

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**EXECUTION PETITION NO. 2 OF 2015**

**IN**

**APPEAL NOS. 76 & 82 OF 2013**

**AND**

**IA Nos. 466, 482 & 483 of 2015 & IA Nos. 78, 79 & 119 of 2016  
& I.A. No. 306 of 2017**

**Dated: 27<sup>th</sup> September, 2017**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**IN THE MATTER OF:**

**EASTERN INDIA POWERTECH LIMITED**

(Formerly known as DLF Power Ltd.)

12<sup>th</sup> Floor, Galleria Building,

DLF City, Gurgaon,

Haryana -122009

.... Execution Petitioner

**VERSUS**

**1. ASSAM POWER DISTRIBUTION COMPANY LTD.**

Bijulee Bhawan,  
Paltan Bazar,  
Guwahati - 781001

**2. ASSAM STATE ELECTRICITY BOARD**

Bijulee Bhawan,  
Paltan Bazar,  
Guwahati - 781001

**3. GOVERNMENT OF ASSAM**

Represented by the Chief Secretary,  
Block B, Assam Secretariat,  
Dispur, Guwahati - 781006

4. **ASSAM ELECTRICITY REGULATORY COMMISSION**

ASEB Campus, Dwarandhar,  
G.S. Road, Sixth Mile,  
Guwahati, Assam - 781001

.... Respondents

Counsel for the Appellant(s) :Mr. Krishnan Venugopal, Sr. Adv.  
Mr. V.P. Singh  
Mr. Abhishek Roy  
Ms. Trishala Kulkarni  
Mr. Aditya Jalan  
Mr. Priyank Ladola  
Mr. Paresh B. Lal  
Mr. Sushil Jethmalani

Counsel for the Respondent(s) :Mr. M.G. Ramachandran  
Mr. Avijit Roy  
Mr. Shubham Arya a/w  
Mr. A.K. Goswami (Rep.) for R.1 & 2  
  
Mr. Sanjay Sen, Sr. Adv.  
Mr. Pragyan Sharma  
Ms. Anandini Kumari Rathore of R.4

**J U D G M E N T**

**PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON:**

1. The Petitioner – Eastern India Powertech Ltd. is a generating company which has set up two gas based power plants in the State of Assam at Adamtilla and Banskandi. Respondent No.1 is Assam Power Distribution Company Ltd. (**“Assam Discom”**). Respondent

No.2 is the Assam State Electricity Board(**“the Board”**). Respondent No.3 is the Government of Assam. Respondent No.4 is the Assam Electricity Regulatory Commission (**“the State Commission”**).

2. The Petitioner has filed the present petition under Section 120(3) of the Electricity Act 2003 (**“the said Act”**) for execution of judgement and order dated 12/08/2014 passed by this Tribunal in Appeal No.76 of 2013 and Appeal No.82 of 2013.

3. Gist of the facts as stated in the memo of petition is as under:

(a) The Petitioner entered into a Power Purchase Agreement (**“PPA”**) on 09/02/1995 with the Board.

In terms of the PPA, the Petitioner set up two combined cycle power plants one at Adamtilla for 9 MW and the other at Banskandi for 15.5 MW in the State of Assam.

(b) Article 3 of the PPA provides for the manner, method and mechanism for fixation of tariff in respect of power plants. The Petitioner preferred a

tariff petition seeking computation of fixed and variable charges and fixation of tariff for the financial year 2008-09 for the Petitioner's power plants before the State Commission.

- (c) The State Commission by its order dated 20/10/2011 fixed the final tariff for the year 2008-09 for purchase of power by Assam Discom. Assam Discom as well as the Petitioner sought review of the order dated 20/10/2011 by filing review petitions. On 12/02/2013 the State Commission passed order modifying the earlier tariff order dated 20/10/2011. The State Commission extended the tariff decided for FY 2008-09 to FY 2009-10 onwards. Against the said order dated 12/02/2013 Assam Discom as well as the Petitioner filed appeals being Appeal No.76 of 2013 and Appeal No.82 of 2013 respectively.
- (d) By judgement and order dated 12/08/2014 this Tribunal partly allowed the Petitioner's Appeal

No.76 of 2013 and dismissed Assam Discom's Appeal No.82 of 2013. This Tribunal upheld the tariff order dated 20/10/2011 for FY 2008-09 and set aside order dated 12/02/2013 to the extent it extended the tariff decided for FY 2008-09 to FY 2009-10 onwards. The State Commission was directed to determine tariff for the period 2009-10 to 2014-15 at the earliest. This Tribunal further observed that since tariff for FY 2009-10 and onwards has not been determined so far in the interim period Assam Discom will make payment to the Petitioner as per interim direction given in paragraph 26 of the judgement. Paragraph 26 reads thus:

*"26. In view of the above, we direct that in the interim period the Distribution Licensee will make payment for the electricity supplied by the Generating company from 2009-10 onwards at the tariff determined by the State Commission for FY 2008-09 in the main tariff order dated 20.10.2011 till the tariff for FY 2009-10 onwards is decided by the State Commission. Full Fixed charges will also be paid for FY 2009-10 onwards as per the direction given in the tariff order dated 10.10.2011 for FY 2008-09 till the State Commission decides this issue while deciding the tariff for FY 2009-10 onwards. These charges shall be subjected to adjustment on final determination of tariff for FY 2009-10 onwards by the State Commission. If*

*some amount is payable to Assam Discom after adjustment of final tariff, then EIPL will pay the same with interest at a rate as decided by the State Commission. Accordingly, decided.”*

- (e) In paragraph 102 this Tribunal observed about the delayed payment surcharge as under:

*“102. As far as payment of interest on arrears for 2008-09 on the basis of tariff order dated 20.10.2011 is concerned, EIPL is entitled to delayed payment surcharge as per the 2006 Tariff Regulations on the bills raised by EIPL after passing of the main tariff order. We find from the impugned order dated 12.2.2013 that the Assam Discom had not paid the arrears due to EIPL as per the main tariff order. The State Commission had not passed any interim order for stay of its main tariff order dated 20.10.2011 and, therefore, Assam Discom was bound to make payment of arrears as per the tariff order dated 20.10.2011 for FY 2008-09. In the Appeal 76 of 2013 this Tribunal had also not granted any stay of the tariff order dated 20.10.2011 and the review order dated 12.2.2013. Therefore, the Distribution Company is liable to pay delayed payment surcharge to the EIPL as per the Regulation.”*

- (f) In view of the above directions issued by this Tribunal the Petitioner raised two invoices upon Assam Discom. According to the Petitioner Assam Discom failed to comply with this Tribunal’s directions. It is in these circumstances that the Petitioner has filed the present execution petition. Following are the prayers made in the petition.

*“Prayer:*

*It is, therefore, respectfully prayed that this Hon’ble Tribunal may be pleased to:*

- A. Execute the judgment and order dated 12.8.2014 by attaching the cash and bank balance(s) disclosed by the Respondent No.1 in its Annual Report for FY 2012-13 annexed hereto as Annexure G hereto towards satisfaction of the decretal dues of Rs.16566.78 Lacs;*
- B. Execute the judgment and order dated 12.8.2014 by attaching and selling the tangible fixed assets mentioned in the Annual Report for FY 2012-13 annexed hereto as Annexure G towards satisfaction of the decretal dues of Rs.16566.78 Lacs; and/or*
- C. Execute the judgment and order dated 12.8.2014 against the Guarantor of Respondent No.1, namely, Government of Assam, by directing it to pay the decretal sum of Rs.16566.78 Lacs to the Petitioner/Decree Holder;*
- D. pass such further or other orders as it may deem fit and proper in the facts and circumstances of the case.”*

4. Having narrated the facts which led to the filing of this petition it is now necessary to go to certain orders of this Tribunal on which Mr. Venugopal learned Senior Advocate has placed great reliance. It is his contention that this Tribunal had passed stringent orders against Assam Discom noticing its approach of avoiding compliance of this Tribunal’s order. It is also his contention that by seeking

time the Respondents tried to defeat the present petition. They utilised the time to pass tariff order and to contend that it is the Petitioner who has to pay Assam Discom. We therefore need to refer to some orders and state their background.

5. On 23/09/2015 this Tribunal heard the counsel for the parties and noted that there was some dispute about the outstanding amount. This Tribunal therefore directed the parties to calculate the outstanding amount. Following is the relevant portion of the order.

*“We direct both the parties to calculate the outstanding amount right from the beginning year of the dispute FY 2008-09. Each party is directed to clearly calculate the principal amount which remained outstanding in Financial Year 2008-09 and thereafter calculation of interest component so as to help this Tribunal to arrive at some undisputed amount to be exchanged between the parties.”*

6. On 15/10/2015 this Tribunal upon perusing affidavits filed by Assam Discom again expressed that there is dispute between the parties about the outstanding amount. Assam Discom was directed to adopt the figures as determined by the State Commission and this Tribunal. The Petitioner was directed to file rejoinder.

7. On 18/11/2015 this Tribunal granted further one week's time to Assam Discom to file details. Assam Discom was directed to deposit an amount of Rs. 9 crores in this Tribunal within 10 days failing which, it was made clear that this Tribunal would be constrained to proceed as per provisions of Order XXI of the CPC. This Tribunal also directed the Petitioner to inform this Tribunal whether the Petitioner had filed any petition for determination of tariff for FY 2009-10 onwards.

8. On 01/12/2015 the Petitioner filed tariff petition for FY 2009-10 to FY 2014-15 before the State Commission. Assam Discom did not make the payment of Rs.9 crores within the time limit prescribed by this Tribunal and hence the Petitioner took out IA No.18 of 2016 praying *inter alia* that bank accounts of Assam Discom and the Board be attached to the extent of Rs.9 crores. This Tribunal directed the Managing Director/Chairman of Assam Discom to remain present in this Tribunal by an order which was pronounced on 05/02/2016. In the meantime, the amount of Rs.9 crores was paid by Assam Discom to the Petitioners. On

18/03/2016, this Tribunal directed the Petitioner and Assam Discom to sit together and ascertain the decretal amount. However, there was no consensus between the parties and hence this Tribunal heard the petition on 26/04/2016 and pronounced its order on 18/05/2016. Following are the relevant observations and order passed by this Tribunal:

*“13. The APDCL claimed that the energy duration for the entire period of 2008-09 should be as follows:*

*“Hence under regulations 46.1 (b), payable energy charges is energy charges [Rs.]=[Rate of energy charges in Rs./KWH]x energy delivered [ex-bus] for the month in KWH. The energy delivered for the entire period of 2008-09 should be as follows:*

*For Adamtila - 25.03 MU (ex-bus) x 0.82=Rs.2.05 crore*

*For Banskandi - 68.46 MU (ex-bus) x 0.69=Rs.4.70 crore*

*Total : Rs.6.75 crore*

*EIPL did not agree to these figures as indicated by APDCL without providing any valid reason. EIPL stick to their calculations without nay valid reason.*

*14. There is a dispute for the payment due for the period beyond 2008-09 to 2013-14.*

### **ORDER**

*15. In view of the above, we direct Assam Electricity Regulatory Commission to issue a notice to the rival parties to furnish the details of power injected from the date of commissioning to shutting down of the generating units into the grid of Assam Distribution Company, compute the actual amount due to EIPL after adjusting the payments made by APDCL and intimate the same for execution*

*of the Petition No. 2 of 2015, to this Tribunal within two months from today positively.*

*Post the Execution Petition for further orders on 20<sup>th</sup> July, 2016.”*

9. It appears that the Petitioner had filed Review Petition No.11 of 2016 for review of order dated 18/05/2016 which was listed on 20/07/2016. On that day this Tribunal recorded the statement of counsel for Assam Discom that all the directions given in the judgment dated 12/08/2014 of this Tribunal shall be taken care of. A direction was given to the State Commission to compute the amount in compliance of interim order dated 18/05/2016 of this Tribunal. Though no extension was sought this Tribunal suo motu extended the time to calculate the amounts in the light of its interim order dated 18/05/2016 by two months. Review Petition No.11 of 2016 was disposed of. The execution petition was posted for further hearing on 28/09/2016. In the meantime Justice Surendra Kumar the Judicial Member who headed the bench which passed the above orders retired. The petition remained pending thereafter. On 18/10/2016 it was mentioned before Court I for listing. Direction was given to list the petition before Court I on 20/10/2016.

10. On 20/10/2016 Court-I (Bench of Justice Ranjana Desai and Mr. T. Munikrishnaiah, Technical Member) heard counsel for the parties. The Bench referred to relevant previous orders by which the State Commission was directed to compute the amount due to the Petitioner with the assistance of the parties. Mr. Sen learned Senior Advocate appearing for the State Commission sought time till February 2017 to complete the exercise. The Bench extended time only upto 05/01/2017. The petition was listed for appropriate orders on 09/01/2017.

11. On 09/01/2017 a statement was made that on 31/12/2016, the State Commission had passed the order. Counsel for the Petitioner sought time to take instructions. At his request matter was adjourned to 16/02/2017. On 16/02/2017 the petition was adjourned to 21/04/2017 to comply with the directions *inter alia* to prepare a chart. The said order runs as under:

*“We have heard learned counsel for the parties.*

*We direct the petitioner to prepare a chart indicating the amount payable as per the tariff order dated 20.10.2011 and the judgment of this Tribunal dated 12.08.2014 along with comparison with the computation*

*given by the State Commission and convenience compilation along with relevant clauses of the PPA within three weeks' time i.e. on or before 10.03.2017 after serving copy on the other side. Thereafter, learned counsel for respondents may file their reply on or before 24.03.2017 after serving copy on the other side.*

*List the matter for further hearing on 21.04.2017 at 2.30 p.m.”*

12. On 12/05/2017 the petition had to be adjourned because Mr. Munikrishnaiah, the then Technical Member was to demit office on 31/05/2017 and it was not possible to hear and finally dispose of the petition by 31/05/2017. It is in these circumstances that this Bench has taken up this petition for hearing.

13. Mr. Venugopal, learned Senior Advocate submitted that Assam Discom and the State Commission have colluded so as to deprive the Petitioner of the legitimate dues which were directed to be paid to the Petitioner by this Tribunal by its judgment dated 12/08/2014. Assam Discom by refusing to provide information sought by this Tribunal on the dues owed to the Petitioner colluded with the State Commission who was acting as a Commissioner in aid of execution proceedings. Purported tariff orders were passed in respect of the Petitioner in violation of principles set out in the decree and it is now being contended that the decree has become

infructuous because of the subsequent events namely tariff orders. Counsel submitted that this Tribunal by its order dated 18/05/2016 had directed the State Commission to compute the actual amount due to the Petitioner after adjusting the payments made by Assam Discom and intimate the same to this Tribunal in two months from the date of the order. Counsel pointed out that by further order dated 20/07/2016, the period to do the calculations was extended *suo motu* by two months. The said period was further extended by Order dated 20/10/2016 till 05/01/2017. The State Commission was, in effect, a Commissioner appointed to follow the orders of this Tribunal. The State Commission exceeded the mandate of this Tribunal. Instead of first carrying out orders of this Tribunal to make payment to the Petitioner for the electricity supplied at the tariff determined in the main tariff order dated 20/10/2011 and full fixed charges till the tariff for F.Y. 2009-10 is determined, the State Commission went on to pass tariff orders on 30/12/2016. By order dated 31/12/2016, the State Commission made calculations based on the same tariff orders. It came to a conclusion that in fact the Petitioner was liable to pay money to Assam Discom. Such an order is a complete nullity. Counsel

submitted that the State Commission acting as a Commissioner was bound by the decree and the directions contained in the various orders of this Tribunal and could not have travelled beyond them. In this connection, counsel relied on the judgment of the Delhi High Court in **Smt. Simrat Katyal v. Virender Katyal**<sup>1</sup>. Counsel submitted that it is well settled that an executing court cannot go beyond the decree and while executing the same must take the decree according to its tenor. In this connection, counsel relied on **Rajasthan Financial Corporation v. Man Industrial Corporation Ltd.**<sup>2</sup> and **State Bank of India v. M/s. Indexport Registered & Ors.**<sup>3</sup> Counsel submitted that a juridical order, not invalid on its face, must be given effect to entailing all consequences, till it is declared void in duly constituted judicial proceedings. For this proposition counsel relied on **Prakash Narain Sharma v. Burmah Shell Co-operative Housing Society Ltd.**<sup>4</sup> and **Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman & Ors.**<sup>5</sup> Counsel submitted that even if a decree is erroneous either in law or on fact it cannot be the subject matter of

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<sup>1</sup> 2002 III AD (Delhi) 341

<sup>2</sup> (2003) 7 SCC 522

<sup>3</sup> (1992) 3 SCC 159

<sup>4</sup> (2002) 7 SCC 46

<sup>5</sup> (1970) 1 SCC 670

objection under Section 47 of the CPC. The executing court cannot go behind the decree, it must take the decree in accordance with its tenor and execute it. In this connection counsel relied on **Brakewel Automotive Components(India) (P) Ltd. v. P.R.Sevem Alagappan**<sup>6</sup>.

14. Relying on **Rameshwar Dass Gupta v. State of U.P. and & Anr.**<sup>7</sup>, counsel submitted that the contention that the order of this Tribunal does not compute the amount and, hence, it is not a decree, must be rejected. Section 47 of the CPC would include quantification of the amount owed under the decree. Reliance was also placed on **State Bank of Travancore v. Devassia Josphe & Ors.**<sup>8</sup> Counsel, relying on **Devaki Antharjanam v. Sreedharan Namboodiri & Anr.**<sup>9</sup> submitted that the executing court can even carry out assessment of a property. Counsel submitted that the executing court cannot go behind a decree and if a decree is executable, it must be executed in terms thereof even if it is found that the decree holder is not legally entitled to the relief. In this

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<sup>6</sup> (2017) 5 SCC 371

<sup>7</sup> (1996) 5 SCC 728

<sup>8</sup> AIR 1990 Ker. 195

<sup>9</sup> (2009) 7 SCC 798

connection, reliance is placed on **Haryana Vidyut Prasaran Nigam Limited & Anr. v. Gulshan Lal & Ors.**<sup>10</sup>. Counsel took us to **Ravinder Kaur v. Ashok Kumar & Anr.**<sup>11</sup> and urged that the executing court must not permit a judgment debtor to frustrate the execution of a decree through a diabolical plan such as the one devised by Assam Discom and the State Commission. Counsel submitted that collusion is writ large in this case and, therefore, this Tribunal should not allow the decree to be frustrated. Counsel submitted that passing of tariff orders is cited as a relevant subsequent event to frustrate the decree. Counsel submitted that ordinarily once the decree has attained finality, the executing court cannot reopen it on the basis of subsequent events. The limited exception to this general principle of law is where a decree becomes inexecutable as a consequence of subsequent events, which are in the nature of enactment or primary legislation which render the decree inexecutable. In this connection, counsel relied on **Brakewel Automotive Components** and **Sayyed Ratanbhai Sayeed (Dead) Through Legal Representatives & Ors. v. Shiridi**

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<sup>10</sup> (2009) 13 SCC 354

<sup>11</sup> (2003) 8 SCC 289

**Nagar Panchayat & Anr** <sup>12</sup>. Counsel submitted that a subsequent development sought to be interposed in execution must not be attributable to collusion with an intent to defraud the decree holder as is the case here (See: **Sayed Ratanbhai Sayeed**). Counsel submitted that a solemn statement was made before this Tribunal by the counsel appearing for Assam Discom and the State Commission that all the directions given in the judgment dated 12/08/2014 of this Tribunal shall be taken care of. This is recorded in the order dated 20/07/2016. They did not abide by the said statement, hence, strict note must be taken of their conduct. Counsel submitted that, in any event, tariff orders have been challenged by the Petitioner. It is not necessary to await the results of those appeals. Once the directions given in order dated 12/08/2014 are complied with, after the appeals are disposed of, this Tribunal can always direct that necessary adjustment be made in the accounts. Counsel submitted that this is therefore a fit case, where this Tribunal should set aside order dated 31/12/2016 passed by the State Commission and appoint a retired Technical Member of this Tribunal for carrying out necessary computation as

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<sup>12</sup> (2016) 4 SCC 631

per directions given in the judgment dated 12/08/2014 to determine the amount due to the Petitioner and ensure that the said amount is paid over to the Petitioner.

15. Mr. Ramachandran, learned counsel for Assam Discom did not dispute the proposition that the executing court cannot go behind the decree. Counsel did not dispute the proposition that the executing court has to take the tenor of the decree into consideration. Counsel submitted that order of this Tribunal dated 12/08/2014 has to be read as a whole. The said order is not only for payment of provisional tariff. It also directs redetermination of tariff. The petitioner wants to avoid tariff determination and get interim tariff so as to collect higher amount. It is well settled that the executing court can always take into account subsequent events (**Gurpreet Singh v. Union of India**)<sup>13</sup>. After taking into account, the tariff order, the State Commission has recorded that an amount of Rs.1.84 crore is due from the Petitioner to Assam Discom. The State Commission cannot be faulted for it. Counsel also relied on the Constitution Bench judgment in **Tirumalachetti**

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<sup>13</sup> (2006) 8 SCC 457

**Rajaram v. Tirumalachetti Radhakrishnaya Chetty & Ors.**<sup>14</sup>

and contended that there can be only one decree and a decree cannot be divided into parts. Counsel submitted that the instant petition has become infructuous. It may be disposed of with a direction to the State Commission to determine the final tariff based on the data and information to be provided by the Petitioner.

16. Mr. Sanjay Sen learned senior counsel appearing for the State Commission submitted that the judgment of this Tribunal in Appeal No.76 of 2013 and Appeal No.82 of 2013 is not a decree in terms envisaged under Section 2(2) of the CPC. From the operative part of the said judgment and order it is clear that the State Commission's review order dated 12/02/2013 was set aside to the extent the same had extended the tariff determined for FY 2008-09 to the subsequent years. Counsel submitted that the said order was in the nature of a remand order. Pending such determination of tariff, this Tribunal gave some direction for payment of tariff to ensure operation of the plant for the interim period. Such interim order does not qualify as a decree. Counsel submitted that paragraph 26

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<sup>14</sup> AIR 1961 SC 1795

of the said judgment as well as its summary of findings make it clear that the right to recover deemed generation/full fixed cost was subject to prudence check. There was no ascertained determined right of the Petitioner for recovery of deemed generation/full cost as alleged. Counsel submitted that the State Commission has now issued 12 tariff orders on 30/12/2016 in terms of the directions issued by this Tribunal. By order dated 31/12/2016 the State Commission has computed the amounts that are due and payable by the parties as per directions issued by this Tribunal on 18/05/2016 and 20/07/2016 in the present execution proceedings. They are not a part of the alleged decree under execution. This Tribunal has not directed the State Commission to carry out any computation in its order dated 12/08/2014. Counsel submitted that judgment and order of this Tribunal dated 12/08/2014 being a remand order, this Tribunal will have to see the effect of remand and consequences thereof on the subject matter of execution. Counsel submitted that there being no decree capable of execution, the petition deserves to be dismissed.

17. At the outset we must note that Mr. Ramachandran and Mr. Sen learned counsel for the Respondents have not contested the legal position that the executing court cannot go behind the decree and the executing court must take the decree in accordance with its tenor and execute it. On basic legal principles, there is no dispute between the parties. It is therefore not necessary to refer to the judgments of the Supreme Court to which our attention was drawn by the counsel. This case really turns on its facts and therefore attention must be focussed on facts.

18. We have given the gist of the judgment and order dated 12/08/2014 of this Tribunal of which execution is sought. We have also given the gist of various orders passed by this Tribunal on which heavy reliance is placed by the Petitioner. It is now necessary to place all the facts in proper perspective to see whether the Petitioner's prayers can be granted.

19. In December, 2008 the Petitioner filed a petition for determination of tariff for FY 2008-09 for its power plants. On 20/10/2011 the State Commission determined the tariff for FY

2008-09 vide its order dated 20/10/2011. The Petitioner sought review of the said order by filing a review petition. By its order dated 12/02/2013, the State Commission disposed of the said review petition. The State Commission maintained its tariff order dated 20/10/2011 and additionally held that the said tariff determined for FY 2008-09 would also be applicable for FY 2009-10 onwards. Aggrieved by the said order, Assam Discom as well as the Petitioner filed appeals in this Tribunal being Appeal No.76 of 2013 and Appeal No.82 of 2013 respectively.

20. By its judgment and order dated 12/08/2014 this Tribunal partly allowed the Petitioner's Appeal No.76 of 2013 and dismissed Assam Discom's Appeal No.82 of 2013. This Tribunal upheld the tariff order dated 20/10/2011 for FY 2008-09 and set aside order dated 12/02/2013 to the extent it extended the tariff decided for FY 2008-09 to FY 2009-10 onwards. It is necessary to quote the relevant paragraphs of the said judgement which are most crucial.

*"22. We feel that determination of tariff from FY 2009-10 onwards has to be carried out by the State Commission according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In fact there has been inordinate delay in determination of tariff for FY 2008-09. The tariff for FY 2008-09 was only determined on 20.10.2011 i.e.*

*after 2½ years of commencement of FY 2008-09. Further, the tariff for FY 2009-10 onwards has not been determined by the State Commission even though the FY 2013-14 is already over and the current FY is 2014-15. Till now only provisional tariff is being paid by Assam Discom, which resulted in the financial crunch for EIPL. We, therefore, direct the State Commission to determine the tariff for EIPL's projects for the period 2009-10 to 2014-15 at the earliest.*

*23. In view of above we set aside the impugned order of the State Commission with regard to tariff for FY 2009-10 onwards. However, we feel that in the interest of sustaining generation at EIPL's plants and maintaining power supply to the consumers in the interim period, we have to pass some orders for interim tariff for FY 2009-10 to FY 2014-15 at which payment will be made by the Assam Discom to the EIPL till the tariff is determined by the State Commission for the period from FY 2009-10 till the current year.*

*xxx                      xxx                      xxx*

*26. In view of above, we direct that in the interim period the Distribution Licensee will make payment for the electricity supplied by the Generating company from 2009-10 onwards at the tariff determined by the State Commission for FY 2008-09 in the main tariff order dated 20.10.2011 till the tariff for the FY 2009-10 onwards is decided by the State Commission. Full Fixed charges will also be paid for FY 2009-10 onwards as per the directions given in the tariff order dated 20.10.2011 for FY 2008-09 till the State Commission decides this issue while deciding the tariff for the FY 2009-10 onwards. These charges will be subjected to adjustment on final determination of tariff for FY 2009-10 onwards by the State Commission. If some amount is payable to Assam Discom after adjustment of final tariff, then EIPL will pay the same with interest at a rate as decided by the State Commission. Accordingly, decided.*

*xxx                      xxx                      xxx*

*102. As far as payment of interest on arrears for FY 2008-09 on the basis of tariff order dated 20.10.2011 is concerned, EIPL is entitled to delayed payment surcharge as per the 2006 Tariff Regulations on*

*the bills raised by EIPL after passing of the main tariff order. We find from the impugned order dated 12.2.2013 that the Assam Discom had not paid the arrears due to EIPL as per the main tariff order. The State Commission had not passed any interim order for stay of its main tariff order dated 20.10.2011 and, therefore, Assam Discom was bound to make payment of arrears as per the tariff order dated 20.10.2011 for FY 2008-09. In the Appeal 76 of 2013 this Tribunal had also not granted any stay of the tariff order dated 20.10.2011 and the review order dated 12.2.2013. Therefore, the Distribution Company is liable to pay delayed payment surcharge to the EIPL as per the Regulation.*

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**104. Summary of our findings:**

**(i) Modification of tariff and extension of the scope of Review Petition:**

*We find that in the impugned review order dated 12.2.2013, the State Commission has not altered the tariff for FY 2008-09 which was the subject matter of the main order as well as the review petition. However, the State Commission has erred in extending the scope of review beyond the review petition and even beyond the main order by extending the tariff determined for the FY 2008-09 to the subsequent years. The tariff for FY 2009-10 onwards has to be determined according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In view of above, we set aside the impugned order of the State Commission only to the extent of the tariff for FY 2009-10 onwards. However, since the tariff for the FY 2009-10 and onwards has not been determined so far, we have given some interim direction for payment of tariff to ensure operation of the plant for the interim period till the tariff is determined by the State Commission. Accordingly, in the interim period, the Assam Discom will make payment to EIPL as per our interim direction given in paragraph 26 of this judgment. The State Commission is also directed to determine the tariff for the period 2009-10 to 2014-15 at the earliest.”*

21. We must note the gist of relevant observations and directions contained in the above paragraphs. This Tribunal noted that tariff for FY 2009-10 onwards has not been determined by the State Commission even though FY 2013-14 is already over. This Tribunal therefore gave a clear direction that the State Commission should determine the tariff for the period 2009-10 to 2014-15 at the earliest. This Tribunal while partly setting aside the impugned order, observed that it will have to pass some orders for interim tariff for FY 2009-10 to FY 2014-15 at which payment will be made by Assam Discom to the Petitioner till the tariff is determined by the State Commission for the period from FY 2009-10 till the current year. A direction was given that in the interim period, Assam Discom shall make payment for the electricity supplied by the Petitioner from 2009-10 onwards at the tariff determined by the State Commission for FY 2008-09 in the main tariff order dated 20/10/2011 till the tariff for FY 2009-10 onwards is decided by the State Commission. A further direction was given that full fixed charges will also be paid for FY 2009-10 onwards as per the directions given in the tariff order dated 20/10/2011 for FY 2008-09 till the State Commission decides this issue while deciding the

tariff for FY 2009-10 onwards. It was further directed that if some amount is payable to Assam Discom after adjustment of final tariff, then the Petitioner will pay the same with interest at a rate decided by the State Commission. It was observed that the Petitioner is entitled to delayed payment surcharge as per the 2006 Tariff Regulations on the bills raised by the Petitioner after passing of the main order. In the summary of its findings this Tribunal made it clear that since tariff for FY 2009-10 and onwards had not been determined so far, it has given some interim direction for payment of tariff to ensure operation of plant for the interim period till the tariff is determined by the State Commission. It was made clear that in the interim period, Assam Discom will make payment to the Petitioner as per the interim direction given in paragraph 26 (quoted hereinabove) of the judgment. The State Commission was again directed to determine the tariff for the period 2009-10 to 2014-15 at the earliest.

22. While proceeding further we must bear in mind that by order dated 12/08/2014, this Tribunal had directed the continuation of tariff determined for FY 2008-09 only as an interim measure till the

tariff is determined by the State Commission for the period from FY 2009-10 onwards. A clear direction was given to the State Commission to determine the tariff for the period FY 2009-10 to FY 2014-15 at the earliest.

23. At this stage, it is necessary to refer to certain correspondence between the State Commission and the Petitioner. The State Commission addressed letter dated 16/09/2015 to the Petitioner asking the Petitioner to comply with the direction issued by this Tribunal in the judgment dated 12/08/2014 to file tariff petition for FY 2009-10 onwards. The Petitioner by its letter dated 14/10/2015 informed the State Commission that it had yet to receive a response from Assam Discom regarding invoices raised upon it. The Petitioner further stated therein that there was no time frame specified for filing the tariff petition in the judgment dated 12/08/2014. We must mention here that the State Commission had directed the Petitioner to file the tariff petition at the earliest. It was therefore improper for the Petitioner to justify its failure to file tariff petition on the ground that no time limit was fixed for it. The State Commission by its letter dated 14/10/2015 rightly informed

the Petitioner that the issue of outstanding arrears of the Petitioner was not relevant to the submission of the tariff petition. The State Commission once again directed the Petitioner to file tariff petition. It must also be mentioned here that in view of the direction issued by this Tribunal in the judgment dated 12/08/2014 to the Petitioner to file tariff petition, this Tribunal by its order dated 18/11/2015 passed in the instant petition called upon the Petitioner to inform in writing within two weeks whether it had filed any petition for determination of tariff. It is pertinent to note that thereafter it is only on 1/12/2015 that the Petitioner filed the tariff petition as directed. In our opinion, it was not necessary for the Petitioner to link the issue of interim payment which was directed to be made by Assam Discom to the Petitioner with the filing of tariff petition. These two issues are independent.

24. We do not want to suggest that Assam Discom should have ignored the interim direction. But the Petitioner's stand before this Tribunal is rather surprising. The Petitioner is virtually taking objection to Tariff Orders dated 30/11/2016 passed by the State Commission. The Petitioner was duty bound to file a tariff petition

at the earliest as per the judgment dated 12/08/2014 and the State Commission was duty bound to pass a tariff order. The State Commission has carried out its legal duty. Surely tariff determined for FY 2008-09 cannot remain frozen to be applicable for all times to come. This Tribunal in its judgment dated 12/08/2014 has clearly stated that interim tariff shall be operative till the tariff is determined by the State Commission for the period from FY 2009-10 till the current year. The Petitioner now wants this Tribunal to ignore the Tariff Orders dated 30/11/2016 and direct Assam Discom to pay the Petitioner the amount as per the interim order. We are afraid we cannot follow such a course when the tariff orders are staring at us.

25. We are informed by the counsel for the State Commission that pursuant to the order dated 18/05/2016, by which this Tribunal directed the State Commission to compute the actual amount due, the State Commission issued notices to the Petitioner as well as Assam Discom to submit certain information on or before 26/06/2016. However, the Petitioner as well as Assam Discom failed to furnish the required information in time. The Petitioner

vide its letter dated 16/06/2016 informed the State Commission that it had filed review petition before this Tribunal seeking review of order dated 18/05/2016 passed in the petition and the State Commission was requested to keep the exercise of seeking particulars to comply with order dated 18/05/2016 in abeyance. On 17/06/2016 Assam Discom requested the State Commission to extend the date of submission of the information. On 15/07/2016, the Petitioner filed a petition before the State Commission to keep in abeyance its direction issued vide order dated 04/06/2016 seeking particulars as per this Tribunal's order dated 18/05/2016 till the review petition is heard. On 20/07/2016, this Tribunal disposed of Review Petition No.11 of 2016, directing that all directions passed in the present petition shall be taken due care of by the State Commission. On 05/08/2016, the State Commission directed the Petitioner as well as Assam Discom to submit relevant data as per the notices issued to them and directed Assam Discom to file year-wise tariff petitions for the power plants from FY 2009-10 onwards till the closure of the plants on or before 24/08/2016. On 24/08/2016, the Petitioner submitted tariff petitions and the State Commission initiated separate proceedings on the tariff petitions.

On 01/09/2016, the State Commission directed the Petitioner to submit data necessary for compliance of directions of this Tribunal, dated 18/05/2016. On 08/09/2016, the State Commission directed the Petitioner to submit data with reference to the tariff petitions on or before 15/09/2016. On 09/09/2016, the Petitioner filed an application before the State Commission for grant of time upto 24/10/2016 to file additional information. The State Commission extended the time upto 17/10/2016. On 23/09/2016, the State Commission filed an application in this Tribunal for extension of time for computation of actual amount due as directed by this Tribunal. On 20/10/2016, this Tribunal extended the time only upto 05/01/2017. On 30/12/2016, the State Commission determined the tariff for the years 2009-10 to 2013-14 vide 12 separate tariff orders and on 31/12/2016, the State Commission in compliance with this Tribunal's judgment dated 12/08/2014 and order dated 18/05/2016 did the necessary computation and passed an order. We shall advert to these orders more in detail a little later. But the purport of giving all the above details, which were made known to us by the State Commission is to dispel the allegation of collusion between the State Commission and Assam

Discom. The above chronology of events indicates that these allegations have no substance. The State Commission in order to comply with the judgment dated 12/08/2014 of this Tribunal which directed it to pass tariff order and to comply with directions issued in the instant petition to ascertain the amount due to the Petitioner during the interregnum as ordered in the judgment dated 12/08/2014, took all the necessary steps. It is the case of the State Commission that it is the Petitioner and Assam Discom who delayed the process by taking time to submit information. We do not find any evidence of collusion between the State Commission and Assam Discom. We find the Petitioner delayed the filing of tariff petition, though specifically directed by this Tribunal. It appears to us that the Petitioner wanted the interim payment to be made to it, before determination of tariff, perhaps anticipating that upon determination of tariff the said amount may get adjusted and the Petitioner will not get any amount.

26. We must now go to the State Commission's orders dated 30/12/2016 and 31/12/2016. It is pointed out to us that though the Petitioner did not comply with the requirement of submitting

abridged form of the tariff petition as per Section 64(2) of the said Act and did not even pay the requisite court fees on time, the State Commission itself prepared and published a draft version of the tariff petitions in the newspapers for inviting public comments and objections. On 30/11/2016, a hearing was conducted. Public hearing was conducted on 5/12/2016. On 30/12/2016, the State Commission passed tariff orders (12 orders) for each of the two generating stations of the Petitioner for six years namely, FY 2009-10 to 2014-15, determining the tariff. On 31/12/2016, in compliance of the orders dated 18/05/2016 and 20/10/2016 of this Tribunal, the State Commission computed the amount and passed a detailed order item-wise after considering the tariff orders dated 30/12/2016. The State Commission held that in fact an amount of Rs.184.27 lakh is due to Assam Discom from the Petitioner. Following is the relevant paragraph.

*“9.10. Thus, as per the working of the Commission, EIPL is liable to pay an amount of Rs.184.27 lakh to APDCL as on 30.12.2016 for both the plants of EIPL for the amount due for the period from FY 2008-09 to FY 2014-15. Further, as discussed in the Tariff Orders issued by the Commission, though the years FY 2008-09 to FY 2014-15 are already over, the Commission due to non-submission of adequate information by EIPL (emphasis added) could not carry out the truing up for these years. Ideally, the amount due for the period which is already over should be computed after carrying out the true up. However, the Commission in compliance to the direction issued by Hon’ble APTEL has worked out the*

*amount due for the period FY 2008-09 to FY 2014-15 at normative tariff, which may undergo change based on truing up for these years”.*

27. Grievance of the Petitioner in substance is that the State Commission should not have taken into account the Tariff Orders dated 30/12/2016. The State Commission should have done the calculation for the interim payment to be made to the Petitioner without considering the Tariff Orders dated 30/12/2016. It is the submission of the Petitioner that by taking into account the tariff orders, the State Commission has travelled beyond the mandate of the judgment dated 12/08/2014 and orders passed by this Tribunal in this petition.

28. We are unable to agree with this submission. Passing of the tariff order is a supervening circumstance of which the executing court i.e. the State Commission had to take note. It is an order passed by the State Commission in exercise of powers conferred on it under the said Act. Moreover, it is a supervening circumstance, the happening of which was contemplated in the judgment dated 12/08/2014 of which execution is sought. There was a clear direction to the State Commission to pass a tariff order. The

possibility of coming into effect of the tariff order was known to the Petitioner. If this Tribunal had directed the State Commission to pass the tariff order, its legal effect could not have been ignored by the State Commission. It can by no stretch of imagination be said that the State Commission by doing this, frustrated the directions issued by this Tribunal regarding interim payment to be made to the Petitioner. As held by the Supreme Court in **Sayed Ratanbhai**, the executing court can take notice of subsequent events, however, it is contingent upon facts. At the cost of repetition it may be stated here, that in this case the supervening circumstance was contemplated in the judgment dated 12/08/2014 itself. The State Commission could not have glossed over it while making computation.

29. It is submitted by Assam Discom that the Petitioner did not cooperate in the determination of proper tariff for FY 2009-10 onwards as a result, the determination of tariff for FY 2009-10 onwards by the State Commission has been on the normative basis without taking into account the truing up of the financials. It is submitted that such truing up of the financials has been deferred

for reason of failure and default on the part of the Petitioner to furnish necessary details to the State Commission and, hence, adverse inference needs to be drawn against the Petitioner. We do not want to express any opinion on these matters. The Petitioner has filed appeals against Tariff Orders dated 30/12/2016. The appeals will be heard independently and in accordance with law. We do not find any reason to interfere with the impugned order of computation dated 31/12/2016. Needless to say that if the Petitioner succeeds in the pending appeals and it is found that the Petitioner is entitled to any amount, after due adjustment, the said amount can be ordered to be paid to the Petitioner. At the cost of repetition it must be stated that once the tariff orders are passed, they will have to be taken into account while carrying out calculations. We therefore cannot fault the State Commission for passing order dated 31/12/2016 taking into account Tariff Orders dated 30/12/2016. The State Commission has not gone behind the judgment dated 12/08/2014. It has taken the judgment in accordance with its tenor. It has taken note of the tariff orders because there was a direction in the judgment dated 12/08/2014 itself to pass the tariff orders at the earliest. It has taken into

account the direction issued to calculate the amount due to the Petitioner and after conducting the said exercise come to a conclusion that the Petitioner is liable to pay an amount of Rs.184.27 lakhs to Assam Discom. We do not find any attempt to frustrate the judgment dated 12/08/2014. No case is made out for appointment of any Commissioner as suggested. The Petitioner is not entitled to the reliefs prayed for by it.

30. In the view that we have taken, the petition will have to be dismissed and is accordingly dismissed. All the connected IAs, if any, shall also stand dismissed accordingly.

31. Pronounced in the Open Court on this **27<sup>th</sup> day of September, 2017.**

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**

√ **REPORTABLE/~~NON-REPORTABLE~~**