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Securities and Exchange Board of India

Revised Circular on Valuation of Debt and Money Market Securities due to COVID-19 Pandemic

The Securities Exchange Board of India ("**SEBI**"), has issued a *Circular dated October 1, 2020* reviewing the provisions regarding the valuation of debt and money market securities due to the COVID-19 pandemic ("**Review Circular**"). The Review Circular will come into force with immediate effect. Following are the evaluations of the Review Circular:

1. In compliance with Clauses 5.1.1.2 and 9.1.2 of the SEBI Circular No. SEBI/HO/IMD/DF4/CIR/P/2019/102 dated September 24, 2019, valuation agencies engaged by the Association of Mutual Funds in India (**"AMFI"**) recognize a security default however, vide its *Circular dated April 23, 2020*, the SEBI has relaxed the provisions in question until the period of moratorium allowed by the Reserve Bank of India.

2. The Review Circular gives discretion to the valuation agencies involved in the identification of defaults by asset management companies ("**AMC**") and the AMFI in the case that the debt restructuring proposal is solely due to stress caused by the COVID-19 pandemic. In such cases, any restructuring proposal received by debenture trustees must be promptly conveyed to the investors. Further, any proposal received from lenders, issuer or debenture trustees via mutual funds must also be reported to the valuation agencies, credit rating agencies and the AMFI immediately. Furthermore, the AMFI is required to disseminate such information to its members.

3. According to the Review Circular, if, on the basis of its evaluation of the proposal, the valuation agency is of the opinion that the proposed restructuring is solely due to the effect of the COVID-19 pandemic, then the restructuring or non-receipt of dues will not be treated as a default on the valuation of the money market or debt securities held by mutual funds.

4. In addition, valuation agencies must ensure that changes in investment terms, the issuer's financial stress and the issuer's capacity to repay dues or borrowings on extended dates are reflected in the valuation of securities.

5. If there is a disparity in the securities valuation given by two valuation agencies, the lesser valuation would be acknowledged.

6. The Review Circular further clarifies that AMCs will continue to be responsible for the true the valuation of securities in compliance with the Principles of Fair Valuation set out in the Eighth Schedule of the SEBI (Mutual Funds) Regulations, 1996 and other relevant circulars.

7. The changes made to the SEBI Circular dated September 24, 2019 shall remain in effect until December 31, 2020.

Securities Exchange Board of India - Standardization of Timeline for Listing of Securities issued on a Private Placement Basis

The Securities Exchange Board of India (**"SEBI"**), in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992, issued a *Circular dated October 5, 2020* on standardization of timeline for listing of securities issued on a private placement basis ("**Circular**") under:

a. SEBI (Issue and Listing of Debt Securities) Regulations, 2008;
b. SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013;
c. SEBI (Public Offer and Listing of Securitised Debt Instruments and Security Receipts) Regulations, 2008; and
d. SEBI (Issue and Listing of Municipal Debt Securities) Regulations, 2015.

The same shall come into effect from December 1, 2020.

1. The following timelines have been stipulated in this Circular:

Sr. No.	Details of Activities	Due Date
1.	Closure of issue	T day
2.	Receipt of funds	To be completed by T + 2 trading day
3.	Allotment of securities	
4.	Issuer to make listing application to stock exchange(s)	To be completed by T + 4 trading day
5.	Listing permission from stock exchange(s)	

2. Depositors are required to enable the International Securities Identification Numbers ("**ISIN(s)**") for debt securities issued on a private placement basis only after they have approved the listing of such securities by the stock exchange(s).

3. In order to facilitate the re-issuance of new ISIN debt securities, depositors have been advised to allocate those new ISIN debt securities under the new temporary ISIN which will be kept frozen.

4. Upon receipt of the approval of such new debt securities from the stock exchange (s), the debt securities in the new temporary ISIN shall be debited and credited to the pre-existing ISIN of the existing debt securities before they become available for trading.

5. Stock exchange(s) were also advised to inform the depositories about the details of the listing approval once the listing permission is given.

6. In the event of a delay in the listing of securities within the time limits set out above, the issuer shall pay a penal interest of 1% (one percent) per annum over the coupon rate to the investor for the period of delay.

7. Furthermore, only after receiving final listing approval from the stock exchange(s) will the issuer be authorised to use the issuing proceeds of its subsequent 2 (two) privately placed securities issuances.

Securities Exchange Board of India - Standardization of Procedure to be followed by Debenture Trustee(s) in case of 'Default' by Issuers of Listed Debt Securities

The Securities Exchange Board of India ("**SEBI**") in exercise of the powers conferred upon it under Section 11 (1) of the SEBI Act, 1992 read with the provisions of Regulation 2A of the SEBI (Debenture Trustees) Regulations, 1993, Regulation 31(1) of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("**ILDS Regulations, 2008**"), and Regulation 101(1) or the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations, 2015**"), with a view to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market issued a *Circular dated October 13, 2020* to come into force with immediate effect. The circular prescribes a standardized procedure to be followed by the Debenture Trustee(s) in case of 'Default' by issuers of listed debt securities, seeking consent from the investors for enforcement of security and/or entering into an Inter-Creditor Agreement ("**ICA**"), as enumerated below:

Step 1: Determination of an Event of Default

- Regulation 51 read with the Explanation to Clause A (11) in Part B of Schedule III of the LODR Regulations, 2015 defines '*default*' as the non-payment of interest or principal amount in full on the pre-agreed date which shall be recognized at the first instance of delay in the servicing of any interest or principal on debt.

- For determining the 'event of default', in case where multiple International Securities Identification Number's ("**ISIN(s)**") are issued under the same Information Memorandum(s) ("**IM(s)**") or a single ISIN has been split across multiple IM(s), it is clarified that 'event of default' shall be reckoned at the ISIN level, as all terms and conditions of issuance of security are same under a single ISIN even though it might have been issued under multiple IMs.

Note 1: *Each security issued bears a unique ISIN issued by the International Standards Organisation (ISO). In India, the task of issuing ISIN of various securities has been assigned by SEBI to NSDL. For Government securities, allotment of ISIN is done by Reserve Bank of India.*

Step 2: Consent of investors for enforcement of security and for signing the ICA

- Investors in debt securities, being financial creditors, shall be approached by other lenders to sign an agreement, referred to as the ICA under specific terms detailed in the framework as stipulated by Reserve Bank of India ("**RBI**"). This is in lieu of the RBI (Prudential Framework for Resolution of Stressed Assets) Directions 2019 which *inter alia* specified the mechanism for resolution of stressed assets by lenders.

- Regulation 59 of LODR Regulations, 2015 states that the consent of the requisite majority of investors for any material modification in the structure of debt securities is required. Regulation 18 of the ILDS Regulations, 2008 applicable to public issue of debt securities, stipulates a notice period of fifteen (15) days in case of roll-over of debt securities and also requires approval of majority investors.
- As the resolution plan in the ICA may involve restructuring including roll-over of debt securities, the consent of investors shall be required. Following is the process to be followed for seeking consent for enforcement of security and/or entering into an ICA:

    1. The Debenture Trustee(s) shall send a notice to the investors within three (3) days of the event of default by registered or speed post/ acknowledgement or courier or hand delivery along with proof of delivery or through email as a text or as an attachment with a notification including a read receipt, and proof of dispatch of such notice or email shall be maintained.
    2. The notice shall contain the following:

        i. negative consent for proceeding with the enforcement of security;

        ii. positive consent for signing the ICA;

        iii. the time period within which the consent needs to be provided, viz. consent to be given within fifteen days from the date of notice; and

        iv. the date of meeting to be convened,

    3. Debenture Trustee(s) shall convene the meeting of all investors within thirty (30) days of the event of default. However, if the default is cured between the date of notice and the date of meeting, then such requirement may be dispensed with.
    4. For Regulation 15(2)(b) of SEBI (Debenture Trustees) Regulations, 1993, relating to public issue of debt securities, the Debenture Trustee (s) is not required to include negative consent for proceeding with the enforcement of security in such notice and also the requirement of convening a meeting will not be applicable.
    5. The Debenture Trustee(s) is required to take necessary action to enforce security except when the majority of investors have expressed their dissent against enforcement of the security.
    6. The Debenture Trustee(s) shall enter into the ICA only with the consent of majority of investors.
    7. If consents are not received for enforcement of security and for signing ICA, the Debenture Trustee(s) shall act further as per the decision taken in the meeting of the investors. The Debenture Trustee(s) is also empowered to form a representative committee of the investors to participate in the ICA or to enforce the security or as may be decided in the meeting.

Note 2: *Consent of the majority of investors shall mean the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level.*

Step 3: Pre-requisites for signing of ICA by Debenture Trustee(s) on behalf of investors

The Debenture Trustee(s) may sign the ICA and consider the resolution plan on behalf of the investors after ensuring that the following conditions are suitably incorporated in the ICA:

a. The ICA and the resolution plan should be in the interest of investors and in compliance with the Companies Act, 2013 and the rules made thereunder, the Securities Contracts (Regulations) Act, 1956 and the SEBI Act, 1992 and the rules, regulations and circulars issued thereunder from time to time.

b. The Debenture Trustee(s) shall be free to exit the ICA altogether with the same rights as if it had never signed the ICA on occurrence of the following events:

   i. if the resolution plan imposes condition(s) on the Debenture Trustee (s) that do not adhere to the provisions of aforementioned Acts and Rules;

   ii. if the resolution plan is not finalized within 180 days from the end of the review period;

   iii. If any of the terms of the approved resolution plan are contravened by any of the signatories to the ICA.

Upon the occurrence of any of the above-mentioned circumstances, the resolution plan shall not be binding on the Debenture Trustee(s).

Note 3*: If the resolution plan is not finalized within 180 days, the Debenture Trustee(s) may give its consent to extend the said period subject to the approval of the investors where, the total timeline shall not exceed 365 days from the date of commencement of the review period.*

Note 4*: Where the terms of the approved resolution plan are contravened the Debenture Trustee(s) can seek appropriate legal recourse or any other action as it may deem fit in the interest of the investors.*

Securities and Exchange Board of India (Issue and Listing of Debt Securities) (Amendment) Regulations, 2020

The Securities Exchange Board of India ("**SEBI**"), in exercise of powers conferred under Section 30 of the Securities and Exchange Board of India Act, 1992, issued a *Regulation dated October 8, 2020* on Securities and Exchange Board of India (Issue and Listing of Debt Securities) (Amendment) Regulations, 2020 to further amend the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008.

The following amendments have been made:

1. **Regulation 2 (1)(h), which specifies the definition of private placement, has been substituted, namely:**

   "(h) "Private placement" means an offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in section 42 of the Companies Act, 2013."

2. In Regulation 2(2), the words and symbols "Companies Act, 1956" has been substituted with "Companies Act, 2013".

3. In Regulation 4(4), the words and symbols "Section 117B of the Companies Act, 1956 (1 of 1956)" has been substituted with "Section 71 of the Companies Act, 2013 (18 of 2013)".

4. **Regulation 5 (2)(a) has been substituted with the following-**

   "disclosures specified in Companies Act, 2013 and Rules prescribed thereunder;".

5. In Regulation 6A (3), the words and symbols "Companies Act, 1956 or "and "whichever is applicable" has been omitted.

6. **Regulation 15 (2), which specifies that every debenture trustee shall accept the trust deed, has been substituted, namely:**

6. **Regulation 15 (2), which specifies that every debenture trustee shall accept the trust deed, has been substituted, namely:**

> **"(2) Every debenture trustee shall amongst other matters, accept the trust deeds which shall contain the matters as prescribed under section 71 of Companies Act, 2013 and Form No. SH.12 of the Companies (Share Capital and Debentures) Rules, 2014. Such trust deed shall consist of two parts:**
>
> **a. Part A containing statutory/standard information pertaining to the debt issue.**
>
> b. **Part B containing details specific to the particular debt issue."**

7. In Regulation 16(1), the words and symbols "Companies Act, 1956 has been substituted with "Companies Act, 2013."

8. In Regulation 18 (2), the words "twenty one (21) days" has been substituted with "fifteen (15) days".

9. In Regulation 19 (1), the words and symbols "sub-section 1 of section 75 of the Companies Act, 1956 (1 of 1956)" has been substituted with "sub-section (1) and sub-section (2) of section 40 of the Companies Act, 2013 (18 of 2013)."

10. In Regulation 20 (1) (a), the words and symbols "Companies Act, 1956" shall be substituted with "Companies Act, 2013."

11. **Regulation 21B, which specifies the creation of the security, has been inserted, namely:**

> **"The issuer shall give an undertaking in the Information Memorandum that the assets on which charge is created are free from any encumbrances and in cases where the assets are already charged to secure a debt, the permission or consent to create a second or pari-passu charge on the assets of the issuer has been obtained from the earlier creditor."**

12. In Regulation 26,

    a. in sub-regulation (2), the words and symbols “Schedule II of the Companies Act, 1956” has been substituted with “the Companies Act, 2013 and the Rules made thereunder.”

    b. sub-regulation (7), has been inserted namely-

    “(7) The issuer shall create a recovery expense fund in the manner as maybe specified by the Board from time to time and inform the Debenture Trustee about the same.”

13. In Regulation 28, the words and symbols “section 621 of the Companies Act, 1956” has been substituted with “section 439 of the Companies Act, 2013”.

14. Further, Schedule I and Schedule II of the said notification has been amended, respectively.

This Notification is issued in exercise of powers conferred under Section 30 of the Securities and Exchange Board of India Act, 1992.

Case Summary

Case Name	***: Ener Sol Infra Private Limited Vs. Southern Power Distribution Company of Telangana Limited and Transmission Corporation of Telangana Limited – O.P. No. 19 of 2020 & I.A. No. 13 of 2020***
Court Name	: Telangana State Electricity Regulatory Commission
Order Date	: October 7, 2020
Sections cited	: Sections 86(1)(j), 86(1)(e) and 86(1)(k) of the Electricity Act 2003 ("**EA, 2003"**) r/w Telangana State Electricity Regulatory Commission (Code of Conduct of Business) Regulations, 2015 ("**TSERC COB Regulations, 2015**"), The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act, 2002**"), Telangana State Electricity Regulatory Commission (Terms and Conditions of Open Access), Regulations, 2005 ("**TSERC TCOA Regulations, 2005**"), Telangana State Electricity Regulatory Commission (Interim Balancing and Settlement Code) Regulations, 2006 ("**TSERC IBSC Regulations, 2006**") and Appendix 3 as amended by Regulation No. 1 of 2017 in TSERC IBSC Regulations, 2006 were considered and argued in the said case.

Facts of the case:

1. Ener Sol Infra Private Limited ("**Petitioner**") has to set up a solar plant with a capacity of 2 MW for which it had acquired land at Vinjamoor village (Telangana) with all the requisite permissions which were issued by TSiPASS district level committee. The Petitioner had undertaken this project due to reforms in electricity sector, demand for generation of energy through non-conventional sources and the Government of Telangana's Solar Policy, 2015 ("**Solar Policy**").

2. Consent for establishment was obtained and the final certificate had been issued and the detailed project report had been placed before the concerned authority and sought for requisite sanction. TSSPDCL ("**DISCOM**") had also granted the technical feasibility approval on May 24, 2016 to the Petitioner.

3. In addition to the above, the Petitioner also got the other necessary permissions from concerned departments such as road, revenue, etc. The Petitioner had also availed loans from three financial institutions to a tune of Rs. 7.5 crores, which were utilized to purchase required equipment and undertook installation of required machinery.

4. Based on the technical feasibility approval, the Petitioner also entered into a Power Purchase Agreement with NATCO Pharma Limited (a third-party sale consumer) for the sale of power of 25 years on July 4, 2016.

5. In accordance with the technical approval and after completion of the project, it applied to DISCOM for synchronization of the grid for the generation of electricity.

6. On May 18, 2018, the project achieved the Commercial Operation Date (COD), which was certified by DISCOM after carrying out the required inspection.

7. As per the provisions of TSERC TCOA Regulations, 2005, on July 18, 2018, the Petitioner made an application for grant of a long term intra-state open access ("**LTOA**") for the tri-partite agreement to the TSTRANSCO ("**Nodal Agency**") in order to sell the power generated from the plant to the third parties as envisaged in Solar Policy.

8. However, Nodal Agency did not approve the application till the filing of the captioned Petition, putting the Petitioner into deep financial trouble and also under the threat of being declared a non-performing asset ("**NPA**") under SARFAESI Act, 2002. Furthermore, Nodal Agency did not accord its reasons for rejection even after repeated requests.

9. In its counter affidavit, DISCOM claimed that it performed the feasibility study solely for grid connectivity approval. It noted that Nodal Agency was required to initiate the processing criteria for open access. Consequently, the authorization given for grid-connectivity would not amount to permission for the use of open access facilities.

10. Furthermore, DISCOM stated that LTOA cannot be granted because of grid network's overloading conditions.

11. DISCOM also claimed that it was not liable to pay for the energy injected at any mutually agreed price from the date of synchronization to the date of the open access agreement without any cost being set by the Commission.

12. Nodal Agency, on the other hand, noted that DISCOM's feasibility report was essential for the processing of an open access application and could only be processed after receipt of the technical feasibility report.

13. The feasibility report never arrived from DISCOM because of which the LTOA application couldn't be processed. Hence, Nodal Agency will not be a party to the agreement and is not connected to the relief sought by the Petitioner.

14. The Petitioner was desirous of invoking penal provision under Section 142 of EA, 2003, however during course of hearing decided not to do so as it did not want to suffer and jeopardize its existence at the hands of Respondents.

Issues before the Hon'ble Commission and its analysis:

Courts Analysis:

- Hon'ble Commission noted that Respondents had not permitted the Petitioner to execute a third-party sale of the energy generated by their project. According to the provisions of EA, 2003, the Respondents are bound to allow the LTOA to the Petitioner. It also observed that the Respondent's denial of LTOA was unreasonable and no communication was made to the Petitioner in the past two years in terms of clause 10.6 or 10.7 of the TSERC TCOA Regulations, 2005;
- Since Respondents did not comply with the timelines of processing Petitioner's LTOA, the Petitioner was constrained from making any third-party sale and earning a revenue;
- The Petitioner was under threat of being declared an NPA;
- Respondents cannot turn around after two (2) years and state that the process is yet to be completed, as it smacks of exercising dominant position by not allowing the open access;
- Respondents have acted contrary to the established law. In addition, the Hon'ble Commission pointed out that the energy fed into the grid is to be considered as banked energy from the date of synchronization before open access approval. It mentioned that for a period of two (2) years, Respondents have not permitted open access and are liable to pay the energy charges it collects; and
- Hon'ble Commission reprimanded the Nodal Agency for taking one (1) month to forward the request to DISCOM to determine the feasibility of providing the Petitioner with open access. The order added that the Nodal Agency should have given notice of the feasibility of open access facilities within thirty (30) days of the date of the request.

Held by the Hon'ble Commission:

1. The Respondents should immediately provide the Petitioner with LTOA.

2. The Respondents should also make necessary payments to the Petitioner as per the provisions of TSERC IBSC Regulations, 2006.

Case Summary

Case Name	***: Vidarbha Industries Power Limited Vs. Maharashtra Electricity Regulatory Commission – Appeal No. 446 of 2019***
Court Name	: The Appellate Tribunal For Electricity at New Delhi
Order Date	: September 15, 2020
Sections cited	: Section 17, 62, 63, 86, 111(1)& (2), 391-394 of the Electricity Act 2003 were considered and argued in the said case.

Facts of the case:

1. Vidarbha Industries Power Limited (**"VIPL"/ "Appellant"**) is a generating company within the meaning of Section 2(28) of the Electricity Act 2003 (the **"EA, 2003"**). VIPL originally supplied power to Reliance Infrastructure Ltd (**"RInfra"**) under a Long-Term Power Purchase Agreement (**"PPA"**) labelled as the **"Consolidation Agreement"** dated August 14, 2013 which came into effect from April 01, 2014.

2. Adani Electricity Mumbai Limited (**"AEML"/"Respondent No. 2"/**the **"Procurer"**) is a Distribution Licensee for specified area of Mumbai, which pursuant to a Share Purchase Agreement (**"SPA"**) dated December 21, 2017 acquired 100% share in the Mumbai Generation, Transmission and Distribution business of RInfra. Pursuant to such take over, PPA signed between RInfra and VIPL was being assigned to AEML w.e.f. August 29, 2018 whereby, R-Infra shall continue to be responsible for all aspects prior to said date, and the obligation and entitlement of AEML shall commence only from August 29, 2018.

3. AEML by invoking certain clauses of the PPA issued a Procurer's Preliminary Default Notice dated January 18, 2019 (**"PPDN"**), followed by a Termination Notice dated April 20, 2019 thereby bringing an end to the contractual relationship between the appellant and AEML.

4. The Appellant vide Case No. 247 of 2019 approached the Maharashtra Electricity Regulatory Commission (**"MERC"**) challenging the legality of such PPDN and Termination Notice. MERC vide the impugned order dated December 16, 2019 held that even though the procedure of serving copy of PPDN on the Lenders as per PPA had not been followed, the plea of the Appellant that the impugned action of the Procurer (AEML) to bring an end to the contractual relationship was illegal, was rejected.

5. The Appellant contends that in taking the above view, Hon'ble MERC has ex facie demonstrated lack of probity or propriety, exhibiting institutional bias, it having condoned critical omission and sustaining such termination on a completely egregious premise, virtually foreclosing the existing rights of VIPL and its shareholders, in spite of holding that the mandatory procedure as prescribed in the PPA dated August 14, 2013 for issuing of PPDN and Termination Notice has not been followed by AEML. Hence, the present appeal was filed before the Hon'ble Appellate Tribunal For Electricity (**"Tribunal"**) under Section 111(1) & (2) of the EA 2003 vide Appeal No. 446 of 2019.

Issues before the Hon'ble Tribunal and its analysis:

Issue I : Whether the decision of Hon'ble MERC in the Impugned Order amounts to Institutional bias?

Courts Analysis : The Appellant vide its letter dated January 10, 2018 requested the Hon'ble MERC that the Mid Term Review Petition matter, be kept "in abeyance" due to the pending decision of the Hon'ble Supreme Court in Civil Appeal no. 372 of 2017. The Appellant submitted before the Hon'ble Supreme Court on February 06, 2017 that it would not press the judgment dated November 03, 2016 of the Hon'ble Tribunal, in light of the pending decision in aforesaid civil appeal. The Appellant was wholly responsible for the delay caused to take up the matter for hearing by the Hon'ble MERC. The Hon'ble Tribunal was of the view that the litigating parties cannot be permitted to take liberty of raising such arguments without foundational facts since such pleas have the potential to erode the confidence of people at large in statutory adjudicatory mechanism. Hence, the plea of institutional bias was wholly uncalled for and was rejected with strong disapproval to the improper language employed against the statutory body.

Issue II : Whether Reduction in Normative Availability of fuel amounts to Force Majeure?

Courts Analysis : The Appellant contended that the reduction in availability of Coal (required for generation of power) is attributable to a Force Majeure condition. However, the Hon'ble Tribunal pointed out that the provisions contained in Article 9.4.1 of the PPA expressly excludes unavailability, late delivery or changes in cost of fuel or consumables; insufficiency of finances or funds; or the agreement having become onerous to perform from the ambit of Force Majeure events.

Further, Article 9.3.1 enumerates that, the denial of Fuel Supply Agreement (**"FSA"**) by itself cannot constitute defense of force majeure unless such denial is declared by a competent court to be "unlawful, unreasonable and discriminatory". There admittedly is no such declaration by any court till date upholding such a contention of the Appellant. The Hon'ble Tribunal while stating that such difficulties do not qualify as good defense of force majeure events, also referred to the ruling of Hon'ble Supreme Court in ***Energy Watchdog v. CERC & Ors (2017) 14 SCC 80***, whereby such claim of power generators on account of higher priced alternate/imported coal was rejected.

Issue III : Whether AEML is eligible to act on the default occurred before the date of takeover (Appointed Date)?

Courts Analysis : The Appellant argued that AEML has only acquired rights and interest of RInfra on the appointed date – August 29, 2018 and, therefore, any alleged default on availability of VIPL, prior to such Appointed Date, could not be used by AEML in the PPDN and Termination letter dated April 20, 2019 for terminating the contractual relationship. The Hon'ble Tribunal pointed out that the transferee company is entitled to all the rights of the transferor company just as it inherits its liabilities, being the 'successor-in-interest' in every case of transfer, merger, takeover or a scheme of amalgamation whereunder the rights and liabilities of one company stands transferred to another. Thus, it was held that AEML is entitled to enforce the PPA provisions as if it had been a party thereto instead of RInfra since inception.

Issue IV : Whether AEML is disentitled to invoke Seller Event of Default even when it was in breach of PPA?

Courts Analysis : The Appellant contended that AEML itself had defaulted in making the timely payments under the PPA which in turn affected its ability to procure coal and generate power, and thus, according to Article 11.1.1 of the PPA, AEML was barred from invoking Seller Event of Default. However, it is a matter of fact that the Appellant did not avail any remedy under the PPA against such default as it was evident from the facts that, contrary to its claim it was sitting on a cash surplus of Rs. 740 crore for FY 14-15 and FY 15-16. Vide an Undertaking dated December 15, 2018 the Appellant (VIPL), at the request of its group company RInfra, accepted the right of AEML to set-off the amounts payable by RInfra to AEML-D against equivalent amount of monies payable by AEML to VIPL under the PPA. The Hon'ble Tribunal held that the set-off carried by AEML was in accordance of the Undertaking.

Issue V : Whether there was a non-compliance of procedure under PPA by AEML?

Courts Analysis : The language employed in Article 11.3.1 of the PPA is that "the Procurer shall have the right to deliver to the Seller a notice with a copy to the MERC and the Lenders' Representative". It means that it is the Procurer's discretion and prerogative whether or not to issue such a notice i.e. the provision to serve a copy of the PPDN upon the Lenders' representative cannot be construed as mandatory requirement controlling its validity. However, if the default is cured or its effect mitigated to the satisfaction of the other party, the matter is closed and normal relationship continues. The failure to achieve cure or mitigation is what might lead to termination by a formal notice at the end of cure period (90 days) at which stage the Lenders are allowed to step in. The Hon'ble Tribunal thus, rejected the argument of the appellant that the process of termination of PPA by AEML was faulty or vitiated.

Held by the Hon'ble Tribunal:

1. The Appellant had set up the thermal power project for generating electricity knowing the fact well that, in the capacity of generator it was always responsible to arrange for regular fuel supply and also to manage its resources and finances such that it did not face any crunch on either front. The fact that it proceeded to take its own sister company (RInfra) as its partner in business for commercial use of the electricity generated by it, entering into a PPA with them, could not have meant that it had the liberty to operate by maintaining any standards less than professional.

2. The Appellant's attempt to wriggle out of the said undertaking which it had by itself consciously issued to the Procurer, is not only unfair but also unconscionable and impermissible.

3. The failure of a generating company to produce and supply electricity in terms of the commitment under the PPA has the ripple effect of the distribution licensee being rendered incapable of discharging its statutory responsibility. A licensee in such position is within its legitimate rights to take suitable remedial steps under the contract to caution the generator asking it to cure and mitigate and upon this not bearing results to look elsewhere.

4. The Hon'ble Tribunal rejected the challenge of the Appellant to the legality and propriety of the impugned decision of Hon'ble MERC and upheld the PPDN and the termination notice issued by the Respondent No.2 and also vacating the direction deeming date of impugned order being the date of service of termination notice.

5. The appeal and the applications filed therewith by the Appellant, stood dismissed.

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Warm Regards,

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