

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 154 of 2013 & I.A. No. 222 of 2013**

**Dated: 12<sup>th</sup> January, 2015**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**In the matter of:**

**M/s. LANCO KONDAPALLI POWER LIMITED,**  
Lanco House, Plot No. 4, Software Units Layout,  
HITEC City, Madhapur,  
Hyderabad-500 034  
Through its Authorized Signatory  
(Mr. Somasekhar Naidu)

**... Appellant (s)**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**  
4<sup>th</sup> & 5<sup>th</sup> Floors, Singareni Bhavan, Red Hills,  
Khairatabad, Hyderabad.  
Andhra Pradesh-500 004  
Represented by its Secretary
2. **Transmission Corporation of Andhra Pradesh Limited,**  
Vidyut Soudha, Somajiguda,  
Hyderabad-500 082,  
Andhra Pradesh  
Represented by its Chairman & Managing Director
3. **Central Power Distribution Company of Andhra Pradesh Ltd.,**  
# 6-1-50, Mint Compound,  
Hyderabad-500 063  
Represented by its Chairman & Managing Director
4. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,**  
Saishakthi Bhavan, New Saraswati Park,  
30-14/9, Visakhapatnam-530 020  
Represented by its Chairman & Managing Director

5. **Northern Power Distribution Company of Andhra Pradesh Ltd.,**  
House No. 1-1-503 & 504, Opp. NIT Petrol Pump,  
Chaitanya Puri, Hanamkonda,  
Warangal-506 004.  
Represented by its Chairman & Managing Director
6. **Southern Power Distribution Company of Andhra Pradesh Ltd.,**  
House No. 193-13 (M), Renisgunta Road,  
TIRUPATI- 517 501,  
Represented by its Chairman & Managing Director
7. **Andhra Pradesh Co-ordination Committee,**  
Vidyut Soudha, Somajiguda,  
Hyderabad-500 082,  
Andhra Pradesh

**...Respondent(s)**

**Counsel for the Appellant (s):** **Mr. C.S. Vaidyanathan, Sr. Advocate**  
**Mr. Sakya Singh Chaudhury**  
**Mr. Anand Kumar Srivastava**  
**Ms. Perna Priyadarshni**  
**Mr. Gautam Chawla**

**Counsel for the Respondent(s):** **Mr. S.B. Upadhyaya, Sr. Advocate**  
**Mr. Kaustuv P. Pathak,**  
**Mr. Anand K. Ganesan,**  
**Ms. Swapna Seshadri for R-2 to 7**  
**Mr. K.V. Mohan,**  
**Mr. K.V. Balakrishnan for R-1**

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

The present Appeal has been filed by M/s. Lanco Kondapalli Power Ltd. against the order dated 13.6.2011 passed by the Andhra Pradesh Electricity Regulatory Commission (“State Commission”) in a

Petition filed by the Distribution Licensees and Transmission Corporation of Andhra Pradesh Ltd. with regard to levy of Liquidated Damages for delay in achieving commercial operation of the Appellant's Power Project.

2. The State Commission is the Respondent no. 1. The Transmission Corporation of Andhra Pradesh Ltd. and the Distribution Licensees are the Respondent nos. 2 to 6. Andhra Pradesh Power Coordination Committee is the Respondent no. 7.

3. The brief facts of the case are as under:

(i) The erstwhile Andhra Pradesh Electricity Board had invited a bid through international competitive bidding for a short gestation power project. The Appellant submitted a bid for a liquid fuel based thermal power plant which was duly accepted by the

Electricity Board. The Appellant and the Electricity Board entered into a Power Purchase Agreement (“PPA”) on 31.3.1997. Pursuant to the PPA, the Appellant set up a 368.144 MW combined cycle thermal power plant. On reorganization of the Electricity Board in the year 1998 following notification of the Andhra Pradesh Electricity Reforms Act, 1998 and on issuance of the First Transfer Scheme, the rights and obligation under the PPA were divested to the Respondent no. 2. Thereafter, on notification of the Third Transfer Scheme, the rights and obligations under the PPA were further divested the Distribution Licensees, the Respondent nos. 3 to 6 herein.

(ii) According to the terms of the PPA, the Appellant was required to complete the said project within a period of 16 months from the date of

operation of the PPA, subject to any delay caused due to force majeure event, the purchaser's default and other reasons for which extension is provided for under the PPA.

(iii) However, the execution of the project was delayed due to certain factors. The first unit of the project achieved CoD on 26.7.2000, the second unit on 24.9.2000 and the Commercial operation of the entire project was declared by the Appellant on 25.10.2000.

(iv) One of the primary conditions precedent under the PPA was the availability of fuel to support 100% plant load. The Respondents were required under the PPA to make all reasonable efforts to assist the Appellant to avail fuel linkage. Pursuant to the approval of the project and execution of PPA, the Ministry of Petroleum & Natural Gas, Government of

India, vide letter dated 21.7.1997 indicated that it will allocate fuel linkage to the extent of 80% Plant Load Factor (“PLF”). However, as per the Appellant they were required to proceed with execution of the project on being assured fuel linkage for 100% PLF.

(v) On 19.1.1998 the Appellant entered into a Fuel Supply Agreement with Hindustan Petroleum Corporation Ltd. (“HPCL”) for annual linkage quantity corresponding to 80% PLF. On 17.11.1998, HPCL in a letter addressed to the Electricity Board, the predecessor the Respondent 2 to 6 indicated that it would supply fuel to the Appellant to enable the power station to operate upto 100% PLF.

(vi) The Appellant during the execution of the Project had placed order for the Gas Turbine for the project on Korea Heavy Industries & Construction who

was Appellant's EPC contractor. On or around 2.6.1999, the barge carrying the turbine and generator of the first unit capsized near Machillpatnam due to unexpected storm and sunk in Bay of Bengal. As a result of this event, the delivery of the turbines and consequently the construction of the Project suffered a set back due to a force majeure event. On 5.6.1999, the Appellant gave an intimation to the Respondent no. 2 about the sinking of the barge carrying the turbine as per the terms of the PPA.

(vii) On 20.1.2000, the EPC contractor of the Appellant supplied the substitute gas turbine. Ultimately the project achieved COD on 25.10.2000. The Respondents 2 to 7 purchased power in terms of the PPA from January 2001 to November 2005 without raising any objection with regard to delay in achieving Commercial Operation Date.

(viii) On 14.12.2005, the Respondent no. 7 for the first time raised the contention that the commissioning of the Project had been delayed by the Appellant from the Scheduled Commercial Operation Date of 20.9.1998 and that the Appellant was liable to pay liquidated damages (“LD”). The Respondent no. 7 then proceeded to adjust the amount payable under the invoice dated 12.12.2005 towards its claim for liquidated damages. The Appellant denied any liability towards the LD on the ground that the claim was barred by limitation and the Respondents had not suffered any loss due to delay in commissioning of the project.

(ix) The Respondent 2 to 7 on 19.12.2005 after adjusting entire monthly bill dated 12.12.2005 towards LDs filed a Petition under Section 62 read



with Section 86(1)(f) of the Electricity Act, 2003 before the State Commission seeking recovery of LD of Rs. 95.16 crores.

(x) In the meantime, the Appellant filed a Writ Petition before the High Court being WP No. 27101 of 2005 challenging the legality of letters dated 14.12.2005 and 15.12.2005 issued by the Respondent no. 7 by which the Respondents had proceeded to withhold the amount payable to the Appellant for supply of power.

(xi) The Learned Single Judge of the High Court vide order dated 29.12.2005 granted interim stay of the operation of the letter dated 14.12.2005. Against this interim order the Respondents 2 to 7 preferred an appeal before the Division Bench of the High Court. While disposing of the Appeal the Division Bench vide

its order dated 2.2.2006 stayed the operation of the order of the Learned Single Judge dated 29.12.2005 subject to the Respondents 2 to 7 not making any further deductions or adjustment in the future bills of the Appellant. An SLP was filed by the Appellant against this interim order before the Hon'ble Supreme Court which was dismissed. Ultimately, the Division Bench of the High Court passed its final order dated 11.4.2011 disposing of WP No. 27101 and holding that the State Commission was authorized to adjudicate upon the matter.

(xii) On 13.6.2011, the State Commission passed the impugned order dismissing the Petition filed by the Respondents 2 to 7 as being barred by limitation. However, the State Commission also decided the issue on merits and held that the Respondents 2 to 7 were entitled to recover LD. The Appellant had also filed its

counter claim before the State Commission regarding unlawful withholding on the moneys payable to the Appellant against power supply. The State Commission held that the counter claim filed by the Appellant was untenable and therefore, liable to be dismissed.

(xiii) The Appellant also filed a review petition against the impugned order which was dismissed by the State Commission vide order dated 23.4.2013.

(xiv) Aggrieved by the impugned order dated 13.6.2011, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

4.1 The execution of the project was delayed due to certain uncontrollable factors. One of the primary

condition precedent under the PPA for the timely execution of the Project was the availability of fuel to support 100% plant load. The Respondents were required under the PPA to make reasonable efforts to ensure the availability of fuel for 100% PLF. The Ministry of Petroleum & Natural Gas, Government of India vide letter dated 21.7.1997 indicated that it would allocate fuel linkage to the extent of only 80% PLF. However, as per the terms of the PPA, the Appellant was required to proceed with execution of the project on being assured of fuel linkage of 100% PLF. HPCL, the oil company indicated only on 17.11.1998 that it would supply fuel to the Appellant to enable its power station to operate upto 100% PLF. Thus, there was a delay of 537 days in getting 100% fuel linkage for the project and the SCOD for the

project and all other prior milestones stood postponed by a period of 537 days.

4.2 During the execution of the Project, on or about 2.6.1999, the barge carrying the gas turbine for the Project capsized near Machillpatnam and sunk in Bay of Bengal. Such an event constitutes an event of force majeure as per the PPA. The Appellant provided the information sought by the Respondents from time to time. The Appellant had also provided a copy of letter dated 22.1.2000 received from the contractor in Korea confirming the cessation of the aforesaid force majeure. Accordingly, the Appellant requested the Respondent no. 2 to take notice of cessation of force majeure event on 20.1.2000 on record and correspondingly extend the SCOD as per the terms of the PPA. The factum of force majeure event, viz., the

sinking of the barrage was never challenged by any of the Respondents.

4.3 It is well settled that when there is breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation or liability, nor does the injured party automatically become entitled to claim any amount as debt or otherwise from the other party. The only right which the aggrieved party has is the right to sue for damages for the injury it has sustained. Further, even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner specified in the contract by the party claiming damages, that will not convert a claim for damages into claim for an ascertained sum due.

4.4 It is settled law that an alleged default or breach gives only to a right to sue for damages and not to claim any debt. A claim for damages becomes “debt due” not when the loss is quantified by the party complaining of the default or breach, but (i) when a court of competent jurisdiction holds an inquiry that the person against whom the claim for damages is made has committed breach, and (ii) the other party has suffered a legal injury on account of such breach whereby the party in breach has incurred a pecuniary liability towards the party complaining of breach; (iii) assessed the quantum of loss suffered, and (iv) awarded damages. Thus, damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach. This is true even in a case where the parties have agreed to a certain specified amount as reasonable damages on

account of breach. In the present case, in the absence of any adjudication by the competent court towards the liquidated damages, the Respondent nos. 2 to 7 did not have any right to recover any amount from the Appellant as damages in any form.

4.5 In the present case, the right to sue for damages is barred by limitation. The petition filed by the Respondent nos. 2 to 7 being barred by limitation, the sole right of the Respondents to claim damages has lapsed with efflux of time. Therefore, the State Commission was required to dismiss the Petition and not to entertain the Petition on merits. In an earlier proceeding between the same parties in O.P. no. 33 of 2009 the State Commission by an order dated 13.6.2011 had refused to proceed on the merits of the claim raised by the present Appellant on the ground that the Petition was barred by time. The State



Commission had no jurisdiction to adjudicate upon the matter on merits when the claim of the Respondents 2 to 7 was barred by limitation.

4.6 Order VII Rule 11 (d) of the CPC casts a mandate on the court to reject/dismiss a plaint when the suit appears from the statement in the plaint to be barred by any law, including the law of limitation. It is the duty of the court to dismiss a time barred suit, appeal or application irrespective of whether or not a defence has been raised by the defendant.

4.7 In the present case, once the State Commission held that the Petition was barred by limitation, it ought to have dismissed the same without examining the merits of the matter and *inter alia*, deciding on the force majeure claim and the amount of liquidated damages.

4.8 The State Commission erred in holding on one hand that the claim of the Respondents 2 to 7 is barred by limitation, but on the other hand holding that they are entitled to adjust the amount treating them as bankers within the meaning of Section 171 of the Contract Act as they are corporate body under the Companies Act as in case of banking companies. The State Commission grossly erred in appreciating the scope of Section 171 of the Contract Act. By taking advantage of the said finding, the Respondents have adjusted monthly tariff bill of Rs. 64.29 crores in June 2011 even after the dismissal of the Petition by the State Commission as barred by limitation.

4.9 The Respondents 2 to 7 are not entitled to claim LDs from the Appellant since they have purchased

cheaper power from the Eastern Region during the period.

4.10 It is a well settled law that even if there is a claim for LDs it is for the court to determine whether it represents a genuine pre-estimate of damages.

4.11 The State Commission has erroneously rejected the counter claim of the Appellant praying for dismissal of the Petition and direction to the Respondent nos. 2 to 7 to pay the amount of Rs. 48,06,55,963/- which was adjusted from the bills of the Appellant along with interest @ 12% per annum from 15.12.2005 till the date of payment.

5. The Respondents 2 to 7 in reply to the above issues have submitted as under:

5.1 It is a well settled principle that limitation only bars the remedy and not the right itself. The principle of limitation has been prescribed in order to avoid parties from inordinately delaying in making claims in court proceedings. The fact that the Petition is barred by limitation would only mean that the claim cannot be enforced through judicial proceedings. Limitation does not destroy the rights of the parties. In other words, the Respondents cannot enforce the liquidated damages through judicial proceedings, in this case, before the State Commission. However, if the Respondents have other means to recover the amounts due to the Respondents, the recovery can always be made.

5.2 There is no infirmity or illegality in the impugned order of the State Commission, wherein all issues

including the issue of limitation have been decided by the State Commission.

5.3 It is not correct that the Respondents did not suffer any financial loss due to delay in commissioning of the Appellant's project. If the electricity for Appellant's project had been made available to the Respondents as per schedule, the said electricity, if cheaper, would have been used for the consumers of the State or sold outside to earn revenue. It is impossible to quantify the value of loss to the Respondents. Considering the nature of electricity and it being impossible to calculate the actual damages, liquidated damages are provided for by the parties in the PPA.

5.4 There can be no question of any waiver of rights to claim liquidated damages by the Respondents in view of specific provisions of the PPA.

5.5 The State Commission was right in rejecting the counter claim of the Appellant as not maintainable. There is no provision in the Electricity Act, 2003 or in the Business Rules of the State Commission to allow a counter claim. In any event, the Appellant can still approach the State Commission with a proper Petition in accordance with law.

5.6 The Appellant could not establish its case regarding force majeure to the satisfaction of the State Commission. In fact the Appellant had not placed the required information regarding sinking of the barge carrying Gas Turbine before the Respondents 2 to 7

and had not answered the queries raised by the Respondents.

5.7 The issue raised by the Appellant that since as per the terms of the PPA, fuel linkage is a condition precedent, if the 100% fuel linkage is not achieved, the Scheduled Date of Commercial Operation shall be deemed to be extended, is misconceived. Obtaining fuel linkage is not the responsibility of the Respondents but that of the Appellant. The Respondents were only expected to provide assistance to the Appellant to obtain fuel linkage. It is not the case of the Appellant that the assistance was not provided by the Respondents.

5.8 The contention of the Appellant that the COD of the project is 25.10.2000 is erroneous and factually incorrect. The COD of 25.10.2000 was not accepted

by the Respondents 2 to 7 as it was not declared after following the requisite procedure. Since the CoD of 25.10.2000 was disputed by the Respondents 2 to 7, the matter was to be referred to an Independent Engineer as per the terms of the PPA. However, Independent Engineer was not appointed by the Appellant. The Respondents started taking power from the project from 2.1.2001 and therefore, the LD became leviable for the period from 20.9.1998 to 2.1.2001.

6. On the above issues we have heard Shri C.S. Vaidyanathan, learned Senior Counsel for the Appellant and Shri S.B. Upadhyay, learned Senior Counsel representing the Respondents 2 to 7. We have carefully considered the submissions made by both the Senior Counsel for the parties and the loads of authorities referred to by them in support of their



arguments. They have also filed written submissions which we have carefully perused. In view of the rival contentions of the parties, the following questions would arise for our consideration:

**(i) Whether the State Commission having come to the conclusion that the Petition of the Appellant for recovery of liquidated damages was barred by limitation should have proceeded to decide the issue on merits?**

**(ii) Whether the Respondent nos. 2 to 7 are entitled to recover the liquidity damages from the Appellant despite the claim having been held barred by limitation?**

**(iii) Whether the State Commission has erred in holding that the delay in commissioning of the**

**project was not due to delay in allocation of fuel oil as per the terms of the PPA and due to force majeure caused by sinking of barge carrying Turbine and Generator?**

**(iv) Whether the Respondent nos. 2 to 7 can claim liquidated damages as provided for in the PPA without establishing the actual loss or injury caused to them due to breach in agreement due to delay in commissioning of the project?**

**(v) Whether the Respondent nos. 2 to 7 were correct in adjusting the liquidity damages from the invoices raised by the Appellant for supply of power without the same first having been adjudicated by the State Commission?**

**(vi) Whether the State Commission should have dealt with the counter claim of the Appellant**

**for payment of the amount deducted by the Respondents 2 to 7 towards liquidated damages with interest?**

7. Let us examine the first two issues regarding limitation together.

8. The crux of the argument of the Shri Vaidyanathan, learned Senior Counsel for the Appellant on the above two issues is that the right of the Respondents 2 to 7 to claim liquidated damages itself is barred by limitation and having held that the claim was barred by limitation the State Commission ought not to have framed the other issues or rendered the findings on other issues on merits.

9. On the other hand Shri S.B. Upadhyay, Senior Advocate representing Respondents 2 to 7 has argued that limitation only bars the remedy and not the right

itself and the fact that a Petition is barred by limitation would only mean that the claim cannot be enforced through judicial proceedings but the same can be adjusted if there are other means to do so.

10. We find that the impugned order was passed on the Petition filed by the Respondents 2 to 7 before the State Commission under Section 86(1)(f) to adjudicate upon the dispute with the Appellant with the following prayers:

(i) To pass orders holding that the Respondent (Appellant herein) is liable to pay Rs. 95.16 crores in all towards liquidated damages to the petitioners.

(ii) To direct the Respondent to pay the balance liquidated damages of Rs. 48,90,78,681/- after deducting the amount already adjusted.

(iii) To pass any other orders which the Commission feels fit and proper in the circumstances of the case.

Thus, the Respondents 2 to 7 had approached the State Commission to adjudicate upon the dispute relating to the liquidity damages and to fix the liability of the Appellant and to direct the Appellant to pay the balance LD after deducting the amount already adjusted by them.

11. Let us examine the findings of the State Commission on limitation.

*“It is a claim of compensation for breach of contract expressly entered between the parties. The same is governed by Article 55 of Limitation Act, 1963 Article 55 which reads as follows:*

46. Article 55 reads as follows:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>For compensation for the breach of any contract, express or implied, not herein specially provided for</i>	<i>Three years</i>	<i>When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases.</i>

*The date of filing of petition is 19.12.2005. Article 55 is a residuary article in respect of suits and contracts, and is applicable only when no other article is appropriate. Article 55 is a general provision applying to all actions ex contractu not specifically provided for otherwise. Where the liability arises not on account of the breach of a contract, but on account of a statute, this article has no application. Similarly, suit for compensation not based on breach of contract but under Section 70 of Contract Act, does not attract this article.*

47. *The word compensation in Article 55 has the same meaning as in Section 73 of Indian Contract Act. The word compensation is used unless article has wide meaning. It means a monetary compensation which has become due on account of a breach of contract. Therefore, the compensation in any other way than by payment of money is not compensation for the purpose of Article 55. The word compensation denotes money or anything given to recompense a person who has suffered through the act of the person committing the breach of contract. The damages on the other hand mean the estimate of some loss and injury actually sustained. But the term compensation used in this article in a sense is wide enough to denote what is claimed which has been fixed by the parties for payment as compensation to the injured party in the event of breach of contract. The word compensation under this article is not confined to unliquidated damages only. It has also been held, that the word compensation in Article 55 is to be understood to denote the payment which a party is entitled to claim on account of loss or damage*

*arising from the breach of contract and it cannot be restricted to a claim of unliquidated damages only, but can be held to include a claim of certain sum or, in other words, the expression compensation for the breach of contract does not only point to claim for unliquidated damage which is used in a very wide sense but also includes a claim for payment of liquidated damage. The words compensation of breach of contract in Article 55 denote a sum of money payable to a person on account of loss or damages caused to him by breach of contract. This article not only attracts to breach of express contract but also to implied contracts. The applicability of article 55 is based mainly on the following conditions:*

*(1) the claim should be ex contractu i.e. based on contract (2) the contract has been broken; (3) the claim is for compensation (4) the claim is not covered by any other article specifically provided for it.*



48. *All the four ingredients are applicable to the facts of this contract, as there is an express contract in between the parties and the said contract is broken. The petition is filed for compensation and the same is not governed in any article provided under Limitation Act, 1963.*

49. *The above said discussion clearly discloses that the petition has to be filed as and when the cause of action has arisen. In this case a specific cause of action is commenced right from the month of January 2001. The petition should be filed within 3 years as envisaged under Article 55 of Limitation Act 1963 from the date of its breach. Virtually, the breach has been commenced in the year 2001 and if the calculation has been made from that date onwards, the petition should be filed in the year 2004 since the period is to be reckoned from the date of COD. Hence, it has to be filed before January 2004, but the petitioner has filed this petition on 19.12.2005 by which time, the period of limitation has already been expired.*

*50. In the light of the above said discussion, we are of the opinion that the claim made by the petitioner is barred by limitation and the petition is liable to be dismissed. Hence, this issue is answered against the petitioners.*

.....

*52. In the result, the Petition is dismissed as it is barred by time”.*

12. Thus, the State Commission has held that the claim of the Respondents 2 to 7 is barred by limitation and the petition is liable to be dismissed. The State Commission also dismissed the Petition as it was barred by time. The State Commission also decided the issue on merit. The State Commission also dismissed the claim of the Appellant regarding delay in fuel linkage and force majeure due to sinking of the barge and held that the Respondents were entitled to Rs. 74.8695 crores and not Rs. 95.16 crores as liquidated damages, provided the remedy to recovery

survives. Treating the Respondents 2 to 7 as bankers and damages as debt, the State Commission on the analogy of recovery of debt from a debtor, held that damages which the Respondents have claimed on the basis of contract are recoverable and though barred by time, the liability still subsists. Accordingly, the Commission came to the conclusion that the Respondents are entitled to adjust the amount of Rs. 48,06,55,963/- from the invoices of power supply.

13. According to Shri Vaidyanathan, Learned Senior Counsel for the Appellant, once the State Commission held that the petition was barred by limitation, it ought to have dismissed the same without examining the merits of the matter and *inter alia* deciding on the force majeure claim and the amount of liquidated damages. The State Commission on one hand held the claim of the Respondents 2 to 7 is barred by limitation,

but on the other hand held they are entitled to adjust the amount treating them as bankers within the meaning of Section 171 of the Contract Act as they are corporate body under the Companies Act as in the case of banking companies. By taking advantage of the said finding the Respondents have adjusted monthly tariff bill for Rs. 64.29 crores in June 2011 even after the dismissal of the Petition by the State Commission as barred by limitation. He referred to the various rulings in support of his claim.

14. According to Shri Upadhyaya, Learned Senior Counsel for Respondents 2 to 7, it is a well settled principle that limitation does not extinguish the debt but only the right to prevent the creditor to enforce the debt by way of court proceedings. He referred to CIT Vs. Sugauli Sugar Works (P) Ltd. (1999) 2 SCC 355,

Punjab National Bank vs. Surendra Prasad Sinha  
(1993) Supp. SCC 499.

15. In Mohanlal Verma vs. District Co-operative Central Bank Ltd., Jagdalpur (2008) 14 SCC 445 referred to by the learned Senior Counsel for the Appellant, the Hon'ble Supreme Court held that limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and decide to it on merits.

16. In V.M. Salgaocar and Bros. vs. Board of Trustee of Port of Mormugao and Another – (2005) 4 SCC 613, the Hon'ble Supreme Court held that if a suit is ex facie barred by law of limitation, a court has no

choice but to dismiss the same even if the defendant has not raised the plea of limitation.

17. In *Manindra Land and Building Corporation Ltd. vs. Bhutnath Banerjee and Others* AIR 1964 SC1336, the Hon'ble Supreme Court held that Section 3 of the Limitation Act, enjoins a court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefore irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the court not to proceed with the application if it is made beyond the period of limitation prescribed.

18. In *Auto Hardware Stores & Anr. vs. State of Bihar and Others* – AIR 2004 Pat 13, it was held that as soon as a court decides that a particular suit or appeal or application is barred by limitation then the only course

left to the court is to dismiss that suit or appeal or application.

19. In *Hardesh Ores Pvt. Ltd. vs. Heddu and Company* – (2007) SCC 614, the Hon'ble Supreme Court held that the plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law.

20. In *Kamlesh Babu and Others vs. Lajpat Rai Sharma and Others*, - (2008) 12 SCC 577, the Hon'ble Supreme Court decided that it is a well settled that Section 3(1) of the Limitation Act casts a duty upon a court to dismiss a suit or an appeal or an application, if made after the prescribed period, although, limitation is not set up as a defence.

21. In National Thermal Power Corporation vs. Siemens Atkeingesellschaft 2007 (4) SCC 451, the Hon'ble Supreme Court held as under:

*“17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In Pandurang Dhoni Chougule vs. Maruti Hari Jadhav this Court observed that:*

*It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of*



*jurisdiction which fall within the purview of Section 115 of the Code.*

*In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction”.*

22. We find that in another order passed on 13.6.2011 in O.P. no. 33 of 2009 between the same parties as the present appeal and in which the Appellant had sought a claim for fixed charges with interest, the same State Commission rejected the Petition on ground of limitation and did not go into the merits of the case.

23. In view of above rulings, it is clear that once the State Commission has come to conclusion that the Petition is barred by limitation it has no jurisdiction to decide the matter on merits and holding that the

Respondent nos. 2 to 7 are entitled to adjust the balance amount of about Rs. 48.06 crores towards the LDs.

24. It is argued by Learned Senior Counsel for the Respondents 2 to 7 that limitation does not extinguish the debt but only the right to prevent the creditors to enforce the debt by way of court proceedings. He has referred to some rulings in this regard which we shall discuss in the following paragraph.

25. In Punjab National Bank and Others vs. Surendra Prasad Sinha – 1993 Supp. (1) SCC 499, the Appellant Bank gave a loan to a person. The Respondent and his wife stood guarantors and executed a ‘security bond’ and handed over a Fixed Deposit Receipt to the Bank. The security bond provided for the FDR pledged as security for the said

loan and the bank was entitled to retain/realize/utilize/appropriate the same without reference to the guarantors. The principal debtor did not repay the debt. The bank as creditor adjusted on maturity of the FDR, the outstanding debt due to the bank. The Respondent lodged a complaint that the debt became barred by limitation and therefore, the Bank was not entitled to adjust the security amount on maturity of the FDR. The Hon'ble Supreme Court held as under:

*“The rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act only bars the remedy, but does not destroy the right which the remedy relates to. Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant Article in the schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. Only exception in which the remedy also*

*becomes barred by limitation is that the right itself is destroyed. For example, under Section 27 of the Act a suit for possession of any property becoming barred by limitation, the right to property itself is destroyed. Except in such cases which are specially provided under the right to which remedy relates in other case the right subsists so long the debt is not repaid. That right can be exercised in any other manner than by means of a suit. It is not obligatory to file a suit to recover the debt. The creditor which he is in possession of an adequate security, could adjust the time barred debt due from the security in his possession and custody and credit the balance amount to the savings bank account of the respondent. Thereby the appellant did not act in violation of any law, nor converted the amount entrusted to them dishonestly for any purpose. Action in terms of the contract expressly or implied is a negation of criminal breach of trust defined in Section 405 and punishable under Section 409 IPC. It is neither dishonest, nor misappropriation. The bank had in its possession the fixed deposit receipt as guarantee for due*

*payment of the debt and the bank appropriated the amount towards the debt due and payable by the principal debtor. Further, the F.D.R. was not entrusted during the course of the business of the first appellant as a Banker of the respondent but in the capacity as guarantor.”*

26. The present case is regarding the claim for the damages under a contract for which the Respondents 2 to 7 prayed before the State Commission for adjudication of dispute and fix the liability of the Appellant. In this case, the Respondents 2 to 7 sought remedy before the State Commission in which the State Commission held the claim as time barred. After the State Commission has held the claim as time barred on a Petition filed by the Respondents 2 to 7, it is not open for the Respondents 2 to 7 to recover the LD from the invoices raised by the Appellant for the power supplied to the Respondents, as a recovery of

debt. Therefore, the findings in the Punjab National Bank case will not be applicable to the present case. The State Commission on the one hand held that the claim of the Respondents 2 to 7 is barred by limitation, but on the other hand held that they were entitled to adjust amount treating them as bankers within the meaning of Section 171 of the Contract Act as they are corporate bodies under the Companies Act like banking companies. This is wrong. Section 171 of the Contract Act applies to certain specified categories, viz. bankers, factors, wharfingers, attorneys and policy-brokers. Section 171 provides that the above mentioned persons, in the absence of a contract to the contrary, retain as security for a general balance of account, any goods bailed to them, but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an

express contract to that effect. The Respondents 2 to 7 are not in the category of bankers, as wrongly held by the State Commission. The Respondents 2 to 7 do not become bankers unless they satisfy the requirement of the Banking Regulations Act and other rules and laws.

27. Similarly CIT vs. Sugauli Sugar Works (P) Ltd. – (1999) 2 SCC 355 relating to the enforcement of debt by the creditor on the expiry of limitation period referred to by learned Senior Counsel for the Respondents 2 to 7 will also not be applicable.

28. Let us also examine the sequence of raising of the force majeure claim by the Appellant and the conduct of the Respondents in raising the claim for liquidated damages for delay in commissioning of the power project.

- (a) On 21.7.1997, the Ministry of Petroleum & Natural Gas, Government of India, decided to allocate liquid fuel for requirement at 80% Plant Load Factor. On receipt of this letter, the Appellant by letter dated 26.7.1997 wrote to the Chairman, A.P. State Electricity Board that limiting the fuel linkage at 80% PLF would not meet the covenants of the Board stipulated in clause 7.2 (g) of the PPA and requested him to review the fuel linkage and take up with Government of India in light of the difficulties they would pose without fuel linkage to generate electricity at 100% PLF.
- (b) On 26.9.1997 the Appellant wrote to the Chief Engineer of the Electricity Board, the predecessor in interest of the Respondents 2 to 7, clarifying the Appellant's contention



about clause 7.2(g) of the PPA which provided for obtaining fuel linkage with 100% PLF within 60 days of the agreement and extension of scheduled date of completion if such linkage is delayed beyond 60 days. It was pointed out that the extension of scheduled date of completion is inextricably linked to obtaining linkage for 100% PLF. The Appellant also informed that as per the PPA the fuel linkage had to be obtained by 31.5.1997 and hence the day to day delay in issuance of the linkage from 31.5.1997 correspondingly would extend the SCOD. In pursuance of the above letter from the Appellant, Chief Engineer, Electricity Board vide letter dated 27.8.1998 sent a letter to HPCL, the fuel oil supplier, to consider

supplying fuel to the Appellant to generate electricity upto 100% PLF.

- (c) The Appellant entered into Fuel Supply Agreement with HPCL on 19.1.1998 for supply of fuel at 80% PLF. However, on 17.11.1998, HPCL confirmed to the Chief Engineer, Electricity Board in response to his request for increasing the fuel supply to generate 100% PLF that they would supply fuel over and above the entitlement to enable the power plant of the Appellant to operate upto 100% PLF. The Appellant claims the 16 months for commissioning of the project should be reckoned from the 61<sup>st</sup> day from acceptance of fuel linkage at 100% PLF i.e. with effect from 18.1.1999.

(d) On 5.6.1999, the Appellant sent a notice of Force Majeure under clause 10.2 (a) & (b) of the PPA informing about sinking of the barge shipping the Gas Turbine and the generator of the first Unit due to unexpected storm on 2.6.1999 and efforts being made to procure an alternative Gas Turbine and Generator at the earliest. In response to the above notice, APTRANSCO, Respondent No. 2 herein vide letter dated 23.6.1999 acknowledged the notice and sought information regarding the date of cessation of the Force Majeure event, day to day progress achieved, day to day programme for restoration of normalcy and report of Meteorological Department at Kakinada or Machillipatnam about occurrence of storm on 2.6.1999. The

Appellant sent weekly reports to the Respondents regarding progress of works as also the cessation notice. However, report of Meteorological Department was not sent.

- (e) On 31.1.2000 the Appellant gave a notice of the cessation of the Force Majeure event enclosing a copy of letter from Korea Heavy Industries & Construction Co., the contractor/supplier, about receipt of the substitute Gas Turbine Generator at inland port on 20.1.2000 and cessation of Force Majeure on 20.1.2000.
- (f) On 22/24.7.2000, APTRANSCO informed the Appellant that before allowing the COD of the Project decision on issues, which included allowing Project COD condoning the delay in

SCOD with resolution of commercial issues, was required.

- (g) On 31.7.2000, the Appellant sent information to APTRANSCO regarding COD of the first Unit after completion of tests in the presence of the APTRANSCO officers.
- (h) On 30.10.2000 the Appellant sent intimation to APTRANSCO regarding successful completion of the tests on the generating project and declaration of COD w.e.f. 25.10.2000. However, APTRANSCO vide letter dated 4.11.2000 did not accept the project COD as according to them the Appellant had not conducted the tests as per the PPA. APTRANSCO did not elaborate the reasons for the same.

- (i) On 12.12.2005, the Appellant sent a monthly tariff bill for the period 11.11.2005 to 10.12.2005 for about Rs. 48.06 crores to AP Power Coordination Committee (Respondent no. 7).
- (j) On 14.12.2005, for the first time APPCO, the Respondent No. 7, raised claims for damages for Rs. 95.16 crores for delay in commissioning of the project. APPCO stated that SCOD of the project was 20.9.1998 and Government of AP had directed to commence the power purchase from the Project w.e.f. 2.1.2001 and accordingly they were procuring power w.e.f. 2.1.2001. APPCC informed that they were adjusting the payment due in the month of December 2005 against the dues and asked for balance

payment or else the same would be adjusted in future bills.

- (k) Vide letter dated 15.12.2005 to APPCC, the Appellant explained that there is no delay in SCOD due to force majeure and stated that the claim for LD was time barred as it was raised after a lapse of 5 years. They also questioned the authority of APPCC, not being a party to the PPA, raising the issue and stated that the action to withhold the payment against the power supply as illegal.
- (l) Again on 15.12.2005, APPCC informed the Appellant that they had adjusted Rs. 46.25 crores against the bill of Rs. 95.16 crores towards the LDs and the balance Rs. 48.90 crores may be paid to

APPCC, else the same would be adjusted against the future bills.

- (m) Immediately thereafter, the Respondents 2 to 7 filed a Petition before the State Commission u/s 62 and 86(1)(f) of the Electricity Act, 2003 with prayer to pass the orders holding that the Appellant is liable to pay Rs. 95.16 crores towards LDs.

29. The above sequence shows that the Respondents 2 to 7 continued to purchase from Appellant from 2.1.2001 and paid the full charges till December 2005. Only on 15.12.2005 i.e. after a lapse of about 4 years and 11 months, the Respondent no. 7 for the first time raised the issue of LDs and also withheld the payments for power supplied against liquidated damages for delay in COD. Immediately, thereafter, the Respondents 2 to 7 filed a petition before the State



Commission u/s 86(1)(f) of the Act for adjudication of the dispute. Even after the Appellant sent a notice for force majeure about sinking of the barge, the Respondent no. 2 after acknowledging the notice sought same information regarding cessation of Force Majeure, report of Meteorological Department about occurrence of storm, etc. On 27.1.2000, the Appellant only gave a notice of cessation of Force Majeure event along with a letter from the contractor/supplier without submitting the report from Meteorological Department. No action was taken by the Respondents 2 to 7 thereafter till 14.12.2005 and the Respondents 2 to 7 continued to receive power from the Appellant from 2.1.2001 and making full payment for the same.

30. It is seen from the response of APTRANSCO to the objections in the proceedings for determination of ARR and Tariff Order for FY 2003-04 before the State

Commission, as furnished by the Appellant, on a specific query by the objectors regarding status of LDs from the Appellant, the response of APTRANSCO was “no liquidated damages claimed from Lanco as APTRANSCO has purchased cheaper power from Eastern Region during the period”. This has not been denied by the Respondents.

31. Neither the APTRANSCO who had obtained the rights and obligations under the PPA under the first Transfer Scheme nor the distribution licensees, the Respondents 3 to 6, who had obtained the rights and obligations under the PPA under the Third Transfer Scheme, served notice for their claim of LDs on the Appellant either in December 2005 or prior to that and did not serve any show cause notice regarding their claim of LDs. Further no opportunity was granted to the Appellant to present their case. On the other hand

the APPCC, the Respondent No. 7, withheld the amount of Rs. 46.25 crores against the invoice for supply of power that too after a lapse of 4 years and 11 months without serving any show cause notice regarding claim of LDs. Immediately, thereafter, the Respondent no. 2 to 7 filed a Petition before the State Commission for adjudication of dispute regarding liability of the Appellant to pay Rs. 95.16 crores towards the LDs. In our opinion withholding of payment by the Respondent no. 7 from the invoice for power supply against the claim of LD for delay in COD of the Project before adjudication of the dispute by the State Commission which was raised by Respondents themselves was illegal.

32. The conduct of the Respondents 2 to 7 shows that they were not diligent to raise their claim of LD. APTRANSCO in the public hearing for ARR and Tariff

Order for FY 2003-04 even justified their action of not claiming the LDs due to procurement of cheaper power from the Eastern Region. Even after the notice of cessation of Force Majeure dated 27.1.2000 issued by the Appellant, the Respondents 2 to 7 did not raise any claim for LDs.

33. In some of the judgments in the past this Tribunal has held that the provisions of Limitation Act would not be applicable to the Electricity Regulatory Commissions but delay and latches would apply. However, in some judgments this Tribunal has held that Limitation Act would be applicable. Therefore, the issue of application of the Limitation Act on the Electricity Regulatory Commission is under consideration of a three member bench of this Tribunal. Even if it is accepted that the Limitation Act is not applicable to the proceedings before the State

Commission, the present case would be covered under delay and latches on behalf of the Respondents 2 to 7 in claiming the LDs.

34. We also notice that in a case filed by the Appellant for a claim under the same PPA against the same Respondents, the State Commission by its order passed on same day as the impugned order i.e. 13.6.2011, did not go into the merit of the case as the claim was barred by limitation and rejected the petition of the Appellant on the ground of limitation only. However, in the present case the State Commission went into the merits of the case even while holding that the claim of the Respondents 2 to 7 (petitioner before the State Commission) was barred by limitation.

35. In view of above discussion, the first two issues are answered in favour of the Appellant.

36. Let us take up the third issue regarding delay in COD of the project.

37. We find that the Appellant has claimed extension of SCOD on two counts viz. delay in allocation of fuel for facilitating operation of the power plant at 100% PLF and force majeure due to sinking of barge carrying turbine and generator of the first unit, as per the terms of the PPA.

38. The State Commission allowed extension of date on account of fuel linkage only for 50 days i.e. 60 days beyond letter dated 21.7.1999, on the ground that the Appellant had not replied to the said letter dated 21.7.1997.

39. We find that immediately after the receipt of letter dated 21.7.1997, the Appellant had written a letter dated 26.7.1997 to Chairman, AP State Electricity Board that limiting fuel linkage to 80% PLF would not meet the covenants of the Board stipulated in clause 7.2 (g) of the PPA and requested the Board to review and take up the matter with the Government of India for allocation of fuel linkage to generate electricity at 100% PLF. On 26.9.1997 the Appellant again wrote to the Electricity Board clarifying their contention about the application of clause 7.2(g) of the PPA for delay in getting fuel linkage at 100% PLF would result in extension of SCOD. Thereafter, the Electricity Board on 27.8.1998 took up the matter with the fuel supplier to consider supplying fuel to the Appellant to generate electricity at 100% PLF. Only on 17.11.1998 HPCL, the fuel supplier, confirmed to the Electricity Board

that they would supply fuel to generate power at 100% PLF. This is also accepted by the State Commission. Therefore, the SCOD should have been calculated from 61<sup>st</sup> day from 17.11.1998 i.e. 18.1.1999 as per the terms of Article 7.2(g) of the PPA. Thus, the SCOD had to be extended to 18.5.2000 on this account (i.e. 16 months from 18.1.1999). Accordingly, the extension of COD has to be allowed for number of days calculated from 30.5.1997 to 18.1.1999, as per the terms of the PPA.

40. The Learned Senior Counsel for the Respondents 2 to 7 has argued that they had to only make reasonable efforts to assist the Appellant to obtain issuance of fuel linkage but it was the responsibility of the Appellant to obtain fuel linkage and, therefore, any delay on this account should not be allowed for extending the SCOD. We do not find any merit in the



argument of the Respondents as Article 7.2 (g) of the PPA allows deemed extension of the SCOD day-to-day for each day of delay on account of issuance of fuel linkage to generate electricity at 100% PLF irrespective of whether the Appellant or the Respondents 2 to 7 are responsible for the requisite fuel linkage. However, if there is any delay in signing of the fuel supply agreement then the extension for such period would not be admissible as per this clause. In the present case the letter from HPCL regarding supply of fuel at 100% PLF was given on 17.11.1998 but the agreement was signed on 28.1.2000. Thus, the extension on account of delay in fuel linkage would not be allowed beyond 18.1.1998 i.e. 61<sup>st</sup> day from 17.11.1998.

41. As regards the force majeure on account of sinking of the barge, we find that the Appellant had claimed force majeure as per clause 10.1(ii) (6) by

letter dated 5.1.1999 addressed to the Chairman and Managing Director, APTRANSCO. Clause 10.1 (ii)(6) relates to Non-Political Force Majeure event due to air cash, shipwreck or train wreck or loss or damage to any major component arising in the course of marine transit other than due to the fault of the transporting party. Clause 10.1(ii)(1) includes flood, cyclone, lightning, earthquake, drought, storm or any other extreme effect of the natural elements.

42. We find that the State Commission has considered clause 10.1 (ii) (1) while deciding the issue that there was no force majeure. However, force majeure was claimed by the Appellant under clause 10.1 (ii)(6) which has not been considered by the State Commission.

43. The Appellant vide letter dated 31.1.2000 gave a notice to APTRANSCO regarding cessation of force majeure, enclosing a copy of letter dated 22.1.2000 from the contractor/supplier regarding receipt of the replacement Gas Turbine and Generator. The letter dated 22.1.2000 from the contractor also refers to force majeure invoked by the contractor due to barge accident on 2.6.1999. The letter dated 31.1.2000 indicates that the Appellant had been keeping the APTRANSCO informed about the replacement of the Gas Turbine through weekly progress reports as required under the PPA. This letter also refers to a letter dated 26.11.1999 sent by the Appellant to APTRANSCO informing about the efforts made by them and the EPC contractor to mitigate the effects of the Force Majeure on the Project in order to commission the Plant at the earliest possible time.

44. The Appellant vide letter dated 26.11.1999 had also informed APTRANSCO about arrival of the replacement Gas Turbine at Kakinada Port and unloading on 18.11.1999. It was also informed that the Generator had also been loaded at the European Port of Rotterdam on 18.11.1999 after successful testing. The letter also states that the Appellant had been furnishing weekly Progress Reports of the status of replacement of Gas Turbine and Generator to APTRANSCO as per the PPA.

45. We find that the Respondents 2 to 7 had not raised any issue or sought any documents from the Appellant after receipt of the notice for cessation dated 31.1.2000 or letter dated 26.11.1999 or the weekly reports sent by the Appellant to APTRANSCO. Thereafter, only in December, 2005, the Respondent

no. 7 withheld the amount due to the Appellant against the power supply from the Project and informed the Appellant that it had been adjusted against the LDs for delay in achieving COD.

46. The Appellant has also forwarded a show cause notice from Central Excise and Customs dated 23.4.2001 informing clearing of goods relating to Gas Turbine & Generator on 20.5.1999 and that the C&F agent vide letter dated 14.6.1999 and 27.7.1999 had informed about sinking of Gas Turbine & Generator during transportation from Kakinada to Machihipatnam on 2.6.1999. The Customs Department had demanded normal custom duty as the Gas Turbine & Generator had not been installed at the Project for which concessional duty was levied earlier. This letter has also not been considered by the State Commission.

47. Therefore, the State Commission has erred in coming to the conclusion that there was no force majeure due to stinking of the barge, considering a different clause of the PPA i.e. clause 10.1(ii) (1), instead of clause 10.1(ii) (6) against which the force majeure was claimed by the Appellant. Therefore, the finding of the State Commission in this regard is set aside. The matter should have been remanded to the State Commission in normal circumstances but in the present case since the claim of LD is barred by limitation, we do not feel it necessary to remand the matter to the State Commission.

**48. The fourth issue is regarding claim of LD without establishing the actual loss or injury caused to them.**

49. According to the Appellant, Respondent no. 2 to 7 do not automatically become entitled to claim the LDs without establishing the amount of damages even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner specified in the contract, that will not convert a claim for damages into a claim for an ascertained sum due. It is a settled law that an alleged default or breach gives rise only to a right to sue for damages and not to claim any debt. A claim for damages become “debt due” not when the loss is quantified by the company complaining of the default or breach, but when a court of competent jurisdiction holds an inquiry that the person against whom claim for damages is made has (i) committed breach and (ii) the other party has suffered a legal injury on account of such breach whereby the party in breach has incurred

a pecuniary liability towards the party complaining of the breach, (iii) the quantum of loss suffered has been assessed and (iv) awarded damages. The principle of law underlying the assessment and award of damage is to put the aggrieved party monetarily, as far as possible in the same position as it would have been if the contract had been performed. It is well settled law that even if there is a clause for liquidated damages, it is for the court to determine whether it represents a genuine pre-estimate of damages. Learned Sr. Advocate for the Appellant referred to loads of authorities in support of his arguments.

50. On the other hand, the learned Senior Counsel for Respondent nos. 2 to 7 argued that considering the nature of electricity and it being impossible to calculate the actual damages, liquidated damages is provided for by the parties. In fact, in almost all cases



involving supply and purchase of electricity, liquidated damages is provided for rather than leaving the parties to calculate the actual damages. He referred to *Bharat Sanchar Nigam Limited vs. Reliance Communication Ltd.* (2011) 1 SCC 394, wherein the Hon'ble Supreme Court has appreciated the concept of liquidated damages relevant to regulatory regime wherein the concept of pricing and level playing field of regulated entities was deliberated upon.

51. We agree with the contentions of Learned Senior Counsel for Respondent nos. 2 to 7 that in view of the difficulties in calculating the actual damages, suffered by a party due to non-supply of electricity by another party, a pre-calculated liquidated damages on pre-estimated basis are agreed between the parties in the PPAs for breach of contract. Electricity is accounted for on the basis of 15 minutes time block for each day

and the demand for electricity varies during the day depending on the time of the day and also varies in different seasons. The Distribution Companies also have contracts with a number of generating stations and also buy electricity in the short term market to meet their varying demand from different hours of the day. Sometimes, due to mis-match between the demand and availability of electricity load shedding is also resorted to. Due to non-availability of power from a contracted source due to delay in COD of the project, the distribution licensee may have to carry out load shedding or procure power from alternate sources which may be more expensive. It is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee. For this reason a provision is kept in the PPA for Liquidated Damages at a pre-

estimate of the loss as agreed between the parties at the time of entering into the PPA.

52. In the present case the Appellant and the Electricity Board agreed for liquidated damages in case of delay in achieving scheduled date of completion of last unit to be paid by the Appellant @ Rs. 50,000/- per day for first 180 days of delay and Rs. 3,50,000/- per day for delay in excess of 180 days, for each 100 MW capacity bid or any part thereof, under Article 1.1.54 of the PPA.

53. We find that the State Commission after considering the various rulings referred to by the parties, which have also been quoted before us, has decided that in the present case there is no need to explain the actual damage caused since a pre-

estimated damage has been arrived by both the parties in the PPA.

54. This Tribunal in judgment dated 30.6.2014 in Appeal No. 62 of 2013 and 47 of 2013 has considered similar case for LDs for non-supply of power to a distribution licensee and held as under:

*“iii) The question whether a clause is penal or pre-estimate of damages depends on the contraction and the surrounding circumstances at the time of entering the contract. In this case the rate of energy agreed to is varying from Rs. 3/- per unit to Rs. 5.96/- per kWh during different months and times of the day. When the buyer fails to off-take the contracted power, the seller suffers loss on account of non-recovery of the fixed cost of the generation sources of the seller whose available capacity could not be utilized due to breach of contract by the buyer. In order to actually evaluate the loss, one has to carry out detailed analysis for all the time blocks of the day to actually calculate the*

*un-utilized capacity at different power plants with whom the seller has contracted power and then calculate the capacity charges paid for the idle capacity. This may be a cumbersome exercise. The parties in this case have agreed to a pre-estimated liquidated damages of Rs. 1.98/- per kWh for the event of default by PTC which has also been defined viz. failure to off- take 80% of the contracted power. Considering the rate of energy agreed to in the agreement, the compensation amount cannot be considered as penal in nature.*

*iv) The compensation payable by each party for their respective defaults has been pre-estimated and as such according to Section 74 of the Contracts Act, there is no need for Gujarat Urja to provide evidence for the actual loss incurred as a result of breach of contract by PTC.*

*v) PTC had entered into the agreement with open eyes fully aware of the market risks and its capacity to bear the risk. Variation of prices in short term market is also not a situation which cannot be contemplated as the market prices vary*

*day to day, month to month and season to season in normal course. It is now not open for PTC to claim that the liquidated damages can not be enforced.”*

*“50. Let us now examine the ruling quoted by Learned Counsel for PTC.*

*51. Fateh Chand case (AIR 1963 SC 1405) dealt with sale of a building. In this case, the agreement between the parties provided for payment of a sum of amount by the vendee and in case the vendee failed to get the sale deed registered by a stipulated date, the sum of amount shall be deemed to be forfeited and agreement cancelled. Similar clause was there for default by the executant for its delay in registration of the sale deed under which the executant had to pay similar amount to the Vendee. The court held defendant responsible for breach of contract as it failed to pay the balance of the price and show willingness to obtain a conveyance. The other issue decided was regarding the amount forfeited by the plaintiff out of the amount paid by the defendant against*

*delivery of possession of building and land to the defendant. The entire amount was considered as earnest money and forfeited by the plaintiff. Regarding application of Section 74 of the Contract Act it was held as under:*

*“The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in*

*case of breach, and stipulations by way of penalty.”*

*In that case it was held that forfeiture of the amount paid by the defendant on possession of the property is by way of penalty. It was held that:*

*“10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having*



*regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”*

*In that case the amount stipulated in the agreement was in the form of a penalty. In the present case the amount stipulated was in the form of compensation which was pre-estimated loss caused by the breach of Agreement which was defined in the agreement. Therefore, the finding of Fateh Chand case will not be any help to PTC.*

*52. Let us now examine Lachia Setty case ((1980) 4 SCC 636). This is a case of bidding of lots of coffee by Coffee Board by the Appellants and after they were declared as successful bidders they failed to pay for the lots of coffee and lift the same. Subsequently, Coffee Board reauctioned the lots and the loss on reauction was claimed from the bidders. The findings in this case for mitigation of loss would not apply to the present case where the agreement was acted upon and the agreement had a provision for pre-estimated compensation for breach of contract”.*

55. The findings of the Tribunal in Appeal No. 62 of 2013 and 47 of 2013 will apply to the present case.

56. In view of above, the fourth issue is answered as against the Appellant.

**57. The fifth issue is regarding adjustment of the liquidated damages from the invoices for power supply raised by the Appellant.**

58. According to the learned Senior Counsel for the Appellant, damages unless adjudicated upon, do not become debt. He has mainly relied on the case of Union of India vs. Raman Iron Foundry (1974) 2 SCC 231.

59. We have already held that the distribution licensees had a right to claim liquidated damages, as admissible as per the PPA without establishing actual loss. However, in this particular case, we find that the distribution licensees did not raise any claim for

liquidated damages and continued to receive power supply and pay tariff from January 2001 till December 2005. Only in December 2005, Respondent no. 7 withheld the payment against the invoices for power supply and the Appellant was informed for the first time that the amount was being adjusted against the LDs due from the Appellant on account of delay in achieving COD of the Project. No notice was served on the Appellant regarding the claim of liquidated damages and no opportunity was given to the Appellant to explain their case. We have already held in the previous paragraphs that the withholding of the payment by the Respondent no. 7 was illegal. The State Commission has already held that the claim was time barred and we have concurred with the findings of the State Commission. Therefore, the adjustment of the liquidated damages by withholding the payment

against the invoices for power supply by the respondent No. 7 was illegal. We find that even after passing of the impugned order wherein the State Commission had held that the claim of liquidated damages was time barred, the respondent No. 7 has again adjusted Rs. 64.29 crores on 23.6.2011 from the invoices raised by the Appellant illegally. When Respondent nos. 2 to 7 themselves had approached the State Commission for adjudication of the dispute and the State Commission having found that the claim was time barred, Respondent nos. 2 to 7 should not have further adjusted the balance amount of liquidated damages from the invoice raised by the Appellant for supply of power.

60. In view of above, the amount illegally adjusted by Respondent no. 7 against the power supply bills of the

Appellant has to be reimbursed to the Appellant with interest @ 12% per annum. Accordingly, decided.

**61. The sixth issue is regarding the counter claim of the Appellant.**

62. We have already held that the amount withheld against the invoices for power supply and adjustment made against the LDs by the Respondent no. 7 is illegal and the same has to be reimbursed to the Appellant. Therefore, we do not feel any need to go into the sixth issue.

**63. Summary of our findings:**

**(i) After considering the various rulings of the Hon'ble Supreme Court referred to above and the circumstances of the case we have come to the conclusion that the State Commission having come to the conclusion that the Petition filed by**

**the respondents 2 to 7 was barred by limitation, had no jurisdiction to decide the matter on merits holding that the respondent no. 2 to 7 are entitled to adjust the balance amount of Rs. 48,06,55,963/- crores towards the liquidated damages.**

**(ii) Section 171 of the Contract Act applies to certain specified categories, viz. bankers, factors, wharfingers, attorneys and policy-brokers. Section 171 provides that the above mentioned persons, in the absence of a contract to the contrary, retain as security for a general balance of account, any goods bailed to them, but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect. The Respondents 2 to 7 are not in the category of bankers, as wrongly held**

**by the State Commission. The Respondents 2 to 7 do not become bankers unless they satisfy the requirement of the Banking Regulations Act and other rules and laws.**

**(iii) Article 7.2 (g) provides for extension of scheduled date of completion of the project for the delay reckoned from 61<sup>st</sup> day in the issuance of fuel linkage at a PLF of 100%. Admittedly, the fuel supplier, namely HPCL confirmed supply of fuel to generate power at 100% PLF only on 17.11.1998. Accordingly, the extension of COD has to be allowed for number of days calculated from 30.5.1997 to 18.1.1999 as per the terms of the PPA.**

**(iv) We find that the State Commission has wrongly considered clause 10.1 (ii) (1) while deciding the issue that there was no force majeure.**



**However, force majeure was claimed by the Appellant under clause 10.1 (ii)(6) which has not been considered by the State Commission. We set aside the findings of the State Commission with regard to force majeure for reasons explained under paragraphs 41 to 47.**

**(v) We find that the State Commission after considering the various rulings referred to by the parties, which have also been quoted before us, has decided that in the present case there is no need to explain the actual damage caused since a pre-estimated damage was arrived by both the parties in the PPA. This Tribunal in judgment dated 30.6.2014 in Appeal Nos. 62 of 2013 and 47 of 2013 has considered similar case for LDs for non-supply of power. The findings of the Tribunal in Appeal No. 62 of 2013 will squarely apply to the**

**present case. Accordingly, this issue is decided against the Appellant.**

**(vi) The amount illegally adjusted by Respondent no. 7 against the power supply bills of the Appellant has to be reimbursed to the Appellant with interest @ 12%.**

64. The Appeal is allowed in part as indicated above.

No order as to costs.

65. Pronounced in the open court on this **12<sup>th</sup> day of January, 2015.**

**(Justice Surendra Kumar)  
Judicial Member**

**( Rakesh Nath)  
Technical Member**

√  
**REPORTABLE/NON-REPORTABLE**  
Vs