

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO.321 OF 2021 &
IA NO. 1784 OF 2021**

Dated: 04th January 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

**1. M/S TAMIL NADU GENERATION AND DISTRIBUTION
CORPORATION LIMITED (TANGEDCO)**

[Through The Chief Engineer]

144, Anna Salai

Chennai – 600 002

E-mail : cmdtangedco@gmail.com

2. THE CHIEF ENGINEER PPP

TANGEDCO

6th Floor, 144, Anna Salai,

Chennai – 600 002

E-mail : ceipp@tnebnnet.org

..... Appellants

VERSUS

1. TAMIL NADU ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]

4th Floor, SIDCO, Corporate Office Building,

Thiru Vi Ka Industrial Estate, Guindy,

Chennai – 600 032

E-mail : tnerc@nic.in

2. OPG Power Generation Pvt Ltd.

[Through its Senior Manager (Legal)]

OPG Nagar, Periya Obulapuram Village,

Nagaraja Kandigai, Madharapakkam Road,

Gummidipondi,

Thiruvallur – 601 201, Tamil Nadu

..... Respondents

Counsel for the Appellant (s) :

**Mr. Amit Anand Tiwari, Addl AG
State of Tamil Nadu**

Ms. Anusha Nagarajan

Mr. Rahul Ranjan

Mr. Devyan Gupta

Counsel for the Respondent (s) : **Mr. Sajan Poovayya, Sr. Advocate**
Mr. Hemant Singh
Mr. Mridul Chakravarty
Mr. Kakshyajit Singh Bagdwal
Mr. Harshit Singh for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appellant, *Tamil Nadu Generation and Distribution Corporation Ltd* (hereinafter referred to variously as the “Appellant” or “TANGEDCO” or “Distribution Licensee”) is a State Government Undertaking engaged in the business of distribution licensee within the State of Tamil Nadu. It has come up by this appeal assailing the Order dated 15.12.2020 passed by the first respondent/*Tamil Nadu Electricity Regulatory Commission* (hereinafter referred to as “TNERC” or “the Commission”) in Miscellaneous Petition no. 7 of 2019 which had been instituted by the second respondent *OPG Power Generation Pvt. Ltd* (hereinafter referred to as the “second respondent” or “OPG” or the “Generator”), it being a private generating company incorporated under the Companies Act. The parties – appellant and the second respondent, had executed a *Power Purchase Agreement (PPA)* on 12.12.2013 in the wake of the acceptance of the bid of the latter for supply of electricity pursuant to the invitation extended by the former in the year 2013. By the impugned order, the appellant has been held liable to pay tariff

to the generator for the power supplied by it at the tariff indicated in the PPA dated 12.12.2013, the order having been made effective from the date of filing of the said Petition dated 16.04.2019.

3. The history of the facts leading to the appeal being presented may be noted in brief.

4. As indicated earlier, the appellant had invited bids for supply of 1000 MW RTC power on long terms basis for the period 01.10.2013 to 30.09.2028. The second respondent (generator) had offered their bid for supply of 74 MW RTC power for a period of 15 years. It became successful bidder, alongside others, in the tender process with a levelized tariff of Rs.4.91/Kwh for supply of 74 MW RTC power. The Letter of Intent was issued by the appellant on 14.11.2013 accordingly. Pursuant to the said events, the PPA was executed on 12.12.2013 for supply of 74 MW RTC power for the period 01.06.2014 to 30.09.2028. In terms of fourth Schedule (on the subject of tariff) of the PPA, the tariff is to be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8, the Energy Charge being the levelized tariff of Rs. 4.91/Kwh.

5. Since it was a process for procurement of power through the bidding route, in terms of Section 63 read with Section 86(1)(b) of the Electricity Act, 2003, the appellant approached the State Commission by PPAP No. 3 of 2014 for adoption of tariff and approval of the PPAs entered into with the

successful bidders including OPG. While the proceedings before the Commission on the said petition were pending, the generator addressed a letter to the appellant on 27.01.2016, the relevant part whereof may be quoted as under: -

“As you are aware, Tamil Nadu suffered from severe flooding causing widespread damage and financial stress to the State and the EB systems. As our humble contribution in the flood relief and restoration of electrical infrastructure, we are pleased to offer a discount on the Monthly Energy Charge in Rs./kWh (“MEPn” as defined in the PPA) contained in the PPA. This discount is for the period from 28-01-2016 upto 31-05-2016. We humbly offer a discount of Rs.1.15 per kWh (One Rupee Fifteen PaisePerKwh) on the MEPn for the period from 28-01-2016 till 31-05- 2016. In the event of any outage at our plant during the relevant period (i.e.28- 01-2016 to 31-05-2016) and our available capacity is less than 85% we confirm that the above level of discount will apply on the actual power scheduled. We further confirm that the amount forgone by us by the above mentioned discount will not be claimed by us subsequently.”

(Emphasis supplied)

6. Subsequent to the above, on 01.02.2016, another letter was sent by the generator to the appellant modifying the terms of the previous offer by letter dated 27.01.2016 as under: -

“The discount referred in the above letter shall be read as Rs.1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA, instead of Rs.1.15 per kWh indicated inadvertently.”

7. The two said letters were, however, superseded by a further communication dated 03.02.2016, and another offer made by the generator, relevant portion thereof may be extracted as under: -

“Sub.: 74 MW long term PPA with OPG Power Generation Pvt Ltd.

This has reference to our long term PPA with TANGEDCO entered into on 12.12.2013 for supply of 74 MW power from our power plant at Gummdipoondi, Tamil Nadu for 15 years.

We humbly offer a discount of Rs. 1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA. This discount is for a period of 5 years and the same can be extended as required.

We hope that our request is considered favorably and we request you to consider, if possible, a schedule of 85% of the contracted capacity.

This letter supercedes the following correspondence on the subject.

1. Our letter no. OPGPG/TNEB/2149/2015-16 dated 27.01.2016

2. Our letter no. OPGPG/TNEB/2350/2015-16 dated 01.02.2016”

(Emphasis supplied)

8. The fact that such discounts as above had been offered by some of the bidders, including OPG, was brought to the notice of the Commission at the hearing on 23.02.2016. The Commission directed the appellant to file written statement to such effect, compliance having been made by the appellant on 26.02.2016.

9. Against the above backdrop, the petition for adoption of the bid discovered price (levelized tariff) was disposed of by Order dated 29.07.2016 passed by the State Commission, it being necessary to quote the following paragraphs: -

“7.6 TANGEDCO has stated that the levelised tariff of Rs.4.91 per kWhr has been discovered in the tender through competitive bidding by following guidelines of MoP and the Evaluation Committee has also certified that Bid Evaluation has been done in a transparent manner and in conformity with the Government of India guidelines. Therefore, in terms of section 63 of the Act, the Commission adopts the levelized tariff of Rs.4.91 per kWhr for procurement of 3330 MW Base Load Power as discovered under Tender No.03/PPLT/2011.

7.7. During the hearing of the above P.P.A.P. held on 23-02-2016, the TANGEDCO submitted interalia that M/s.CoastalEnergen Private Ltd., M/s.IL&FS Tamil Nadu Power Company Ltd. and OPG Power Generation Pvt. Ltd. have offered some reduction in the rate discovered in the tender for specific periods. The Commission directed the TANGEDCO to file Written Statement to the above effect. Accordingly TANGEDCO filed Written Statement on 26-02-2016. In para 17 of the said Written Statement, TANGEDCO has stated as follows:-

“Though it is out of context to the issue of adoption of levelised tariff, which is the average tariff over the period of the contract (15 years) duly escalated as per the escalation indices and discount factors issued by CERC for the purpose of evaluation, the voluntary discounts offered by M/s.CoastalEnergen, M/s.IL&FS and M/s. OPG Power are enclosed for the information of the Commission.”

The above statement of the TANGEDCO is recorded.

7.8. Regulation 75 (1) of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2005 provides interalia that the Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch. Thus, the procurement of power in the above tender also shall be subject to the above Regulation. With the above order and observations, the P.P.A.P.No.3 of 2014 is disposed of.”

10. It was pointed out at the hearing, and so noted at this stage, that subsequently the matter for determination of tariff for generation and distribution came up before the State Commission in Tariff Petition no. 01 of

2017 at the instance of the appellant. The said petition resulted in Multi Year Tariff (MYT) Order being passed on 11.08.2017 and made effective from the said very date, it being made clear (in para 1.8.1 of the said order) that the generation and retail tariff thereby determined “*will be valid until issue of the next order*”

11. By the MYT Order dated 11.08.2017, the State Commission approved the source-wise power purchase cost for the control period from Financial Year (FY) 2016-17 to FY 2018-19 (in para 4.15.12), second respondent (generator) having been shown as one of such sources for procurement, the energy charges payable by it having been mentioned as Rs. 3.12/kWh, quite apparently taking into account the discount offered by the generator by letter dated 03.02.2016, as quoted earlier, and noted by the Commission in the Order dated 29.07.2016 on PPAP no. 3 of 2014, already referred to, this position being duly reflected in the three tables (nos. 4-50, 4-51 and 4-52) pertaining to the FYs 2016-17, 2017-18 and 2018-19 respectively, in para 4.15.12 of the MYT Order.

12. As noted earlier, the State Commission, by its Order dated 29.07.2016, on PPAP no. 3 of 2014, had made it clear (para 7.8) that the licensee (appellant) was obliged by Regulation 75(1) of *Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff), Regulations, 2005* (“Tariff Determination Regulations”, for short) and was to

“procure power on least cost basis and strictly on Merit Order Despatch (MOD)”, the procurement of power approved on the basis of the tender process having been directed to be *“subject to the above Regulation”*.

13. It is pointed out by the appellant that the generator was party to the proceedings in PPAP no. 3 of 2014 leading to the Order dated 29.07.2016 and had also participated in the hearing leading to the MYT Order dated 11.08.2017.

14. In the MYT Order dated 11.08.2017, the State Commission set out the MOD ranking of the various sources from whom procurement had been approved, this being incorporated in a tabulated form (in Para 4.15.7), the three tables (no. 4-47, 4-48 and 4-49) pertaining to FY 2016-17, FY 2017-18 and FY 2018-19. Noticeably, on account of the discount offered, taken note of by the State Commission in tariff adoption order, the second respondent was given MOD ranking ahead of certain other sources, the one immediately below the second respondent for each of the said three years being an entity named “NLC TS-I”, the variable cost in whose respect is mentioned as Rs. 3.36/kWh, there being certain other sources falling below the said other entity as well.

15. The second respondent (generator), however, had reasons to feel dissatisfied. It addressed a letter on 22.05.2018 to the Chief Engineer of the appellant, the relevant portion whereof reads thus: -

“Sub: 74 MW Long term PPA

Ref.: Our letter No. OPGPG/TNEB/2355/2015-16 dated 3rd Feb 2016

This has reference to our long term PPA with TANGEDCO entered into on 12.12.2013 for supply of 74 MW power from our power plant at Gummidipoondi, Tamil Nadu for 15 years.

As you are aware we had offered an discount of Rs. 1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA vide our letter dated 03.02.2016, on the basis that upon availing the discount, TANGEDCO will provide us schedule of atleast 85% of the contracted capacity of the PPA. We humbly submit that in keeping with our commitment we have always kept our plant at 100% availability; howeverinspite of this additional discount provided by us, TANGEDCO has not given the agreed schedule.

For your kind information, schedule given by TANGEDCO at monthly wise basis is FY 16-17 & 17-18 is as follows:

TANGEDCO LTOA BILLING DETAILS FY 2016-17		
Billing Month	Scheduled Units in Kwh	%of Schedule
Apr-16	41,436,250	78%
May-16	16,755,506	31%
Jun-16	-	0%
Jul-16	6,895,253	13%
Aug-16	138,750	0.25%
Sep-16	2,508,250	5%
Oct-16	15,145,500	28%
Nov-16	26,241,250	49%
Dec-16	18,824,796	33%
Jan-17	10,332,500	19%
Feb-17	11,584,000	23%
Mar-17	27,250,000	49%
Total in FY 16-17	176,612,055	27%

TANGEDCO LTOA BILLING DETAILS FY 2017-18		
Billing Month	Scheduled Units in Kwh	%of Schedule
Apr-17	46,473,750	31%
May-17	13,777,750	25%
Jun-17	5,371,250	10%

Jul-17	16,761,005	30%
Aug-17	21,204,500	39%
Sep-17	25,124,750	47%
Oct-17	27,941,250	51%
Nov-17	28,423,250	53%
Dec-17	23,401,000	43%
Jan-18	19,098,250	35%
Feb-18	19,866,750	40%
Mar-18	42,376,500	77%
Total in FY 17-18	259,820,005	40%

In light of the above, we withdraw the discount offered to you and submit that from 1st June 2018 onwards, we will be supplying power only at the rate as per the contract dated 12.12.2013.

We request that schedule from 1st June 2018 is provided only after taking into account this letter.

Finally, this letter supersedes our earlier correspondence on this subject with effect from 01.06.2018.”

(Emphasis supplied)

16. The appellant responded to the above said communication by its letter dated 29.05.2018 reading thus: -

*“Lr. No: CE/PPP/SE/PP/F.OPG/D.97/2018 dated 29.05.2018
Sir,*

Sub: M/s OPG – 74 MW – Long term – 15 years from 01.01.14 to 30.09.28 – Discount offered in Energy Tariff – Withdrawal – Regarding.

Ref.: 1. PPA signed between TANGEDCO and OPG on 12.12.2013

2. M/s OPG/TNEB/693/2018-19 dated 22.05.2018

With reference to the above, it is informed that the voluntary discount offered by OPG has been recorded in Commission’s Tariff adoption order.

In the tariff Order dated 11.08.2017, the Commission has placed OPG as unapproved source and directed TANGEDCO to get prior approval for purchase of energy from unapproved source.

Since dispatch is based on MOD ranking, OPG can get higher dispatch only if it finds place in MOD stack.
Hence it is requested to withdraw the letter cited.”

(Emphasis supplied)

17. It appears that, by its letter dated 07,08.2018, the appellant proceeded to instruct the generator to continue supply of power at the energy charge of Rs. 3.1170/kWh after availing of discount of Rs. 1.20/kWh. The generator approached the State Commission by Miscellaneous Petition no. 7 of 2019 invoking its jurisdiction under Section 86(1)(a) & (b) read with Section 63 of the Electricity Act, 2003 and Regulation 16(1) of TNERC – Conduct of Business Regulations, 2004, contending that the discount that had been offered by it was “*conditional, unilateral and voluntary*” and that the same had already been withdrawn, the continued disregard of such withdrawal by the appellant, not placing the generator accordingly in the MOD list, effectively amounting to disobedience of the binding directives that would lead to proceedings under Section 142 of the Electricity Act, 2003.

18. The proceedings arising out of the Miscellaneous Petition no. 7 of 2019 were resisted by the appellant TANGEDCO, *inter-alia*, on the grounds that a dispute was being raised through a miscellaneous petition which was not maintainable in as much as a Dispute Resolution Petition (DRP) should have been filed for such claim as was agitated. The generator, however, sought to clarify (as mentioned in paras 4.2 and 7.2 of the impugned order) that the

petition was to be treated as miscellaneous petition since it involved exercise of a Regulatory Power, no monetary claim having been raised, the prayer being only for “*adherence of the tariff approval*”.

19. The State Commission has rendered the impugned decision, against the above backdrop, observing and directing thus: -

“9.12. From the above three letters, it is seen that in the first letter dated 27-01-2016 (though superseded later) the period of 4 months during which the petitioner had offered discount to mitigate the financial stress caused to the State and EB systems caused due to severe flooding that occurred during that period is already over. In the letter dated 03-02-2016, the petitioner has only requested the respondent to consider a schedule of 85% of the contracted capacity. Therefore, the intention underlying the discount offer is evident that the petitioner is offering discount in order to get 85% schedule of the contractual capacity.”

9.13. Further, we have to determine the issue within the contours of the provisions of the PPA. It is noticed that the PPA has not been amended to give effect to the discounts offered by the petitioner. Nor the Commission has passed any specific orders on the discount made by the petitioner. The Commission has only recorded the submission made by the TANGEDCO regarding the discount offered by the petitioner. Now, it appears that the condition of the petitioner is not fulfilled by respondent and in such circumstance, the person making such conditional offer can withdraw it as it has no binding effect. The discount offered by the petitioner is not legally enforceable when it decides to withdraw it. Therefore, we hold that the petitioner is entitled to withdraw its discount offer and the respondent is liable to pay the tariff to the power supplied by it to the respondent at the tariff approved in the PPA dated 12-12-2013 and this order taken effect from the date of filing of this petition i.e. on 16-04-2019.”

(Emphasis supplied)

20. The second respondent (OPG) defends the impugned order contending that it had offered the discount by letter dated 03.02.2016 against the levelized tariff “*as a bargain for scheduling at least 85% of the contracted capacity by the appellant*”, the aim being to climb up in the MOD, a list of generators prepared having lowest to high variable tariffs, the distribution licensee (the appellant) being obliged to schedule the power from contracted sources in terms of the said list, first exhausting the least variable cost power followed by the next higher cost. The second respondent submits that the discount had not worked out effectively since it was not able to schedule the contracted capacity under the PPA to the extent of 85% even after applying the discounted price in the MOD list and, therefore, had withdrawn the offer of discount by letter dated 22.05.2018. It is argued that the appellant could not have continued to place the second respondent in the MOD, after the withdrawal, as if the discount was continuing, protest having been lodged by a series of letters.

21. On the above basis, the second respondent argues that the sole issue to be decided is whether it was entitled to the levelized tariff of Rs. 4.91/unit after the withdrawal of the discount on 22.05.2018. We may observe here itself that the issues raised by the appellant cannot be seen through only such narrow lens for the discussion hereinafter would show the prime issue raised is as to whether the offer of discount was conditional or not binding.

22. In our reading of the documents relevant for resolution of this dispute, we are clear in our mind that the tone, tenor and content of letter dated 03.02.2016 leave no scope for any doubts that offer of discount thereby made was not only voluntary but absolute and unconditional. The three communications made during period contemporaneous to consideration of petition for adoption under section 63, ending with letter dated 03.02.2016, must be read in conjunction. By the first communication dated 27.01.2016, the second respondent was eager to contribute to the cost arising out of the financial stress suffered by the utilities in the State due to damage caused by the severe floods and in that context offered the discount (at a different rate) adding that the said discount would continue to apply even if the available capacity was to go lower than 85%. The next letter (dated 01.02.2016) only modified the rate of discount offered. The two said letters were, however, superseded by letter dated 03.02.2016. This last communication was in two parts. The first concerns the offer of discount in the monthly energy charge for a period of five years, with provision for extension "*as required*". Clearly, the offer was for the period of five years, in the minimum. This offer is followed by the second part of the letter wherein the second respondent expressed its commercial interest by requesting for a schedule of 85% of the contracted capacity to be considered "*if possible*". The use of the expressions "*consider*" and "*if possible*" in the context of the request for scheduling of 85% contracted capacity makes it clear that this

was subject to discretion to be exercised by the appellant, there being no obligation on the part of latter to accept the same or not. Though the offer and the request for scheduling of 85% of contracted capacity are included in the same communication, there is no linkage between the two. As said before, the offer came first followed by the request, there being nothing in the communication to infer that the offer would not be valid unless the request for scheduling was accepted. Noticeably, in the context of request for scheduling what is set out in the communication is only “*hope*” of the second respondent that the same would be “*considered favorably*”.

23. We agree that the respondent Commission has fallen into error by inferring that it was a conditional offer. The document speaks for itself and external aids cannot be used to construe it differently from what is set out therein clearly. [*Bai Hira Devi v. Official Assignee of Bombay*, AIR 1958 SC 448 and *Roop Kumar vs. Mohan Thedani*, (2003) 6 SCC 595].

24. The second respondent, however, argues that since there was no amendment to the PPA, which had been approved by the State Commission, the terms as to applicable tariff cannot be treated as having undergone a change, this being impermissible for the parties to do on their own. It is pointed out that by the directions in Order dated 29.07.2016, the levelized tariff of Rs. 4.91/kWh had been adopted which consequently became a condition of the approved PPA. Referring to the *Statement of Objects and*

Reasons for enactment of the Electricity Act and rulings of the Hon'ble Supreme Court in *PTC India Ltd. v. Central Electricity Regulatory Commission* (2010) 4 SCC 603 and *India Thermal Power Ltd. v. State of M.P.* (2000) 3 SCC 379, as indeed judgments of this tribunal in Appeal no. 82 of 2011 *Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission & ors.* (16.12.2011); Appeal no. 210 of 2014 *Indian Wind Power Association v. Maharashtra Electricity Regulatory Commission & anr.* (26.02.2016); Appeal no. 112 of 2012 *Tamil Nadu Generation and Distribution Corporation Ltd. v. M/s Penna electricity Ltd.* (10.07.2013); and Appeal no. 51 of 2011 *Rutwik Energy Generation Private Limited v. Karnataka Power Transmission Corporation & ors.* (21.10.2011), it is argued that the tariff determination is carried out by the Regulatory Commission under Sections 61 & 64, 79 & 86, consequential inclusion of the financial terms in the PPA giving it a statutory flavour, no modification of any term being permitted unless approved by the Regulatory Authority, reliance also being placed on Clause 15.3 (on subject of amendment) of the PPA. The sum and substance of the argument is that since there is no formal amendment of the PPA so as to reflect the discounted price, it having been offered unilaterally, its withdrawal cannot be questioned.

25. The fallacy in the above line of arguments lies in the facts that the discounted price was no longer a matter of unilateral arrangement once it had been placed by the procurer (appellant) before the Regulatory Authority,

then in the midst of consideration of the prayer for adoption under Section 63 and taken note of by the Regulatory Commission at the stage of adopting bid discovered price (levelized tariff) and also acted upon while issuing the MYT order. Even further, the parties acted upon the said arrangement, *inter alia*, pursuant to the MYT order which had indicated the MOD ranking, accepting the discounted price as the appropriate benchmark in respect of second respondent, the scheduling thereafter over the subsequent period being in such accord. The tariff adoption order was common for all sources approved, the discounted price being not applicable to those as had not offered the same. In this view, it is not correct for the second respondent to argue that there was no formal adoption or approval of the discounted price or that it was entitled to renege from the discount tendered through letter dated 03.02.2016 at any stage.

26. The discounted price was approved by the Commission by the tariff adoption order and subsequent MYT order. In this view, separate amendment of the PPA was not required. No public interest suffered as a consequence to the discount in the price. On the contrary, it only enhanced the public interest [*Adani Power Ltd. v. Gujarat Electricity Regulatory Commission* (2016) 15 SCC 665].

27. It is not fair for the second respondent to argue that the offer of discount was not binding since there was no consideration flowing from it in its favor.

This is absolutely wrong for the reason the consideration received was the placement of the appellant in the MOD on the basis of discounted tariff, the procurement of power to be scheduled accordingly for the period of five years, as concededly was the aim sought to be achieved by tender of such discount. In fact, the second respondent gained advantage and was placed on the MOD higher than it would have been but for the discounted tariff, up to the period when the discounted tariff was paid (30.11.2020).

28. it is trite that where the parties to a contract mutually agree to “alter” a contract, a new contract emerges containing, in entirety, the old terms along with the new terms, as modifying the old terms [*Chrisomar Corpn. v. MJR Steels (P) Ltd.* (2018) 16 SCC 117]. Further, once the parties had acted upon the financial terms, as modified by the discount, the same became part of the contract and could not be unilaterally withdrawn, not the least before the expiry of agreed period of five years for which there was an unequivocal commitment [*Mukul Sharma v. Orion India (P) Ltd.* (2016) 12 SCC 623]. It is well settled proposition of law that the performance having become commercially onerous cannot be a good reason to permit a party to resile from its contractual obligation [*Har Shankar v. Deputy Excise and Taxation Commissioner* (1975) 1 SCC 737 and *GMR Airport Limited v. Mihan India Limited* 2021 SCC Online Bom 2132].

29. In our view, the impugned order is bad in law in as much as the offer by letter dated 03.02.2016 for discount given by the second respondent was voluntary and unconditional, there being no obligation on the part of the appellant to give schedule of 85% of the targeted capacity for availing such discount. The offer was made and acted upon by the parties, after it had been taken on record by the State Commission by Order dated 29.07.2016 while adopting the bid discovered price, it consequently having become part of the contractual arrangement. The second respondent (generator) had given the said offer and bound itself with it, with open eyes, the error in commercial considerations, if any, not meriting it to be permitted to withdraw therefrom, it being its obligation to accept the consequent burden.

30. In our considered view, the State Commission has fallen into grave error by making inferences as to the intent behind the letter dated 03.02.2016 by extraneous considerations, it being impermissible to do so. The appellant is right in arguing that since OPG had approached the State Commission invoking its regulatory jurisdiction, rather than dispute resolution jurisdiction, it having been expressly made clear by the appellant that no money claim was pressed for adjudication, the Commission could not and should not have given the directions in the nature given in the operative part of the impugned order (para 9.13, as quoted above).

31. The second respondent (generator) had taken advantage of the discount so as to rise in ranking in the MOD and the efforts made to withdraw the same are clearly a dishonest attempt to wriggle out of the financial obligations arising therefrom.

32. For the foregoing reasons, the impugned order must be vacated and set aside and the miscellaneous petition on which it was rendered dismissed.

33. We order accordingly.

34. The appeal is allowed in above terms. The pending application is rendered infructuous and disposed of accordingly.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 04th DAY OF JANUARY, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson