 along with an application for stay, requesting the CERC to take up the stay application of MSEDCL on 20th August, 2024. In the interregnum and until 20th August, 2024, it was directed that there shall be no reduction or withdrawal of access for sale and purchase of electricity. It was clarified that

this will not affect reduction, if any, that was already triggered and /or had taken place; the interim protection granted by them would be subject to the orders passed by the CERC in the proposed stay application to be filed by MSEDCL; and the CERC shall decide the Petition and the application for interim reliefs of MSEDCL without being influenced by anything stated in the order.

Subsequent to orders being reserved in EP No. 12 of 2023, MSEDCL had filed Petition No. 276/MP/2024 before the CERC, along with IA No. 67 of 2024, seeking the following reliefs: (a) declare the invoices raised by RGPPL as void, non-est, and illegal; (b) restrain RGPPL from issuing any further invoices under the terminated PPA dated 10.4.2007, and from uploading any further invoices on the PRAPTI portal seeking payment thereof; (c) direct Grid Controller of India Limited and PFC Ltd to restore MSEDCL's short-term access and full GNA; and (d) restrain the Respondents from taking any coercive steps against MSEDCL in furtherance of such impermissible, inapplicable, void, non-est, and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS Rules.

By its order, in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, CERC observed that the question that necessitated examination, not at the interlocutory stage of the proceedings, but when the main petition was finally heard, was whether the issue of termination of the PPA dated 10.4.2007 had attained finality and /or whether the principles of law of limitation and constructive res judicata, would be applicable in the present case; since the aforesaid issues were to be adjudicated during the proceedings in the main petition, they were proceeding on the basis that there existed a prima facie case for consideration of the grant of interim relief in the present case; and with the first test of prima facie case being a sine qua non,

one of the other two tests of the balance of convenience or irreparable injury must be satisfied for the grant of interim relief.

On balance of convenience, the CERC observed that they were of the considered view that RGPPL, having made an upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needed to be serviced during the lifetime of the generating stations through payment of annual fixed charges; such annual fixed charges were determined with reference to the specific tariff elements as provided under the applicable tariff regulations; RGPPL, having made upfront investments in establishing, operating, and maintaining the generating station, needed to service its capital cost during the lifetime of the station through payment of annual fixed charges; RGPPL, in terms of the Tariff Regulations read with the tariff orders issued by this Commission, and based on the monthly declared availability, had raised invoices on MSEDCL; any denial of payment of such fixed charges to RGPPL would not only result in the plant condition being deteriorated, but would also impact its viability; MSEDCL could not, therefore, contend that RGPPL would not loose anything if the said amounts were not paid; consumer's interest, as raised by MSEDCL, could have been best served had they paid the monthly principal amounts to RGPPL, thereby avoiding any interest being levied on it for the delay; the comparative hardship or inconvenience to RGPPL, which was likely to arise from granting interim relief to MSEDCL, would be greater than that which was likely to arise from withholding it; and they were of the considered opinion that the balance of convenience did not lie in favour of MSEDCL for the grant of interim relief in their favour, as prayed for.

On the question of irreparable injury, CERC observed that RGPPL had executed PPA dated 10.4.2007 with MSEDCL and, in terms of the tariff orders read with the Tariff Regulations, they has raised invoices on MSEDCL for

payment of fixed charges; in terms of the orders/judgment of Courts, it had become entitled to the recovery of fixed charges, based on availability declaration, from the Respondent beneficiaries, which included MSEDCL; termination of the PPA by MSEDCL, with effect from 01.04.2014, had been repudiated by RGPPL vide its letters dated 22.5.2014 and 3.6.2014 respectively, which issues were to be examined by the Commission during the proceedings in the main petition; pending final decision on the issue of termination of the PPA between the parties, MSEDCL could not be permitted to avoid payment of fixed charges to RGPPL, as per the monthly invoices raised by it; even otherwise, no irreparable injury would be caused to MSEDCL if interim payments were directed to be made to RGPPL, considering the fact that such payments were subject to the final decision in the main petition, and in case MSEDCL succeeded, it would be entitled to the recovery of the said amounts paid to RGPPL, along with interest. The CERC held that the test of irreparable injury to MSEDCL was also not satisfied in the present case.

Considering the fact that neither the test of balance of inconvenience nor that of irreparable injury had been satisfied, the Commission held that MSEDCL was not entitled to the grant of interim reliefs as sought by them in the IA. While disposing of the IA in terms of said order, the CERC observed that it was, however, subject to the final decision of the Commission in the main petition.

The CERC, thereafter, observed that it was evident from the submissions of RGPPL that the total amount recoverable from MSEDCL was in excess of Rs. 7000 crores, out of which an amount of Rs.1400 crores related to the period 2013-14; however, an amount of Rs 471 crores was only payable by MSEDCL, in terms of the invoices uploaded in the PRRAPTI portal by RGPPL, to avoid curtailment of power; since MSEDCL was found

not entitled to the grant of interim relief, they were directing MSEDCL to make payment of Rs.471 crores to RGPPL within 15 days from the date of this order; upon such payment by MSEDCL, RGPPL shall withdraw such restrictions from the PRAAPTI portal; recovery of the balance amounts by RGPPL shall, however, await the final decision of the Commission in the main petition; accordingly, they were directing that no further coercive/precipitative action should be taken by RGPPL with regard to the recovery of the balance amounts; and, having said so, they were directing RGPPL to ensure that the plant remained in operation.

The CERC further noted that RGPPL had filed Execution Petition No.12/2023 before this Tribunal seeking execution of APTEL's judgment dated 22.04.2015 in Appeal No. 261/2013, and the same was pending consideration; and needless to state, the decision of the Commission, in this order, shall abide by the decision of APTEL in the said execution proceedings. IA 67 of 2024 was disposed of accordingly.

IA No. 1671 of 2024 was filed by MSEDCL before this Tribunal on 03.10.2024 to take on record the information and documents filed therewith, which included a copy of Petition No. 276/MP/2024, along with IA No. 67 of 2024, filed by them before the CERC, and the order of the CERC in IA No. 67 of 2024 dated 30.09.2024.

III.RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, have been put forth by Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Execution Petitioner and Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL. Sri A.M. Singhvi, Learned Senior Counsel appearing on behalf of the Government of Maharashtra, put forth his submissions both on the State Govt's entitlement to be impleaded as a respondent in this EP,

as also on the merits of the Petitioner's claim to be granted the relief sought for by them in this E.P.

IV. IS THE SUBJECT DECREE A MERE DECLARATORY DECREE WHICH CANNOT BE EXECUTED?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that the decree, sought to be executed by way of the present EP, is a mere declaratory decree, and is not a money decree which can be executed; the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, which is being sought to be executed through the present execution petition, cannot in law be executed for the reason that the said judgment is in the nature of a declaratory order/decree, which merely declares the right of the decree holder i.e. RGPPL vis-à-vis the judgment debtor i.e. MSEDCL and does not, in terms, compute and quantify the amount to be paid, vis-à-vis the period and the rate of interest etc., so as to term it as a money decree for the purpose of maintainability of the present execution petition (***State of MP vs. Mangilal Sharma*: *(1998) 2 SCC 510)***; it is settled law that an Executing Court cannot dwell into any process/aspect for the purposes of execution of a decree, in such terms which itself is not specifically present in the original decree or even directed in the said decree; the subject order which is sought to be executed originates from the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013 which has not specifically determined and quantified the exact amount to be paid qua the petitioner's claim of fixed cost charges, particularly concerning the period of payment as well as the rate of interest for delayed payment; nor has it been so determined in the judgment of this Tribunal under execution; therefore this Tribunal, as an Executing Court, cannot go behind the decree and quantify the payable amount in the absence of any specific direction in the decree

itself qua the term/period of payment and the rate of interest, nor can it grant relief in terms of the prayers in the present execution petition.

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would further submit that this Tribunal, in ***Sprng Soura Kiran Vidyut Pvt. Ltd. Vs. Southern Power Distribution Company of Andhra Pradesh Ltd. & Ors*: *2023 SCC Online APTEL 9,*** while adjudicating a batch of Execution Petitions i.e., *EP Nos. 7 – 11 of 2021* vide its detailed Judgment dated 24.02.2023, had categorically held that *"on a conjoint reading of Section 120(3) of the Electricity Act and Section 2(2) CPC, the order of this Tribunal which is capable of execution is its operative portion, which alone can be said to be the formal expression of an adjudication in the appeal conclusively determining the rights of parties with regard to the dispute (matters in controversy) before it and not every finding in the order or in a Judgment of a Court, which would constitute a Decree.";* therefore, for the purposes of execution, the "OPERATIVE ORDER" of this Tribunal, in its Judgment in Appeal No. 261 of 2013 dated 22.04.2015, can only be looked into for being called as the Decree for execution which contemplated a mere declaration that *"……appellant is under obligation to pay capacity charges to respondent No. 2…."* and not Paragraph 16, as is being contented to the contrary by the Execution Petitioner for seeking the reliefs under the present Execution Petition.

B. SUBMISSIONS URGED ON BEHALF OF THE PETITITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that the defence taken by MSEDCL, that the judgement of this Tribunal dated 22.04.2015 is not a money decree and cannot be executed, is misconceived; in ***Bapurao [AIR 1950 Hyd. 48], Saltanat Begum [AIR 1951 All 817], BapuPuri & Ors. [AIR 2005 Raj 77],***

State of Tripura [(2005) 3 Gauhati Law Reports 525]*,* several High Courts have held that the decree passed need not contain the exact numbers or particulars of payment to be made; the dispute between RGPPL and MSEDCL arose only because MSEDCL refused to recognise RLNG as a primary fuel under the PPA, and also refused to consider the declared capacity on the RLNG for payment of fixed charges; further, a specific prayer claiming a direction to the Respondents to pay fixed charges was made in the petition**;** this prayer was opposed by MSEDCL which is recorded at Paras 12 and 16 of the CERC's Order; at Para Nos.25, CERC has clearly held that MSEDCL cannot disown its liability to pay fixed charges when RGPPL declares capacity based on RLNG as a primary fuel; at Para 26, the CERC has directed that the fixed charges recovery be made by RGPPL based on availability after accounting for the declaration of capacity on RLNG**;** this Tribunal has not merely upheld the Order but has also framed two issues at Page 44 of the E.P, the second being whether MSEDCL is required to pay capacity charge when it does not give consent to the GSA/GTA; at paras 14 and 16 of the Judgement dated 22.04.2015, this Tribunal has repeatedly held that MSEDCL is required to pay capacity charges to RGPPL and that it is under an obligation to pay capacity charges to RGPPL even if it does not give consent to the GSA/GTA for procuring RLNG**;** and the above are not mere declarations but fixation of liability on MSEDCL to pay capacity charges to RGPPL so long as RGPPL declares availability based on RLNG.

C. ANALYSIS:

In examining the objection, raised on behalf of MSEDCL under this head, that the subject decree cannot be executed as it is a declaratory decree and not a money decree, it is necessary to understand what the expression *"declaratory decree"* means. Chapter VI of the Specific Relief Act, 1963 relates to declaratory decrees. Section 34, thereunder, relates to the

discretion of the court as to declaration of status or right. Section 34 stipulates that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Under the proviso thereto, no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Section 35, under Chapter VI of the Specific Relief Act, 1963, relates to the effect of declaration. Thereunder, a declaration made under this Chapter is binding only on the parties to the suit, and persons claiming through them respectively.

In terms of Section 34 of the Specific Relief Act, a “declaratory decree” is a decree whereby the status of the decree-holder to the legal character he claims, or his right to any property, is declared by a competent court as against any person denying, or interested to deny, his title to such character or right. The scope and ambit of a “declaratory decree” can be better understood from the law declared in the following judgements.

In **State of M.P. v. Mangilal Sharma, (1998) 2 SCC 510, (**on which reliance is placed on behalf of MSEDCL), the respondent before the Supreme Court was employed as a Clerk in the Irrigation Department of the appellant. On his transfer, he handed over charge, and represented that, due to acute illness of his father, he may be transferred to a place near his hometown. This eventually led the respondent to submit his resignation. He was not informed if the resignation had been accepted. All this period, the respondent did not join duty and remained at his hometown. This led the appellant to assume that the respondent had voluntarily resigned from his service as he continuously remained absent, from the place of taking over charge of his post, for more than five years. Thus, according to the appellant, the services

of the respondent stood terminated. The respondent filed a suit for declaration against the appellant that he continued to be in service. The plaintiff's suit was decreed with costs, and it was declared that the plaintiff was still in continuous service of the defendant and his services were not terminated; the defendant should bear the cost of the suit of the plaintiff along with its own cost; and a sum of Rs 63.50 be paid by the defendant to the plaintiff on account of costs of this suit with interest. The appeal before the District Judge was dismissed, and the second appeal instituted in the High Court was also dismissed.

The Respondent-decree-holder then filed an execution application praying that he be awarded all consequential benefits, salary, dearness allowance, promotion etc. of the service, and also cost of the application. The appellant opposed the application on grounds that the court did not pass any decree of reinstatement of the decree-holder or for payment of salary to him and, in the suit, the decree-holder had not prayed for re-instatement and for arrears of his salary; and, since the decree-holder had remained absent from duty, he was not entitled to any salary on the principle of “no work no salary”.

The objections filed by the appellant were dismissed by the executing court. The revision filed against that order was also dismissed by the Additional District Judge. The appellant then filed a Writ petition in the High Court of Madhya Pradesh which was dismissed. Aggrieved thereby, the appellant moved the Supreme Court.

It is in this context that the Supreme Court observed that a suit for mere declaration to any legal character was maintainable under Section 34 of the Specific Relief Act, 1963; the proviso to the said Section barred any such declaration where the plaintiff, being able to seek further relief, omitted to do so; normally the plaintiff, when seeking relief of declaration that he continues to be in service, would also seek consequential reliefs of reinstatement and

arrears of salary; this the respondent, as the plaintiff, did not do; the appellant had rightly reinstated the respondent in service as the decree gave a declaration to his legal status of having remained a government servant throughout, as if the order of termination of service never existed; it was not necessary for the respondent to seek the relief of arrears of salary in a suit for declaration as he may be satisfied with the mere relief for declaration that he continued to be in service; and, if he afterwards claimed arrears of salary in a suit for the period prior to the relief of declaration, he may face the bar of Order II Rule 2 of the Code of Civil Procedure.

The Supreme Court further observed that a declaratory decree merely declares the right of the decree-holder vis-à-vis the judgment-debtor, and does not in terms direct the judgment-debtor to do or refrain from doing any particular act or thing; since, in the present case, the decree did not direct reinstatement or payment of arrears of salary, the executing court could not issue any process for the purpose, as that would be going outside or beyond the decree; the respondent, as a decree-holder, was free to seek his remedy for arrears of salary in the suit for declaration; the executing court had no jurisdiction to direct payment of salary or grant any other consequential relief which did not flow directly and necessarily from the declaratory decree; it was not that, if in a suit for declaration where the plaintiff is able to seek further relief, he must seek that relief, though he may not be in need of that further relief; in the present suit, the plaintiff, while seeking the relief of declaration, could certainly have asked for other reliefs like re-instatement, arrears of salary and consequential benefits; but he was, however, satisfied with the relief of declaration knowing that the Government would honour the decree and would reinstate him; the courts below did not exercise their jurisdiction properly; and the respondent could not have sought execution of the declaratory decree when no relief was granted to him towards arrears of salary and other consequential benefits.

The questions which arose for consideration, in **Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660,** was whether an arbitration award which determined the compensation amount for the land, to be paid under an agreement for sale, can be directed to be executed as a suit for specific performance of the agreement, when the reference to the arbitrator (as per the agreement) was only for fixation of price of the land in question, and the arbitration award was also only with regard to the same.

The Appellant partnership firm was the owner of 249.60 bighas (approximately 100 acres) of land, which was purchased by them in the year 1966. The said land was the subject-matter of acquisition, for which a Notification was issued. The said notification was challenged by the appellant before the Rajasthan High Court, and the acquisition proceedings were quashed by the Division Bench of the Rajasthan High Court. The special leave petitions filed by the respondent Hindustan Engineering & Industries Ltd., as well as the State of Rajasthan, were dismissed by the Supreme Court.

During the pendency of the special leave petitions, an agreement was arrived at between the parties, as well as the State of Rajasthan, to the effect that, out of the 249.60 bighas of land belonging to the appellant firm, approximately 104 bighas would be retained by the appellant, and the remaining 145 bighas would be sold to the respondent Company, subject to fixation of price of land, construction, etc. to be finalised through arbitration. Pursuant thereto, an agreement was entered into between the appellant firm and the respondent Company which was superseded by another agreement executed between the parties.

The price of the land, to be sold by the appellant to the respondent Company, was determined by the sole arbitrator. In the said award, the arbitrator mentioned that the parties had *“referred their dispute regarding*

determination of compensation of land to him as the sole arbitrator". The said award held that the market value of the land to be transferred in favour of the respondent Company would be determined as on 27-11-1978, which was the date on which the parties had agreed to transfer the land. In pursuance thereof, the total compensation amount for the land in question was determined by the arbitrator. After the award was passed, the respondent Company conveyed its acceptance of the award to both the appellant and the arbitrator. The appellant filed its objections to the award before the Additional District Judge. The objections were allowed and the matter was remanded to the sole arbitrator. Challenging the said order dated 22-11-1988, the respondent Company filed Civil Revision Petition before the Rajasthan High Court, which was allowed, and the award passed by the arbitrator was affirmed and made a rule of the court. Challenging the said order of the Rajasthan High Court, the appellant filed Special Leave Petition which was dismissed by the Supreme Court, and the award thus attained finality.

The respondent Company then filed an application for execution of the award, wherein they stated that, according to the directions contained in the award of the arbitrator, they were required to furnish stamp paper to the respondent for execution of the sale deed. The prayer made in the said application was that the appellants be directed to take steps and execute the sale deed on the stamp papers filed by the respondent herein, and thereafter produce the sale deed before the Sub-Registrar for its registration. In the alternative, it was prayed that, if the appellant failed to execute the sale deed, the same may be executed by the court. In response thereto, the appellants filed its reply opposing the execution application and specifically denied that any such direction for execution of the sale deed, was made in the award of the arbitrator. The Additional District Judge allowed the application of the respondent and directed the appellant to execute and register the sale deed

and hand over possession of the subject land to the respondent. Aggrieved thereby, the appellant filed Civil Revision Petition before the Rajasthan High Court. During the pendency of the civil revision petition, the respondent Company filed Civil Suit No. 60 of 1996 against the appellants seeking specific performance of the agreement between the parties. The Civil Suit, seeking specific performance of the agreement, was permitted to be unconditionally withdrawn by the respondent Company. On the Civil Revision Petition being dismissed, the Appellant approached the Supreme Court.

The submission, urged on behalf of the appellant before the Supreme Court, was that the executing court had travelled beyond the award whereby only price of the subject land was determined by the arbitrator, and it did not declare, create or confer any right, title or interest in the land in question in favour of the respondent Company; by the agreement, the appellant had agreed to sell their land to the respondent Company at the rate to be fixed in future by an arbitrator, and the respondent Company was given an option in the agreement to be exercised within a period of 45 days of the fixing of the price by the arbitrator, either to purchase or decline to purchase the land; the said agreement was to result in a concluded contract only after the respondent Company had either given its consent to purchase the land at the price fixed by the arbitrator or declined to do so; the respondent had not acquired any enforceable right even at the time of the passing of the award, as there did not exist any concluded contract between the parties; the contractual obligations of the parties were to arise subsequent to the passing of the award and only after the respondent Company had exercised its option of purchasing the land at the price fixed by the arbitrator; the executing court could not have gone behind or beyond the award, and thus could not have considered the agreement entered into between the parties; as the scope of reference to the arbitrator being only with regard to determination of the price of land at which it may be sold by the appellants to the respondent Company,

in execution of the award, no direction for execution of the sale deed by the appellants in favour of the respondent Company in pursuance of the agreement, could have been issued by the executing court, especially when the suit for specific performance of the agreement had been withdrawn by the respondent Company without any condition.

It is in this context that the Supreme Court held that the award passed by the arbitrator could not be independently executed, as the same was only for fixation of price of land and not for enforcement of the agreement; the award was only declaratory of the price of the land; as per the agreement, if the respondent agreed to the price so fixed, it could then get the sale deed executed in terms of the agreement, as it had the option of either accepting the price and getting the sale deed executed, or not accepting the price and thus not getting the sale deed executed; this would clearly mean that the award was merely for declaration of the price of the land, which would be subject to the agreement, and it was not necessary for the respondent to get the sale deed executed at the price so determined by the arbitrator; what was thus executable was the award, and not the agreement; the relief granted by the court below for execution of the sale deed in terms of the award, was thus outside the realm of law, as the award did not contemplate the transfer of land in favour of the respondent, but only determined the price of land.

The Supreme Court further observed that going behind the decree for doing complete justice would not mean that the entire nature of the case could be changed, and what was not awarded in favour of the respondent, could be granted by the executing court; it was only after the respondent had exercised its right to purchase the land, at the price fixed by the arbitrator, that a right to enforce the agreement could have arisen in favour of the respondent; and the award of the arbitrator, in the present case, in itself was not a conclusive contract between the parties, which could be executed.

A declaratory decree merely declares the right of the decree holder vis-a-vis the judgment debtor. Where no relief is further claimed nor any direction is given, execution of the declaratory decree cannot be made. **(Babu Puri v. Kalu, 2004 SCC OnLine Raj 86; State of Madhya Pradesh v. Mangi Lal Sharma: (1998) 2 SCC 510**), If there is simply a, declaratory decree with no consequential benefits, then such type of decree cannot be executed. **(Babu Puri v. Kalu, 2004 SCC OnLine Raj 86**). A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgment-debtor and does not, in terms, direct the judgment-debtor to do or to refrain from doing any particular act or thing. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command. The decree holder is free to seek his legal remedies by way of suit or otherwise on the basis of the declaration given in his favour. **(Babu Puri v. Kalu, 2004 SCC OnLine Raj 86; Parkash Chand: (Punjab and Haryana High Court).**

A declaratory decree merely declares the rights of the decree holder vis-à-vis the judgment debtor and does not, in terms, direct the judgment debtor to do or refrain from doing any particular act. Where a declaratory decree is sought to be executed, the executing court would lack jurisdiction to direct or grant any consequential relief which does not flow directly and necessarily from the declaratory decree.

In this context, it is relevant to note that the expression used, in the proviso to Section 34 of the Specific Relief Act which deals with declaratory decrees is “further relief”. The further relief must be a relief flowing directly and necessarily from the declaration sought, and a relief appropriate to and necessarily consequent upon the right or title asserted. It does not mean “every kind of relief that may be prayed for” but only a relief arising from the

cause of action on which the plaintiff's suit is based. It is the relief which is consequent upon the cause of action, that can be enforced by the executing court. **(Babu Puri v. Kalu, 2004 SCC OnLine Raj 86**), The expression "further relief" would mean the relief which would complete the claim of the plaintiff, and not lead to multiplicity of suits. Further relief must flow necessarily from the relief of declaration and a relief appropriate to and necessarily consequent on the right or claim asserted. It is such relief as flows necessarily from the relief of declaration. It must be a relief ancillary to the main relief, and not one in the alternative. **(Babu Puri v. Kalu, 2004 SCC OnLine Raj 86**),

Both, in **State of MP Vs Mangilal Sharma: (1998) 2 SCC 510,** and in **Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660,** the further relief sought in the Execution Petition did not necessarily flow from the relief of declaration nor was it a relief appropriate to and necessarily consequent on the right or claim asserted. While in **State of MP Vs Mangilal Sharma: (1998) 2 SCC 510,** the relief sought by the Respondent, in his suit, was for declaration against the appellant that he was still in continuous service of the appellant, and his services were not terminated, the relief sought in the EP was for arrears of salary anf promotion, both of which did not necessarily flow from the relief of declaration. It is in such circumstances that the Supreme Court held that the executing court had no jurisdiction to direct or grant any consequential relief which did not flow directly and necessarily from the declaratory decree.

In **Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660),** the award, execution of which was sought, only declared the price at which the land was to be sold by the appellant to the respondent in terms of the agreement. The relief sought in the EP, for execution of the sale deed in terms of the award, was held by the Supreme Court to fall outside the realm

of law, as the award did not contemplate transfer of land in favour of the respondent, but only determined the price of the land.

In this context, it is useful to note that, in **Bhavan Vaja v. Solanki Hanuji Khodaji Mansang : (1973) 2 SCC 40,** the Supreme Court held that, though an executing court cannot go behind the decree under execution; that did not mean that it had no duty to find out the true effect of that decree; for construing a decree it can, and in appropriate cases it ought to, take into consideration the pleadings as well as the proceedings leading up to the decree; in order to find out the meaning of the words employed in a decree the Court, often, has to ascertain the circumstances under which those words came to be used; that is the plain duty of the Execution Court; and, if the Court fails to discharge that duty, it has plainly failed to exercise the jurisdiction vested in it.

In **Deep Chand v. Mohan Lal : (2000) 6 SCC 259,** the Supreme Court held that the purpose of an execution proceeding is to enable the decree-holder to obtain the fruits of his decree; in cases where the language of the decree is capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree, and the other which prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted; execution of the decree should not be made futile on mere technicalities; and the policy of the law is to give a fair and liberal, and not a technical, construction enabling the decree-holder to reap the fruits of his decree.

In the light of the law declared by the Supreme Court, in **Bhavan Vaja : (1973) 2 SCC 40, and Deep Chand : (2000) 6 SCC 259,** we must take into consideration the pleadings, as well as the proceedings leading up to the decree, in construing the decree; and in case the language of the decree is capable of two interpretations, one of which assists the decree-holder to

obtain the fruits of the decree, and the other which prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted.

It is necessary, therefore, for us to refer to the reliefs sought and those granted by the Commission in the original petition, and in appeal by this Tribunal, for that would establish whether this Tribunal had held that MSEDCL should pay capacity charges (fixed charges) to the Execution Petitioner.

As noted hereinabove. in Petition No. 166/MP/2012 filed by them before the CERC, the Execution Petitioner had sought, among other reliefs, that the issue arising out of non-availability of domestic gas, of the required quantum and reservations of beneficiaries to allow the petitioner to enter into contracts for available alternate fuel ie RLNG, be resolved; and to direct the beneficiaries to pay the fixed charges due to the petitioner.

In its order, in Petition No. 166/MP/2012 dated 30.07.2013, the CERC observed that MSEDCL could not disown its liability to pay the fixed charges when the Execution Petitioner had declared capacity based on R-LNG as the primary fuel in accordance with Article 4.3 of the PPA (Para 25), and fixed charges recovery be made by the petitioner based on availability after accounting for declaration of capacity on R-LNG. (Para 26). While it no doubt held that MSEDCL could not disown liability to pay fixed charges, and fixed charges recovery be made by the petitioner based on availability after accounting for declaration of capacity on R-NLG, the CERC did not issue a specific direction to MSEDCL to pay the fixed charges due to the Petitioner.

It is also true that Appeal No. 261 of 2013, against the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, was preferred before this Tribunal by MSEDCL, and not by the Execution Petitioner. The fact remains that, in paragraph 8 of the judgement under execution, this Tribunal

framed two issues. The first issue was whether the impugned order (ie order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013) was erroneous being based on incorrect reading of the provisions of PPA dated 10.04.2007, particularly clause 4.3 and 5.9? The second issue was whether the Appellant (MSEDCL) was required to pay capacity charges when they did not give consent to GSA/GTA.

After holding that both the issues were decided against MSEDCL and that the appeal was liable to be dismissed, this Tribunal observed, in para 16 of its judgment in Appeal No. 261 of 2013 dated 22.04.2015 that *"we clearly hold that the appellant distribution licensee is required to pay capacity charges to the respondent No.2 (execution petitioner), power generating company even if the appellant does not given consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel".*

Thereafter, in the order part of the judgment, this Tribunal observed thus "……*Further, the appellant is under obligation to pay capacity charges to respondent No.2, power generating company, even if the appellant does not give consent to GSA/GTA because the appellant in place of natural gas or fuel is using R-LNG (primary fuel)".*

The relevant sentences in paragraph 16 of the judgment of this Tribunal is *"the appellant distribution licensee is required to pay capacity charges to the respondent No.2, power generating company even if the appellant does not give consent for GSA/GTA".* The relevant sentence in the order part of the judgment is *"the appellant is under obligation to pay capacity charges to respondent No.2, power generating company even if the appellant does not give consent to GSA/GTA".*

While para 16 of the judgment holds that MSEDCL is required to pay capacity charges to the Execution Petitioner, the order part of the judgment holds that MSEDCL is under an obligation to pay capacity charges to the Execution Petitioner. Use of the word *"obligated to pay"* in the order part of the judgment as against the words *"required to pay:* in para 16 of the judgment matters little, as both the words *"required"* and *"obligated"* clearly establish that MSEDCL should pay capacity charges (fixed charges) to the Execution Petitioner. The above referred italicised sentences make it clear that the judgment of this Tribunal, requiring/obligating MSEDCL to pay capacity charges (fixed charges) to the Execution Petitioner is not a declaratory decree, and there is a specific direction in terms of which MSEDCL has been called upon to pay the Execution Petitioner fixed charges.

Unlike both in **State of M.P. v. Mangilal Sharma, (1998) 2 SCC 510**, and in **Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660,** where the executing court had granted a relief which was neither sought by the plaintiff in the suit, nor was any such relief granted by way of the decree passed in the said suit, in the present case, the relief of a direction to MSEDCL to pay fixed charges due to them was specifically sought by the Petitioner in Petition No. 166/MP/2012 filed by them before the CERC. Further, in Appeal No. 261 of 2013 preferred there against by MSEDCL, this Tribunal had framed a specific issue as to *'whether MSEDCL was required to pay capacity charges when it did not give consent to GSA/GTA*", and had thereafter decided this issue against MSEDCL and dismissed the appeal.

The question, which fell for consideration in **Bapurao v. Hanumanth Rao: AIR 1950 Hyderabad 48,** was whether the following decree was executable or not:—

> *"The plaintiffs suit is decreed. A decree is passed in favour of this plaintiff in these terms that he would be entitled to receive from*

the defendant every year half of the POTGI amount after deduction of the amount payable to the Gumastha.".

The contention of the judgment-debtor was that the decree was a declaratory decree, and was therefore not executable. It is in this context that the Division Bench of the Hyderabad High Court held that, where a decree directs that the plaintiff is entitled to receive from the defendant every year half of the emoluments of the Patwari, the decree is not declaratory, but is executable; and the mere fact that the decree does not mention any fixed amount or the date on which it is payable cannot make it inexecutable when the amount and the date can be ascertained from a construction of the decree.

In **State of Tripura v. Tarun Chandra Dey, 2004 SCC OnLine Gau 29**, the Gauhati High Court held that the Division Bench of the Hyderabad High Court, in **Bapurao v. Hanumanth Rao: AIR 1950 Hyderabad 48,** had come to the said conclusion on the ground that the date and the amount could be ascertained from a construction of the decree and this was allowed under the law; thus, the Division Bench rejected the contention of the appellant therein as regards the inexecutability of the decree; and they were in respectful agreement with the views of the Division Bench of the Hyderabad High Court in that case.

Just as, in **Bapurao v. Hanumanth Rao: AIR 1950 Hyderabad 48,** where the decree, that the plaintiff would be entitled to receive from the defendant every year certain amounts, was held to be an executable decree, the decree in the present case (Judgement of this Tribunal in Appeal No. 261 of 2013), that MSEDCL is required/obligated to pay capacity charges (fixed charges) to the Petitioner, would also be an executable decree and not merely a declaratory decree. If the words *"entitled to receive"* in a decree

suffices to make it executable, the words *"required/obligated to pay capacity charges (fixed charges)"* would likewise make the subject decree executable.

Quantification of the capacity charges (fixed charges) to be paid by MSEDCL to the Execution Petitioner falls within the jurisdiction of the executing court and, in computing the amount of fixed charges payable, the executing court cannot be said to travel beyond or behind the decree. Section 120(3) of the Electricity Act requires an order, made by this Tribunal under the Electricity Act, to be executed as a decree of the civil court, and for this purpose this Tribunal has been held to have all the powers of a civil court. Section 47(1) of the Civil Procedure Code requires the civil court to decide all questions which arise between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, to be determined by the court executing the decree and not by way of a separate suit. Section 47 CPC enables an Executing Court to determine all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. It is only questions which do not relate to the execution, discharge or satisfaction of the decree which are not within the jurisdiction of the Executing Court. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker: AIR 1961 ALL 1 (FB): 1960 SCCOnLine ALL 89).** While MSEDCL has been required/obligated to pay capacity charges (fixed charges) to the Execution Petitioner, the actual quantum of fixed charges, to which the Petitioner is entitled to, is but a matter of computation which exercise can, undoubtedly, be undertaken by this Tribunal in the present execution proceedings.

In **SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd (2023 SCC OnLine APTEL 9)**, (on which reliance is placed on behalf of MSEDCL), this Tribunal held that the findings recorded by it, in answer to the contentions raised by the

Respondents for the first time in the appeal, that too in an appeal not filed by them, and which is independent of and not related to the issues raised by the Appellants in the Appeals filed by them before this Tribunal, may, possibly, be binding in a subsequent lis inter-parties, or may possibly constitute res judicata in terms of Section 11 CPC in independent proceedings, if any, instituted subsequently, it cannot form the basis or the foundation of a proceeding for execution, when it is unrelated either to the original proceedings before the Commission or to the issues raised by the Appellants in the Appeal filed by them before this Tribunal.

The observations of this Tribunal in its judgment in **Sprng Soura Kiran Vidyut Private Limited v. Southern Power Distribution Company of Andhra Pradesh 2023 SCC Online APTEL Page 9**, cannot be read out of context. In **SPRNG Soura Kiran Vidyut (P) Ltd,** this Tribunal held that the letter dated 14.06.2021, which the Petitioners had requested to be set aside in the Execution Petition, was issued by the APDISCOMs more than a year and three months after this Tribunal passed the Appellate Order (execution of which was being sought) on 27.02.2020; by the said letter dated 14.06.2021, SECI was informed that the Execution Petitioner therein had requested AP Discoms, by letter dated 17.03.2021, for extension of timelines for completion and commissioning of the three Solar Power Projects for which PSAs were entered into with APDISCOMs on 27.07.2018; as per the field status report dated 24.03.2021, the civil works, such as levelling of land, foundations for mounting arrangements etc, had not commenced in all the three Solar Power Projects; and most of the works, for establishing the solar power projects in respect of the above three developers, had not yet started; earlier, by the letters dated 01.06.2021 and 20.06.2021, SECI was informed of the decision of APDISCOMs to cancel the three PSAs entered into with SECI with immediate effect, because of the poor work progress in these three solar projects, and as the due date for completion and commissioning of the

solar projects had expired on 29.05.2021, which was 32 months from the effective date of the PPAs i.e., 29.09.2018.

The reliefs sought by the Execution Petitioner in the Execution Proceedings in **SPRNG Soura Kiran Vidyut (P) Ltd,** was to declare the action of the APDISCOMs, in seeking to terminate their PSAs with SECI and in refusing to extend time for completion and commissioning of the projects, as illegal; and to direct the implementing agencies to hand over the project land to them. It is in this context that this Tribunal, in **SPRNG Soura Kiran Vidyut (P) Ltd.**, held that, while the Execution Petitioners could, no doubt, have sought such reliefs by filing an independent petition before the Commission, no such relief could be sought in the present Execution Proceedings as it went far beyond the decree ie the operative portion of the Order of this Tribunal dated 27.02.2020.

As the afore-said findings, recorded in the order under execution in **SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Prdesh Ltd., 2023 SCC OnLine APTEL 9,** were with respect to events which arose subsequent to the disposal of the petition before the APERC, and were issues wholly unconnected with the original lis, this Tribunal held that no such relief could be sought in the Execution proceedings in the said case, as the reliefs sought went far beyond the decree ie the operative portion of the order of this Tribunal.

Unlike in **Sprng Soura Kiran Vidyut Private Limited,** the Execution Petitioner, in the present case, had specifically sought before the CERC a direction to MSEDCL to pay them fixed charges. Even, in the Appeal preferred thereagainst before this Tribunal, such an issue was framed and decided by this Tribunal against MSEDCL.

Even if we were to proceed on the basis that is only the operative order of this Tribunal which can be executed, this Tribunal held, in the order portion of the said judgement, that the Appellant (MSEDCL) is under an obligation to pay capacity charges to the Petitioner. This is not a mere declaration of the right of the Execution Petitioner but this Tribunal has, in fact, held that MSEDCL should pay fixed charges to the Execution Petitioner.

Suffice it to conclude our analysis under this head, by holding that the order of this Tribunal in Appeal No.261 of 2013 dated 22.04.2015, (execution of which is sought in the present EP), is not a declaratory decree, and is therefore executable. The contentions, urged on behalf of MSEDCL under this head, necessitate rejection.

V. IS THE DECREE VAGUE RENDERING IT INEXECUTABLE?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that the manner in which RGPPL has sought to execute the judgement of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, namely, by way of seeking a direction against MSEDCL to make payments in furtherance of illegal invoices raised by it on MSEDCL, is impermissible as the APTEL Order has merely affirmed the Order dated 30.07.2013 passed by the CERC in Petition No. 166/MP/2024; the APTEL Order does not include any direction for payments to be made by MSEDCL to RGPPL, and is purely in the nature of a declaratory decree affirming the CERC's interpretation of Article 4.3 and 5.9 of the terminated PPA; a declaratory decree cannot be executed as such a decree merely declares the rights of the decree-holder qua the judgement debtor and falls short of directing the judgement debtor to do or to not do any particular thing or action; and reliance is placed on the following judgements ie (a) **State of M.P. Vs.**

Mangilal Sharma (1998)2 SCC 510; (b) **H.P. Cotton Textile Mills Ltd. vs. The Oriental Insurance Company Limited: MANU/DE/7780/2023 (Delhi HC);** as such, to the extent RGPPL seeks to interpret the APTEL Order to be in the nature of a direction to make payment, the said interpretation is based on a vague reading of the APTEL Order; and, as per settled law, a vague decree is not executable as such by the executing court, and ought to be remanded to the court of original jurisdiction, so that the vagueness of the decree is cured. Reliance is placed on the judgement of the Supreme Court in **Pramina Devi v. State of Jharkhand, (2022) 6 SCC 581.**

B. SUBMISSIONS URGED ON BEHALF OF RGPPL:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of RGPPL, would submit that, during the hearing in the main E.P, MSEDCL had already raised objection to the effect that the Judgement dated 22.04.2015 is not a money decree, but a declaratory decree; this has already been dealt with by RGPPL; the further contention that this Tribunal's Judgement is vague, and vague decrees are not executable has now been raised by MSEDCL; this Tribunal has held @ Para 14 and 16, that MSEDCL is required to pay Capacity Charges to RGPPL and it is under an obligation to pay capacity charges to RGPPL; after framing two issues @ Para 8. It has also held that MSEDCL is required to pay the capacity charges even when it does not give consent to the GSA/GTA; this is clearly an executable decree since what is claimed at Annexure 'Y' is nothing but the components of capacity charges and surcharges thereon as per the Tariff Regulations, and Orders passed by the CERC; and MSEDCL has not disputed this calculation at any stage of the hearing of the E.P.

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of RGPPL, would further submit that, in its Judgement, this Tribunal has also noted the specific prayer of RGPPL for a direction to MSEDCL to pay fixed

charges in its main petition, which was opposed by MSEDCL, and has been recorded at paras 12 and 16 of the CERC's Order; in **Bapurao** *[AIR 1950 Hyd. 48],* **Saltanat Begum** *[AIR 1951 All 817]*, **Bapu Puri & Ors**. *[AIR 2005 Raj 77]*, **State of Tripura** [*(2005) 3 Gauhati Law Reports 525*], several High Courts have held that the decree passed need not contain the exact numbers or particulars of payments to be made; the Judgement relied on by MSEDCL, including in **H.P. Cotton** and **Pramina Devi** *(2022) 6 SCC 581*, were cases where the decree holder was seeking to claim amounts beyond the award by producing evidence and adding proof with no relevance to the present matter; there is a finding that an Order directing land compensation had been passed without actual assessment or determination of market value; but the decree sought to be executed by RGPPL is a clear and unambiguous claim based on the CERC tariff order/regulations from time to time i.e. MSEDCL has to pay the capacity charges to RGPPL so long as RGPPL declares availability based on RLNG even without the consent of MSEDCL to the GSA/GTA; MSEDCL has not disputed a single number claimed by RGPPL as capacity charges in its monthly invoices/bills being raised on it from 2013-2014 onwards; even in reply to the E.P, MSEDCL has not raised any objections to the computation; and to suddenly state that the decree is vague is an afterthought, and should be rejected.

C. JUDGEMENTS RELIED UPON UNDER THIS HEAD:

1. In State of Tripura v. Tarun Chandra Dey, 2004 SCC OnLine Gau 29, the Assam High Court held that a decree is incapable of execution if it is null and void or if the same s passed in ignorance of provisions of law or if any law is promulgated making the decree in executable after its passing or if it is passed in the absence of a necessary party.

2. In **Tapanmal v. Kundomal Gangaram, AIR 1960 SC 388,** the Supreme Court, while dealing with the power of the executing court to

construe a decree which was ambiguous, held that the decree passed, at the worst, could be said to be an ambiguous decree and it was the duty of the executing Court to construe the decree and for that purpose it would be certainly entitled to look into the pleadings and the judgment.

3. On the question as to how far the executing court can act and what it should do if the decree is ambiguous, the Supreme Court, in **Bhavan Vaja v. Solanki Hanuji, (1973) 2 SCC 40 : AIR 1972 SC 1371**, after discussing the scope of Section 47 of the Code of Civil Procedure, held that an executing court cannot go behind the decree under execution; but that did not mean that it had no duty to find out the true effect of that decree; for construing a decree, it could and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading up to the decree; in order to find out the meaning of the words employed in a decree, the court often has to ascertain the circumstances under which these words came to be used; that was the plain duty of the executing court and, if that court failed to discharge that duty, it would be deemed to have failed to exercise the jurisdiction vested in it."

4. Following the judgement of the Supreme Court, in **Bhavan Vaja v. Solanki Hanuji, (1973) 2 SCC 40 : AIR 1972 SC 1371**, the Assam High Court, in **State of Tripura v. Tarun Chandra Dey, 2004 SCC OnLine Gau 29,** held that, in so far as the decrees in question were concerned, they could not be held to be a declaration simpliciter in as much as there was also a direction made by the trial court to the effect that "the defendants were directed to implement the decree within two months from the date of decree"; may be, the decrees were not happily worded; may be, the decrees suffered from lack of detailed particulars; but a bare reading thereof, showed that there was no ambiguity in those decrees in such a manner that it was not possible for the Judgment debtors to understand or make out the nature of the

directions passed by the trial court; once the decree had specified the pay scale to be paid by the petitioners to the respondents, it was necessary for the trial court to make calculation or computation of the exact amount payable to the respondents; all the relevant records and accounts were in the custody of the petitioners; and the petitioners also had competent Officials and Accountants to work out the exact amount to be paid to the decree holders; the exact amount which had become payable to the decree holders and the juniors of the decree holders, could be reasonably worked out by the concerned officials of the petitioners by due application of mind and by proper computation by referring to the records available in their custody; under the circumstances, there was no improper exercise of jurisdiction by the executing court in passing the impugned orders; and, in other words, the petitioners could not make out any case of excess of jurisdiction or want of jurisdiction in the impugned orders passed by the executing court.

In **H.P. Cotton Textile Mills Ltd. vs. The Oriental Insurance Company Limited: MANU/DE/7780/2023,** the Delhi High Court observed that the decree holder cannot, under the garb of this execution petition, seek a claim that was not quantified in the award due to failure of the parties to furnish proof; and, in execution proceedings, the court cannot go behind the award and enable the decree holder to fill in the gaps by producing evidence to quantify costs.

In **Pramina Devi v. State of Jharkhand, (2022) 6 SCC 581,** the Supreme Court held that there was no clarity on the actual market price and, while passing the final order, the High Court had not stated the exact market value and/or the amount of compensation to be paid; there was no actual assessment and/or determination of market value and/or the compensation; on such a vague order, a decree could neither be drawn nor was such an order executable; the judgment must have clarity on the exact relief that is

granted by the Court, so that it may not create further complication and/or difficulty in the execution; every litigant must know what actual relief he has received from the Court; but the impugned judgment and order passed by the High Court lacked total clarity.

While quashing and setting aside the impugned judgments and orders, the Supreme Court remitted the appeals to the High Court to consider and decide the appeals afresh in accordance with law and on merits and after considering the relevant factors while considering the sale deed as a sale exemplar; and thereafter to decide and determine the exact market value and the compensation to be paid to the original claimants. For this purpose, the appeals before the High Court were ordered to be restored to file.

D. ANALYSIS:

As held under the earlier head, the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 is not a declaratory decree and, in fact, requires/ obligates MSEDCL to pay capacity charges (fixed charges) to RGPPL. While there can be no quarrel with the submission urged on behalf of MSEDCL, in principle, that a vague decree cannot be executed, the question which necessitates examination is whether the subject decree is vague, rendering it in-executable.

As noted hereinabove, the order of this Tribunal, in Appeal No.261 of 2013 dated 22.04.2015, required/ obligated MSEDCL to pay capacity charges (fixed charges) to RGPPL. Quantification of the capacity charges, payable by MSEDCL to RGPPL, falls within the jurisdiction of the executing court under Section 120(3) of the Electricity Act read with the applicable provisions of the Civil Procedure Code. In the present case, MSEDCL has not even disputed the amount quantified by RGPPL in the table in Annexure-Y of the Execution Petition. The table in Annexure-Y records the capacity

charges payable by MSEDCL to RGPPL, for the period up to December 2022, as Rs. 2679,85,88,408/-. As this amount has not even been disputed by MSEDCL, all that is required to be done by the Executing Court is to deduct from this amount, representing capacity charges, the amount realized thereafter by the Execution Petitioner from MSEDCL with respect to such capacity charges. The table, in Annexure-Y, records the amount realized as Rs. 650,28,02,079. It does appear that, in addition, MSEDCL had, in terms of the interim order passed by the CERC in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, paid a sum of Rs. 471 Crores to RGPPL. While it is not known whether this sum of Rs.471 Crores is also towards capacity charges for the period prior to December 2022, MSEDCL is entitled to deduct the said amount, if it relates to capacity charges for the period prior to December 2022, and make payment of the balance amount to RGPPL towards capacity charges.

There is no merit in the submission, urged on behalf of MSEDCL, that the order of this Tribunal, in Appeal No. 261 of 2013 dated 22.04.2015, merely affirmed the Order passed by CERC dated 30.07.2013 or that the said order of this Tribunal does not include any direction for payment to be made by MSEDCL to RGPPL towards capacity charges. As shall be detailed later in this order, the understanding of MSEDCL, as is evident from the Appeal filed by them before the Supreme Court in Civil Appeal No.1922 of 2023, is also that, by its order in Appeal No. 261 of 2013 dated 22.04.2015, this Tribunal had directed MSEDCL to pay capacity charges to RGPPL.

Reliance placed by MSEDCL on the judgment of the Supreme Court in **Prameena Devi** is of no avail. In the said case, the appellate judgment and decree of the High Court, which was under challenge before the Supreme Court, was held to be a vague decree. The said judgment of the High Court was, accordingly, set aside and the matter remanded to the High Court for its

consideration afresh. Unlike in **Prameena Devi**, in the present case, the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 has been affirmed by the Supreme Court in its order in CA No. 1922 of 2023 dated 09.11.2023, and is not vague. Viewed from any angle, the submission that the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 is vague and in-executable, necessitates rejection.

VI. SHOULD THE EP HAVE BEEN FILED BEFORE THE CERC INSTEAD OF THIS TRIBUNAL?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that, alternatively, if it is held to be a money decree, then only the CERC can execute it, and not this Tribunal; the order of this Tribunal, while affirming the original order of the CERC dated 30.07.2013, has made no modification/variation in the original order, but has only confirmed the same in appeal; as such, the execution petitioner is free in law to seek his remedy for payment by way of a fresh petition by quantifying the amount before the CERC in terms of *Regulation 111, 112 and particularly Regulation 119 of the CERC (Conduct of Business) Regulations, 1999* as being prevalent on the date of filling of the present Execution Petition; clearly in law they cannot seek such a remedy in the present execution proceeding. (***J&K Bank Ltd. & Ors. Vs. Jagdish C. Gupta (2004) 10 SCC 568)***; even otherwise by application of the doctrine of merger, as on date it is the original order of the CERC, being the original decree, which stands in law for the purposes of execution, in terms of Section 37 r/w 38 of the CPC; it is the Court of first instance i.e., the CERC which is the “Court” meaning the “Court which passed the decree”; in the facts of the present case, undisputedly it is the CERC which had passed the original order, and the same was merely upheld as being rightly passed by the two Appellate Courts i.e., this Tribunal

and the Supreme Court; hence, since there is no alteration/modification of the "original order" by the Appellate Courts, it is the CERC which is to be regarded as the Court of first instance i.e., the "Court which passed the decree" for the purposes of execution under Section 38 CPC.

Sri Balbir Singh, Learned Senior Counsel, would further submit that the doctrine of merger is based on principles of propriety in the hierarchy of the justice-delivery system; the said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time and hence, in the absence of there being any modification by the Appellate Court, the original decree of the Court of first instance would prevail for being executed; furthermore, the Petitioner herein is seeking execution of an order which has been passed, in an appeal preferred by the Respondent herein, which, by the order sought to be executed, has been dismissed and as such, on account of such dismissal, benefit thereof cannot be derived in terms of execution of a dismissal order for the reason that the dismissal order has not been converted into a 'decree'; in other words, any interference by this Tribunal, in the present Petition, would tantamount to mean that even a dismissal order of a civil suit is to be regarded as a decree, which is not the law as it stands; and another aspect of the matter is that, the Petitioner herein was the Respondent in Appeal No. 261 of 2013, i.e., at par with a 'Defendant' in the Civil Suit, and it cannot be said that a 'decree' has been passed in favour of the 'Defendant'.

B. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that, under the Electricity Act, 2003, it is only this Tribunal which has power to execute its Orders / Judgments as a decree of the Civil Court. ***(@Section 120 (3))*****;** no other court, in the hierarchy of decision-making authorities under the Electricity Act, has this power; the Act

envisages this Tribunal to be the executing court; this also becomes clear from Section 120 (4) which enables this Tribunal to transfer a decree for execution to a civil court for the purposes of execution; the provision of Section 120 (3) is a statutory exception to the principle of merger similar to Section 37 of the CPC, 1908 that vests the power to execute decrees in the court of first instance.

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would further submit that a plain reading of Section 120 (3) would show that an Order made by this Tribunal under the Electricity Act is executable as a decree of the civil court; of course, the Order has to contain an executable direction; a second Appeal to the Supreme Court, under Section 125, is only on substantive questions of law; this Tribunal is the final fact-finding authority; the Supreme Court has not modified the Order of this Tribunal, but has confirmed the same; it has also noted that the EP must go on before this Tribunal; if the construction placed on Section 120 (3) by MSEDCL is accepted, there will be no executing court even when Orders passed by the Commission are confirmed after detailed discussions by this Tribunal, and further directions are also given by this Tribunal; in all such cases, parties will have to necessarily go to the Electricity Regulatory Commissions (**'ERCs'**) which has no power of execution; further, Section 120 (3) would only be available if this Tribunal modifies or partly sets aside the Order of the Commission; as a first Appellate Court, this Tribunal sets aside numerous Orders and remands the matters for reconsideration by the ERCs; in all such cases, there will be no execution possible for the decree holders and the only remedy will be to come back in a second round of appeal complaining that the remand has not been complied with by the Commission; it is incorrect on the part of MSEDCL to contend that CERC is the court of first instance for the purposes of execution under Section 38 of the CPC; the CERC does not even have the power of execution under the Electricity Act,

2003; and, merely because RGPPL was a respondent in Appeal No. 261 of 2013, does not lead to the position that there is no decree in its favour in the judgement dated 22.04.2015.

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would also submit that the legislature has seen this Tribunal both as a first appellate court as well as the executing court; prior to the judgment of the Supreme Court in ***State of Gujarat*** v ***Utility Welfare Association & Ors*** **(2018) 6 SCC 21**, there was no mandate to have a legal member in the ERCs; the Supreme Court, under Section 125, only hears second appeals on substantial questions of law; therefore, this Tribunal has been envisaged to be an executing court under the Act; it is well settled that an interpretation preserving jurisdiction of an authority should be preferred to the one which would denude the same; and an interpretation that gives the law its claws ought to be preferred over one that leads to the statute being a damp squib **(*Carew Company Ltd vs Tata Engg. & Locomotives Co. Ltd (1975) 2 SCC 791*).**

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would state that the contention of MSEDCL, that this Tribunal has only confirmed the order passed by the CERC dated 30.07.2013, is not tenable; this Tribunal framed two issues; while the first issue was framed and answered confirming the view taken by the CERC, the second issue was framed and answered requiring MSEDCL to pay capacity charges to RGPPL; it is not necessary to modify the order passed by the CERC in each case; even while confirming such order, this Tribunal can order suitable directions as has been done in this case; further, merely because the Judgement has been passed in an Appeal filed by MSEDCL would not change this position.

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would further contend that the second alternative submission

made by MSEDCL is that the directions given by this Tribunal in its judgement would expand the scope of the original lis between the parties; at the same breath, MSEDCL has contended that the executing court cannot go behind the decree or question its legality/ correctness; on a reading of paras 14 and 16 of the judgement dated 22.04.2015, there is clearly an executable decree requiring MSEDCL to pay capacity charges to RGPPL; and RGPPL is also requesting this Tribunal not to go behind the decree, and execute the above directions as it is.

C. JUDGEMENTS RELIED ON UNDER THIS HEAD:

1. In **SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9,** this Tribunal held that Section 2 (9) CPC defines "judgment" to mean "the statement given by the Judge on the grounds of a decree or order; while Section 2 (14) CPC no doubt defines "Orders" to mean "the formal expression of any decision of a Civil Court which is not a decree.", the meaning of the word "Order" used in Section 120(3) would, in view of Rule 91 of the 2007 Rules, be the final decision of the Tribunal; on a conjoint reading of Section 120(3) of the Act and Section 2(2) CPC, the order of this Tribunal which is capable of execution is its operative portion, which alone can be said to be the formal expression of an adjudication in the appeal conclusively determining the rights of parties with regard to the dispute (matters in controversy) before it.

2. In **J&K Bank Ltd. v. Jagdish C. Gupta, (2004) 10 SCC 568, (**on which reliance is placed on behalf of MSEDCL), the question which arose for consideration was whether the executing court could go beyond the decree by directing that the respondent be promoted to the post of Chief Manager. It is in this context that the Supreme Court held that it was not disputed that the decree did not contain any direction to promote the respondent to the post of

Chief Manager; under such circumstances, the executing court fell in error in issuing directions, in the execution proceedings, that the respondent be promoted to the post of Chief Manager; and the order under challenge, therefore, deserved to be set aside.

In **Carew & Co. Ltd. v. Union of India, (1975) 2 SCC 791,** the Supreme Court held that, if the language used in a statute can be construed widely so as to salvage the remedial intendment, the Court must adopt it; if, however, the language of the statute does not admit of the construction sought, wishful thinking was no substitute and then, not the Court but the Legislature was to blame for enacting a damp squib statute; minor definitional disability, divorced from the realities of industrial economics, if stressed as the sole touchstone, was sure to prove disastrous; and when two interpretations are feasible, that which advances the remedy and suppresses the evil, as the Legislature envisioned, must find favour with the Court.

D. ANALYSIS:

It is no doubt true that the appeal before this Tribunal (Appeal No. 261 of 2013), against the order passed by the CERC in Petition No. 166/MP/2012 dated 30.07.2013, was filed by MSEDCL and not by the Execution Petitioner; the relief, which the Execution Petitioner was admittedly not granted by CERC, despite a specific prayer made by them in this regard, has been granted by this Tribunal in an appeal filed not by them, but by MSEDCL; and it is a single sentence, in Para 16 (and in the Order thereafter), in the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, which forms the basis of the claim for relief in the present Execution Petition.

The fact, however, remains that, in its judgment in Appeal No. 261 of 2013 dated 22.04.2015, not only did this Tribunal frame a specific issue (Issue No.2) as to *"whether the Appellant (MSEDCL) is required to pay*

capacity charge when the Appellant (MSEDCL) does not give consent to GSA/GTA?", it also, in para 16 of the said judgment, decided both the issues (including Issue No.2) against MSEDCL, and held that the appeal was liable to be dismissed. This Tribunal further held that the Appellant Distribution Licensee (MSEDCL) is required to pay capacity charges to the Respondent No.2, power generating company (RGPPL-the Execution Petitioner) even if the appellant (MSEDCL) does not give consent for GSA/GTA because there is no change of fuel, falling under the category of primary fuel, to liquid fuel.

Thereafter, in the order part of the judgment in Appeal No. 261 of 2013 dated 22.04.2015, this Tribunal, while dismissing the appeal and upholding the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, held that the Appellant (MSEDCL) was under obligation to pay capacity charges to Respondent No.2, power generating company (RGPPL-Execution Petitioner). But for these observations, dismissal of the Appeal would have resulted in the order of the CERC being affirmed and, as a result, RGPPL would have been required to invoke the jurisdiction of the CERC, and not file the present petition under Section 120(3) of the Electricity Act whereby jurisdiction is conferred on this Tribunal only to execute the order passed by it.

While the conclusion of this Tribunal in the aforesaid judgment, in Appeal No. 261 of 2013 dated 22.04.2015, that MSEDCL is required/ obligated to pay capacity charges (fixed charges) to the Execution Petitioner is undoubtedly a direction to MSEDCL to pay the Execution Petitioner the said charges, it is relevant to note that, even the Appellant understood the aforesaid conclusion of this Tribunal as a direction for it to pay the Execution Petitioner capacity charges.

As noted hereinabove, MSEDCL had preferred Civil Appeal No. 1922 of 2023, against the judgment of this Tribunal in Appeal No. 261 of 2013 dated

22.04.2015, before the Supreme Court. In Para 7 of the said Civil Appeal MSEDCL narrated the relevant facts. Para 7(ee) reads thus:-

> *"Tribunal has passed the impugned judgement with the following directions:-*
>
> *1) Appellant is directed to pay capacity charges to Respondent No.1 even if the Appellant does not give consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel.*
>
> *2) Any change on account of principle of "take or pay" is not to be passed on the Appellant herein……"*

It does appear, therefore, that MSEDCL, having all along understood the judgment of this Tribunal to contain a direction for it to pay the Execution Petitioner capacity charges (fixed charges) is now, only for the purposes of these Execution Proceedings and with a view to avoid its having to make payment in terms of the said judgment, contending that no such direction was issued to it, and the above referred conclusions are merely a declaration of the Execution Petitioner's right, and nothing more.

It is impermissible for this Tribunal, in execution proceedings, to go into the correctness or otherwise of the aforesaid conclusions of this Tribunal holding that MSEDCL was required/obligated to pay the Execution Petitioner capacity charges (fixed charges). As the aforesaid conclusion/direction of this Tribunal, in its judgment in Appeal No. 261 of 2013 dated 22.04.2015, did not form part of the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, it is clear that the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, at least to the extent of the aforesaid conclusion/direction, was not a mere affirmation of the order of the CERC in Petition No. 166/MP/2012 dated 30.07.2013, but was an order passed/ direction issued by it independent of the order of the CERC.

The wisdom of this Tribunal, in issuing such directions in its judgment in Appeal No. 261 of 2013 dated 22.04.2015 (ie in an Appeal preferred by MSEDCL against the order of the CERC) cannot be examined by the Executing Court in the exercise of its jurisdiction under Section 120(3) of the Electricity Act, more so as the said judgment of this Tribunal has been affirmed by the Supreme Court on merits, and by way of a reasoned judgement in Civil Appeal No. 1992 of 2023 dated 09.11.2023

The basis for this submission, urged on behalf of MSEDCL, that RGPPL ought to have approached the CERC, and could not have filed the present EP before this Tribunal, is evidently Section 37 of the Civil Procedure Code which relates to the definition of "*court which passed the decree*". Thereunder the expression *"court which passed the decree"*, or words to that effect, shall, in relation to the execution of the decree, unless there is anything repugnant in the subject or context, be deemed to include (a) where the decree to be executed has been passed in the exercise of the appellate jurisdiction, the court of first instance.

The definition of *"court which passed the decree"* under Section 37 of Civil Procedure Code would apply unless there is anything repugnant in the subject or context. It is necessary for us, therefore, to ascertain whether there is anything in Section 120(3) of the Electricity Act (which confers jurisdiction on this Tribunal to execute its orders) which is repugnant to the subject or context of Section 37 of the Civil Procedure Code. Section 120(3) requires this Tribunal to execute an order made by it under the Electricity Act as a decree of the Civil Court. Since the conclusion/direction of this Tribunal, in its judgment in Appeal No. 261 of 2013 dated 22.04.2015, is an order made by this Tribunal in an appeal preferred under Section 111 of the Electricity Act, the said order can only be executed by it under Section 120(3), and not by the CERC as no such direction was given in its order dated 30.07.2013.

As the aforesaid conclusion/direction was issued by this Tribunal for the first time in appeal, and no such direction was issued by the CERC in the order appealed against, the aforesaid judgment of this Tribunal is not a mere affirmation of the order of the CERC. While it is possible to contend that a mere order of affirmation would require the execution proceedings to be instituted before the Court/Tribunal which passed the original order, such a situation does not arise in the present case. The exercise of quantification of the amount to be paid in terms of the decree is again a matter which falls within the jurisdiction of the executing court and this Tribunal can, in the light of the powers conferred on it under the second limb of Section 120(3) of the Electricity Act, undertake such an exercise.

The second limb of Section 120(3) stipulates that, in executing the orders made by it under the Electricity Act as a decree of the Civil Court, this Tribunal shall have all the powers of a Civil Court. Consequently, for the purposes of executing the decree, this Tribunal can undoubtedly exercise the powers conferred on a Civil Court under Section 47 and Order 21 of the Civil procedure Code which relates to execution. In the light of Section 120(3) of the Electricity Act, which requires this Tribunal to execute the orders passed by it, the jurisdiction to execute the orders passed by it is conferred only on this Tribunal, and reliance placed either on Section 37 CPC, or on any provision analogous thereto, is wholly misplaced.

Reference made, on behalf of MSEDCL, to the doctrine of merger is also misplaced. In **Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat: (1969) 2 SCC 74,** (on which reliance was placed in **Kunhayammed & Ors (2000) 6 SCC 359**), the Supreme Court emphasised on three pre-conditions attracting applicability of the doctrine of merger ie (*i*) the jurisdiction exercised should be appellate or revisional jurisdiction, (*ii*) the jurisdiction should have been exercised after issue of notice, and (*iii*) after a

full hearing in presence of both the parties; and then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment.

In **Kunhayammed v. State of Kerala, (2000) 6 SCC 359,** the Supreme Court held that the expression *"to merge"* means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up; merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased, an absorption or swallowing up so as to involve a loss of identity and individuality (***Corpus Juris Secundum*, Vol. LVII, pp. 1067-68**); where the order impugned before the Supreme Court is an order appealed against, the appellate order passed thereafter would attract the doctrine of merger; it would not make a difference whether the order is one of reversal or of modification or of dismissal or affirming the order appealed against; it would also not make any difference if the order is a speaking or non-speaking one; where an appeal is provided against an order passed by a court, tribunal or any other authority before the superior forum, and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law; the doctrine of merger is not a doctrine of universal or unlimited application; it will depend on the nature of jurisdiction exercised by the superior forum, and the content or subject-matter of challenge laid, or capable of being laid, shall be determinative of the applicability of merger; the superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it; and, when the appellate jurisdiction of the Supreme Court is invoked, the order passed in appeal would attract the doctrine of merger - the order may be of reversal, modification or merely affirmation.

In its judgement in **Kunhayammad**, as above referred, the Supreme Court has made it amply clear that application of the doctrine of merger is not a doctrine of universal or unlimited application, but would depend on the nature of the jurisdiction exercised by the forum, and the contents and subject matter of challenge laid or capable of being laid. As a specific power has been conferred on this Tribunal, under Section 120(3) of the Electricity Act, to execute the orders passed by it, the conclusion and direction in Para 16 and the order portion of the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, (which did not form part of the original order passed by the CERC), can only be executed by this Tribunal and not the CERC.

Accepting this far-fetched submission, urged on behalf of MSEDCL, would require us to hold that even in cases where the Supreme Court, in exercise of its jurisdiction under Section 125 of the Electricity Act, dismisses the Civil Appeal preferred against the judgement of this Tribunal holding that no substantial question of law arises for consideration, such an order would require the Supreme Court to execute the said judgment on application of the doctrine of merger. Such a convoluted construction placed on Section 120(3) of the Electricity Act and Section 37 of the Civil Procedure Code, on behalf of MSEDCL, does not merit acceptance.

We must also express our inability to agree with the submission, urged on behalf of RGPPL, that it is only this Tribunal which has the power to execute the appellate orders passed by it even if it be merely an order of affirmation, and not the Regulatory Commission which passed the original order. Accepting such a contention would require this Tribunal to execute all appellate orders, even if it merely affirms the order of the Regulatory Commission.

In this context, it is relevant to note that the Commission has been given the power, under Section 142 of the Electricity Act, to punish for contravention

of its directions, and to impose penalty. The mere fact that no specific power of execution has been conferred on the regulatory Commissions would not mean that this Tribunal, when it merely dismisses an appeal passed against the orders of the Commission, would be required to execute the orders of the Commission under Section 120(3) of the Electricity Act. It is only where a specific power of execution has been conferred, can such a power be exercised. If Parliament, in its wisdom, has chosen not to make any specific provision for execution by the Regulatory Commission, that does not mean that this Tribunal would be required to take upon itself the burden of executing all orders passed by all Commissions merely on an appeal being preferred thereagainst before this Tribunal, for no such power has been conferred by Parliament on this Tribunal to do so.

The language of Section 120(3) of the Electricity Act makes it clear that this Tribunal has been conferred jurisdiction to execute the orders passed by it. A mere order of affirmation, without anything more, may not fall within the ambit of Section 120(3) of the Electricity Act. Since this question is merely academic, and does not arise for consideration in the present Execution Proceedings, we do not wish to dwell on this aspect any further, and deem it unnecessary to express any conclusive opinion in this regard.

All that Section 120(4) of the Electricity Act empowers this Tribunal to do, instead of executing the order itself, is to transmit such an order for execution by a civil court having local jurisdiction. On the decree being so transmitted, the said civil court is required, under Section 120(4), to execute the order as if it was a decree passed by it. In the present EP, we see no reason to exercise jurisdiction under Section 120(4) of the Electricity Act, as no complicated issues arise in determining the quantum of capacity charges payable by MSEDCL to the Execution Petitioner.

Suffice it to conclude our analysis under this head, holding that the Execution Petitioner was justified in invoking the jurisdiction of this Tribunal under Section 120(3) of the Electricity Act, and they could not have approached the CERC in this regard, as the order, execution of which is sought, was passed by this Tribunal and not by the CERC.

VII. SHOULD RELIEF TO BE RESTRICTED ONLY TO THE PERIOD PRIOR TO TERMINATION OF THE PPA BY MSEDCL?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that, even if it is presumed that the subject decree can be executed by this Tribunal, then the following points arise for consideration qua execution: (i) the Executing Court cannot go behind the original decree; application of the theory of original lis/dispute, and relief to be restricted only for the pre-termination period; (ii) Post-termination period is a subsequent event having a fresh cause of action, and cannot be termed as original dispute; and, hence, relief thereof cannot be granted.

Sri Balbir Singh, Learned Senior Counsel, would further submit that an executing Court has jurisdiction to only execute the order/decree as it stands, and it can neither go behind the decree nor question its legality or correctness; in other words, the decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it; an executing Court can neither add to such a decree nor vary its terms; an executing Court has jurisdiction only to enforce a decretal liability, and has no jurisdiction over any other matter and cannot enforce any other liability; this Tribunal, in **Sprng Soura Kiran Vidyut,** while referring to a catena of judgments of the Supreme Court on this aspect, held that as an executing Court cannot travel beyond the original *lis* between the

parties to any subsequent cause of action, as the entire purpose of execution proceeding is not to add to the decree or to modify the directions or grant such directions that was neither prayed nor formed part of the original *lis (as in the present case existed on the date of filling of the original Petition before* the *CERC)*, but only to enforce the direction passed in the decree, and nothing more; the Executing Court has no jurisdiction over any other matter, and cannot enforce any other liability; there can be no execution or specific enforcement of a liability without a previous determination of the liability by a Court of competent jurisdiction *(in the present case w.r.t., the validation of the termination of the PPA in question, enforcement of payment liability post termination so being sought in the present execution petition)*; such determination must be incorporated in a formal document called the decree, and therefore issues which do not form part of the "Decree" under execution are not within the jurisdiction of the Executing Court.

Sri Balbir Singh, Learned Senior Counsel, would also submit that, if the operative portion of the decree does not give any specific direction which has now been sought afresh under the execution proceedings in the guise of pleading qua rendering substantial justice or to avail the fruits of the decree; the executing Court would not be entitled to grant any relief in the absence of any such direction in the operative portion which alone is executable, as the powers of the executing Court are confined and limited and cannot be exercised on aspects which are not part of the original lis, execution whereof has been sought; in other words, the executing Court has to take the decree at its face value and cannot go behind and beyond it; on a bare reading of the prayers sought before the CERC along with the operative order of the CERC, which has been affirmed without any modification/alteration by the operative order of this Tribunal, as well as by the Supreme Court, would go to show that this Tribunal, as an Executing Court, cannot exercise its power to grant execution beyond the *"original lis"* between the parties as it stood

before the CERC *(i.e., liability during the period when the PPA was active)* and, hence, the reliefs sought, in the present execution Petition, not only expands the original decree/order of the CERC but also contemplates a relief which has neither been specifically prayed before the CERC in the original proceedings nor has been directed by the CERC in the original order or even by this Tribunal in the order under execution, particularly considering that the "*original lis",* as it stands for the limited purpose of execution, was not for determination qua termination of the PPA; consequently, in the present execution proceedings, the Petitioner cannot make a claim post the date of termination of the PPA i.e., 01.04.2014, thereby rendering the termination invalid through an order of an Executing Court, without even any adjudication on the same.

Sri Balbir Singh, Learned Senior Counsel, would contend that this Tribunal, in **Sprng Soura Kiran Vidyut** *(*Supra*),* while considering the scope of execution proceedings, has held that there can be no execution or specific enforcement of a liability, without a previous determination of such liability by a Court, which is further incorporated in a formal document called the decree; in other words, if a decree holder wants to enforce a liability other than the decretal liability, it would then strictly not be a question for consideration in proceedings seeking execution of such a decree, and the prayers to that effect would thereby tantamount to asking the Executing Court to travel behind the decree; the prayer sought in the present execution proceedings, in effect, is to declare termination of the PPA as illegal; such a relief was, evidently, not part of the original lis i.e. Petition No. 166/MP/2012, and hence no relief beyond the termination period can be sought under the present execution proceedings, as it goes far beyond the operative portion of the original order; and such a relief can only be sought by filing an independent Petition before the CERC.

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would further contend that reliance has been placed by the Execution Petitioner, during oral submissions, to the pleadings of MSEDCL before the Supreme Court in Civil Appeal No. 1922 of 2023 and in Review Petition (Civil) No. 1997 of 2023 with respect to the aspect of termination of the PPA; the Supreme Court has not delved on the said aspect in either of the proceedings; in the absence of any observation in this regard, no inference can be drawn against MSEDCL particularly when the said judgment/order itself is completely silent on this aspect; and, in any event, the pleadings of the Judgment Debtor-MSEDCL before the Supreme Court, either in the Civil Appeal or in the Review Petition, neither alters the "Decree" under execution nor does it result in expansion of the original dispute/ lis.

B. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that there is no provision in the PPA enabling either of the parties to unilaterally terminate the PPA; the purported termination claimed is by the letter of MSEDCL dated 08.05.2014, and the repudiation by the Petitioner is by its letter dated 22.05.2014; if MSEDCL was clear that it had no liability post termination, it could have placed the same in the proceedings in Appeal No. 261 of 2013, which was ongoing, and the Judgment was delivered only later on 22.04.2015; in ***Rahul Shah vs Jinendra Kumar Gandhi & Ors. (2021) 6 SCC 418,*** the Supreme Court, in exercise of its powers under Article 141, 142 & 144, directed all executing courts not to go into any issues which could have been and ought to have been raised at the time of the decision in the main suit; above all, any view expressed on the issue of termination of PPA or its repudiation in the EP will lead to an adjudication by this Tribunal i.e. going behind the decree despite

the fact that the decretal part of the Order of this Tribunal is clear and unambiguous.

C. JUDGEMENTS RELIED UPON UNDER THIS HEAD:

In **Rahul S. Shah v. Jinendra Kumar Gandhi, (2021) 6 SCC 418,** the Supreme Court held that all courts, dealing with suits and execution proceedings, should mandatorily follow the below mentioned directions; (1) in suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties; (2) in appropriate cases, where possession is not in dispute, and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property; (3) after examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit; (4) under Order 40 Rule 1 CPC, a Court Receiver can be appointed to monitor the status of the property in question as *custodia legis* for proper adjudication of the matter; (5) the court must, before passing the decree pertaining to delivery of possession of a property, ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property; (6) in a money suit, the court must invariably resort to Order 21 Rule 11, ensuring immediate execution of decree for payment of money on oral application; (7) in a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit; the court may

further at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree; (8) the court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant; (9) the court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits; (10) the court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to sub-rule (2) of Rule 98 of Order 21 as well as grant compensatory costs in accordance with Section 35-A; (11) under Section 60 CPC the term "… in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property; (12) the executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay; (13) the executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the police station concerned to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the court, the same must be dealt with stringently in accordance with law; and (14) the judicial Academies must prepare manuals and ensure continuous training through

appropriate mediums to the court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the executing courts.

D. ANALYSIS:

In its "Without prejudice" letter dated 08.05.2014, MSEDCL informed the Execution Petitioner that, in terms of the PPA dated 10.04.2007, generation of power by the Petitioner was based upon sources of gas and approval of the said source including commercial terms by MSEDCL under Clause 5.9 of the PPA; when the original agreement was signed between MSEDCL and the Execution Petitioner, the Petitioner had a long term agreement for purchase of RLNG up to September, 2009; a supplementary agreement was entered into between the Petitioner and MSEDCL for supply of gas from RIL and Neco Ltd. up to 31.02.2014; according to the agreement dated 10.04.2007, the gas supply agreement between MSEDCL and the Petitioner, which had been approved by MSEDCL, was only upto 31.03.2014; admittedly, the Petitioner had not been able to enter into a gas supply agreement, the commercial terms of which were acceptable to MSEDCL; MSEDCL was not in a position to approve the spot purchase of fuel as suggested by the Petitioner; as the Petitioner was not in a position to procure gas at competitive or commercially viable rates for MSEDCL, no useful purpose would be served in continuing the PPA without there being a corresponding Gas Supply Agreement duly approved by MSEDCL; as the Petitioner had not been able to indicate any commercially viable source for purchase of gas even after expiry of the supplementary agreement No.3 (Gas Supply Agreement) on 31.03.2014, there was no use in continuing the PPA; accordingly, MSEDCL was hereby terminating the subject PPA dated 10.04.2007 due to the default on the part of the Petitioner to obtain gas at commercially viable rates and due to fact that the Petitioner had not been

able to get any gas supply agreement approved by MSEDCL in respect of expiry of the last Gas Supply Agreement on 31.03.2014; hence MSEDCL was terminating the PPA dated 10.04.2007 with effect from 01.04.2014 ie the date on which the last Gas Supply Agreement, duly approved by MSEDCL, expired, and because no Gas Supply Agreement had since been approved by MSEDCL as required under Clause 5.9 of the said PPA; and, since the entire understanding between the parties ie MSEDCL and the Petitioner was disrupted, MSEDCL was hereby terminating the PPA dated 10.04.2007 reserving all their rights to take action against the Petitioner in accordance with the extant law.

In reply thereto the Petitioner, vide letter dated 22.05.2014, informed MSEDCL that MSEDCL was bound to pay capacity charges and continue with the agreement dated 10.04.2007, even if MSEDCL did not wish to schedule power on account of the cost of R-LNG; use of R-LNG by the Petitioner was clearly recognized in the Power Purchase Agreement, and the energy charges for such use was provided as a part of the tariff; in the event MSEDCL did not wish to schedule power when R-LNG was used, on account of the price factor, MSEDCL was still liable to pay capacity charges; the purported termination of the PPA dated 10.04.2007 was without any merit; and MSEDCL would continue to be liable with the obligations assumed under the PPA dated 10.04.2007.

Again, vide letter dated 03.06.2014, the Petitioner informed MSEDCL that they were reiterating their position as conveyed in the earlier latter dated 22.05.2014, and MSEDCL should release all payments due to them. Vide their letter dated 25.07.2014, MSEDCL informed the Petitioner that MSEDCL had terminated the PPA dated 10.04.2007 with effect from 01.04.2013; hence MSEDCL had no liability towards the Petitioner; and the bills dated 06.05.2014, 05.06.2014 and 08.07.2014 and the supplementary bills for

electricity duty and MPCD consent fee for 2014-15 dated 21.07.2014 was being returned herewith.

Though Appeal No. 261 of 2013 was pending on the file of this Tribunal, both when MSEDCL had terminated the PPA and the above referred correspondence took place between the Petitioner and MSEDCL thereafter, it does appear that neither MSEDCL nor the Execution Petitioner had brought the fact, of alleged termination of the PPA, to the notice of this Tribunal at any stage before the said Appeal was disposed of by order dated 22.04.2015.

In Para 8 of its judgement in Appeal No. 261 of 2013 dated 22.04.2015 this Tribunal framed two issues ie (i) whether the impugned order was erroneous being based on incorrect reading of the provisions of the PPA dated 10.04.2007 particularly clause 4.3 and 5.9?; and (ii) whether the appellant (MSEDCL) was required to pay capacity charge when the appellant did not give consent to GSA/GTA?.

This Tribunal then observed that, in the impugned order, the CERC had given cogent reasons in arriving at the conclusion that the Execution Petitioner, due to heavy shortage of domestic gas, had to change the nature of primary fuel namely LNG/natural gas to R-LNG; LNG or natural gas or R-LNG were all covered by the definition of primary fuels; there was a shift only to one source of primary fuel, namely R-LNG; hence, the consent or approval of the distribution licensee was not required to be obtained prior to entering into the GSA/GTA between the Execution Petitioner and the gas supplier, namely GAIL; this was not a case of change from LNG/natural gas or R-LNG to liquid fuel, but was a case of change of inter-se primary fuel; since LNG/natural gas or R-LNG were all primary fuels, Article 4.3 of the PPA did not require the consent or approval of the distribution licensee to enable the Execution Petitioner, to enter into a contract or GSA/GTA with the gas supplier, namely GAIL; since there was a heavy shortage of domestic gas at

the relevant time, and MSEDCL was not agreeing to schedule power for the declared availability, the Execution Petitioner was left with no other option except to enter into GSA/GTA with GAIL in order to generate electricity for which purpose the plant in question was set up.

This Tribunal further held that the Execution Petitioner had been rightly held entitled to capacity charges as they remained in a position to generate electricity, and had declared necessary availability of electricity when MSEDCL had chosen not to schedule the quantum of electricity on the declared availability; MSEDCL had rightly been held to be under the obligation to pay capacity charges so long as the Execution Petitioner had declared available capacity, irrespective of whether MSEDCL scheduled the capacity offered by the Execution Petitioner or not; if MSEDCL did not wish to take electricity based on R-LNG, MSEDCL was required to compensate the Execution Petitioner with capacity charges in relation to the quantum of electricity for the total declared availability made by the Execution Petitioner on gas and/or R-LNG; they were unable to accept the contention of MSEDCL that prior approval of MSEDCL, in terms of Article 5.9 of the PPA, for entering into GSA/GTA, was required to be taken because such agreements have financial implications on MSEDCL; in the present case, the Execution Petitioner had only shifted the fuel source from natural gas to R-LNG which were primary fuels, no such consent or approval of MSEDCL was required; the contention of MSEDCL could have been accepted in case there was a change of primary fuel, namely from LNG/natural gas or RLNG to liquid fuel; and there was no perversity in the impugned order passed by the CERC.

Both the issues were decided against MSEDCL, and this Tribunal held that the appeal was liable to be dismissed. This Tribunal further held that MSEDCL was required to pay capacity charges to the Execution Petitioner even if MSEDCL did not give consent for the GSA/GTA, because there was

no change of fuel falling under the category of primary fuel to liquid fuel. Appeal No. 261 of 2013 filed by MSEDCL was dismissed, and the impugned order passed by CERC in Petition No. 16/MP/2012 dated 30.07.2013 was upheld. Further, MSEDCL was held to be under an obligation to pay capacity charges to the Execution Petitioner, even if MSEDCL did not give consent to the GSA/GTA because the Execution Petitioner, in the place of natural gas or fuel, was using R-LNG (primary fuel).

The aforesaid judgment of this Tribunal was affirmed by the Supreme Court in Civil Appeal No. 1922 of 2003 dated 09.11.2003 holding that the CERC and APTEL had correctly held that GSA/GTA with GAIL was permissible by the terms of the contract, and the consent or approval of MSEDCL was irrelevant; Clause 5.9 and Clause 4.3 operated in different spheres, and the requirements of the former could not be foisted on an arrangement permissible by the latter; capacity charges mandated under Clause 5.2 hinged on the declared capacity that the Station was capable of delivering to its beneficiaries; energy charges, on the other hand, were payable only against the actual energy delivered; MSEDCL's liability for the former was actual delivery agnostic; it arose as long as the declared capacity was made in terms of the PPA i.e. Clause 4.3; Clause 2.2.2 of the PPA prescribed that, even in case MSEDCL was unable to utilize the entire allocated capacity of the Execution Petitioner, or in case MSEDCL failed to comply with the payment obligations in accordance with the PPA, the Execution Petitioner shall be entitled to sell power to other parties, without prejudice to its claim for recovery of capacity charges from MSEDCL subject to the provisions of Clause 2.2.2; Clause 2.2.2 indicated the intention of the parties to the PPA to put capacity charges beyond the realm of actual energy supplied; MSEDCL's reading implied that such a fixed charge could be avoided and made subject to the consent of MSEDCL; and such a reading

went against the apparent intention of the parties to treat capacity charges as fixed charges under the PPA.

The Supreme Court further held that bearing in mind the background of the establishment of the Execution Petitioner, and the shortfall of domestic gas for reasons beyond the control of the Execution Petitioner, such a deviation from the plain terms was not merited and militated against business efficacy as it had a detrimental impact on the viability of the Execution Petitioner. While directing that the execution proceedings, pursuant to the Execution Petitioner before APTEL, be continued, the Supreme Court dismissed the appeal filed by MSEDCL.

It does appear, from the contents of the termination letter dated 08.05.2014, that the reason for termination of the PPA was the inability of the Execution Petitioner to obtain approval, for the Gas Supply Agreement executed by them with GAIL, from MSEDCL after expiry of the last Gas Supply Agreement on 31.03.2014; and the PPA dated 10.04.2014 was terminated by MSEDCL with effect from 01.04.2007 ie the date on which the last Gas Supply Agreement duly approved by MSEDCL had expired, and because no Gas Supply Agreement had been approved by MSEDCL thereafter as required in Clause 5.9 of the PPA.

As noted hereinabove the CERC, this Tribunal and the Supreme Court have all held that Article 5.9 of the PPA has no application and approval of MSEDCL was not required to be obtained by the Petitioner for entering into a Gas Supply Agreement with GAIL for supply of R-LNG which was also a primary fuel like LNG/Natural Gas. It is possibly, for this reason, that MSEDCL did not refer to the termination of the PPA during the course of hearing of Appeal No. 261 of 2013,

However, in Para 7 of Civil Appeal No. 1922 of 2023 preferred by them before the Supreme Court, against the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, MSEDCL narrated the relevant facts. Para 7(u) specifically referred to the fact that, on 08.05.2014, the Appellant (MSEDCL) had terminated the PPA when Respondent No.1 (RGPPL-Execution Petitioner) with effect from 01.04.2014 ie the date on which the last GSA duly approved by the Appellant had expired, and because no GSA had since been approved by the Appellant in terms of Clause 5.9 of the PPA. A copy of the termination notice was also annexed and marked as Annexure A12 to the said Appeal. Para 7(v) of the said Civil Appeal records that, on 12.05.2014, Respondent No.1 (RGPPL-Execution Petitioner) filed an application before APTEL in Appeal No. 261 of 2013 praying for directions qua Appellant (MSEDCL) to pay certain amounts every month to prevent it from becoming NPA; on 22.05.2014, Respondent No.1 disputed the termination letter; RGPPL had not approached any forum in order to obtain stay or challenge the said termination letter. A copy of the said letter dated 22.05.2014 was annexed and marked as Annexure A12 to the Civil Appeal.

In Para 8 of Civil Appeal No.1922 of 2023, MSEDCL had raised several grounds for preferring the Civil Appeal against the judgement of this Tribunal in Appeal No.261 of 2013 dated 22.04.2015. Ground (MM) is that:-

> *"the Appellant (MSEDCL), on 08.05.2014, had terminated the PPA dated 10.04.2007 with the Respondent No.1 (RGPPL) with effect from 01.04.2014 ie immediately after expiry of the last GSA duly approved by MSEDCL and because no GSA has since been approved by Appellant herein as required in Clause 5.9 of the said PPA and continuing with PPA without GSA would not have served any useful purpose"*.

Ground (NN) is that:-

"*Respondent No. 1, after termination of PPA, is raising monthly capacity charges bills to Appellant from January, 2019, however Appellant has returned the bills raised by Respondent No.1 as there is no valid contract is in existence between RGPPL and MSEDCL"*

Despite these facts being specifically stated, and grounds being raised in this regard, in the Civil Appeal filed by MSEDCL, the Supreme Court, in its Order in Civil Appeal No. 1992 of 2023 dated 09.11.2023, upheld the judgment of this Tribunal on its merits after analyzing the relevant clauses of the PPA, and dismissed the appeal filed by MSEDCL. The Supreme Court also made it clear that the execution proceedings, pursuant to the Execution Petition filed before APTEL be continued.

MSEDCL sought review of the judgment of the Supreme Court in Civil Appeal No. 1992 of 2023 dated 09.11.2023 by way of RP (C) No. 1997 of 2023 wherein also they had specifically raised this plea of the PPA having been terminated as early as on 08.05.2014. Para 4 of the said Review Petition are the grounds raised by MSEDCL for filing the review petition for the errors apparent on the face of the record. Under Para 4, below the head **"Re: Termination of the PPA has not been considered despite attaining finality"** are grounds (I) and (J).

Ground (I) is that:-

"Because the Impugned Order has failed to address the fact that the appellant had terminated the PPA on 08.05.2014 with effect from 01.04.2014 ie, immediately after expiry of the last GSA duly approved by MSEDCL, since no consent has been sought for any GSA from MSEDCL (as was required in Article 5.9 of the said PPA), thereafter continuing the PPA without GSA would not have served any useful purpose. The impugned judgement does not discusses this aspect".

Ground (J) is that:-

> *"Because the Impugned Order has failed to consider that the PPA is a determinable contract and that RGPPL has not challenged the termination of the PPA before any forum till date. Thus, the said termination has attained finality. Therefore, without prejudice to the contentions as raised hereinabove, MSEDCL cannot be saddled with any liability towards capacity charges from 01.04.2014, particularly considering that there was/is no valid contract existing between the parties from 01.04.2014."*

RP (C) No. 1997 of 2023 was also dismissed by the Supreme Court, by its order dated 19.04.2024, holding that, having perused the review petition, there was no error apparent on the face of the record; no case for review under Order XLVII Rule 1 of the Supreme Court Rules, 2013 had been established; and the review petition was, therefore, dismissed.

The validity or otherwise of the letter of termination dated 08.05.2014 was put in issue by the Execution Petitioner in their replies to the said letter, contents of which have been referred hereinabove. The grounds which were urged by MSEDCL in Petition No. 166/MP/2012 which culminated in an order being passed by the CERC on 30.07.2013, appear to have formed the basis of terminating the PPA as is stated in their letter dated 08.05.2014, The orders passed by this Tribunal in Appeal No.261 of 2013 dated 22.04.2015 , and in the second appeal by the Supreme Court in CA No. 1922 of 2023 dated 09.11.2023 have specifically rejected contentions which formed the basis for termination of the PPA by MSEDCL.

As noted hereinabove, the reasons which formed the basis for terminating the PPA (as is evident from the letter of termination issued by MSEDCL dated 08.05.2014) have been rejected not only by the CERC but also in appeal and second appeal by this Tribunal and the Supreme Court.

MSEDCL has now instituted fresh proceedings by way of Petition No. 276/MP/2024 before the CERC questioning the validity of the invoices raised by the Execution Petitioner on the ground that the PPA has been terminated on 08.05.2014. It is only if the CERC were to uphold the validity of termination of the PPA by letter dated 08.05.2014, would MSEDCL then be entitled to the relief sought for in the said petition. The mere fact that Petition No. 276/MP/2024 has been instituted by MSEDCL before the CERC, that too only in August, 2024 after hearing in the present EP stood initially concluded, would not justify dismissal of the EP on this score.

Suffice it make it clear that we have not expressed any conclusive opinion on the merits of Petition No. 276/MP/2024 filed by MSEDCL before the CERC and, in case of their success in the said Petition, the order now passed by us shall not disable MSEDCL from recovering the amounts due to it from the Execution Petitioner in terms of the order passed by the CERC. That does not, however, justify this Tribunal refraining from executing a decree in the discharge of its statutory functions under Section 120(3) of the Electricity Act.

The contention, urged on behalf of MSEDCL, regarding enforcement of only the operating part of the judgment of this Tribunal has already been dealt with earlier in this order. The relief sought in the present execution petition is only for execution of the judgment (order) passed by this Tribunal in Appeal No.261 of 2013 dated 22.04.2015, and does not expand the original decree/order. Such a prayer was specifically sought by the Execution Petitioner in the original proceedings before the CERC and was one among the two issues framed by this Tribunal in Appeal.

As observed earlier, the judgment of this Tribunal in **Sprng Soura Kiran Vidyut** can neither be read out of context nor can it be said that this Tribunal would, in granting the relief sought for in the present execution

petition, be required to go behind the decree. The validity of termination of the PPA, by letter dated 08.05.2014, is neither in issue nor are we required to consider its validity in the present execution proceedings. All that we have observed is that the grounds, which formed the basis of termination of the PPA, appear to have been considered and held against MSEDCL, by the CERC, this Tribunal and the Supreme Court. Suffice it to make it clear that the afore-said observations made in this regard shall not be understood as our conclusive opinion on this issue, for these are matters for the CERC to consider in Petition No. 276/MP/2024, instituted before it by MSEDCL, which Petition is still pending before it for its consideration. It is, likewise, made clear that we have not undertaken any examination of the submissions, urged on behalf of the Execution Petitioner, that there is no provision in the PPA enabling parties to unilaterally terminate the PPA as these are also matters which can urged for consideration before the CERC in Petition No. 276/MP/2024.

For the reasons afore-mentioned, and in as much as the validity or otherwise of the action of MSEDCL in terminating the PPA, is not the subject matter of the present execution proceedings, we see no reason to restrict grant of relief, in this execution proceeding, only to the period prior to the alleged termination of the PPA by MSEDCL. The contentions, urged on behalf of the Respondent-MSEDCL under this head, necessitate rejections.

VIII. ORDER OF THE SUPREME COURT: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that MSEDCL raised the ground, regarding their having terminated the PPA, before the Supreme Court in its Civil Appeal,

which has been dismissed; MSEDCL sought a review of the Judgment, and one of the specific grounds taken was with regard to the issue of alleged termination; the Review Petition was also dismissed; and MSEDCL cannot re-agitate the very same issue as a defence to the instant EP.

B. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that the liberty granted by the Supreme Court, with respect to continuation of the execution proceeding before this Tribunal, would not confer immunity from a challenge with respect to the maintainability of the EP, as no direction can be said to have been passed in contravention of the settled law; pleadings of the Judgment Debtor/MSEDCL before the Supreme Court, either in the Civil Appeal or in the Review Petition, does not either alter the "Decree" under execution nor would it tantamount to any shift in the original dispute/ lis, which binds the powers of an Executing Court; Para 37 of the Order of the Supreme Court can neither be interpreted to mean that the right of the respondents to raise objections, particularly in accordance with Section 47 CPC, has been curtailed nor can it be understood to mean that the execution petition was directed to be continued without considering the legal objections available in law to be raised by the Respondents; the Supreme Court, while adjudicating Civil Appeal No. 1922 of 2023, did not delve into the maintainability of the execution petition pending before this Tribunal *per se* (Refer: **Rajasthan Rajya Vidyut Prasaran Nigam Ltd Vs. Inox Wind Energy Ltd: 2024 SCC Online APTEL 48);** the respondent is entitled in law to raise objections qua maintainability of present execution petition; the Supreme Court had only stated that the execution proceeding be continued without specifically determining the stage from where it is to be continued; a combined reading of para 4 and para 37 of the judgment of the Supreme Court, in Civil Appeal No. 1922 of 2023 dated

09.11.2023, makes it clear that the directions in para 37 were given on the premise that the earlier Execution Petition No. 18 of 2022 filed on 23.11.2022 before this Tribunal was still pending during the pendency of proceedings in the Civil Appeal; as a natural consequence of dismissal of the Civil Appeal, the direction for continuation of the said execution proceedings (assuming it to be pending) came to be passed; however, the fact of the matter is that, during the pendency of Civil Appeal No. 1922 of 2023, the Execution Petitioner had withdrawn Execution Petition No. 18 of 2022 on 20.04.2023; at that stage only notice had been issued by this Tribunal on 25.11.2022; and, as the issue of maintainability of the present Execution Petition is a pure question of law, this Tribunal is not precluded from examining this aspect upon considering the legal objections raised by the respondents.

C. JUDGEMENT RELIED UPON UNDER THIS HEAD:

In **Rajasthan Rajya Vidyut Prasaran Nigam Ltd. v. Inox Wind Energy Ltd., 2024 SCC OnLine APTEL 48 (**Order in E.P. NO.4 0f 2021 dated 31.05.2024), the Petitioner had filed a petition before the CERC alleging violation of CERC (UI Charges and Related Matter) Regulations, 2009, as well as resort to deliberate gaming by the 1st respondent and thus, seeking to penalize the generating station and also permitting the petitioner to refuse inter-state open access to it in case, there is any further violation of more than 30% from the schedule and to limit the total energy sale by 1st respondent as per the Capacity Utilization Factor (CUF) for wind farm. By its order dated 09.05.2013, the CERC concluded that the charge of gaming stands proved against the 1st respondent, and accordingly directed it to pay a sum of Rs. 870 lakhs to the petitioner which it had gained during the relevant period on account of under injection of power, as compensation for the loss suffered by the petitioner. The said penalty amount was directed to

be paid by the 1st respondent to the petitioner within one month from the date of the order.

The 1st respondent assailed the said order dated 09.05.2013 of the CERC before this Tribunal by way of Appeal No. 162 of 2013 which was dismissed by judgment dated 26.11.2014 holding that there was no infirmity in the impugned order of the CERC. The Petitioner filed an EP before this Tribunal contending that, in view of Sub-Section 3 of Section 120 of the Electricity Act, 2003, this Tribunal is bound to execute any order made by it as a decree of the civil court; judgment dated 26.11.2014 had been passed by this Tribunal, it can be executed only by this Tribunal.

It is in this context that this Tribunal held that Section 120(3) makes any order passed by this Tribunal under the Act executable by the Tribunal as a decree of the civil court; however, in the instant case, the petitioner is actually and in effect seeking execution/enforcement of the order dated 09.05.2013 passed by CERC in Petition No. 14/MP/2011; what this Tribunal has done by way of the judgment dated 26.11.2014 is dismissal of the appeal filed by the 1st respondent against the said order dated 09.05.2013 of the CERC, thereby upholding the same; no fresh order or direction has been passed by this Tribunal *dehors* the order dated 09.05.2013 of the CERC; this Tribunal has neither modified nor reversed the said impugned order of the CERC; and, therefore, the petitioner should have approached the CERC by way of the execution petition for recovery of compensation from the 1st respondent as directed vide order dated 09.05.2013.

D. ANALYSIS:

As noted hereinabove, the Supreme Court, in its order in Civil Appeal No. 1922 of 2023 dated 09.11.2023, noted that RGPPL had filed an execution petition before this Tribunal seeking payment of Rs.5287.76

Crores together with an amount of Rs.1826 Crores in accordance with the order of APTEL dated 22.04.2013, and notice was issued on Execution Petition by order dated 25.11.2022. After analyzing the provisions of the PPA, and after taking note of the contents of the order of the CERC dated 30.07.2013 and the judgment of APTEL dated 22.04.2015, the Supreme Court dismissed the Appeal and held that the execution proceedings before APTEL be continued. The review petition filed by MSEDCL, in RP (Civil) No. 1997 of 2023 in Civil Appeal No. 1922 of 2023, was dismissed by the Supreme Court by its order dated 19.03.2024 observing that, having perused the review petition, there was no error apparent on the fact of the record, and no case for review under Order 47 Rule 1 of the Supreme Court Rules 2013 had been established.

While the afore-said orders of the Supreme Court, both in Civil Appeal No. 1922 of 2023 dated 09.11.2023 and in RP (Civil) No. 1997 of 2023 dated 19.03.2024, have resulted in the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 attaining finality, we have no quarrel with the submission, urged on behalf of MSEDCL, that the observation in the judgment of the Supreme Court, that the execution proceedings pending before this Tribunal be continued, does not disable MSEDCL from raising objections to the maintainability or on the merits of the Execution Petition filed by RGPPL. All the objections raised by MSEDCL, to the present Execution Proceedings, have been considered on its merits, and have not been rejected on the ground that the observations of the Supreme Court, to the effect that the execution proceedings pending before this Tribunal be continued, disabled MSEDCL from raising any objections thereto.

It must, however, be borne in mind that, considering the objections urged on behalf of MSEDCL, does not mean that this Tribunal should ignore the judgment of this Tribunal dated 22.04.2015, which is sought to be

executed in the present proceedings, or the orders passed by the Supreme Court in appeal there-against or in the order dismissing the review petition.

It does appear that dismissal of EP No. 18 of 2022 (which was filed by the execution petitioner on 22.11.2022) by the order of this Tribunal dated 20.04.2023, granting the petitioner liberty to file a fresh execution petition, if need be, after the Supreme Court hears and decides the Civil Appeal, was not brought to the notice of the Supreme Court at any time prior to its order in Civil Appeal No.1922 of 2023 dated 09.11.2023. The fact, however, remains that the observations of the Supreme Court, in Civil Appeal No. 1922 of 2023 dated 09.11.2023, and the liberty granted by this Tribunal while dismissing the earlier EP, enabled the Execution Petitioner to institute the present Execution Proceedings.

IX. CAN LPS, (AS WELL AS OTHER STATUTORY PAYMENT, SHIP OR PAY CHARGES – AS CLAIMED IN PRESENT EP), BE GRANTED?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that, as the relief for realisation of LPS has not been granted in the Original Decree, *(as well as for other statutory payment, Ship or Pay charges – as claimed in present EP)* relief. to that extent, cannot be granted; it is for the first time that the Execution Petitioner, through Annexure "Y", has computed the monetary claim which was not part of the original petition before the CERC, and was consequently also not made part of the original decree of the CERC; it did not even form part of the appellate order of this Tribunal confirming the original orders of the CERC; since the "Decree" under execution does not contemplate payment of either Late Payment Surcharge (LPS) or other statutory payment or Ship of Pay

Charges, the Executing Court cannot go behind the Decree and grant reliefs, which was not even part of such a “Decree”; this Tribunal, in ***Sprng Soura Kiran Vidyut (Supra)*** had observed that the purpose of execution proceedings is to enforce the verdict of the Court and, while executing the Decree, it is only concerned with the execution part of it and nothing else; the Court has to take the Decree at its face value; execution of the “Decree” is confined to what has been decreed; the Executing Court cannot go behind the decree for doing complete justice, and cannot grant what has not been awarded in the original proceedings which culminated in the decree; and, while referring to the judgment of the Supreme Court in ***Rajasthan Udyog Vs. Hindustan Engg. Industries Ltd., (2020) 6 SCC 660,*** this Tribunal, in ***Sprng Soura Kiran Vidyut (Supra)***, held that, if the operative portion of the decree does not give any specific direction which has now been sought afresh in the execution proceedings in the guise of a plea that substantial justice should be rendered or that an order should be passed to ensure that the petitioner can avail the fruits of the decree, the executing Court cannot grant any such relief.

B. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that the Petitioner is only seeking to execute the directions relating to MSEDCL’s obligation to pay capacity charges to it, when it has declared availability using RLNG; in each of the disputed years i.e., from FY 2013-14 onwards, the Petitioner has declared availability to WRLDC / WRPC on a daily basis, which has been cumulated at end of the month; the claim of monthly capacity charges is based on this declaration read with the respective CERC Tariff Regulations providing the formula capacity charges calculation; the tariff / capacity charges have been billed

as per the determination by CERC from time to time; and this has not been disputed by MSEDCL even in response to the present EP despite getting adequate opportunities.

Sri C.A. Sundaram, Learned Senior Counsel, would further submit that even though, in the Reply filed to the E.P. or in the hearing, MSEDCL did not question the claim of LPS or statutory payment or the Ship or Pay charges, in the written submissions, for the first time, certain submissions have been raised on these aspects; what is being claimed at Annexure Y of the E.P. is nothing but the components of capacity charges and the surcharge thereon as per the tariff regulations read with the PPA; for the sake of clarity, the columns of “Other Statutory Payment” and “Ship or Pay” have been indicated; these charges are part of the capacity charges and billed to all beneficiaries to whom power stands allocated; with regard to the surcharge, late payment charges, the same is in accordance with the PPA Article 5.1.4 read with the Applicable tariff regulations framed by CERC from time to time; and it cannot be the case of MSEDCL that a new round of litigation needs to be started by RGPPL to claim late payment surcharge when it is only consequential to the principal payment.

C. ANALYSIS:

In the present Execution Petition, the petitioner has claimed payment to them by MSEDCL of Rs.66,96,47,83,132/- (Rupees Six Thousand Six Hundred and Ninety Six Crores Forty Seven Lakhs Eighty Three Thousand One Hundred and Thirty Two only) towards outstanding dues including capacity charges, late payment surcharge etc. in terms of the PPA, and in compliance with the judgment of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. The breakup of this claim of Rs.66,96,47,83,132/- (Rupees Six thousand six hundred and ninety six crores Forty seven Lakhs Eighty three thousand One hundred and thirty two only) has been furnished

by the Petitioner in Annexure-Y to the Execution Petition. From the table in Annexure-Y, it is evident that the Execution Petitioner claims payment of Rs. 3,39,63,14,681/- (Rupees Three hundred and Thirty Nine Crores Sixty Three Lakhs Fourteen thousand Six Hundred and Eighty One only) towards energy charges, Rs.31,27,48,66,735/- (Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only) towards capacity charges, Rs.37,50,56,450/- (Rupees Thirty Seven Crores, Fifty Lakhs Fifty Six Thousand Four Hundred and Fifty Only) towards other statutory payments, and Rs.1,29,84,24,908/- (Rupees One Hundred and Twenty Nine Crores Eighty Four Lakhs Twenty Four Thousand Nine Hundred and Eight Only) towards ship or pay charges. Rs.6,50,28,02,079/- (Rupees Six Hundred and Fifty Crores Twenty Eight Lakhs Two Thousand and Seventy Nine only) is said to be the amount of realization, and thereby the Petitioner has arrived at the total principal outstanding dues of Rs.29,84,18,60,695/-. (Rupees Two thousand Nine Hundred and Eighty Four Crores Eighteen Lakhs Sixty Thousand Six Hundred and Ninety Five only). On this total principal outstanding amount, surcharge of Rs.37,12,29,22,437/- (Rupees Three Thousand Seven Hundred and Twelve Crores Twenty Nine Lakhs Twenty Two Thousand Four Hundred and Thirty Seven Only) is claimed, and thereby the total claim of Rs.66,96,47,83,132/- (Rupees Six Thousand Six Hundred and Ninety Six Crores Forty Seven Lakhs Eighty Three Thousand One Hundred and Thirty Two only) is arrived at.

As repeatedly held earlier in this order, this Tribunal had, in its judgment in Appeal No. 261 of 2013 dated 22.04.2015, only held that MSEDCL was required/ obligated to pay the Execution Petitioner capacity charges. It is un-necessary for us to undertake the exercise of determination of the quantum of capacity charges, since the table in Annexure-Y of the EP has not been disputed by MSEDCL. While they have raised several

objections to the EP being entertained, they have not raised any specific objection regarding the quantum payable towards capacity charges. Consequently, the decretal amount which the Execution Petitioner is entitled to is only the capacity charge of Rs.31,27,48,66,735/-. (Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only).

The question whether the direction of this Tribunal requiring/ obligating MSEDCL to pay capacity charges would bring within its ambit “other statutory payment”, and “ship or pay” charges and LPS thereon cannot be examined in the present Execution Proceedings, since, on the petitioners own admission in the table in Annexure-Y, there charges have been shown separately from that of capacity charges, and the order of this Tribunal (execution of which is sought) only requires/ obligates MSEDCL to pay the Petitioner capacity charges and nothing more. It is impermissible for this Tribunal, in Execution Proceedings under Section 120(3) of the Electricity Act, to examine whether or not the Petitioner is entitled to the other claims referred to in the Table in Annexure-Y of the EP, as that would result in this Tribunal going behind the decree (order) execution of which is sought in the present EP.

It is settled law that an executing court has jurisdiction only to execute the decree, i.e. it can enforce only the decretal liability. It has jurisdiction, conferred by Section 47 CPC, to decide all questions relating to execution, discharge and satisfaction of the decree, but it has no jurisdiction whatsoever over any other matter and cannot enforce any other liability. It is concerned only with enforcing the decretal liability and not any other. (**Maharaj Kumar Mahmud Hasan Khan v. Moti Lal Banker : AIR 1961 All 1 (FB) : 1960 SCC OnLine All 89)**. If a decree-holder wants to enforce a liability other than the judgment-debtor's decretal liability, it would strictly not be a question of

execution of the decree, and will not be within the jurisdiction of the executing court. (**Maharaj Kumar Mahmud Hasan Khan v. Moti Lal Banker : AIR 1961 All 1 (FB) : 1960 SCC OnLine All 89).** The Executing Court cannot travel beyond the original *lis*, between the parties, to any subsequent cause of action. It is also not open to the Executing Court to add to a decree, of which execution is sought, a direction or injunction that were neither prayed for nor formed part of the original lis between the parties; and the Executing Court cannot travel behind the decree to add or modify the directions contained therein. **(J&K Bank Ltd. v. Jagdish C. Gupta, (2004) 10 SCC 568; Gurdev Singh v. Narain Singh, (2007) 14 SCC 173).** The entire purpose of execution proceedings is to enforce the directions passed in the decree **(Firm Rajasthan Udyog v. Hindustan Engineering and Industries Ltd. (2020) 6 SCC 660).** Findings, even though binding, cannot form the basis of a proceeding for execution. **(SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9)**

There can be no execution or specific enforcement of a liability without a previous determination of the liability by a court which is incorporated in a formal document called a decree. Any question, that does not relate to the execution of the decree, is not within the jurisdiction of the executing court. The executing court can neither go behind the decree nor can it question its legality or correctness. The decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it. A Court executing a decree can neither add to such a decree nor vary its terms. It is not within the jurisdiction of the executing court to enforce any liability other than the judgment-debtor's decretal liability. It is also not open to the Executing Court to grant a direction that was neither prayed for nor formed part of the original *lis* between the parties. The entire purpose of execution proceedings is to enforce the directions passed in the

decree, and nothing more. **(SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9).**

This Tribunal would have such incidental and ancillary powers necessary to make fully effective the express grant of the statutory powers of execution under Section 120(3), however, within the bounds of its jurisdiction. As the jurisdiction of this Tribunal, to execute its orders, has been expressly confined by Section 120(3) to that exercised by a Civil Court executing a decree, it is only such incidental powers of execution available to a Civil Court that are also available to be exercised by this Tribunal, and not beyond. **(SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9; Paras Laminates (P) Ltd).** The executing court cannot go behind the decree. Going behind the decree, for doing complete justice, does not mean that the entire nature of the case can be changed, and what was not awarded can be granted by the executing court. (**SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9; Gurdev Singh v. Narain Singh, (2007) 14 SCC 173; Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660).** The purpose of execution proceedings is to enforce the verdict of the court. The executing court, while executing the decree, is only concerned with the execution part of it and nothing else. The court has to take the judgment at its face value. (**Meenakshi Saxena v. ECGC Ltd., (2018) 7 SCC 479); SPRNG Soura Kiran Vidyut (P) Ltd. v. Southern Power Distribution Co. of Andhra Pradesh Ltd., 2023 SCC OnLine APTEL 9).**

The entitlement of the Execution Petitioner, in terms of the PPA, is again a matter which would require this Tribunal to go behind and beyond the decree, and is an exercise which cannot be undertaken in Execution

Proceedings under Section 120(3) of the Electricity Act. The Petitioner is therefore not entitled to claim energy charges, other statutory payments and ship or pay charges in the present EP as such claims go beyond the decree. Irrespective of the fact, that the contents of the table in Annexure-Y to the EP do not appear to have been disputed by MSEDCL, it is impermissible for this Tribunal, in execution of the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015 and in exercise of its jurisdiction under Section 120(3) of the Electricity Act, to grant the Petitioner any relief which does not flow directly from the decree.

Even in so far as capacity charges. claimed fpr Rs.31,27,48,66,735/-, (Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only) is concerned, the Execution Petitioner admits to have realized Rs.6,50,28,02,079/- (Rupees Six Hundred and Fifty Crores Twenty Eight Lakhs Two Thousand and Seventy Nine only) and, consequently, it is only Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy Seven Crores Twenty Lakhs Sixty Four Thousand Six Hundred and Fifty Six only) (capacity charges of Rs. 31,27,48,66,735/- minus realization of Rs.6,50,28.02,079/-) which the Execution Petitioner is entitled to be granted in the present execution proceedings, as the order of this Tribunal only required MSEDCL to pay capacity charges and nothing more. Likewise, the Execution Petitioner's claim for payment of surcharge, due on the delayed payment, does not flow directly from the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, and cannot, therefore, be granted in the present Execution Proceedings.

Suffice it to observe that the order now passed by this Tribunal shall not disable the Execution Petitioner, to institute independent legal proceedings before the CERC raising such claims. Needless to state that, in

case any such petition is filed, the CERC shall consider such claims on its merits and in accordance with law.

X. DO THE OBJECTIONS RAISED BY THE GOVERNMENT OF MAHARASHTRA NECESSITATE CONSIDERATION IN THIS EP?

A. SUBMISSIONS URGED ON BEHALF OF THE GOVT OF MAHARASHTRA:

Sri A.M. Singhvi, Learned Senior Counsel appearing on behalf of the Government of Maharashtra, would submit that the Govt of Maharashtra seeks Impleadment/ Intervention in the present Execution Proceeding, as they are a proper and necessary party, mainly for the following two reasons, ie (i) it is based on the Government of Maharashtra's approval of the restructuring model for rvival of the erstwhile Dabhol Power Project that the subject PPA was entered into, and accordingly a viable and acceptable tariff was worked out ***(Ref. Article 5.0 of the PPA)***; consequently, under the Payment Security Mechanism, a tripartite agreement of the Government of Maharashtra with the Government of India and RBI was made a condition precedent for the present PPA ***(Ref. Article 7.2 of PPA)***; so much so that the PPA was contemplated to come into force only from the date of signing of the said tripartite agreement ***(Ref. Article 13 of PPA)***; the Government of Maharashtra was, thus, a party of interest in the framework of the PPA itself, based on which the present Execution Petition has been filed; (ii) it is based on the reciprocal representation and assurances between RGPPL and the Government of Maharashtra, through the intervention of PMO qua the PPA in question in particular, that the present execution petition against MSEDCL would not be maintainable at all, since, by pressing claims against MSEDCL through suppression of material facts in the present Execution Petition, the rights of the Government of Maharashtra are directly being prejudiced; and

since the execution order, if any, will have a direct and material bearing on the interests of the Government of Maharashtra, qua the PPA in question, they are compelled to file the present IA as being a proper and necessary party which otherwise was not required in the original proceedings.

Sri A.M. Singhvi, Learned Senior Counsel, would further submit that, with a view to protect the ultimate interest of the end consumers of Maharashtra and its State DISCOM, the Government of Maharashtra is seeking Impleadment/ intervention in the present Execution Petition, for the following reasons: (i) the Government of Maharashtra had granted waiver of certain taxes to RGPPL as a part of its revival plan in the year 2015 so that it can supply power at cheap rates to the Indian Railways, and in return an assurance and representation was made by RGPPL, through participation in meetings held in the said context in PMO, that the claims raised against MSEDCL (State DISCOM) by RGPPL, towards alleged capacity/fixed charges, will not be pressed; despite receipt of such beneficial financial assistance for revival, they have filed the present execution petition; the State Government is compelled to implead/intervene in the present Execution Proceedings, since RGPPL has backtracked from the said representation and assurances given by it to the Government of Maharashtra and the PMO; it is because RGPPL was availing tax waiver benefits from the State Government from 2015 till 2022, for supplying power to Indian Railways, that they had, purposefully, not filed any execution petition, despite the order of this Tribunal being passed in their favour in 2015 itself.

Sri A.M. Singhvi, Learned Senior Counsel, would also submit that the entire premise, of the State of Maharashtra seeking Impleadment in the present Execution Proceeding, rests upon the PMO meeting dated 17.08.2015based whereupon, to facilitate the revival plan of RGPPL, the State of Maharashtra agreed to grant state tax waivers (CST & VAT) and

waiver of transmission charges of STU ***(***aprrox. loss estimated under the head of "Financial Impact" in the Cabinet Note***)*** to RGPPL, so that it could sell power to Indian Railways at cheaper rate and revive its stalled project; such concession was agreed to by the State of Maharashtra, on the pre-condition that the alleged claim of RGPPL against MSEDCL, towards Fixed Cost charges as on that date to the tune of Rs. 1800 Crores, be withdrawn, since the PPA in question itself had been terminated; the PMO meeting minutes have not been withdrawn till date and stands valid and effective; PMO, in the said meeting, itself acknowledges the pre-condition *(withdrawal of alleged outstanding liability against MSEDCL),* and the necessity for the State of Maharashtra, to agree for grant of tax waiver concessions; RGPPL, being a participant in the said meeting, have not objected to the said pre-condition, and hence are now bound by the same; they cannot, therefore, press the present Execution Petition; after the PMO meeting, upon passing of the Cabinet Note on 06.10.2015, the then CM of Maharashtra had, on 14.10.2015, written to the PM intimating grant of tax waiver, and had requested that RGPPL be directed, through Power Ministry, to initiate steps for withdrawal of claims against MSEDCL, as agreed in the PMO meeting; RGPPL also acknowledged grant of tax waivers *(from 26.10.2015 to 31.03.2017)* through its letter dated 16.12.2016, and had thereby acted on the PMO meeting; through the said letter it also requested, the State of Maharashtra to extend the said tax waivers further from 01.04.2017, which was acted upon by the State of Maharashtra and tax waiver was extended upto 31.03.2022; based on the tax waiver, undisputedly RGPPL revived and it is only then that it could supply power to Indian Railways at cheaper rate from 2015 up to 2022; as such, now when RGPPL is pressing for realisation of alleged claims against MSEDCL through the present Execution Petition, despite earlier agreeing for withdrawal of such claims while seeking financial aid for revival, the State of Maharashtra's interests *(for being proper and*

necessary party) to realise and recover the said financial aid from RGPPL also interlinks with the present execution proceedings, as the Executing Court is bound in law to decide all issues that arises upon the objections raised during the execution proceedings; the Delhi High Court, in ***Simmi Dhawan Vs. Navin Malhotra & Ors (2023) SCC OnLine Del 3839***, has held that the Executing Court is deemed to have jurisdiction to decide all issues relating to right, title and interest in the property in question, and no separate suit is required to be filed in that regard, to avoid multiplicity of proceedings; furthermore, if this Tribunal, as an Executing Court, were to grant execution of the decree on the alleged claims of RGPPL against MSEDCL, it would be directly ruling on the PMO meeting having inconsequential impact for the State of Maharashtra, thereby taking away the entire validity of the premise for grant of tax waiver, and thereby ruling on the policy decision of the State of Maharashtra, by which tax waivers were granted; moreover, the direction of abeyance by PMO still continues to operate, as it has neither been withdrawn nor modified by the PMO till date; hence grant of relief, under the present execution petition, would tantamount to ignoring the PMO meeting and its consequential effect on the interested party i.e., the State of Maharashtra; it is settled law that Executing Courts cannot get into issues of Public Policy; and the Madras High Court, in ***P. Govindasamy Vs. Manickam & Ors. (2016) 1 L.W. 49***, has held that where a decision in a case would impinge or have a bearing on the rights of a third party, then they can be added in the proceeding as, in their absence, the controversy involved in the proceeding cannot be effectively or efficaciously and completely be decided.

Sri A.M. Singhvi, Learned Senior Counsel appearing on behalf of the Government of Maharashtra, would also make the following submissions contending that they are essential: (i) Period/term of Payment has not been determined by CERC, APTEL and the Supreme Court. (ii) RGPPL, as the

aggrieved party, has not challenged termination of the PPA, rather it had acted upon it firstly by supplying MSEDCL's share of power to Indian Railways, and secondly by not filing any Execution Proceedings till 23.11.2022, despite this Tribunal's Judgment having been passed in their favour on 22.04.2015; Execution Proceeding was pressed after supply to Indian Railways came to an end; thus, the factum of termination had attained finality in law, by conduct itself; (iii) declaration of power post termination was solely an act of self-commercial gain, by realising fixed cost charges. (iv) releasing LPS even for the period when the claimed amount was directed to be kept in abeyance by PMO directives which is still in force, and grant of relief thereof, would be prejudicial to the interests of the State of Maharashtra, and the State's end consumers; (v) conduct of RGPPL is also required to be seen as, despite being aware of the APTEL judgment passed in the year 2015, it, for no reason, had chosen not to press/file execution proceedings till finally in the year 2022 i.e., after availing the tax benefit granted by the State of Maharashtra and consequently supplying power to Indian Railways and commercially gaining thereby.

B. SUBMISSIONS URGED ON BEHALF OF THE PETITIONER:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that, apart from the fact that the Government of Maharashtra was not a party to any of the proceedings till now, it is seeking to get impleaded on completely frivolous grounds at this stage; to test the impleadment application, principles of Order 1 Rule 10 of the CPC, 1908 can be applied. (***Chaganti Lakshmi Rajyan & Ord v Kolla Rama Rao [1997 SCC Online AP 967], Vaggu Agamaiah and Others versus South Central Railway, Secunderabad and another [2001 SCC Online AP 820],*** *and* ***Mir Sardar Ali Khan and Others v Special Deputy***

Collector, Land Acquisition (Industries), Hyderabad, and Others [1972 SCC Online AP 139]; in ***Rahul Shah vs Jinendra Kumar Gandhi & Ors. [(2021) 6 SCC 418],*** the Supreme Court has held that, at the stage of execution, the executing courts should not issue notice on applications filed by third parties claiming rights etc; even otherwise, the waivers alleged to have been extended by the Government of Maharashtra in its impleadment application are misleading, and is an attempt to derail this EP; there is no special waiver extended by the Govt of Maharashtra to RGPPL, and the Scheme floated by the MoP was applicable to all gas based power plants which won the bid which was floated; the tax exemption benefits were available to all such plants to implement scheme of MoP, GoI and had no correlation with the PPA between RGPPL and MSEDCL.

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of the Petitioner, would further submit that, with regard to waiver of transmission charges and losses, the Indian Railways signed a PPA with RGPPL for 300-620 MW first for FY 2015-16 & FY 2016-17 under PSDF scheme and then for five years from 01.04.2017 till 31.03.2022, with the Govt. of Maharashtra agreeing to waive transmission charges, losses and VAT on fuel to ensure viability; however, Govt. of Maharashtra after FY 2017 did not provide for any waiver on transmission charges, losses and VAT due to which RGPPL had to bear transmission loss of Rs 1142 Crores for the supply of power from 2017 – 2022; Cross Subsidy Surcharge/ Additional Subsidy are applicable to Bulk Consumers (e.g. Railways) and not on Generators (e.g. RGPPL); sale of power by MSEDCL to Indian Railways has benefitted MSEDCL since the capacity charges billed to MSEDCL for the period of sale to Indian Railways has reduced to the extent of Rs. 2972 crores apart from earning transmission charges to the tune of Rs. 1142 crores; and, with regard to the settlement talks or keeping the claim of fixed charges in abeyance, the respective stands of Govt. of Maharashtra, MSEDCL as well as RGPPL has been

clearly captured by the Ministry of Power in a meeting held on 04.04.2024 and the Minutes issued on 22.04.2024.

C. JUDGEMENTS RELIED UPON UNDER THIS HEAD:

1. Under Or. 1 R. 10 of the Civil Procedure Code, a person may be added as a party in the following cases namely, (1) when he ought to have been joined as a plaintiff or defendant and is not joined or (2) when, without his presence, the questions in the suit cannot be completely decided. A Civil Court can direct impleadment of a third party in a suit only in a case where it is a proper or necessary party and otherwise as an interest in the subject matter of the suit. Where the decision in the case would impinge or have a bearing on the right of the concerned party, then they can be added in the suit, immaterial of the fact that they had filed a separate suit for the same. Individuals, who have no right or interest in the suit property, would not be added as parties in the suit. Even parties, sought to be added as defendant, need not be interested in the whole of the subject matter of the suit. Individuals, in whose absence the controversy involved in the suit could not be effectively or efficaciously and completely decided as necessary parties to the suit, are to be impleaded. A necessary party can be impleaded even at an appellate stage after dismissal of the suit by a trial Court. To put it differently, persons likely to be affected by the ultimate outcome of the case must be impleaded as necessary parties. **(P. Govindasamy v. Manickam, 2015 SCC OnLine Mad 13147 : (2016) 1 LW 49).**

2. Mir Sardar Ali Khan v. Special Deputy Collector, 1972 SCC OnLine AP 139, the Division Bench of the Andhra Pradesh High Court held that the very intendment and purpose of Order I, Rule 10(2) C.P.C. was to add parties, necessary or proper, to enable the Court to effectually and completely adjudicate all the questions that are involved in a case; the use of the words “at any stage of the proceeding” in sub-rule 2 of Rule 10 in order

I manifests that the power vested in the Court under that provision can be exercised only when the proceedings before it are alive and still pending; in other words, the application of Order I Rule 10(2) should be confined only to cases where any proceedings are pending before the Court; the very purpose and object of this provision being to make any party a defendant or respondent, or plaintiff or appellant in a proceeding, in order to enable the Court to make an effective and complete adjudication of the questions involved in the case, when once the adjudication itself of all the disputes in the case is over, this provision cannot be made use of by any party; this view gained support from the decision of the Madras High Court in **Lingammal v. Chinna Venkatammat: (I.L.R. 6 Madras 237);** in the case on hand, the appeal was already disposed of; admittedly there was no proceeding pending before them; it was only in cases or proceedings before them that the question of adding any third party would arise, apart from the desirability or propriety of doing the same; in this case, the provisions of Order I, Rule 10(2) C.P.C. do not come to the aid of the petitioners to maintain this application in view of the admitted fact that no appeal or proceedings was pending now before them.

3. In **Chaganti Lakshmi Rajyan v. Kolla Rama Rao, 1997 SCC OnLine AP 967,** a suit was filed on the basis of a promissory note alleged to have been executed by one *Mr. Raghava Rao*, husband of the first petitioner and father of Petitioners 2 to 4 before the High Court. After summons were received by the defendant *Raghava Rao*, he engaged an Advocate, who sought time for filing written statement. The defendant was later called absent and set *ex parte*. An *ex parte* decree was passed, and the respondent-decree holder filed E.P. The petitioners filed applications to implead themselves as parties to the execution petition on the ground that *Raghava Rao* was absconding, he could not be traced in spite of their best efforts, including giving a report in the police station, and the respondent

who was having knowledge about these facts purposely omitted to implead the petitioners as parties to the suit who had a very good defence in the suit; and therefore, without impleading them, the execution petition cannot be proceeded as the decree is not valid and binding on them.

After referring to Order 1 Rule 3, and Order 1 Rule 10 CPC, the Andhra Pradesh High Court held that necessary parties are those who ought to have joined and without whom no order can be passed effectively as their presence is necessary for the constitution of the suit itself; in other words, without whom no effective decree can be passed; a proper party is one without whom no effective order can be made, whose presence is necessary for a complete and final adjudication of the dispute; normally speaking, the plaintiff is the dominant litus, and he is the master of the suit; he can choose parties to the suit as well as the forum; he cannot normally be compelled to fight against a party whom he does not wish to fight and against whom he does not seek any relief; the question of addition of parties under Order 1, Rule 10 CPC mainly not one of initial jurisdiction of the Court, but clearly of judicial discretion which has to be exercised in the light of the facts and circumstances of each case; for instance, where the subject matter of the litigation is as regards declaration of status or legal character the accepted rule of direct interest or interest in presenti may be relaxed, provided the Court opines that by adding such a party, it would be in a position effectively and completely adjudicate upon the controversy.

4. On the question, whether Order 1, Rule 10 CPC, had application to proceedings other than suits and appeals, the A.P. High Court, in **Chaganti Lakshmi Rajyan v. Kolla Rama Rao, 1997 SCC OnLine AP 967**, relied on its earlier Division Bench Judgement, in **Sardar Ali Khan v. S. Deputy Collector, 1993 (2) ALT 155,** wherein it was held that the scope and application of Order 1, Rule 10(2) CPC was to add parties, necessary or

proper, to enable the Court, to effectually and completely adjudicate all questions that were involved in a case; the use of the words “at any stage of the proceeding” in sub-rule (2) of Rule 10 in Order 1 manifests that the power vested in the Court under that provision can be exercised only when the proceedings before it are alive and still pending; in other words, the application of Order 1, Rule 10(2) should be confined only to cases where any proceedings are pending before the Court; the very purpose and object of this provision being to make any party a defendant or respondent or plaintiff or appellant in a proceeding, in order to enable the Court to make an effective and complete adjudication itself of all the disputes in the case is over, this provision cannot be made use of by any party; in the light of the Division Bench Judgement, an application to implead as parties to the execution petition is not maintainable after the disposal of the suit; pleas like (i) the property attached is not the exclusive property of the Judgment-debtor or it is the Joint family property in which other co-parceners have rights along with the Judgment debtor; (ii) the property sought to be attached is the exclusive or separate property of one of the heirs *etc.*, can be raised by way of other proceedings; and Order 21, Rule 58, or Rule 103 or Section 47 of the Code of Civil Procedure amply provide safeguards in such a situation.

5. In **Vaggu Agamaiah v. South Central Railway, Secunderabad, 2001 SCC OnLine AP 820,** the question that fell for consideration was whether a non-party to the litigation, in a reference under Section 18 of the Land Acquisition Act, could be brought on record, that too at the stage of execution. After referring to Order 1 Rule 10(2) of the Code, the High Court held that the words “……whether as plaintiff or defendant……..” clearly go to show that this provision can be invoked only when the original or part proceeding is pending and not at the stage of execution; the Court below had committed a jurisdictional error in allowing the application to

implead a party under Order 1 Rule 10(2) of the Code at the stage of execution.

D. ANALYSIS:

As reliance is placed, on behalf of the Govt of Maharastra, on certain clauses of the PPA, it is useful to note what these clauses stipulate. Clause **5.0** of the PPA relates to Tariff**,** and stipulates that the Tariff of this station has been worked out based on the restructuring model as approved by GoI, GoM and IFIs for revival of the erstwhile Dabhol Power Project; this Station cannot be compared to any other regulated power station as both financial and technical parameters have been restructured to arrive at a tariff, which is viable and acceptable. Clause 5.1.2 of the PPA relates to Plant Life, and stipulates that the financial consultants of both IFIs and GOI had assumed plant life of 25 years; however as per prudent operating practices, life of Gas Turbines (GTS) was only for 15 years and there was need for Renovation and Modernisation (R&M) of GTs at the end of 15 years for extension of life for which substantial investment (about Rs. 3000 Crores based on current estimates) shall be required; RGPPL and MSEDCL shall mutually discuss and finalise the quantum of such investment required at the relevant time to enable extension of the life of the Station ie generate the specified quantum of electricity during the period beyond 15 years and till 25 years; in the event of any disagreement as to the amount of the required investment the same shall be referred to CERC for adjudication; the Impact of such capital infusion has not been presently considered in the tariff; and the parties agree that the impact of such investment on tariff shall be appropriately worked out and the same will be additionally paid by MSEDCL

Clause 5.1.3 of the PPA relates to Project Cost, and provides that, at the time of asset transfer, provisional project cost of Rs. 10303 Cr comprising of Rs. 7803 Cr for power plant and Rs 2500 Cr for LNG terminal has been

considered as total completed cost of the project till COD of the last block; the Project Cost was subject to the provisions of common term loan agreement (CTLA) and approval of GoI on completion of revival activities. Clause 5.1.4 relates to Capital Structure, and it is acknowledged that the equity base of Rs 1765 Cr includes an equity of Rs. 265 Cr by MSEB Holding Company Ltd. and that MSEDCL has agreed to increase the Capacity Charge of Rs. 0.93 per Kwh agreed at the time of asset takeover by additional Rs 0.03 per Kwh (total of Rs. 0.96 kWh) to reflect RoE @ 14% on MSEB Holding Company's Equity. Clause 5.2 of the PPA relates to Capacity Charge, and sub-clause (i) thereof provides that the Annual Capacity Charge (ACC) of Power Block for supply of power from the station worked out to Rs. 1446.451 Cr per annum based on capacity charge of 96p/KWH finalized at the time of asset takeover by RGPPL. This Capacity Charge of 0.96/KWh is increased to 98.5p/KWH pursuant to discussions under the aegis of GoI. This Capacity Charge of 98.5p/KWH is subject to further review and finalization by GoI and GOM pursuant to the ongoing restructuring exercise under consideration by GoI to ensure project viability.

Clause 7.2 of the PPA relates to Tripartite agreement, and records that it is agreed that a Tripartite Agreement shall be signed among GOI, GOM and RBI for payment from GOM's share in central devolution through RBI account in the event of default in payment by MSEDCL in accordance with the Tripartite Agreement reached for payment of the dues to Central Public Sector Undertakings; this is a condition precedent of this Agreement; and it is agreed that TPA shall be executed before COD of last block (ie. Block-1) The draft Tripartite Agreement is enclosed at Annexure-A. Clause 13.0 of the PPA relates to the Effective date and duration of the Agreement, and stipulates that the Agreement shall come into force from the date of Signing of the Tripartite Agreement to cover supplies from Ratnagiri Gas & Power Station; subject to the fulfilment of the above Condition Precedent(s), the

Agreement for all purposes and intent and shall remain operative upto completion of Twenty Five (25) years from COD of last unit of the Station, unless the parties with mutual consent agree to extend the Agreement

The aforesaid clauses of the PPA, no doubt, reflect the involvement of and the efforts put in both by the Govt of India and the Govt of Maharashtra to revive the Dabhol Power Plant, and to make it operational and functional. The fact, however, remains that the terms of the PPA, as interpreted by the CERC, this Tribunal and the Supreme Court, obligated only MSEDCL to pay capacity charges to RGPPL. In these Execution Proceedings, we are only concerned with whether, in view of the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, MSEDCL should pay capacity charges to RGPPL; and, if so, the actual amount payable in this regard. It is in this context, that the application of the Govt of Maharashtra seeking to be impleaded as a respondent to this EP, more so when they were not parties to any of the earlier proceedings, assumes relevance.

While the Respondent-MSEDCL is undoubtedly a Government of Maharashtra Utility. it is a company incorporated and registered under the Companies Act, 1956, and a legal entity distinct from that of the Government of Maharashtra. The order of this Tribunal, in Appeal No. 261 of 2013 dated 22.04.2015 (execution of which is sought), required/ obligated MSEDCL to pay capacity charges to the Execution Petitioner. Neither could any direction have been issued nor was any direction in fact issued to the Government of Maharashtra to pay capacity charges to the Execution Petitioner. Further, the Government of Maharashtra was not even a party either to the original proceedings before the CERC in Petition No. 166/MP/2012 which culminated in an order being passed on 30.07.2013 nor was it a party to Appeal No. 261 of 2013 filed by MSEDCL before this Tribunal which culminated in the judgment being passed on 22.04.2015. The Government of Maharashtra

was not even a party to Civil Appeal No. 1922 of 2023 filed by MSEDCL which culminated in an order being passed by the Supreme Court on 09.11.2023. All these orders (order of the CERC, this Tribunal and the Supreme Court) are orders which are binding inter-parties, i.e. orders to which both RGPPL and MSEDCL are bound by. The said orders are not applicable to the Government of Maharashtra as it was neither a party to, nor was any direction issued to them in, the said proceedings

The correctness or otherwise of either the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2013, or that of the Supreme Court in Civil Appeal No. 1922 of 2023 dated 09.11.2023, cannot be examined in execution proceedings, as the scope of inquiry in these proceedings is limited only to ascertain what the order of this Tribunal (which is sought to be executed) stipulates, and nothing more. It is also not as if the Execution Petitioner has sought lifting of the corporate veil raising any contention that the liability of MSEDCL, to pay capacity charges to them, must instead be borne by the Government of Maharashtra. The directions sought in the present EP is only against MSEDCL, and not against the Government of Maharashtra. Further, there is no provision in the Electricity Act which confers jurisdiction on this Tribunal either to pass orders for or against the State Government, and this Tribunal does not exercise any jurisdiction over the Government - either State or Central. Prejudice, if any, caused to the Government of Maharashtra, either by the judgment of this Tribunal or by the order of the Supreme Court, cannot be agitated in the present Execution Proceedings. While an obligation is no doubt cast on the regulator as well as the distribution licensees to protect consumers' interest, discharge of any such an obligation cannot be at the cost of violating orders of this Tribunal, more so an order which has attained finality on the said order being affirmed by the Supreme Court. Judgments inter-parties, which have attained finality, cannot be sought to be re-opened, that too in Execution Proceedings, much

less on the ground that such judgments/ orders may have an adverse effect on the interest of the end consumers.

The main thrust of the submissions of Sri. A.M. Singhvi, Learned Senior Counsel, is that the Government of Maharashtra had extended several concessions and benefits to the Execution Petitioner, despite which they were claiming a huge sum from MSEDCL towards capacity charges, payment of which would affect the interests of consumers in the State of Maharashtra.

This submission, urged on behalf of the Govt of Maharashtra, cannot be understood as a plea of “set-off”, as any plea of set off should fall within any one of the five different meanings which can be ascribed to the said term, namely, (*a*) statutory or legal set-off; (*b*) common law set-off; (*c*) equitable set-off; (*d*) contractual set-off; and (*e*) insolvency set-off. (**Jurong Aromatics Corpn. Pte. Ltd. v. BP Singapore Pte. Ltd., 2018 SGHC 215 (High Court of Republic of Singapore); Bharti Airtel Ltd. v. Aircel Ltd. & Dishnet Wireless Ltd. (Resolution Professional), (2024) 4 SCC 668)** Contractual set-off is a matter of agreement. Statutory or legal set-off is created by a statute. For example, Order 8 Rule 6 of the Code of Civil Procedure, 1908. The claim for an equitable set-off must have a connection between the plaintiff's claim for the debt and the defendant's claim to set-off, which would make it inequitable to drive the defendant to a separate suit. Further, such a claim for equitable set-off should arise out of the same transaction, or transactions which can be regarded as one transaction. Equitable set-off is allowed in common law, as distinguished from legal set-off, which is a statutory right. **(Bharti Airtel Ltd. v. Aircel Ltd. & Dishnet Wireless Ltd. (Resolution Professional), (2024) 4 SCC 668) Professional), (2024) 4 SCC 668)**.

The general principles of set-off are that a person who is obliged to pay a sum of money to another person, and also has in his hands an amount of money which that other person is entitled to claim from him, then, instead of physically entering into two transactions by exchanging money twice, that person may utilize the money available in his hands to satisfy the claim due and legally recoverable from such other person to him. This equitable principle has its limitations. While a debtor, making an adjustment or set-off, may have done so on its own volition, the validity of such action can be called in question and decided by a court of law wherein the creditor seeks enforcement of his claim. **(Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504).**The difference between legal set off and equitable set off is that, while in the former, the Court is bound to entertain and adjudicate upon the plea when raised, the defence of equitable set off cannot be claimed as a matter of right, and the court has a discretion either to adjudicate upon it or to order it to be dealt with in a separate suit. The discretion to grant equitable set off is a judicial discretion which should be exercised according to settled rules rather than individual fluctuating and unsettled opinion. (**Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104).** No claim for contractual, statutory or equitable set-off is made, in these execution proceedings, on behalf of the Govt of Maharashtra.

Further, in execution proceedings such as the present, it is only two cross decrees which can be equitably set off because, after the decrees are passed, there is precious little to be enquired into, unlike a claim of set off based on separate transactions in a suit under order VIII Rule 6 CPC; Thus, on the execution side, two cross decrees, although arising out of two separate and unconnected transactions, can be permitted to be equitably set off. In a proper case, equitable set off can be permitted, although the decrees may have been the result of unconnected and independent transactions.

(**Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104 (FB)).** While two cross decrees can be sought to be equitably set off in execution proceedings, as the claims have already been adjudicated by a competent court, no cross-decree has been obtained either by MSEDCL or the Govt of Maharashtra. We are saved the trouble of delving into these aspects in the present EP, since no such set-off is claimed by the Government of Maharashtra.

Reliance placed on behalf of the Government of Maharashtra on the judgment of the Delhi High Court, in **Simmi Dhawan vs. Naveen Malhotra (2023 SCC OnLine Del 3839),** is also misplaced.

In **Simmi Dhawan vs. Naveen Malhotra (2023 SCC OnLine Del 3839),** the decree holder (DH) sought execution of the decree for specific performance and possession passed by this Court in *CS (OS) No. 984/2014*. The Delhi High Court had passed a decree of specific performance in favour of the Plaintiff - Smt. Simmi Dhawan against the Defendant - Sh. Naveen Malhotra in respect of property in land ad-measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi. A decree of possession was also passed in favour of Mrs. Dhawan directing Mr. Malhotra to deliver vacant and peaceful possession of the suit property. Till the sale deed was executed and possession was transferred to Mrs. Dhawan, the Court directed that there shall be a permanent injunction restraining Mr. Malhotra from creating any third party interest in the suit property.

Respondent No. 1 was the judgment debtor (JD), and Respondent Nos. 2 to 10 were the objectors, who opposed execution of the decree, claiming interest in different portions of the suit property.

It is in this context that the Delhi High Court observed that there were varying and diverse claims by different parties to different portions of the suit property; Respondents 2 to 10, who had based their claims on the basis of legal proceedings and legal documents in their favour, were not parties to the suit filed by the decree holder i.e. *CS (OS) No. 984/2014*; rather, when Respondent no. 8 sought to be made a party in the said suit filed by the decree holder, the same was opposed by the decree holder on the ground that he was a stranger to the suit, as he was neither a party nor a signatory to the Agreement to Sell and Purchase between the DH and the JD herein; the conflicting claims and interests as asserted and professed by Respondents 2 to 10 had not been adjudicated by the Court at the time of passing the decree in favour of the decree holder; when there were conflicting claims set up by the respondents on the basis of legal documents and legal proceedings, then the issue with respect to their title and interest in the suit property had to be adjudicated by the Court; in the present execution proceedings, no order could be passed in favour of the decree holder merely on the basis of the decree, when varying claims of Respondents 2 to 10 were yet to be adjudicated by the Delhi High Court; the said Respondents were never made parties in the suit filed by the DH; the Court could not ignore the assertions made on behalf of Respondents 2 to 10 of valuable rights having accrued in their favour on the basis of various proceedings carried out as per law; and the Court had to adjudicate and define the interests, rights and title of the Respondents, if any, by carrying out detailed examination and trial.

The Delhi High Court further held that the Executing Court was required to determine and decide all such issues that arose upon the objections raised during the execution proceedings; in terms of Order XXI Rule 101 of the Civil Procedure Code, 1908 (CPC), any issue pertaining to right, title and interest claimed in the property in question, arising between

the parties to the proceedings, and that were relevant to the adjudication of the objections as raised to the execution of a decree, shall be determined by the Executing Court; no separate suit was required to be filed by the parties objecting to the execution of a decree and the Executing Court was deemed to have jurisdiction to decide such issues relating to right, title or interest in the property in question; such a course of action was necessary to avoid multiplicity of proceedings, and to cut down on any prolonged litigation between the parties who were claiming right, title and interest in the property, which was the subject matter of the execution; and such a determination of the conflicting claims of the parties, over the property in question which was the subject matter of the execution proceedings, was germane in bringing finality to the conflicting claims.

Relying on the judgements of the Supreme Court in **Noorduddin v. Dr. K.L. Anand**, **Vateena Begum v. Shamim Zafar, Silverline Forum Pvt. Ltd. v. Rajiv Trust, Bhanwar Lal v. Satyanarain: (1995) 1 SCC 6, Sameer Singh v. Abdul Rab, N.S.S. Narayana Sarma v. Goldstone Exports (P) Ltd.,** and **Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation connected matters,** as also Order 21 Rules 97, 101 and 103 CPC, the Delhi High Court held that no orders can be passed in favour of the decree holder at this stage; the various issues as raised on behalf of Respondent Nos. 2 to 10 would have to be adjudicated by the Court after receiving evidence upon trial; issues would have to be framed by this Court; and thereafter directions would have to be given to Respondents 2 to 10 to file their evidence before this Court. Considering that various conflicting claims, as regards right, title and interest of the parties in the property in question had to be adjudicated, the Delhi High Court directed that the Respondents, who were in physical possession of the respective portions of the property in question, shall maintain status quo as regards possession and title during the pendency of the present proceedings.

It is relevant to note that Order XXI of the Civil Procedure Code relates to execution of decrees and orders. Rule 97 thereunder relates to resistance or obstruction to possession of immovable property. Rule 97(1) stipulates that, where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. Rule 97(2) stipulates that, where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions contained in Order XXI.

Order XXI Rule 98 relates to orders after adjudication. Rule 98(1) provides that, upon the determination of the questions referred to in Rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule (2), (a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or (b) pass such other order as, in the circumstances of the case, it may deem fit. Rule 101 relates to the question to be determined and, thereunder, all questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and, for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. Rule 103 requires orders to be treated as decrees and, thereunder, where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

As noted hereinabove, **Simmi Dhawan vs. Naveen Malhotra (2023 SCC OnLine Del 3839)** was a case where the right and title to the decretal property was claimed by certain objectors who were not parties to the Suit. The objectors, who were not parties to the suit, had claimed right and title over the property which was the subject matter of the decree, and as they were sought to be dispossessed in terms of the said decree. The said judgment, in **Simmi Dhawan,** cannot be relied upon by MSEDCL which was a party to the petition filed before the CERC, and was the appellant both in the appeal filed before this Tribunal and before the Supreme Court. It is no doubt true that the Government of Maharashtra was not a party to the proceedings either before the CERC or before this Tribunal or even before the Supreme Court. The fact, however, remains that it is not even the case of the Govt of Maharashtra, in the present EP, that they have the sole right, to the exclusion of MSEDCL, over the amount which MSEDCL has been directed to pay RGPPL towards capacity charges nor have they claimed any set off.

The scope and ambit of Order XXI Rules 97 to 103 was in issue before the Delhi High Court in execution proceedings, that too on applications being filed by several objectors claiming right and title over the property which was the subject matter of the decree passed in a Suit to which they were not parties to. Reliance placed both by MSEDCL, and by the Government of Maharashtra, on **Simmi Dhawan,** is therefore wholly misplaced.

The power conferred on the executing court to decide issues relating to right, title and interest in the property is with respect to a property which is the subject matter of the execution proceedings, and relates to a matter which falls within the jurisdiction of an executing court. That does not mean that this Tribunal can, in execution proceedings, entertain disputes wholly unconnected with the lis or adjudicate any dispute unconnected with the

decree sought to be executed. All that this Tribunal is empowered to do, in the exercise of its jurisdiction under Section 120(3) of the Electricity Act, is to execute the order passed by this Tribunal earlier and nothing more. In executing such orders under Section 120(3) of the Electricity Act, this Tribunal cannot be said to have entered into domain of public policy.

Reliance placed on the judgment of the Madras High Court in **Govindasamy vs. Manikyam [2016 (1) Law Weekly 49]** is also misplaced. The contention regarding termination of the PPA has already been dealt with earlier in this order, and does not bear repetition. The other contentions regarding supply of power to Indian Railways etc. are wholly extraneous to the present execution proceedings as the scope of inquiry in the present proceedings is confined only to execution of the order passed by this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015, and nothing more.

The contention that the execution petition was filed only on 23.11.2022 to execute the order passed by this Tribunal, more than seven and half years earlier on 22.04.2015, necessitates rejection in as much as it is not even contended before us that the Execution Petition, as filed, is barred by limitation. As long as the Execution Petition is held to have been filed within limitation, (which is 12 years under Article 136 of the Schedule to the Limitation Act), it is impermissible for this Tribunal to refuse to entertain the present Execution Petition on this score. It is relevant to note that the Supreme Court has also, in its order in Civil Appeal No. 1922 of 2023 dated 09.11.2023, directed that the execution proceedings be continued. All that this Tribunal is required to do, in the present execution proceedings, is to examine whether the relief sought by the Execution Petitioner is strictly in terms of the order of this Tribunal in Appeal No. 261 of 2013 dated 22.04.2015. The conduct of the Execution Petitioner (a subsidiary of NTPC which is a Government of India Public Sector Undertaking) is not in issue nor

can it be put in issue in the present execution proceedings instituted under Section 120(3) of the Electricity Act.

As the plaintiff is the dominant litus and the master of the suit, he can choose parties to the suit (Petition filed before the CERC). He cannot normally be compelled to fight against a party whom he does not wish to fight, and against whom he does not seek any relief. Under Order 1 rule 10 CPC, necessary parties are those who ought to have been joined as parties and without whom no order can be passed effectively as their presence is necessary for the constitution of the suit itself. In other words, without them no effective decree can be passed. A proper party is one without whom no effective order can be made or, in other words, whose presence is necessary for a complete and final adjudication of the dispute. A person may be added as a party to a proceeding only (1) when he ought to have been joined as a plaintiff or defendant and is not joined or (2) when, without his presence, the questions in the suit cannot be completely decided. Persons likely to be affected by the ultimate outcome of the case must be impleaded as necessary parties. The very purpose and object of this provision is to make any party a defendant or respondent, or plaintiff or appellant in a proceeding in order to enable the Court to make an effective and complete adjudication of the questions involved in the case.

It is not as if, without impleading the Govt of Maharashtra, no order can be passed effectively nor was their presence necessary for the constitution of the Petition filed by RGPPL before the CERC which culminated in the order dated 30.07.2013 being passed. As the present proceedings are for execution of a decree (order), the test of inability to pass an effective decree in their absence, has no application. It is also not as if, without the Govt of Maharashtra, no effective order can be made or that their presence is necessary for a complete and final adjudication of the dispute. It is clear,

therefore, that the Government of Maharashtra is neither a necessary nor a proper party to these execution proceedings.

Further, as held by the Andhra Pradesh High Court, in **Vaggu Agamaiah v. South Central Railway, Secunderabad, 2001 SCC OnLine AP 820,** Order 1 Rule 10(2) CPC can be invoked only when the original or part proceeding is pending and not at the stage of execution; and allowing the application, to implead a party under Order 1 Rule 10(2) of the Code at the stage of execution, would constitute a jurisdictional error. On this ground also, the application filed by the Govt of Maharashtra, seeking impleadment in the present Execution Proceedings, is liable to be rejected.

As held by the Supreme Court, in **Rahul S. Shah v. Jinendra Kumar Gandhi, (2021) 6 SCC 418,** the court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice, on an application of a third party claiming rights, in a mechanical manner; and, further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of the suit if due diligence was exercised by the applicant.

Both on the ground that the Government of Maharashtra is neither a necessary nor a proper party to the present execution proceedings, and also on the ground that the objection raised by them, to the grant of the relief sought for by the Execution Petitioner, does not merit acceptance, we see no reason to entertain the impleadment petition or the objection raised by the Government of Maharashtra on the merits of the EP filed by RGPPL.

Needless to state that any claim, which the Government of Maharashtra may have against the Execution Petitioner, can always be agitated by them in independent legal proceedings.

XI. WOULD THE SUBSEQUENT EVENT OF THE INTERIM ORDER PASSED BY THE CERC REQUIRE THIS TRIBUNAL TO REFRAIN FROM EXECUTING THE DECREE?

A. SUBMISSIONS URGED ON BEHALF OF MSEDCL:

Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSEDCL, would submit that the Interim Order passed by CERC in I.A. No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, has a material bearing on the present Execution Petition, as it pertains to and deals with the treatment of claims filed by RGPPL; MSEDCL was constrained to file the said Petition before the CERC seeking quashing of various invoices (along with their stay by way of I.A. No. 67 of 2024) raised by RGPPL as being void, illegal and *non-est,* and seeking appropriate directions against RGPPL restraining it from issuing or uploading any further invoices on the said portal, and from taking any coercive action in furtherance of such invoices, including by way of seeking regulation of open access under the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 ("LPS Rules" for short); notably, the misconceived claims raised by RGPPL before this Tribunal in the EP are also based on the very same invoices which have been challenged before the CERC; the CERC has passed the Interim Order in the following terms: (a) there exists a prima facie case in favour of the Applicant in respect of the issue pertaining to termination of the PPA, and that the issue will be finally adjudicated by the Commission; (b) the Applicant was directed to pay an amount of Rs 471 crores to the Execution Petitioner within 15 days from date of the Interim Order; (c) upon such payment, RGPPL shall withdraw such restrictions from the PRAAPTI portal; and (d) recovery of the balance amounts by RGPPL shall, however, await the final decision of the CERC in the Petition, and no further coercive/precipitative action shall be taken by RGPPL.

Sri Balbir Singh, Learned Senior Counsel, would further submit that the Supreme Court has, in a catena of cases, recognized the principle that, in the face of intervening and supervening developments, a decree of the court may become unexecutable. Reliance is placed by the Learned Senior Counsel on **Sayyed Ratanbhai Sayeed v. Shirdi Nagar Panchayat, (2016) 4 SCC 631** in this regard. Learned Senior Counsel would also submit that a change in the circumstance in which the decree was passed may render execution of such decree inexecutable. Reliance is placed on **Arun Lal v. Union of India, (2010) 14 SCC 384,** in this regard. He would also submit that the Supreme Court has, time and again, taken notice of subsequent events that had altered the premise of an issue before the court, and would rely on **Laxmi & Co. v. Anant R. Deshpande, (1973) 1 SCC 37** in this regard.

B. SUBMISSIONS URGED ON BEHALF OF RGPPL:

Sri C.A. Sundaram, Learned Senior Counsel appearing on behalf of RGPPL, would submit that, though, in the Daily Order dated 07.10.2024, this Tribunal had confined the hearing of this Application to the impact of the Interim Order dated 30.09.2024 passed by CERC in I.A No. 67 of 2024 in Petition No. 276/MP/2024, Senior Counsel for MSEDCL had made detailed submissions on the following two aspects: (i) the subsequent event of the petition filed before, and the Interim Order passed thereon, by the Central Commission would require this Tribunal to refrain from adjudicating the Execution Petition; and (ii) vagueness of the Decree, execution of which is sought by the Petitioner, would render the decree inexecutable; besides the afore-said two aspects, the written note submitted by Sri Balbir Singh, Learned Senior Counsel appearing on behalf of MSCDCL, also contains submissions on the scope of Section 79(1)(f) of the Electricity Act; however, during the course of hearing, Sri Balbir Singh, Learned Senior Counsel, fairly

stated that this part of the note may be ignored in view of the order of this Tribunal dated 07.10.2024 making it clear that both the parties would not be permitted to re-agitate issues which were argued in depth during the hearing of the EP; and MSEDC was permitted only to put forth submissions on the consequences of the subsequent interim order passed by the CERC on 30.09.2024; and other questions relating to the EP cannot be re-agitated.

Sri C.A. Sundaram, Learned Senior Counsel, would further submit that the Interim Order of the CERC dated 30.09.2024 has no impact on the issues raised or decision to be taken in the present E.P; the CERC has in para 28 clearly stated that the arrangement made is subject to the decision to be taken by this Tribunal in the E.P; the only prayer in I.A. 67 of 2024, which has been granted, is to direct RGPPL not to precipitate the matter through the PRAAPTI under the LPS Rules which would lead to regulation of GNA and open access of MSEDCL; on several occasions while the E.P. was being argued, MSEDCL had sought for directions to restrain RGPPL from operating the PRAAPTI but no such Orders were granted; what is under consideration by this Tribunal is the execution of its Judgement till 30.11.2023; the claim of RGPPL, as stated in Annexure 'Y' of the E.P, works out to Rs. 66,96,47,83,132 till Nov 2023; MSEDCL has already argued its defence with reference to termination of the PPA as a response to the E.P; RGPPL has also responded to the same by stating that any view expressed on this issue, of termination of the PPA or its repudiation in the E.P, will amount to an adjudication by this Tribunal requiring it to go behind the decree, despite the fact that the decretal part of the Order in the Judgement dated 22.04.2015 is clear and unambiguous.

Sri C.A. Sundaram, Learned Senior Counsel, would also submit that, asking this Tribunal to then take note of an interim arrangement made by the CERC in a substantive petition seeking a declaration on its termination is

another attempt to prevent RGPPL from receiving the fruits of the decree till such time a new belated round of litigation started by it achieves finality; the above approach is not only erroneous but also amounts to an abuse of the process of this Court; under the Electricity Act, 2003 this Tribunal is the only executing court; the dispute on payment of capacity charges has achieved finality right till the Supreme Court; if the submission of MSEDCL is accepted, a litigant, even after losing a litigation till the final Court, will be permitted to start a new round of litigation of some related issue and contend that execution should not go on or that the executing court should hold its hands till such parallel proceedings are decided; on first principles, this submission deserves to be rejected since even, in the same proceeding when Appeals are pending before a higher Court and there is no stay, the E.P is permitted to go on and reach fruition; and a parallel belated proceeding before a lower court cannot cause the consequent effect of an executing court (which is also the first appellate court) staying its hands.

Sri C.A. Sundaram, Learned Senior Counsel, would contend that Order 21 Rules 26-29 of the CPC deals with stay of execution proceedings; on a plain reading, none of the rules would apply; Order 21 Rule 26 would apply to enable a Judgement Debtor to apply to an Appellate Court for an Order to stay execution for short periods of time; in the present case, MSEDCL has not filed any application to exercise its right to stay the execution by filing an Appeal before the Supreme Court which is the only Appellate Court above this Tribunal; to the contrary, the Supreme Cout, by its Judgement dated 09.11.2023, has confirmed the Decree and observed that the E.P shall go on before this Tribunal; in **Shaukat** (*AIR 1973 SC 528*), it has been held that stay by the Supreme Court, under this Rule, is intended to be for a short period to enable the Judgement Debtor to get a stay order from the Court specified in the Rule; and, since the Rule refers only to the Appellate Court,

any Interim Order passed by the CERC would not have any impact on the present E.P.

Sri C.A. Sundaram, Learned Senior Counsel, would also contend that neither Rule 27 nor Rule 28 of Order 21 CPC have any application enabling MSEDCL to seek a stay before this Tribunal; in so far as Rule 29 is concerned, it is now authoritatively held that, in order to attract Rule 29, there ought to be two simultaneous proceedings in the same Court i.e. one a proceeding for execution by the Decree holder and the other a suit by the Judgement debtor against the Decree holder of such a Court where the suit is pending. (**Shaukat**, [*AIR 1973 SC 528*]; **Inayat**, [*AIR 1930 A 121*]; **Khemchand**, [*AIR 1958 MP 131*]; the Judgements relied on by MSEDCL, including **Sayyed**, *(2016) 4 SCC 631*, **Arun Lal** *(2010) 14 SCC 384* and **Laxmi & Co.** *(1973) 1 SCC 37* refer to the principle of unexecutability of the decree of a court in the face of intervening and supervening developments; in other words, the decision of the Court cannot be given effect due to impossibility; this principle has no application in the present case, since, in the unlikely event that MSEDCL is successful in its petition claiming a declaration on the PPA termination, it can always be restituted by payment of money; RGPPL is a Central Govt Company. and the subsequent event of passing of the Order dated 30.09.2024 does not, in any manner, render the decree passed by this Tribunal inexecutable.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

In **Sayyed Ratanbhai Sayeed v. Shirdi Nagar Panchayat, (2016) 4 SCC 631,** the Supreme Court held that intervening developments had occurred in the free flow of events and, in absence of any semblance of evidence of any collusion, they were not inclined to sustain the said accusation; in **Arun Lal v. Union of India, (2010) 14 SCC 384** and **Dhurandhar Prasad Singh v. Jai Prakash University, (2001) 6 SCC**

534, the decrees involved had been held to have been rendered unexecutable in the contextual facts; in **Laxmi & Co. v. Anant R. Deshpande, (1973) 1 SCC 37**, it was enunciated as a matter of general proposition, that a court can take notice of subsequent events because of altered circumstances to shorten the litigation; it was held that, if the court finds, in view of such intervening developments, the relief had become inappropriate or a decision cannot be given effect to, it ought to take notice of the same to shorten litigation, to preserve the right of both the parties and to subserve the ends of justice.

The Supreme Court further held that, unexecutability of the decree of a court, in the face of intervening and supervening developments, was thus a consequence comprehended in law, however contingent on the facts of each case; they felt disinclined to interfere with the judgment and order dated 5-7-2010 [*Sayyed Ratanbhai Sayeed* v. *Tahsildar*, WP No. 1705 of 2009, order dated 5-7-2010 (Bom)] of the High Court and impugned in CA No. 3154 of 2011, so far as it pertained to the aspect of unexecutability of the compromise decree dated 20-8-1979; and any contrary view, would have the consequence of effacing the stream of developments for over three decades; more particularly when a formidable element of public interest was involved.

In **Arun Lal v. Union of India, (2010) 14 SCC 384,** the Supreme Court held that it was common ground that the land appurtenant to the bungalow had been utilised by the Union of India for construction of barracks; the entire extent of 2.792 acres of land including the one under the barracks could, therefore, be taken over pursuant to the resumption order which was never assailed and had thereby attained finality; such being the position, the High Court was right in holding that possession of the above extent of land could not be taken away from the Union of India for delivery to the decree-holders; that was because, after resumption of the property and the taking over of the

possession by the Union of India in exercise of its rights as the paramount title-holder, it was no longer holding the same as a tenant so as to be answerable to the petitioners as its landlords; the Union of India was, on the contrary, holding the resumed property in its own right, and in a capacity that was different from the one in which it had suffered the decree for eviction; and this was a significant change in the circumstances in which the decree was passed rendering it inexecutable.

In **Laxmi & Co. v. Anant R. Deshpande, (1973) 1 SCC 37,** the Supreme Court held that the Court can take notice of subsequent events; these cases are where the court finds that, because of altered circumstances like devolution of interest, it was necessary to shorten litigation; where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes; if the Court finds that the judgment of the Court cannot be carried into effect, because of change of circumstances, the Court takes notice of the same; if the Court finds that the matter is no longer in controversy the court also takes notice of such event; if the property which is the subject-matter of the suit is no longer available, the court will take notice of such event; the court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties, and to subserve the ends of justice; judged by these principles it was manifest that, in the present case, the suits were pending; on the one hand the appellant had challenged the decree obtained by Ashar and others as also the warrant of execution; on the other hand, the suit instituted by Ashar and others against inter alia the appellant in 1965 for possession was pending; they could not say with exactitude that any final decision had been reached on the respective and rival rights and claims of the appellant and the respondent; and it was, therefore, neither desirable nor practicable to take notice of any fact on the rival versions of the parties as to subsequent events.

In **Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731,** the Supreme Court held that, in appropriate cases, a court may grant an injunction against a party not to prosecute a proceeding in some other court; but ordinarily courts, unless they exercise appellate or revisional jurisdiction, do not have the power to stop proceedings in other courts by an order directed to such courts; for this specific provisions of law are necessary; Order 21 Rule 29 CPC clearly showed that the power of the court to stay execution before it flowed directly from the fact that the execution was at the instance of the decree-holder whose decree had been passed by that court only; if the decree in execution was not passed by it, it had no jurisdiction to stay the execution; in fact this is emphasised by Rule 26; the decree sought to be executed was not the decree of Munsif 1st Court, Gaya but the decree of the Subordinate Judge, Gaya passed by him in exercise of his Small Cause Court jurisdiction; and it was, therefore, obvious that the Order staying execution passed by the Munsif, Gaya would be incompetent and without jurisdiction;

In **Inayat Beg v. Umrao Beg: AIR 1930 All 121,** the Allahabad High Court held that, where a decree was transferred for execution to a court, the latter could not, under Order 21 Rule 29 CPC, stay execution of that decree in a suit at the instance of the judgment-debtor, the reason being that the decree sought to be executed was not the decree of 'such court', that is, the court in which the suit was pending.

In **Khemchand Rajmal v. Rambabu Johrimal: AIR 1958 MP 131,** the Madhya Pradesh High Court held that, in the present case, it could not be said that, at the time the application for execution was made, the Indore Court had jurisdiction to try the suit in which the decree was obtained by the non-applicant at Delhi; that suit, even if it had been filed at the time of execution, would be maintainable in the Delhi Court; it therefore followed that

the Indore Court could not be said to be the Court passing the decree under execution for the purposes of O. 21, R. 29, merely because the Delhi Court transferred that decree to it for execution; and the Indore Court had no power to stay the execution of the decree of the Delhi Court in exercise of the powers under O. 21, R. 29 of the CPC.

D. ANALYSIS:

Petition No. 276/MP/2024 was filed by MSEDCL before the CERC on 12.08.2024 to declare the invoices raised by RGPPL against them as detailed in Annexure P-28, as void, non-est and illegal; (b) restrain RGPPL from issuing any further invoices under the terminated PPA dated 10.04.2007 and from uploading any further invoices on the Praapti portal seeking payment thereof; and (d) restrain the Respondents from taking coercive steps against MSEDCL in furtherance of such impermissible, inapplicable, void, non-est and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS rules.

In its interim order, in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, the CERC observed that the question that necessitated examination, not at the interlocutory stage of the proceedings, but when the main petition was finally heard, was whether the issue of termination of the PPA dated 10.04.2007 had attained finality and/ or whether principles of the law of limitation and constructive res judicata was applicable in the present case; and, since the afore-said issues were to be adjudicated during the proceedings in the main petition, they were proceeding on the basis that there existed a prima facie case for consideration of the grant of interim reliefs in the present case.

The CERC, thereafter, observed that the first test of prima facie case being a sine qua non, one of the other two tests of balance of convenience

or irreparable injury must be satisfied for the grant of interim relief. The CERC observed that the balance of convenience did not lie in favour of MSEDCL for grant of interim relief in their favour as prayed for. The CERC also held that no irreparable injury would be caused to MSEDCL if the interim payments were directed to be made to RGPPL considering the fact that such payments were subject to its final decision in the main petition; and. in case MSEDCL succeeded, it would be entitled to recovery of the said amounts paid to RGPPL, along with interest; and, therefore, the test of irreparable injury to MSEDCL was also not satisfied in the present case.

The CERC held that, considering the fact that neither the test of balance of convenience nor that of irreparable injury had been satisfied, MSEDCL was not entitled to the grant of interim reliefs as sought by them in the IA. While holding that the IA stood disposed of in the above terms, the CERC held that this was, however, subject to the final decision of the Commission in the main petition. Having so held, the CERC then observed that an amount of Rs.471 Crores was only payable by MSEDCL in terms of the invoices uploaded in the Praapti portal by RGPPL to avoid the curtailment of power; since MSEDCL was found not entitled for grant of interim reliefs, they were directing MSEDCL to make payment of Rs.471 Crores to RGPPL within 15 days from the date of the order; upon such payment by MSEDCL, RGPPL should withdraw such restrictions from the Praapti portal; and recovery of the balance amounts by RGPPL should, however, await the final decision of the Commission in the main petition. While directing that no further coercive/ precipitative action should be taken by RGPPL with regard to the recovery of the balance amounts, the CERC directed RGPPL to ensure that the plant remained in operation.

Thereafter, the CERC noted that RGPPL had filed Execution Petition No.12 of 2023 before this Tribunal seeking execution of APTEL's judgment

dated 22.04.2015 in Appeal No. 261 of 2013, and the same was pending consideration; and needless to state that the decision of the Commission, in this order, shall abide by the decision of APTEL in the Execution Proceedings.

It is clear, therefore, that even the interim order passed by the CERC, in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, was required to abide by the decision of this Tribunal in the present Execution Proceedings. Reliance placed by MSEDCL on the said interim order passed by the CERC is, therefore, of no avail. It does not stand to reason that the said interim order of the CERC should be understood as rendering execution of the decree, by way of the present Execution Proceedings, in-executable. In these circumstances, it is wholly un-necessary for us to examine the contention, urged on behalf of RGPPL, that the subsequent event of MSEDCL, having filed a petition before the CERC, should not be taken notice of by this Tribunal.

While we find force in the submission urged on behalf of RGPPL that the dispute regarding payment of capacity charges has attained finality consequent on dismissal of Civil Appeal No. 1922 of 2023 by the order of the Supreme Court dated 09.11.2023, and that it may be impermissible for MSEDCL to start a fresh round of litigation to re-open issues which have attained finality, it is un-necessary for us to delve into these aspects, since the mere pendency of proceedings before the CERC would not justify this Tribunal refraining from executing its order in Appeal No. 261 of 2013 dated 22.04.2015, more so as the interim order passed by it has been explicitly made by the CERC to be subject to the decision of the present Execution Proceedings. It is not even the case of MSEDCL that the provisions of Rules 26 to 29 of Order 21 CPC are applicable and it is, therefore, un-necessary for us to examine the submissions urged on behalf of the Execution

Petitioner in this regard. As has been made clear by the CERC itself, in its order in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 0.09.2024, the question whether termination by MSEDCL of the PPA dated 10.04.2007 has attained finality is a matter to be adjudicated in the main petition pending before the CERC. Needless to state that payments made by MSEDCL to the Execution Petitioner, including those in terms of the order which we are now passing in the present Execution Proceedings, shall not disable MSEDCL, in case any such relief is granted by CERC in the Petition pending before it, from recovering the amounts from the Execution Petitioner along with interest, if any, awarded by the CERC.

XII. CONCLUSION:

The Execution Petition is allowed to the extent indicated hereinabove and MSEDCL shall pay RGPPL capacity charges of Rs.31,27,48,66,735/-, (Rupees Three Thousand One Hundred and Twenty Seven Crores Forty Eight Lakhs Sixty Six Thousand Seven Hundred and Thirty Five only) less the amount realized of Rs.6,50,28,02,079/- (Rupees Six Hundred and Fifty Crores Twenty Eight Lakhs Two Thousand and Seventy Nine only). Consequently, MSEDCL shall pay RGPPL Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy Seven Crores Twenty Lakhs Sixty Four Thousand Six Hundred and Fifty Six only), (capacity charges of Rs. 31,27,48,66,735/- minus realization of Rs.6,50,28.02,079/-), within four months from the date of receipt of a copy of this order.

In case MSEDCL has paid Rs.471 Crores as directed by the CERC in its order in IA No. 67 of 2024 in Petition No. 276/MP/2024 dated 30.09.2024, and if the said amount was payable towards capacity charges for the period covered by the present EP, MSEDCL may deduct Rs. 471 Crores from Rs. 2477,20,64,656/-, and pay RGPPL Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety Four Thousand Six Hundred

and Fifty Six only) within four months from the date of receipt of a copy of this order.

It is made clear that, in case payment of Rs. 2477,20,64,656/- (Rupees Two Thousand Four Hundred and Seventy Seven Crores Twenty Lakhs Sixty Four Thousand Six Hundred and Fifty Six only), or Rs. 2006,20,94,656/- (Rupees Two Thousand and Six Crores Twenty Lakhs Ninety Four Thousand Six Hundred and Fifty Six only), as the case may be, is not made within four months from the date of receipt of a copy of this order, Bank Account No. 0239256010710 of MSEDCL with Mumbai Industrial Finance Branch of Canara Bank and A/c No. 016020110000033 of MSEDCL at Mumbai Large Corporate Branch of the Bank of India shall stand attached, and the afore-said amounts shall be realized from the said bank accounts.

The Execution Petition is, accordingly, disposed of. All the IAs therein shall, consequently, also stand disposed of.

Pronounced in the open court on this the **17th day of January, 2025**.

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd