

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

Appeal No. 260 of 2013 and
Appeal no. 285 of 2013

Dated: 23rd February, 2015

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

In the matter of:

Appeal No. 260 of 2013

GVK Industries Limited (Phase-I) ... Appellant
Paigah House, 156-159, SP Road
Secunderabad – 500 003

Versus

- 1. Eastern Power Distribution Company ...Respondent**
of Andhra Pradesh Limited
P&T Colony, Seetamma Dhara
Vishakhapatnam - 530 020
Andhra Pradesh
- 2. Southern Power Distribution Company**
of Andhra Pradesh Limited
Beside Srinivasa Kalyana Mantapam
Tiruchanur Road, Tirupathi - 517 501
Andhra Pradesh
- 3. Central Power Distribution Company**
of Andhra Pradesh Limited
H.No. 11-64-660, 3rd Floor, Singareni Bhavan
Adjacent to Hanuman Temple, Red Hills
Hyderabad 500 004, Andhra Pradesh

3. **Southern Power Distribution Company
of Andhra Pradesh Limited
D.No. 19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupathi - 517 501
Andhra Pradesh**
4. **Central Power Distribution Company
of Andhra Pradesh Limited
6-1-50, Corporate Office
Mint Compound
Hyderabad 500 063, Andhra Pradesh**
5. **Northern Power Distribution Company
of Andhra Pradesh Limited
H.No. 2-5-31/2, Corporate Office
Nakkalagutta, Hanamkonda
Warangal (AP) – 506 004
Andhra Pradesh**
6. **Andhra Pradesh Power Coordination Committee
Vidyut Soudha, Khairatabad,
Hyderabad – 500 082
Andhra Pradesh**

Versus

1. **Andhra Pradesh Electricity Regulatory Commission** ...Respondent(s)
**4th & 5th Floors, Singareni Bhavan
Red Hills, Hyderabad – 500 004**
2. **GVK Industries Limited (Phase-I)
Paigah House, 156-159, SP Road
Secunderabad – 500 003**

Counsel for the Appellant: **Mr. S.B. Upadhyay, Sr. Adv.**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Ms. Mandakini Ghosh
Mr. P. Shiva Rao

Counsel for the Respondent : **Mr. M.G. Ramachandran**
Ms. Poorva Saigal
Ms. Anushree Bardhan
Ms. Swagatika Sahoo
Mr. K.V. Balakrishnan
Mr. K.V. Mohan

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal no.260 of 2013 has been filed by GVK Industries Ltd, a generating company, challenging order dated 13.08.2013 passed by Andhra Pradesh Electricity Regulatory Commission (“State Commission”) determining the capital cost of the power project of the Appellant. Appeal no. 285 of 2013 is a cross Appeal filed by the Distribution Licensees and other State utilities against the same order.

2. The State Commission determined capital cost of Rs. 882.742 crores against the claim of Rs. 1025.24 crores of the GVK Industries. GVK Industries are aggrieved by certain disallowances in capital cost of the project. On the other hand the State utilities are aggrieved by allowance of certain claims of GVK Industries and non-acceptance of Rs. 816 crores as a ceiling on the completed cost as per the Power Purchase Adjustment, based on the Techno-Economic Clearance accorded by the Central Electricity Authority in the year 1993.
3. The brief facts of the case are as under:

- 3.1 On 17.06.1993 a Power Purchase Agreement ('PPA') was executed between GVK Industries and A P State Electricity Board for supply of power from 200 MW gas based project. On 25.11.1993, the Central Electricity Authority, hereinafter referred to as "Authority", accorded Techno-Economic Clearance ('TEC') of the power project as required under the Electricity (Supply) Act, 1948. The Authority approved an in principle capital cost of Rs. 827 crores including Interest During Construction ("IDC") against the claim of Rs. 840 crores of the GVK Industries.
- 3.2 On 19.04.1996 GVK Industries entered into an amended and restated PPA with the erstwhile A P State Electricity Board.
- 3.3 On 06.08.1996 the generating station of GVK Industries achieved Commercial Operation. Since then, GVK Industries have been supplying power to the Electricity Board and after re-organization of the Electricity Board to the successor distribution companies.
- 3.4 Upon commercial operation, GVK Industries calculated completed capital cost of the project at Rs. 1025 crores and submitted the details of the actual capital cost along with its justification to the Electricity Board with a request to forward the same to the Authority for according approval as per the provisions of the Electricity (Supply) Act, 1948.
- 3.5 The State Government enacted the A P Electricity Reforms Act, 1998 and the State Commission was set up under the said Act.
- 3.6 Pursuant to the provisions of the A P Electricity Reforms Act, 1998, the A P Electricity Board was restructured and Transmission Corporation of Andhra Pradesh (APTRANSCO) was formed as a successor entity of the Electricity Board under the first transfer

- scheme. Subsequently, on 31.03.2000, the State Government notified the second transfer scheme wherein APTRANSCO retained the transmission & bulk supply business and distribution and retail supply business was transferred to four distribution companies.
- 3.7 The Electricity Act, 2003 came into force on 10.06.2003. However, till then the Authority had not approved the completed capital cost of GVK's power project. A question arose whether the Authority had powers to give concurrence to the completed project cost under the Electricity Act, 2003.
- 3.8 In the year 2005, GVK Industries approached High Court of Delhi requesting the High Court to pass an appropriate order directing the Authority to determine the completed cost of the project. On 27.02.2006, the High Court held that the State Commission had the jurisdiction to determine the completed capital cost.
- 3.9 In the meantime the State Government on 07.06.2005 notified the transfer scheme wherein the bulk supply business of APTRANSCO was vested with the distribution companies.
- 3.10 On 28.01.2008, GVK Industries filed a petition before the State Commission for determination of completed capital cost of the project. On 13.08.2013, the State Commission passed the impugned order.
- 3.11 Aggrieved by the impugned order dated 13.08.2013, GVK Industries have filed Appeal no. 260 of 2013 regarding disallowance of some of their claims. The State utilities have filed the cross Appeal no. 285 of 2013 against the same order challenging allowance of certain claims of GVK Industries and not

- accepting their plea of restricting the capital cost to Rs. 816 crores as per the PPA.
4. As the impugned order challenged in both the Appeals is the same, a common judgment is being rendered.
 5. In the impugned order, the State Commission has categorized the claim of GVK into four distinct categories, namely Category 1 (Customs Duty), Category 2 (works contract and public issue expenses), Category 3 (start up expenses, training expenses, financial charges and contingency) and category 4 (consisting of land and site development, EPC Foreign, EPC Indian, civil, electrical and mechanical works, design, engineering, construction, supervision and inspection, establishment, insurance, audit and accounts, tools and plants, IFC, loan and syndication charges, letter of credit charges, upfront fees, commitment charges and IDC).
 6. Out of above, Category 1 claims have been allowed by the State Commission in favour of GVK Industries. Category 2 and 3 have not been allowed and category 4 has been allowed only to the limited extent of foreign exchange variation of EPC (foreign) and the additional facilities installed under EPC (Indian). GVK Industries are challenging above disallowances in categories 2, 3 and 4 in Appeal no. 260 of 2013.
 7. The State utilities are challenging the non-acceptance of Rs. 816 crores as ceiling on completed capital cost and the allowance of EPC (foreign) of the sum of Rs. 61.138 crores, EPC (Indian) to the tune of Rs. 0.287 crores and customs duty of Rs. 105.643 crores.

8. GVK Industries have raised the following issues in Appeal no. 260 of 2013.

8.1 **Failure to give reasoned order:** The State Commission has not given a reasoned order in regard to disallowance of the capital expenditure in excess of Rs. 882.742 crores and has cursorily disallowed the claims by stating that “variation on account of these items can be anticipated and planned accordingly”, without going into merits of the justification provided by GVK Industries. There are various rulings of the Hon’ble Supreme Court regarding principle of law which require an administrative authority to record reasons for its decision. The disallowance under categories 2, 3 and 4 made by the State Commission are without reasons and liable to be set aside.

8.2 **Delay on account of financial closure and counter guarantee:** The delay on part of Government of India to provide the counter guarantee and subsequent delay in commencement of construction and achievement of financial closure led to an increase in the capital cost actually incurred by GVK Industries. Although the Government of India had in-principle agreed to issue the counter guarantee by its letter dated 25.11.1993, the counter guarantee was issued only 04.09.1996. The delay in obtaining the counter guarantee resulted in delay in the financial closure. The Engineering Procurement and Construction Contract (‘EPC Contract’) entered by GVK Industries with its suppliers M/s. ABB, contemplated a commencement date for the contract for which the financial closure was a pre-requisite. As a result of the failure of the Government to issue the counter guarantee and postponement

of the financial closure, GVK Industries were unable to drawdown funds and make payment under the EPC contract. As a result GVK Industries had to pay damages of US dollars 80 million (Rs. 32.209 crores) to ABB. Further, GVK Industries had to spend an additional amount of Rs. 4.549 crores as increased establishment charges or increased cost as a result of bridge loans taken since GVK Industries did not receive disbursements of foreign currency loans from IFC and NIB in time. Thus, the delay in giving counter guarantee also resulted in an increase in the IDC than what was projected.

8.3 Delay on account of change in the, scope of the project:

- a) The power project initially comprised of three gas turbines designed to operate on multi fuel, that is, natural gas/naphtha. However, the equipment was ordered on the assumption that the project would primarily be a gas-based project and naphtha will be used only as a supplementary fuel that is, only to get 20% of the rated output. Subsequently, the lenders deemed it advisable that all the three gas turbines be equipped in such a manner so as to run on naphtha simultaneously in case of non-availability of natural gas. The policy of the Government of India was also that the station should be set up not based on single fuel but with flexibility to use alternate fuel. Therefore, the project was set up with the capability of using the alternate fuel and the same involved incurring of additional cost.
- b) Proceeding on the earlier assumption that the project was mainly a gas-based project, the EPC contract given to ABB provided for a 30 m stack height for both – the bypass stack and the HRSG

stack. As the sulphur content in the natural gas was practically nil, a 30 m stack height was considered adequate. Subsequently, while complying with the directions of the Ministry of Environment and Forests, GVK approached the Andhra Pradesh Pollution Control Board for the approval of the stack height. The Andhra Pradesh Pollution Control Board insisted that the stack height be 50 m instead of 30 m because of the increase in sulphur emission with Naphtha firing which added to the cost and time overrun. Therefore, the additional costs incurred by GVK to the tune of Rs. 4.3 crores for increasing the stack height from 30 m to 50 m was in compliance with the conditions stipulated by the Andhra Pradesh Pollution Control Board which is a 'change in law' and cannot be attributed to GVK.

8.4 Alleged high capital cost of the project: GVK project was one of the first privately owned power projects in India and was subject to a risk assessment process of the lenders that was more rigorous and detailed. As a consequence of the novelty of the privately owned power project, GVK had to incur significant expenses to ensure that the project was financed. Further, the insurance policies taken up for the project were a first of their kind and thus, expensive.

The comparative statement filed by the Andhra Utilities to show that the cost claimed by GVK is substantially higher, as compared to similarly placed projects in the vicinity, has to be considered taking into account the peculiar and unique facts and circumstances of the project of GVK. Further, a comparison would be relevant only if it involved comparing projects with a similar

technology. GVKs project was equipped with technology which permitted a more efficient performance but was also more expensive. Also, the other projects which are referred to, did not require payment of liquidated damages to EPC contractors which contributed to increase in the capital cost.

9. In Appeal no. 285 of 2013, the State utilities have raised the following issues:

9.1 **Interpretation of the PPA:** The PPA provides for capital cost ceiling. The PPA also provides that the notification dated 30.03.1992 issued by the Government of India is to be read as a part of the PPA. The Government of India notification provides that if the parties to the PPA have provided a ceiling capital cost, the same would apply for tariff determination. Subsequent to the discussions held with GVK Industries, the ceiling on the capital cost at Rs. 816.00 crores was agreed and the same was reflected in the PPA dated 19.04.1996. However, there is an exception to the said ceiling of capital cost on the actual expenditure of customs duty in the event of custom duty actually incurred is found to be more than Rs. 779.9 million. The claims of GVK have to be looked in the above background of there being a capital cost ceiling agreed to in the PPA.

9.2 **Foreign Exchange Rate Variation:** The State Commission has erroneously interpreted the provisions of the PPA to hold that the cost and expenses incurred on import of capital goods were subject to Foreign Exchange Rate Variation (FERV), even though the import was required to be by infusion of foreign equity and foreign loan. The FERV liability was limited to the payment of

customs duty and interest on loan, etc., and not for consideration payable on import of equipment. The provisions of the PPA protect GVK Industries for FERV impact in servicing of foreign debt and foreign equity. However, the same does not extend to the payment of rupee liability on the capital cost at the time of import of equipment, which was required to be by drawdown of foreign equity and foreign debt.

9.3 **Customs duty:** The State Commission has proceeded on the simplistic basis that the entire customs duty claim, being a statutory levy, has to be allowed in the capital cost. There are several discrepancies pointed by them before the State Commission due to increase in amount of increase in customs duty from 20% to 22% in respect of certain equipment where the increase in customs duty would not have been payable if the equipment had been lifted before the hike in customs duty, original copy of receipt not furnished for certain items, customs duty on additional import due to change in technical scope of the project which has to be borne by GVK and customs duty paid after combined cycle COD of the project which is not admissible.

10. We have heard Mr. M.G. Ramachandran, Learned Counsel on behalf of GVK Industries and Mr. S.B. Upadhyay, Sr. Advocate representing the distribution licensees and other State utilities on the above issues. Based on the rival contentions of the parties, the following question would arise for our consideration:

i) **Whether the State Commission has not given a reasoned order for rejecting the claim of GVK Industries for additional**

- expenditure of Rs. 142 crores towards the capital cost of the power project?
- ii) **Whether the State Commission has erred in not allowing additional cost incurred by GVK Industries due to delay in financial closure on account of delay in providing counter guarantee by the Central Government?**
 - iii) **Whether GVK Industries are entitled for additional cost incurred due to change in scope of the project in the capital cost determined by the State Commission?**
 - iv) **Whether the increase in capital cost should be seen in the context that GVK project was one of the first privately owned power projects in India and was subjected to a more vigorous and detailed risk assessment process of lenders resulting in incurring of significant expenses to ensure that the project was financed?**
 - v) **Whether the State Commission has erred in not limiting the capital cost as per the ceiling cost prescribed in the PPA?**
 - vi) **Whether the State Commission has erred in allowing Foreign Exchange Rate Variation on the cost of imported capital goods.**
 - vii) **Whether the State Commission has erred in not disallowing customs duty on certain goods due to deficiencies on the part of GVK Industries?**
11. All the issues are interconnected and are being dealt with together.
12. **Let us examine the Techno-Economic Clearance accorded by the Authority dated 25.11.1993.**

The Authority had accorded clearance on the basis of provisional financial package and subject to obtaining approval of Ministry of Power for deviations from Government of India tariff notification dated 30.03.1992 at Rs. 760.43 crores excluding IDC (Rs. 827 crores including IDC). The clearance was subject to review after financial closure and furnishing firm financial package within a period of six months.

13. **Let us now examine the amended and restated PPA dated 19.04.1996 entered into between GVK Industries and AP State Electricity Board.**
14. The Capital Cost is defined as the cost in Rupees actually incurred in completing the project, provided that costs in excess of ceiling cost as agreed in the PPA, and is as per the foreign exchange rate assumed in the Techno-Economic Clearance of the Authority, shall not be included as "Capital Cost" except to the extent that the Authority approves such excess costs as not having been attributable to the fault of the company or its suppliers or contractors. In determining the amount of costs actually incurred in completing the project account shall be taken of:
 - i) Project costs incurred in foreign currency converted to Rupees at TT Buying Rate prevailing on the date of such costs are incurred by drawdown of foreign debt or a contribution of foreign equity;
 - ii) any reduction of project cost through the application of liquidated damages;
 - iii) IDC at the rates of debt (including variable interest rates) set out in the financial package approved by the Authority;

iv) any excess insurance proceeds paid to the company.

In case the actually incurred cost is less than the Capital Cost ceiling, the lesser cost shall be taken as Capital Cost. GVK shall submit half yearly reports certified by the auditors on Capital Cost actually incurred. During the period between the combined cycle COD and delivery of the actual cost approval of the Capital Cost by the Authority, the company will use the Capital Cost ceiling as its provisional capital cost. When the actual Capital Cost is approved by the Authority, the amount of overcharge or undercharge resulting from the use of provisional capital cost for the purpose of tariff calculation will be refunded to or paid by the Electricity Board.

15. Schedule E of the PPA specifies the capital cost ceiling as Rs. 816 crores assuming the foreign exchange amounts in dollars and DM converted into Indian Rupees at the specified foreign exchange rates (1 DM=Rs. 18.69, 1 US\$= Rs. 31.50 and 1 US\$ = DM 1.69) and as adjusted pursuant to the following provisions:
 - a) adjustment to the extent of actual expenditure for “Public Issue Expenses” forming part of ceiling cost is less than Rs. 32 million and “Works Contract Tax” forming part of the capital cost ceiling is less than Rs. 95 million. Except the above adjustment, for each heads of expenditure the estimated expenditure amounts comprising the capital cost are indicative only and shall not amount to a ceiling on the actual expenditure incurred with respect to such heads of expenditure, subject to the sum of the actual expenditure for all heads being less than or equal to the capital cost ceiling;

- b) the capital cost ceiling shall be adjusted to account for the actual Rupee liability of the company for custom duty payable on import of equipment for construction of the project. At the time of the final approval of the capital cost by the Authority on COD of the combined cycle, the company shall compute the difference between (i) Rupee amount actually paid by the company for such custom duty minus (ii) Rs. 779.9 million. If such difference is a positive number, the capital cost shall be increased by the difference and if such difference is a negative number, the capital cost ceiling shall be decreased by the amount of difference.
16. The Schedule E of the PPA also specifies the amount of debt and equity as indicative amounts and such amounts are to be revised upon the approval by the Authority. The amounts of equity and debt are indicated separately in foreign currency and Indian Rupees.
17. The model calculation for determination of capital cost in the Schedule to the PPA indicates as under:

Completed capital cost

- Capital cost ceiling as per PPA 'x'
- In case completed capital cost exceeds the ceiling cost, excess cost allowed by the Authority 'a'
- In case completed capital cost is less than the ceiling cost, the amount of the cost underrun as approved by the Authority 'b'
- Completed capita cost $Y = (x+a)$ or $(x-b)$ which ever is applicable.

Thus, as per PPA, the completed capital cost can be lesser than or more than the capital cost ceiling, as approved by the Authority.

18. The Authority could not approve the completed capital cost before the enactment of the Electricity Act, 2003. After the enactment of the 2003 Act, the duty to determine the capital cost and tariff of the project has now vested with the State Commission.
19. **Let us now examine the findings in the impugned order dated 13.08.2013. The same are summarized as under:**
 - (a) As per the Government of India notification of 30.03.1992, the actual capital expenditure increased on completion of the project shall be criteria for fixation of tariff. Where the actual expenditure exceeds the approved project cost, the excess as approved by the Authority shall be deemed to be the actual capital expenditure for the purpose of determining the tariff, provided such excess expenditure is not attributable to the fault of the generating company or its suppliers or contractors. But if there is a PPA entered between the generating company and the Board which provides a ceiling on capital expenditure, the capital expenditure is subject to such a ceiling.
 - b) Taking the totality of the provisions regarding capital cost fixation into account including the definition in PPA, the Commission has considered that the appropriate methodology should be based on segregating the item-wise cost ceiling figure of Rs. 8160 million into extents attributable/non-attributable to the company and disallow/allow the extents as part of the completed capital cost, based on the exceptional clause contained in definition of the capital cost as per Clause 1.1(x) of the PPA.

- c) Ambit of ceiling costs are not fixed once for all and are amenable to change depending on the nature of such expenditure. There are certain uncontrollable costs which cannot be reduced under broad umbrella conditions of ceiling cost and in this pursuit, components which have a bearing on foreign exchange and statutory levies cannot be denied. There are certain variation in other cost heads which are controllable, the positive and negative variations would even out.
- d) Any variation in foreign exchange rate and actual amount paid towards customs duty, being a statutory levy by the Union of India, on the equipment imported for the purpose of the project are beyond the reasonable control of GVK Industries and accordingly determined the completed capital cost.
- e) The State Commission segregated the 21 items comprising the capital cost into four categories and determined the admissible completed capital costs in the four categories.
- f) Under the first category viz. custom duty against the claim of Rs. 1061.08, Rs. 1056.43 million was allowed on the basis of checking of the vouchers. An amount of Rs. 4.65 million spent towards imports not envisaged originally was not allowed.
- g) Under category 2, viz. works contracts and public issue expenses, the Commission observed that the public issue had not taken place and there was no proof of works contract tax paid by GVK. In view of this, the Commission has come to the conclusion that the amount admissible under these two heads is nil.
- h) Under category 3, viz. start up expenses, training, other financial charges and contingency, it was found on prudent voucher check

that the actual cost is less than the corresponding cost item in the capital cost ceiling. Therefore, the Commission considered the actual cost towards these items as per the voucher check.

i) Regarding category 4 there were 14 items for which the claimed capital cost (as per voucher check) was more than the figure for the respective item as per the break-up of capital cost ceiling. For these items there is no specific mention in Schedule E. Therefore, the excess cost to the extent as not being attributable to the fault of the GVK or its suppliers or contractors is admissible and the excess cost attributable to GVK or its suppliers or contractors is not admissible. After careful examination, only two items were identified for which excess cost can be admissible. The following explanation has been given for these two items by the State Commission.

(i) **EPC (foreign):** The excess of Rs. 611.38 million towards foreign exchange rate variation has been considered as not attributable to the fault of GVK and has been allowed. The amount of Rs. 140.35 million incurred for additional works not contemplated in DPR/PPA and Rs. 322.09 million incurred towards liquidated damages paid due to delay in providing counter guarantee by Government of India have not been considered to be not attributable to GVK and disallowed.

(ii) **EPC (Indian):** GVK claimed Rs. 2008.94 million under this head. However, the claim as audited by the consultant was Rs. 1977.36 million. In the break up of capital cost ceiling an amount of Rs. 1781.0 million had been provided. Thus, the

excess over ceiling was Rs. 196.04 million on 5 items, viz., additional facilities provided in control room, modification of plant to facilitate dual firing, increase in stack height, additional naphtha storage facility, liquidated damages paid due to delay in providing Government of India counter guarantee and additional works not contemplated in DPR/PPA. The Commission felt that excess expenses on these items cannot be allowed as the variations on account of these items can be anticipated and planned accordingly and hence, cannot be considered to be part of scope of the project. These items were not considered as “not attributable to the fault of the company”. However, amount incurred towards additional facilities installed at the main control room at an expenditure of Rs. 2.87 million was allowed as not being attributable to the fault of the company as it was found essential to operate the plant in synchronization with the grid and to meet certain grid exigencies.

- j) Accordingly, the State Commission determined the completed capital cost as Rs. 8827.42 million.
20. Thus, the State Commission allowed excess expenses on account of customs duty (except customs duty on imports not envisaged originally), EPC (Foreign) on account of foreign exchange variation and EPC (Indian) only to the extent of additional facilities installed at the main control room which were found essential for operation of the plant in synchronization with the grid and for meeting grid contingencies.

21. We find that the distribution licensee had appointed CRISIL advisory services to study the statement and purpose of the completed capital cost. CRISIL appointed M/s. K.S. Aiyar & Co., Chartered Accountants to verify the correctness of the actual cost expended on the project by GVK Industries. M/s K.S. Aiyar & Co. examined the books of accounts and all documents. Based on the recommendation of CRISIL, the State Transmission Utility recommended to the State Government completed capital cost of Rs. 851.33 crores. However, later during the proceedings before the State Commission, the State utilities submitted that the said recommendation was inadvertently made under mistake of facts.
22. We do not agree with the contention of the State utilities that the capital cost ceiling as defined in Schedule E of the PPA is the completed capital cost and GVK Industries are not entitled to any increase over and above the capital cost ceiling except the increase in customs duty if the same is found to be more than Rs. 779.9 million, for the following reasons:-
- (i) The definition of capital cost in the PPA provides for adjustment for excess costs incurred to the extent the Authority approves such excess costs as not having been attributable to the fault of the company or its suppliers or contractors. Under the Electricity (Supply) Act, 1948 the Authority was empowered to determine the capital cost of the project. The Authority in this case could not determine the completed capital cost till the enactment of the Electricity Act, 2003. After the enactment of the Electricity Act, 2003, the function of determining the completed capital cost in order to determine the tariff of power supply to the distribution

- companies from the GVK's project has vested with the State Commission. Therefore, the State Commission has to consider the excess costs not attributable to the fault of the company or its suppliers or contractors while deciding the completed capital cost as per the terms of the PPA.
- (ii) The model calculation for determination of capital cost in Schedule E of the PPA provides a formula for completed capital cost. The formula provides that in case completed capital cost exceeds the ceiling cost then the excess cost allowed by the Authority added to the capital cost ceiling as per the PPA will be the completed capital cost. However, in case the completed capital cost is less than the ceiling cost, amount of cost underrun as approved by the Authority shall be deducted from the capital cost ceiling to determine the completed capital cost.
 - (iii) The definition of capital cost in the PPA provides that during the period between the COD of the project and approval of the capital cost by the Authority, the company will use the capital cost ceiling as its provisional capital cost for the purpose of tariff calculation. When the capital cost is approved by the Authority, the amount of overcharge or under charge resulting from the use of the provisional capital cost for the purpose of tariff calculation will be refunded to or paid by the Electricity Board.
 - iv) The Authority in the Techno-Economic Concurrence approved in-principle capital cost and not the completed capital cost.
23. In view of above, the State Commission is competent to allow such excess costs incurred by GVK Industries over the capital cost ceiling agreed in the PPA, as found not attributable to the fault of

GVK Industries, or its suppliers or its contractors. The question regarding limiting the completed capital cost to capital cost ceiling (as agreed in the PPA) raised by the State Utilities is answered accordingly.

24. Shri M G Ramachandran, learned Counsel for GVK Industries has argued that the State Commission has not discussed, deliberated or dealt with substantial justification given by GVK Industries for the excess capital expenditure. There was no material available on record to show any imprudence, negligence or wrongful action or otherwise any act of omission on part of GVK Industries. The disallowance of excess costs has been done cursorily without proper deliberation. If there is no material to show that the entire capital expenditure is attributable to the generating company, there is no reason for not allowing the same as a part of the project cost. The State Commission has not given a reasoned order in regard to disallowance of the capital expenditure in excess of Rs. 882.742 crores. He has referred to the following authorities regarding position of law on recording of reasons by an Administrative Authority discharging quasi judicial powers/function.

a) Kranti Associates Private Ltd. and Another V. Masood Ahmed Khan and others, (2010) 9 SCC 496

b) Namit Sharma V Union of India, 2012(8) SCALE 593

25. Shri Upadhyay, Learned Senior Counsel for the State utilities has argued that the State Commission has passed a reasoned order except that the reasons are not recorded in pages after pages. In this regard he referred to S.N. Mukherjee V Union of India, (1990) 4

SCC 594, Divisional Forest Officer V Madhusudhan Rao (2008) 3 SCC 469 and M S Sivani & Ors. V State of Karnataka (1995) 6 SCC 289. He stated that there is no doubt on legal principle that reasons have to be given by a deciding authority. However, the reasons can be in brief as long as the same are clearly conveyed and shows the application of mind of the authorities on the issue involved.

26. We find that the State Commission segregated the 21 items comprising the capital cost into four categories and fixed the capital cost for each category. For the 1st Category, viz. customs duty, the State Commission gave proper reasons for allowing excess expenditure incurred on the customs duty.
27. Regarding category 2, viz. works contract and public issue expenses, the State Commission observed that public issue has not taken place at all and there is no proof of works contract tax paid by the developer. Therefore, State Commission correctly did not allowed any expenses under Category 2 and gave proper reason for disallowance of expenses.
28. For Category 3 items, the Commission found that in the audited figures as compared to respective capital cost ceiling figure for these items, there was no excess expenditure over the ceiling cost. Therefore, the State Commission correctly did not allow any excess expenses on Category 3 items for which proper reason has been given.
29. For category 4 items, out of 14 items, the State Commission has considered only two items EPC (Foreign) and EPC (Indian) in which same excess expenditure has been allowed by the

Commission. The finding of the State Commission with regard to Category 4 is as under:

“Fourteen items for which the claimed capital cost (as per voucher check) is more than the figure for the respective item as per the break-up of capital cost ceiling.

- a. *Land and site development*
- b. *EPC Foreign*
- c. *EPC(Indian)*
- d. *Civil Elec & Mech Works*
- e. *Design. Engg., Const, Supr & Insp.*
- f. *Establishment*
- g. *Insurance*
- h. *Audit & Accounts*
- i. *Tools & Plants*
- j. *IFC(W) Loan and Syndication Charges*
- k. *LC (Letter of Credit) Charges*
- l. *UP-front Fees*
- m. *Commitment Charges*
- n. *IDC (Interest during construction)*

For these fourteen items, there is no specific mention in the Schedule-E. The capital cost has to be determined as per the definition of capital cost in the PPA which is as follows:”

The State Commission after careful examination found only two items, viz. EPC (Foreign) and EPC (Indian) for which some excess expenditure was to be allowed. For remaining the items the State Commission decided that no excess expenditure was admissible. The criteria for allowance of excess expenditure was whether such excess expenditure was attributable to the fault of the company or its suppliers or contractors as per the definition of capital cost in the PPA. The State Commission has specifically discussed the excess expenditure under EPC (Foreign) and EPC (Indian) under

different heads and allowed admissible expenditure and disallowed inadmissible expenditure after giving reasons. The following reasons have been given by the State Commission for disallowance of some excess expenditure under EPC (Foreign) and EPC (Indian).

“Item b: EPC (Foreign)

For this item, the claim by M/s GVK is Rs 4832.32 Million. This was also audited by M/s. KSA with voucher check and confirmed the figure of Rs.4832.32 million. In the break-up of capital cost ceiling an amount of Rs.3885.4 million has been provided towards this item. The excess over ceiling is Rs.946.9 million. The excess is on account of the following elements:

- 1. Foreign Exchange Variation: Rs.611.38 Million*
- 2. Liquidated Damages paid due to delay in counter guarantee Rs.322.09 Million*
- 3. Additional Works not contemplated in the DPR/PPA Rs.140.35 Million*

Out of these excesses, the excess of Rs.611.38 Million towards Foreign Exchange variation can be considered as being "not attributable to the fault of the Company" and hence have to be allowed as permissible "actual capital cost". The amount of Rs.140.35 Million, incurred for additional works not contemplated in the DPR/PPA and Rs 322.09 Million incurred towards Liquidated Damages paid due to delay in counter guarantee cannot be considered to be "not attributable to the fault of the Company" and hence cannot be allowed as permissible "actual capital cost". In view of the above, for this item i.e., EPC (Foreign), the Commission's determination of admissible actual capital cost is Rs.4496.78 Million.

Rs 4496.78 Million = Rs 3885.4 Million + Rs 611.38 Million

Item c:EPC (Indian):

For this item, the claim by M/s GVK is Rs 2008.94 Million. The claim as audited by M/s. KSA with voucher check is Rs. 1977.36 million. In the break-up of capital cost ceiling an amount of Rs.1781.0 million has been provided towards this item. The excess over ceiling is Rs.196.04 million. The excess is (Other Miscellaneous Works) on account of the following elements:

*Additional facilities installed in the main Rs 2.87 Million
Control room
Modification of Plant configuration and Rs 58.15 Million
auxiliaries to facilitate dual firing:*

Increase in Stack Height: Rs 43.26 Million

Additional Naphtha Storage facility: Rs 42.3 Million

*Liquidated Damages paid due to delay in Rs. 45.6 Million
counter guarantee:*

*Additional Works not contemplated in the Rs. 35.76Million
DPR/PPA (Other Miscellaneous Works)*

After careful examination of the rival contentions, Commission considers that, the increase in actual capital costs on these above five items i.e., Modification of Plant configuration and auxiliaries to facilitate dual firing, Increase in Stack Height, Additional Naphtha Storage facility, Liquidated Damages paid due to delay in counter guarantee can not be allowed. Commission is of the opinion that, the variations on account of those items, can be anticipated and planned accordingly and hence, can not be considered to be part of scope of the project.

In view of the above, amount spent on those above items can not be considered to be "not attributable to the fault of the Company" and hence cannot be allowed as permissible "actual capital cost".

However, the amount incurred towards the additional facilities installed at the main control room at an expenditure of Rs 2.87 Million can be allowed as" not being attributable to the fault of

the Company” as it is found essential to operate the plant in synchronism with the grid and to meet certain grid exigencies.

In view of the above, for this item i.e., EPC (Indian), the Commission's determination of admissible actual capital cost is Rs.1783.87 Million.”

30. We agree that a judicial authority must record reasons in support of its conclusions. Recording of reasons is meant to serve the wider principles of justice that justice must not only be done it must also appear to be done as well. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous conditions. Reasons also facilitate the process of judicial review by superior courts.
31. We feel that the State Commission has relied on the voucher verification of actual expenditure under different heads of expenditure and then given reasons for allowance and disallowance of the excess expenditure under various heads as per the provisions of the PPA. We find that the State Commission has applied its mind before allowing/disallowing excess expenditure under various heads.
32. Learned Counsel for GVK Industries is aggrieved by disallowance of certain expenditure under EPC (Foreign) and EPC (Indian) which have been disallowed as these items cannot be considered to be not attributable the fault of the company. We find that Learned Counsel for GVK Industries has sought to justify claims of GVK Industries on these items. We shall be considering the specific submissions of GVK Industries on these items. Therefore, we do not feel that there is any need to remand the matter to the

State Commission for giving further reasoning for disallowing the excess expenditure on these items, as the State Commission has applied its mind before disallowing expenses under the various heads.

33. **The first item of excess expenditure is due to delay in financial closure on account of counter guarantee of the Government of India:**
34. According to Shri Ramachandran, the delay on the part of Government of India to provide the counter guarantee and subsequent delay in commencement of construction and achievement of financial closure led to an increase in the capital cost actually incurred by GVK.
35. According to Mr. Upadhyay, Learned Senior Counsel for the State utilities, the amended and restated PPA was executed by the parties on 19.04.1996 in which the capital cost ceiling of Rs. 816 crores was agreed. At that time GVK Industries did not raise any issue of additional capital cost on account of delay in issuance of counter guarantee by the Government of India. Even assuming the case of GVK that counter guarantee was issued on 04.09.1996, the 1st unit of the generating station was commissioned on 06.08.1996, i.e. prior to the above date and in fact the entire generating station itself was completed and commissioned on 20.06.1997.
36. We find that the amended and restated PPA was signed between the parties on 19.04.1996. The PPA provides for the scheduled date of completion with respect of combined cycle COD as date

- which is 16 months after the date of financial closure, or such other date as may be subsequently determined by mutual agreement. In the PPA the capital cost ceiling of Rs. 816 crores has been agreed to between the parties with certain provisions for adjustment in the cost. No provision for escalation in capital cost due to delay in achieving financial closure due to delay in getting the Government of India counter guarantee has been agreed to.
37. The amended and restated PPA was entered into on 19.04.1996. The project operating in combined cycle was synchronized on 20.06.1997. We find that the first unit of the project was commissioned in less than four months from the signing of the amended and restated PPA and the combined cycle operation was achieved in about 14 months after the date of signing the amended restated PPA i.e. well within the period specified in the PPA. We find force in the argument of the Learned Senior Counsel for the State utilities. GVK while signing the amendment restated PPA has not raised the issue of increase in the cost of the project due to delay in financial closure as a result of delay in counter guarantee by the Government of India. The first unit was also synchronized within 4 months of the signing of the amended PPA. Further, the first unit was also synchronized prior to the date of counter guarantee issued by the Government of India. Therefore, we do not find any force in the argument of GVK Industries regarding increase in capital cost due to delay in achieving financial closure.
38. **The second issue raised by GVK Industries regarding delay on account of change in the scope of the project.**

39. According to the GVK Industries, the project initially comprised of three gas turbines designed to operate on multi fuel, i.e. natural gas/naptha, however, the equipment was ordered on the assumption that the project would primarily be gas-based project and naptha will be used only as a supplementing fuel, that is only to get 20% of rated output. Subsequently, the lenders deemed it advisable that all the three gas turbines be equipped in such a manner so as to run on naptha simultaneously in case of non-availability of natural gas. The policy of Government of India was also that the station should not be set up based on single fuel but with flexibility to use alternate fuel. Therefore, the project was set up with capability using the alternative fuel and the same involved incurring of additional cost. Based on the earlier assumptions of the project, the EPC contract given to ABB provided for a 30 m stack height. Subsequently, while complying with the directions of the Ministry of Environment and Forests, GVK approached the A P Pollution Control Board for approval of the stack height. The A P Pollution Control Board insisted that the stack height should be 50 m instead of 30 m because of increase in sulphur emission with naptha firing which added to the cost and time overrun. Therefore, the additional cost of 4.3 crores for increasing stack height from 30 m to 50 m was in compliance with the conditions stipulated by the State Pollution Control Board which is 'change in law' and cannot be attributed to GVK.
40. Shri Upadhyay, Learned Senior Counsel for the State utilities argued that the requirement for including naptha firing facility for the project was not as stipulated by the distribution companies but

- was a choice made by GVK Industries. Further, GVK at all points of time specifically represented and stated that the fuel risk was being taken by GVK and the facility for naphtha firing resulting change in scope of work of the project would be at the cost and risk of GVK Industries without any implication on the tariff payable by the distribution companies. In this regard he referred to communication dated 19.08.1996 by GVK Industries addressed to the A P State Electricity Board. Similar statement was made by GVK Industries in a separate letter dated 19.09.1996 addressed to the Authority. He also referred to communication dated 22.11.1995 from GVK addressed to the State Government wherein GVK Industries stated that they were also incurring on additional expenditure of 25 crores at their cost to set up naphtha facilities for the project since they were taking fuel risk.
41. We have perused the above communications from GVK Industries wherein they specifically represented and agreed that the additional cost on account of naphtha facility would not have any bearing on the capital cost and the tariff since the entire additional cost would be borne by them. Further, the distribution companies had not asked for additional facilities for naphtha firing and these were provided by GVK Industries on their own volition to cover the fuel risk which they had decided to take.
42. We find no merits in the argument of Learned Counsel for GVK Industries that the above letters were sent as they were put into desperate circumstances of delay while claiming approval of the project cost as the State utilities were adopting dilatory tactics and not cooperating and the letters written in the period 1996-1998 for

- getting capital cost approved and the concessions given cannot be taken as binding on GVK.
43. We also do not find any merits in the contention of Learned Counsel for GVK Industries that the increase in stack height from 30 meters to 50 meters is 'change in law'. From the correspondence referred to by the State utilities it is apparent that before executing the amended and restated PPA on 19.04.1996, the decision for change in scope of the project regarding use of naphtha firing had been taken by GVK on their own volition. APPCA has put the condition of 50 meter stack height vide their letter dated 18.05.1994 much before the signing of the amended and restated PPA. Therefore, the consequences of change in the stack height can not be taken as due to 'change in law'.
- 44. The third issue is regarding high cost due to risk assessment involved as one of the first privately owned power project.**
45. According to the Appellants, GVK project was one of the first privately owned power projects in India and was subjected to a risk assessment process of the lenders that was more rigorous and detailed. As a consequence of the novelty of the privately owned power project, GVK had to incur significant expenses to ensure that the project was financed. Further, the insurance policies taken up for the project were first of their kind and thus, expensive. Learned Counsel for GVK also submitted a comparative statement of capital cost of various thermal projects to argue that the capital cost of GVK was comparable to other projects.
46. As per Learned Senior Counsel for the State utilities, the parties are governed by the PPA and there can be no claim after

- execution of PPA by GVK to the effect that some of the costs and expenses had increased. The capital cost as claimed by GVK is substantially higher as compared to similarly placed projects in the vicinity of GVK and established in the state of Andhra Pradesh about the same time when the generating plant of GVK was commissioned. He has also submitted a list of power projects showing comparison of capital cost indicating that the capital cost of GVK-Jegurupadu was the highest.
47. We agree with the contentions of the Learned Senior Counsel for the State utilities that the increase in capital cost cannot be allowed due to high risk amendment involved in the project. The comparative statement of capital cost of various projects submitted by Learned Counsel for GVK Industries includes coal based power projects of Rosa, Korba and Nagarjuna TPP the capital cost which cannot be compared with gas turbine based project of GVK Industries. On the other hand, the comparative statement of capital cost of gas based projects provided by the State utilities clearly indicate that the capital cost of GVK's project was the highest and other gas projects were commissioned in the same time period at much lower capital cost.
48. Let us now examine the issues raised in Appeal no. 285 of 2013 by the distribution companies/State utilities.
49. **First issue regarding interpretation of PPA regarding capital cost ceiling to be taken as completed cost with adjustment of customs duty has already been dealt with above in paragraphs 22 and 23 against the State utilities.**

- 50. The second issue is regarding foreign exchange rate variation.**
51. According to Learned Senior Counsel for the State Utilities, the State Commission has erroneously interpreted the provisions of the PPA entered into between the parties to hold that the cost of expenses incurred on the import of capital goods were subject to Foreign Exchange Rate Variation (FERV), even though the import of goods was required to be serviced by infusion of foreign equity and foreign loan. The FERV liability was limited to the payment of customs duty and for the servicing of the capital cost by way of return on equity and interest on loan, etc; and not for the consideration payable on import of equipment. The provision in the PPA protects GVK for the FERV impact in servicing of foreign debt and foreign equity. However, the same does not extend to the payment of Rupee liability on the capital cost at the time of import of equipment, which was required to be by drawdown of foreign equity and foreign debt. The term of the PPA does not envisage or provide for payment of the FERV on the cost incurred on import of equipment. On the other hand, the cost of import of equipment was required to be incurred by drawdown of foreign debt or contribution of foreign equity and not by means of payment in Rupee terms and in such circumstances, there was no question of payment for equipment imported in Rupee terms.
52. According to GVK Industries, the FERV on EPC (foreign) has been allowed by the State Commission as per the terms of the PPA.
53. We find that definition of Capital Cost in the PPA clearly provides that in determining the amount of costs actually incurred in

- completing the project, account shall be taken of project cost incurred in foreign currency converted to Rupees at the TT Buying Rate prevailing on the date of such costs as incurred by a drawdown of foreign debt or a contribution of foreign equity. Further, as per the PPA, the foreign exchange variation for debt repayment is to be calculated as difference between rupee equivalent of foreign debt repayment at the current rates of exchange on the date the foreign debt was drawn down and rupee equivalent of foreign debt repayment computed at the current rate of exchange as of the fixed charge computation date. Unless the expenses on imported capital goods are converted into equivalent rupee at the prevailing exchange rate on the date such costs are incurred by drawdown of Foreign debt or contribution of foreign equity, GVK would not be able to service full debt and equity utilized in the completed capital cost of the project.
54. Therefore, we do not find any merits in the contention of the State utilities. We feel that the State Commission has correctly interpreted the PPA and allowed FERV on the EPC (foreign).
- 55. The third issue raised by the State utilities is regarding customs duty paid.**
56. The discrepancies pointed out by the State utilities in customs duty allowed by the State Commission are as under:
- (i) Duty difference amounts on account of increase in customs duty from 20% to 22% in respect of items bearing transport no. 38, 48, 53, 64, 70 & 71 as bill of entry was much prior to 01.08.1996 during which period the duty payable was 20% which was subsequently increased to 22% with effect from 01.08.1996. GVK

- is responsible for the delay in lifting the goods. Amount not admissible on this account is Rs. 108,67,299/-
- ii) Original/copy of receipt for item covered under transport no 110 was not furnished by M/s. GVK to the distribution companies. The amount to be disallowed on this account is Rs. 8,08.94,427/-
 - iii) Customs duty on equipment imported due to change in technical scope of the project has to borne by M/s. GVK as per their undertaking. Rs. 198,19,069/- should be disallowed on this account.
 - iv) Customs duty paid by GVK after combined cycle COD of the project (20.06.1997) is not admissible as any equipment imported after the said date is to the account of GVK only. Rs. 60,35,390 should be disallowed on this account.
57. GVK Industries have submitted the following in this regard:
- i) It is not the case where the goods were lying for sufficiently long time in custom warehouse. There is no reason for GVK Industries to leave these specific goods in customs warehouse deliberately without clearing. The transportation of the consignment to the plant had to be done in two phases owing to heavy machinery and equipment and, therefore, in the interregnum the equipment was kept in warehouse.
 - ii) The entire customs duty related issue was audited by the auditors of State utilities in the year 1999-2000 itself based on which the State utilities vide letter dated 20.02.2001 had recommended a revision of the capital cost from 816 crores to Rs. 851.8 crores to the State Government.

- iii) Though the delivery of items 127 to 134 was after the combined cycle Commercial Operation Date, i.e. after 20.06.1997, they were purchased through the purchase order dated 17.08.1997 prior to the combined cycle COD, which had been approved by the Authority.
58. Regarding increase in customs duty for 20% to 22% with effect from 01.08.1996, we have perused the statement furnished by the GVK Industries. We find that except for 2 items out of total 7 items, all other items were having bill entry date of July 1996. One item was dated 30.05.1996 and the other one dated 13.06.1996. We do not find that there is any deliberate delay or negligence in lifting the heavy material for site from the warehouse in phases. The PPA provides for adjustment of customs duty actually paid with respect to the base figure. The increase in customs duty with effect from 01.08.1996 was beyond the control of GVK Industries. We do not find any infirmity in the State Commission in allowing the customs duty on these items.
59. We also find that the State Utilities after detailed audit had recommend capital cost of Rs. 851.8 crores by letter dated 20.02.2001 to the State Government. In the break up of capital cost customs duty of Rs. 1056.42 million was recommended.
60. We found that the State Commission has observed that the claim of custom duty as certified by the Chartered Accountant M/s. KSA after during voucher check is Rs. 1061.08 million. As per break up of capital cost ceiling, an amount of Rs. 779.9 million has been provided towards this item. Thus, there is an excess of Rs. 281.2 million over the ceiling figure. An amount of Rs. 4.65 million spent

- towards imports not envisaged originally has not been allowed by the State Commission. Hence, the Commission has allowed 1056.43 million towards customs duty (Rs. 10610.08 million – Rs.4.65 million on account of equipment not envisaged originally). Thus, the State Commission has already deducted the customs duty on the equipment not envisaged originally.
61. GVK Industries explained that the even though certain items were received after the COD of the project in combined cycle these were procured through purchase order dated 17.08.1997 prior to the COD to the project and which were approved by the Authority. Therefore, we do not find any infirmity in the State Commission allowing customs duty on such items.
62. We find that the State Commission after considering voucher check by the Chartered Accountant and after deducting the customs duty on items not envisaged originally has decided the custom duty amount. We do not find any infirmity in the findings of the State Commission.
- 63. Summary of our findings.**
- i) **After considering the provisions of the PPA we have reached to a conclusion that there is no merit in the contention of the distribution licensees that the completed capital cost is to be restricted to the capital cost ceiling as agreed to in the PPA plus the increase in the customs duty, if any, over the base amount indicated in the PPA.**
- ii) **The State Commission has applied its mind and given reasons for allowance/disallowance of excess expenditure to**

be allowed over the capital cost ceiling as agreed to in the PPA.

- iii) GVK Industries are not entitled to any excess expenditure claimed due to delay in financial closure on account of delay in providing counter guarantee by the Government of India.
- iv) GVK Industries are not entitled to any increase in capital cost due to change in scope of the project including increase in stack height.
- v) There is no merit in the contention of GVK Industries regarding increased cost of the project as being one of the first privately owned project it was subjected to more vigorous and detailed risk assessment process.
- vi) The State Commission has correctly allowed FERV on the expenses incurred on import of capital goods as per the terms of the PPA.
- vii) There is no infirmity in determination of customs duty by the State Commission.

64. In view of above both the Appeals i.e. 260 of 2013 and 285 of 2013, are dismissed and the State Commission's order is confirmed. No order as to costs.

65 Pronounced in the open court on this **23rd day of February, 2015.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

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