Court-2

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.45 OF 2018

Dated: 15.07.2026

Present: Hon'ble Ms. Seema Gupta, Officiating Chairperson
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

1. **Tata Power Trading Company Limited**
Through its Chief Financial Officer & Company Secretary)
Having its Corporate Office at
B12/13, 2nd Floor, Shatabdi Bhavan,
Sector 4, Noida, Uttar Pradesh – 201301 … Appellant

Versus

1. **Karnataka Electricity Regulatory Commission**
Through its Secretary
No. 9/2, 6th & 7th Floor,
Mahalakshmi Chambers, M. G. Road,
Bengaluru - 560001

2. **Power Company of Karnataka Limited**
Through its Managing Director
Room No. 501, 5th Floor,
KPTCL Building, Kaveri Bhavan,
Bengaluru - 560009

3. **State Load Despatch Center**
Karnataka Power Transmission Corporation Limited
Through its Chief Engineer
No. 28, Race Course, Road,
Bengaluru

4. **Bengalore Electricity Supply Company Limited**
Through its Managing Director

Corporate Office, BESCOM,
2nd Floor, K.R. Circle
Bengaluru – 560001

5. **Mangalore Electricity Supply Company Limited**
Through its Managing Director
Corporate Office, Paradigm Plaza,
A.B. Shetty Circle, Pandeshwara
Mangalore – 575001

6. **Chamundeshwari Electricity Supply Company Limited**
Through its Managing Director
Corporate Office, 927,
L.J. Avenue, New Kantharaja Urs Road,
Saraswathipuram, Mysuru – 570009

7. **Hubli Electricity Supply Company Limited**
Through its Managing Director
Corporate Office, HESCOM,
P.B. Road, Navnagar,
Hubli – 580025

8. **Gulbarga Electricity Supply Company Limited**
Through its Managing Director
Corporate Office, GESCOM,
Station Main Road,
Gulbarga – 585102

9. **Shantha Projects Limited**
Through its Managing Director
Corporate Office, S-9, 1st Floor,
Shantha Skyline Apartment,
M.J. Nagar, Hospet – 583203,
Bellary District, Karnataka … Respondent(s)

Counsel for the Appellant(s) : Shri Venkatesh
Shryeshth Ramesh Sharma
Kanika Chugh
Ashutosh Kumar Srivastava
Suhael Buttan
Priya Dhankar
Vineet Kumar
Surbhi Kapoor
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Punyam Bhutani
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Manav Bhatia
Drishti Rathi
Nihal Bhardwaj
Adarsh Singh
Siddharth Nigotia
Manu Tiwari
Abhishek Nangia
Mohit Mansharamani
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Shivam Kumar
Kartikay Trivedi
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Mohit Gupta
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Counsel for the Respondent(s) : S. Sriranga, Sr. Adv.
Sumana Naganand
Garima Jain
Nidhi Gupta
Tushar Kanti Mohindroo
for Res. 2

S. Sriranga, Sr. Adv.
Balaji Srinivasan
Pratiksha Mishra
for Res. 4

S. Sriranga, Sr. Adv.
Sumana Naganand
Garima Jain
Nidhi Gupta
Tushar Kanti Mohindroo
for Res. 7

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant Tata Power Trading Company Limited has, in this appeal, assailed the order dated 01.08.2017 passed by the 1st respondent Karnataka Electricity Regulatory Commission (hereinafter referred to as "the Commission") passed in petition no.18/2015 whereby the Commission has held the appellant liable to pay compensation to the respondent no.4-8 for short supply of energy and also to pay UI Charges. In addition, the Commission has also held that the appellant had indulged in "gaming" and accordingly has directed it to pay further compensation to the respondent nos.4-8 in this regard.

<u>Introduction of the Parties:</u>

2. The appellant is an incorporated company engaged in the business of trading of electricity under the license issued by Central Electricity Regulatory Commission under Section 14(c) of the Electricity Act, 2003.

3. The respondent no.2 is a nodal agency responsible for procurement of short-term and long-term power to bridge the demand and supply gap in the State of Karnataka. It has been procuring power on behalf of respondent nos.4-8 from various sources including purchase of power through energy exchange as well as bilateral transmissions. The respondent no.3 is the apex body to ensure integrated operation of the power system in the State of Karnataka and is responsible for the real time load dispatch functions, operation and maintenance of SCADA system as well as energy accounting.

4. The respondent nos.4-8 are the distribution licensees responsible for supplying the electricity to the consumers in their respective licensed area of supply in the State of Karnataka. They have entered into Power Purchase Agreements with the appellant for short-term procurement of power.

5. Respondent no.9 is a generating company and has set up a thermal power generating plant of 10MW capacity. It had entered into back-to-back agreement with the appellant for supply of electricity to respondent nos.4-8, the electricity supply companies (in short ESCOMs) in the State of Karnataka for the period from 11.11.2013 to 31.03.2014.

<u>Brief conspectus of the facts of the case:</u>

6. In the month of July, 2013, the respondent no.2 invited a tender on behalf of respondent nos.4-8 for procurement of 500MW RTC power for the period starting from 01.09.2013 to 30.06.2014 on short-term basis. The Request for Proposal (RfP) clearly indicated that in case, the bidders were traders, they were required to furnish the copy of Letter of Intent (LoI) received from the generator along with documentary evidence regarding commissioning of the power station issued by the competent authority as well as the back-to-back agreement entered into with the generator.

7. The appellant participated in the tender and emerged as one of the successful bidders. Accordingly, appellant was awarded contract for supply of 57MW aggregated power from different generation sources. Letters of Intent were issued to the appellant vide letters dated 30.08.2013, 08.11.2013 and 23.11.2013 by respondent no.2, the details of which are given in the following table: -

"

LOI Date	***Generator***	***Quantum***	***Period***
30.8.2013	*Core Green Sugars*	*15 MW*	*2.9.2013 to 31.3.2014*
8.11.2013	*Shantha Projects Ltd.*	*10 MW*	*11.11.2013 to 31.3.2014*
23.11.2013	*Hiranyakeshi Sahakari Sakkare Karkhane Niyamit*	*18 MW*	*1.12.2013 to 15.2.2014*
23.11.2013	*Vishwanath Sugars Ltd.*	*14 MW*	*1.12.2013 to 31.3.2014*

"

8. Consequently, the appellant executed Power Purchase Agreement (PPA) dated 06.09.2013 with the ESCOMs for supply of contracted quantum i.e. 57MW of power at the firm price of Rs.5.50/unit for the entire contract period.

9. In terms of the LoI dated 08.11.2013, the appellant was to source 10MW of power from respondent no.9 for onward supply to respondent nos.4-8 from 11.11.2013 to 31.03.2014 in terms of the PPA dated 06.09.2013. However, it appears that the respondent no.9 failed to supply the requisite quantum of power to the appellant as per the said LoI during the period of November-December, 2013 on account of some purported grid disturbance and failure as well as tripping of 100MVA transformer in Kushagti 220kV R/s KPTCL sub-station for 11 number of instances. As a result, total scheduling of power under the PPA fell below 85% of the contracted quantity in a month.

10. Despite various communications exchanged in this regard between the appellant and the respondents, the respondents had raised demand for compensation from the appellant for short-supply of power as per the provisions of Article 6.2.4 of the PPA and also deducted the compensation amount from the invoices raised by the appellant under the subsequent PPAs executed between the parties for different transactions.

11. On 01.04.2014, the respondent no.4 imposed a further penalty upon the appellant on the ground that as per Article 3.1.2 of the PPA, the appellant has failed to furnish the revised schedule, and therefore, was liable to pay amount of Rs.1,10,55,000/- being excess amount paid towards scheduled energy. In addition thereto, the respondent no.4 claimed further amount of Rs.77,69,100/- on the ground that due to short supply of power by the appellant, it has entered into short-term contract to source power to meet the shortfall in power, at higher rate, and therefore, appellant was liable to make good the loss suffered on this count by the respondent no.4.

12. The respondent no.5 deducted a sum of Rs.8,17,855/- and Rs.13,00,000/- from the invoices of the appellant in the month of March, 2014. Vide letters dated 22.04.2014 and 08.05.2014, the appellant requested the respondent no.5 to remit the amount so deducted by it but of no avail.

13. On 16.05.2014, respondent no.4 raised a further claim in the amount of Rs.72,71,700/- against the appellant on the ground that UI rate paid by the generator i.e. respondent no.9 to SLDC is less than the agreed tariff under the PPA i.e. Rs.5.50/unit and accordingly, encashed the Performance Bank Guarantee amount to Rs.67,79,520/- which had been furnished by the appellant. Letter dated 02.06.2014 sent by the appellant objecting to such encashment of Bank Guarantee to the respondent no.4 to remit the said amount of Rs.67,79,520/- did not yield any result.

14. In the years 2014 and 2015, the respondent no.2 again invited tenders for supply of 500MW and 250MW of power. The bid submitted by the appellant in response to such tender was accepted and thereupon, the appellant entered into PPA dated 14.11.2014 and 27.02.2015 with the respondent nos.4-8 for the capacity of 89.80 MW and 17MW respectively. When the appellant raised monthly bill for the month of December, 2014 under the PPA dated 14.11.2014, it received a short payment from the respondent no.4.

15. Vide e-mail dated 26.02.2015, the respondent no.4 informed the appellant that an amount of Rs.15,10,177/- is payable by the appellant in respect of transactions covered under PPA dated 06.09.2013. Similarly, the respondent no.3 also vide letter dated 11.03.2015 informed the appellant that an amount of Rs.1,56,45,949 was due from respondent no.9 towards payment of UI Charges as the respondent no.9 had deviated from the schedule which resulted in huge UI charges. In addition to the same, respondent no.2 also vide letter dated 23.03.2015 informed the appellant that an amount of Rs.1.56 crores was due from respondent no.9 which will be deducted from the energy bills of the appellant from the month of March, 2015.

16. Despite objections raised by the appellant to these demands from respondent nos.2,3 & 4 vide letters dated 01.04.2015 and 07.04.2015, the respondent no.4 deducted a sum of Rs.1,56,44,949/- from the energy bills submitted by the appellant for the month of March, 2015.

17. Aggrieved by such recoveries/deductions made by the respondent ESCOMs, the appellant approached the Commission by way of petition no.18/2015 with the following prayers: -

> *"(a) Admit the Petition;*
>
> *(b) Declare that the recovery of Rs.1,56,44,949/- made by the Third Respondent on 7.5.2015 from the amount payable to the Petitioner against its invoice is illegal, contrary to law and against the terms of the Power Purchase Agreements dated 14.11.2014 and 27.2.2015;*
>
> *(c) Direct the Third Respondent to refund the sum of Rs.1,56,44,949/- deducted / recovered from the Petitioner along with surcharge at 15% per annum;*
>
> *(d) Declare that recovery of Rs.1,42,00,422/- made by the Respondents from the amounts payable to the Petitioner is illegal, contrary to law and against the terms of the Power Purchase Agreement dated 6.9.2013;*
>
> *(e) Direct the Third to Seventh Respondents to refund the sum of Rs.1,42,00,422/- deducted / recovered from the Petitioner along with surcharge at 15% per annum;*

(f) Direct the Third to Seventh Respondents to refund the sum of Rs.49,91,937/- recovered as compensation charges for the period November, 2013 and December, 2013 when there was a force majeure event resulting in short supply;

(g) Declare that the Third to Seventh Respondents are not entitled to recover any sums from the Petitioner for the power sourced by the Petitioner other than the deductions permitted under the Power Purchase Agreements between the parties;

(h) Award cost of this Petition; and

(i) Pass any such other and further orders / directions as this Hon'ble Commission may deem fit in the facts and circumstances of the case."

18. The Commission framed following issues for its consideration: -

"(1) To what extent the Intra-State ABT Order dated 20.6.2006 passed by this Commission or UI Regulations, 2009 is applicable in the present case?

(2) What are the liabilities of the Petitioner under the terms of the PPA for the variation between the Scheduled Energy and the actual energy delivered, i.e., for short-delivery of energy?

(3) Whether there was force majeure event during the months of November and December, 2013 as contended by the Petitioner? If so, for what duration and for what reliefs the Petitioner is entitled to?

(4) Whether the contesting Respondents have proved that, the conduct of the Petitioner in not taking timely steps for revising the energy schedule (Dispatch Instructions) amounted to „gaming‟ in the present case?

(5) If Issue No.(4) above is answered in the affirmative, what should be the compensation payable to the contesting Respondents?

(6) Whether the deductions made by the ESCOMs (Respondents - 3 to 7) and the encashment of the Bank Guarantee by the 3rd Respondent (BESCOM) are valid in law?

(7) Whether the deduction of Rs.1,56,44,949/- made by the 3rd Respondent (BESCOM) from the payments to be made to the Petitioner against its energy Bill for March, 2015, relating to the subsequent PPA, is valid in law?

(8) What Order?"

19. On issue no.1, the Commission held that the Intra-State ABT order or UI Regulations, 2009 is not applicable in its entirety in the present case but the UI principles, as understood in the said order/regulations, should be made applicable. On issue no.2, the Commission has held the petitioner liable to pay: -

> *"(i) the UI charges for the variation between the scheduled energy and the actual energy injected, as per Article 4.2.3 of the PPA;*
> *(ii) the Liquidated Damages, as per Article 6.2.4 of the PPA; and*
> *(iii) the Open Access charges to the extent of the quantum of the shortfall in energy supplied, in excess of the permitted deviation, not availed by the Procurer, as per Article 6.2.4 of the PPA."*

20. On issue no.3, the Commission has concluded that the case of the appellant falls under clause (iii) of Article 7.1 (force majeure clause) of the PPA and has held that the contracted power will be treated as "deemed reduction" for a period of six hours in each of the months of November and December, 2013.

21. On issue no.4, the Commission has held that the charge of "gaming" has been established against the appellant and accordingly has, under issue no.5, held the appellant liable to pay compensation to the ESCOMs to the extent of the difference between the price for the quantum of short-supply of energy at the agreed tariff and the amount received towards UI charges as well as the liquidated damages.

22. The issue no.6 has also been answered by the Commission in affirmative while finding no fault in the actions of the ESCOMs in deducting the amounts due to them from the amounts payable to them on any count.

23. On issue no.7, the Commission did not find anything wrong on the part of the 4th respondent BESCOM in deducting UI charges upon the request of 3rd respondent SLDC. However, the Commission further held that deduction towards backup power supply charges and the interest payable thereon to be not valid and gave the concerned ESCOM liberty to take such action for recovery of the same against the respondent no.9, as provided under the law.

24. Accordingly, under issue no.8, the Commission directed the parties to settle the accounts in terms of these findings on issue nos.1-7 in respect of the energy supplied in terms of the PPA dated 06.09.2013 and to make necessary payments for adjusting their rights and liabilities.

25. These findings of the Commission and the final order passed thereon have been assailed by the appellant in this appeal.

26. We have heard Mr. Shri Venkatesh, learned counsel for the appellant, as well as Mr. S. Sriranga, learned senior counsel for the respondent nos.2-7. We have also perused the written submissions filed by the learned counsels.

Our Analysis:

27. We note that in terms of the impugned order dated 01.08.2017 of the Commission, following damages/charges have been levied upon the appellant on account of shortfall in supply of power under the PPA dated 06.09.2013:

"

Sr. No.	*Particulars*	*Amount (Rs.)*
1	*Compensation charges/liquidated damages under Article 6.2.4 of the PPA*	*2,02,98,740*
2	*Unscheduled interchange charges due from Shantha Projects Ltd. (Respondent No.9) payable to State Load Despatch Centre ("SLDC")*	*1,16,89,303*
3	*Penalty for 'gaming' (for short supply of power i.e., difference between the price for quantum of short supply at agreed tariff and amount towards UI*	*73,10,369*

	charges and liquidated damages under Article 6.2.4 of the PPA)	
4	*Open access charges for short supply (@39.74 paise / Kwh)*	*95,34,183*
	Total	*4,88,32,595*

"

In re:- Gaming

28. At the outset, we feel of the opinion that the Commission has fallen into error not only in holding the appellant guilty of "gaming" but also in holding it liable for compensating the respondent ESCOMs on this count.

29. The Commission has itself noted in the Paragraph 12(a) of the impugned order that in the context of present case, the term "gaming" shall be construed to mean "intentional act" in not taking timely steps by the appellant for revising the energy schedule, in order to make an undue commercial gain.

30. The Commission has then proceeded to record that the appellant did not inject energy as per the schedule. The energy scheduled in a month and actual energy supplied to the grid in different months have been given in the following table: -

"

M/s/ Tata Power Trading Company Limited
SHANTHA PROJECTS (Period from Nov-13 to Mar-14)

Particulars	*Nov-13*	*Dec-13*	*Jan-14*	*Feb-14*	*Mar-14*
Energy scheduled to ESCOMs (MUs)	*2438375*	*3447500*	*549000*	*4514000*	*7440000*
Actual Energy pumped to Grid (as per JMR) in MUs	*1614200*	*2693900*	*0*	*3123200*	*5584500*
Short generation in MUs	*824175*	*753600*	*549000*	*1390800*	*1855500*
% Deviation to ESCOMs w.r.t. Scheduled energy Vs Actual energy	*33.80*	*21.86*	*100.00*	*30.81*	*24.94*

"

31. It is true that in case, scheduled energy is revised within a reasonable time, the deviation is accounted for as per the prevailing UI charges. However, if there is an intentional lapse on the part of the seller to take steps for revision of the scheduled energy within a reasonable time duration, it would lead to an inference of "gaming" by the seller. It cannot be disputed that the percentage of deviation, as reflected in the above given table, cannot be termed to be within normal limits. However, the Commission has failed to consider that the appellant is not a power generator but a trading licensee. It was for the generator i.e. the respondent no.9 to provide revised schedule when it felt that it was unable to supply power according to the scheduled capacity. This aspect of the matter has nowhere been discussed by the Commission in the impugned order. Even the respondent no.2 had, in its statement of objections filed before the Commission, stated that it was the generator i.e. respondent no.9 that had not revised the schedule. The Commission has misdirected itself in not appreciating the fact that the allegation of the respondent nos.2&3 qua “gaming” were primarily against the generator i.e. the respondent no.9 and not against the appellant.

32. Even if it be assumed for the sake of arguments that the appellant had indulged in “gaming”, then also the Commission ought not to have held the appellant liable to pay compensation on this count to the respondent ESCOMs in these proceedings in which the impugned order has been passed. The Commission was dealing with a petition filed by the appellant claiming wrongful recoveries/deductions made by the respondent ESCOMs from its energy bills. No counterclaim had been filed by the respondent ESCOMs seeking compensation from the appellant on account of “gaming”. Thus, there was no prayer at all on the part of the respondent ESCOMs for compensation from the appellant on account of “gaming”. It is a well settled legal principle that a judgment of a court or a judicial tribunal has to be based upon the pleadings of the parties before it and the prayers made before it. A court is precluded from granting any relief which has not been specifically prayed or sought for by the parties before it. It is clear that in this case, the Commission has traversed beyond the pleadings of the parties in passing the directions which were never sought by the respondent ESCOMs against the appellant in so far as the compensation on account of "gaming" is concerned.

33. Hence, the findings of the Commission on this aspect in the impugned order and the consequent directions cannot be sustained and are liable to be set aside.

In re:- Compensation/liquidated damages in the sum of Rs.2,02,98,740/- under Article 6.2.4 of the PPA.

34. Referring to Articles 6.2.4 of the PPA on this aspect, the Commission has, in the impugned order held that in case deviation from the seller side is more than 15% of the contracted energy, the seller shall pay compensation to the procurer at 20% of the tariff per kWh for the quantum of shortfall in excess of the permitted deviation of 15% in the energy supplied and has rejected the contention of the appellant that such compensation has to be computed on the difference between the scheduled energy and the actual energy injected into the grid.

35. It is argued by learned counsel for the appellant that the respondent ESCOMs had levied the liquidated damages under Article 6.2.4 of the PPA on the basis of difference between the scheduled energy to the ESCOMs and the actual energy injected into the grid but the Commission, without any prayer or pleadings to that effect on behalf of the respondent ESCOMs, has revised the calculation of liquidated damages from the said basis adopted by the ESCOMs. It is submitted that it was for the respondent ESCOM to plead and prove that they had suffered loss in order to be compensated under Article 6.2.4 and the Commission could not have enhanced the quantum for compensation beyond what has been provided in the said clause of the PPA. It it argued that the Commission has erred in interpretation of the Article 6.2.4 of the PPA.

36. Per contra, learned counsel for the respondent ESCOMs pointed out that in Para 37 of the written submissions filed by the appellant, the appellant has admitted its liability to pay liquidated damages to the tune of Rs.1,25,28,038/- but the calculation upon which said amount has been arrived at is erroneous and the appellant is liable to pay Rs.2.02 crores towards liquidated damages for short supply from the contracted capacity.

37. Article 6.2.4 of the PPA dated 06.09.2013 executed between the appellant and the ESCOMs is extracted hereinbelow: -

> *"6.2.4 In case deviation from Seller side is more than 15% of contracted energy for which open access has*

been allocated on monthly basis, Seller shall pay compensation to Procurer at 20% of Tariff per KWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer."

38. A bare perusal of this clause in the PPA would reveal that where there is any deviation on the part of the seller to the extent of more than 15% of the contracted energy, compensation to the tune of 20% of the tariff per kWh would be payable by the seller on the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied. In other words, for the purpose of computing the compensation payable by the seller to the procurer under this clause of the PPA at 20% of the tariff per kWh, the quantum of shortfall in excess of permitted deviation of 15% in the energy supply has to be taken into consideration. Therefore, we do not find any error in the impugned order of the Commission where the Commission has held that the difference between 85% of the contracted capacity and the energy actually injected into the grid should be taken into consideration for the purpose of calculation of liquidated damages under Article 6.2.4 provided the open access has been allocated on monthly basis for the 85% of the contracted capacity.

39. It is, thus, manifest that the impugned order of the Commission on this aspect is absolutely in consonance with the relevant clause in the

PPA. It is true that the respondent ESCOMs had initially levied the liquidated damages under Article 6.2.4 on the basis of the difference between the scheduled energy to the ESCOMs and the actual energy injected into the grid. However, the same, being contrary to the Article 6.2.4 of the PPA, could not have been accepted by the Commission in the impugned order. It is not that the Commission has erred in interpretation of Article 6.2.4 of the PPA. To the contrary, the computation of liquidated damages had been done erroneously by the respondent ESCOMs due to wrong interpretation of the said clause of the PPA.

40. There is no basis for the claim of the appellant that the seller is liable for the shortfall between 85% of the contracted energy and the energy scheduled by the seller, as was canvassed by its counsel. This argument is patently in conflict with the provisions of Article 6.2.4 of the PPA which we have extracted and discussed hereinabove, and therefore, cannot be accepted.

41. In view of the same, we concur with the findings of the Commission on this issue.

In re:- UI Charges

42. The Commission in the impugned order has held the appellant liable to pay an amount of Rs.1,16,89,303/- as Unscheduled Interchange (UI) Charges.

43. Learned counsel for the appellant submitted that the appellant, being only an intermediary trader cannot be held liable to pay UI Charges for variation in power generation from the schedule of energy. It is argued that there is a clear link between the generator and the procurer i.e. ESCOMs in this regard and the appellant would not take upon itself the financial as well as commercial risks. It is submitted that the Commission has overlooked the fact that the actual injection in the grid is beyond the control of the appellant and any consequence on account of variation from the generation schedule is to the account of the generator. The learned counsel would further point out that despite noting in the impugned order that the respondents have given up their claim towards UI Charges and Open Access Charges, the Commission has proceeded to allow these charges to the respondent ESCOMs illegally and in contravention to the settled legal position. It is, further argued that despite holding that ABT order is not applicable to the appellant, appellant could not have been made liable for UI Charges under ABT order. He placed reliance upon the judgment of this Tribunal dated 04.11.2011 in Appeal No.15/2011 Lanco Power Limited v. HERC & Ors. in support of his submissions.

44. In his arguments, learned counsel for the respondent ESCOMs has justified the impugned order of the Commission upholding levy of UI Charges against the appellant. He submitted that the contentions raised on behalf of the appellant against the levy of these charges are untenable and contrary to the CERC UI Regulations, 2009.

45. We have considered the rival submissions of the learned counsels on this issue.

46. In Paragraph no.13(b) at page 42 of the impugned order, the Commission has very clearly recorded that the contesting respondents have given up their claim towards UI Charges and Open Access Charges but have retained the liquidated damages calculated on difference between scheduled energy and the actual energy injected. For the sake of convenience, we extract the said Paragraph of the impugned order hereunder: -

> *"(b) The compensation for "gaming" may be awarded on the basis of the losses suffered by the contesting Respondents due to short-supply of energy, apart from the Liquidated Damages provided under the PPA. The*

contesting Respondents are entitled to receive the Unliquidated Damages, which would represent the compensation towards the other consequences of the short-supply of energy, which is suffered in the usual course of business. The contesting Respondents have, in essence, claimed compensation for the short-supply of energy, at the agreed tariff. They have given up their claim towards the UI charges and the Open Access charges, but have retained the Liquidated Damages calculated on the difference between the scheduled energy and the actual energy injected."

(Emphasis supplied)

47. It is, thus, manifest from the perusal of the above noted Paragraph of the impugned order that the respondent ESCOMs had given up their claim towards UI Charges. Therefore, it is inexplicable as to how the Commission proceeded to hold the appellant liable to pay UI Charges despite the respondent ESCOMs having given up their claim towards these charges.

48. Further, the Commission has in Paragraph no.9(a) at page 17 of the impugned order also noted that the provisions of ABT order or the UI Regulations, 2009 cannot be made applicable, in their entirety in order to determine the rights and liabilities of the parties in this case. Therefore, we concur with the submissions of the learned counsel for the appellant that the appellant ought not to have been made liable for UI Charges under ABT order despite holding that the ABT order is not applicable to the present case.

49. Appellant's counsel had also argued that the appellant being only an intermediary trader, cannot be held liable to pay UI Charges on account of variation from generation schedule which ought to be to the account of the generator. He has relied upon the previous judgment of this Tribunal in Lanco Power Ltd v. HERC & Ors. in Appeal No.15/2011 decided on 04.11.2011, the relevant portion of which is extracted hereunder: -

> *"20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1) (j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:*

"66. Development of market.

The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard"

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company."

50. We are unable to find any flaw or lacuna in these observations of this Tribunal in the above noted judgment. A trader of electricity only acts as an intermediary or conduit between the generating company and the distribution licensee while indulging in sale and purchase of electricity. A trader cannot be treated as an agent of the power generator. However, it is only when the trader is not functioning as a merchant trader i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the purchaser under re-sale, it can be said that there is a clear link between the generator and the ultimate distribution company with the trader acting only as intermediary. That is not the case herein. Perusal of the PPA dated 06.09.2013 executed between the respondent ESCOMs and the appellant reveals that there is no provision in the entire PPA showing that the appellant did not take upon itself the financial and commercial risks and passed on all such risks to the purchaser i.e. the respondent ESCOMs. To the contrary, there is Article 4.2.3 in the PPA which reads as under: -

> *"4.2.3 Variation between scheduled energy and actual energy at the Delivery Point shall be accounted for through UI as per the provisions of the Grid Code and UI regulations from time to time."*

51. In view of the said Article in the PPA, it is manifest that UI charges payable on account of short-supply of energy due to variation in the scheduled energy and actual energy supply has to be borne by the appellant itself.

52. Having said so, we reiterate that since the respondent discoms had given up their claim towards UI Charges during the proceedings before the Commission, the appellant ought not to have been held liable to pay such charges to them. Therefore, this issue is decided accordingly.

In Re: - Open Access Charges

53. In the impugned order, the Commission has held the appellant liable for payment of Rs.95,34,183/- towards Open Access Charges for short supply of power. We note that none of the prayers made by the appellant in the petition before the Commission relate to the Open Access Charges. There was no prayer in the petition that the respondent ESCOMs have levied or are contemplating of levying Open Access Charges against the appellant and they ought to be restrained from doing so. There were no pleadings on this aspect before the Commission. In fact, the Commission notes in Paragraph 10(d) at page 24 of the impugned order that the ESCOMs have not claimed any amount towards reimbursement of Open Access Charges. Similarly in Paragraph no.13(b) at page 42 of the impugned order also, which has already been extracted hereinabove, the Commission has recorded that the respondent ESCOMs have given up their claims towards UI Charges and Open Access Charges. It is ironical that despite noting so at two places in the impugned order, the Commission has proceeded to discuss the issue of Open Access Charges and has held the appellant liable to pay such charges to the respondent ESCOMs. Therefore, the Commission has evidently traversed beyond the pleadings of the parties and the reliefs claimed by the appellant and has committed a blatant error in holding the appellant liable to pay Open Access Charges to the respondent ESCOMs.

54. Hence, the findings of the Commission on this issue cannot be sustained and are liable to be set aside.

In Re: - Deduction Rs.1,56,44,949/- made by the Respondent No.4 (BESCOM) from the payments to be made to the appellant in relation to subsequent PPAs dated 14.11.2014 and 27.02.2015.

55. As noted by the Commission in the impugned order itself, this amount of Rs.1,56,44,949/- consists of UI Charges as well as the backup power supply charges as detailed in the following table: -

"

1	*UI Bills for (11.11.13 to 31.03.14)*	*Rs.1,06,56,414*
2	*Interest on UI Bills calculated upto 28.02.15*	*Rs.10,32,889*
3	*Back-up power supply charges for (Nov, 13 to Mar, 14)*	*Rs.35,19,668*
4	*Interest on Back-up power supply calculated upto 28.02.15*	*Rs.4,35,978*
	Total amount due:	*Rs.1,56,44,949*
	(One Crore Fifty Six Lakhs Forty Four Thousand Nine Hundred and Forty Nine only)	

"

56. In so far as backup of power supply charges and interest thereon are concerned, the Commission has held the appellant not liable to pay the same to the respondent ESCOMs. However, the Commission has affirmed the action of the respondent ESCOMs in deducting UI Charges in the sum of Rs.1,06,56,414/- from the invoices raised by the appellant in respect of subsequent PPA on the following reasoning: -

> *"(c) The Petitioner has also contended that, the UI charges was payable to the 2nd Respondent (SLDC) therefore, the 3rd Respondent (BESCOM) could not have recovered this amount by way of deduction from the monthly tariff invoices of the Petitioner relating to a different PPA. The contesting Respondents have stated*

in reply that, whatever charges are payable by the Petitioner to the 2nd Respondent (SLDC), were in turn payable to the ESCOMs by the 2nd Respondent (SLDC), therefore the real beneficiaries for the UI charges were the ESCOMs. Therefore, the contesting Respondents have contended that, the deduction effected by the 3rd Respondent (BESCOM) from the amounts payable by it to the Petitioner towards the monthly tariff invoices raised under the subsequent PPA is correct. We note that, the ESCOMs are entitled to share the UI charges collected by the 2nd Respondent (SLDC). Therefore, on equitable principles, we find that, there is nothing wrong on the part of the 3rd Respondent (BESCOM) in deducting the UI charges, upon the request of the 2nd Respondent (SLDC). We also note, the Petitioner or the 8th Respondent (Shantha Projects) had not paid the UI charges and the back-up power supply charges, though demanded by the contesting Respondents on several occasions."

57. Since, we have already held that the appellant ought not to have been held liable to the UI Charges to the respondent ESCOMs, the deduction of such charges from any of the bills of the appellant cannot be said to be valid and acceptable. When the respondent ESCOMs had themselves given up their claim towards UI Charges, the Commission ought not to have permitted deduction of such charges from the bills of the appellant.

58. Even otherwise also, such a set-off was permissible only when the cross demands of the parties arose out of the same transaction in view of the law laid down by the Hon'ble Supreme Court in Jitendra Kumar Khan v. Peerless General Finance & Investment Co. Ltd. (2013) 8 SCC 769. The relevant Paragraphs of the said judgment are extracted hereinbelow: -

> *"11. On a reading of the aforesaid Rule it is noticeable that certain conditions precedent are to be satisfied for application of the said Rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this Rule. As far as equitable set-off is concerned, it has been enunciated in Clark v. Ratnavaloo Chetti ((1865) 2 Mad HCR 296) that the right of set-off exists not only in cases*

of mutual debits and credits, but also where cross-demands arise out of the same transaction. The said principle has been reiterated by the Calcutta High Court in G. Chishlom v. Gopal Chunder Surma [ILR (1889) 16 Cal 711].

12. In Bhupendra Narain Singha Bahadur v. Bahadur Singh [(1952) 1 SCC 436: AIR 1952 SC 201] it has been opined that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and not connected in its nature and circumstances. It has been further stated therein that: (AIR p. 204, para 8)

"8.... A wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that ... have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong and not to take advantage of it."

13. In Lakshmichand and Balchand v. State of A.P. [(1987) 1 SCC 19] this Court has ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

14. In Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. [(2004) 3 SCC 504] while referring to the concept of set-off, this Court has stated thus: (SCC p. 511, para 15)

"15. 'Set-off' is defined in Black's Law Dictionary (7th Edn., 1999) inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from A Treatise on the Law of Set-Off, Recoupment, and Counterclaim as stating:

'Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set-off was stopped or deducted from the cross-demand.'

15. Thereafter, the learned Judges referred to sub-rule (1) of Rule 6 Order 8 and proceeded to opine thus: [Karam Chand Thapar and Bros. (Coal Sales) Ltd. case [(2004) 3 SCC 504], SCC p. 512. para 18]

"18.... What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sun of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debits and credits or cross-demands, to be

available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

16. From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debits and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and *the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in Dobson & Barlow Ltd. v. Bengal Spg. & Wvg. Co. [ILR (1897) 21 Bom 126] and Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal [AIR 1940 Nag 177]."*

59. In the instant case, the claim of the respondent ESCOMs had arisen out of the PPA dated 06.09.2013 executed by them with the appellant whereas these charges have been deducted from the bills/invoices raised by the appellant in relation to the subsequent PPAs dated 14.11.2014 and 27.02.2015 executed between the parties. It is, thus, manifest that the cross demands of the parties do not arise out of the same transaction. These arose out of the totally distinct transactions between the parties. In the above noted judgment, the Apex Court has explained the distinction between the legal set-off and the equitable set-off. Equitable set-off, which has been applied to this case, is independent of the provisions of Code of Civil Procedure and cannot be agitated as a matter of right. The discretion lies with the court to entertain and allow such plea or not to do so. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it. An equitable set-off is not to be allowed where protracted enquiry is needed for determination of the sum due. In the instant case, the respondent ESCOMs have themselves proceeded to deduct the UI Charges under the PPA dated 06.09.2013 from the bills/invoices of the appellant raised in relation to the subsequent PPAs, in the absence of any adjudication in this regard from the Commission. Equitable set-off not being a matter of right, the respondent ESCOMs could not have deducted the UI Charges from the bills/invoices of appellant raised in terms of a subsequent Power Purchase Agreement. There ought to have been an adjudication in this regard from the Commission before such deduction. The Commission has failed to note these principles in the impugned order and has thus erred in saying that there is nothing wrong on the part of respondent no.4 BESCOM in deducting UI Charges from the bills/invoices of the appellant in relation to subsequent PPAs.

60. Therefore, the findings/observations of the Commission on this aspect are also liable to be set aside.

<u>Conclusion:</u>

61. In view of the above discussion, we hold the appellant liable to pay liquidated damages in the sum of Rs.2,02,98,740/- (Rupees two crore two lakh ninety-eight thousand seven hundred and forty only) to the respondent ESCOMs as per Article 6.2.4 of the PPA. However, we further hold that the appellant is not liable to pay any compensation to the respondent ESCOMs for gaming. The appellant shall also not be liable to pay UI Charges or Open Access Charges to the respondent ESCOMs.

62. We further direct that in case any further amount, apart from the liquidated damages in the sum of Rs.2,02,98,740/-, has been recovered from the appellant by the respondent ESCOMs, the same shall be refunded to the appellant along with applicable carrying cost within four weeks from the date of this judgment. On this aspect, the matter is remanded to the Commission for issuing consequential directions to the parties after affording them reasonable opportunity of hearing.

63. The impugned order stands partly set aside and the appeal stands partly allowed to the extent indicated hereinabove.

Pronounced in the open court on this the 15th day of July, 2026.

Virender Bhat
Judicial Member

(Seema Gupta)
Officiating Chairperson

✓
REPORTABLE / ~~NON-REPORATBLE~~

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