Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.176 of 2011

Dated:22nd Feb, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

Tamil Nadu Generation and Distribution Corporation Ltd
144, Anna Salai
Chennai-600 002

…Appellant

Versus

1. **PPN Power Generating Company Pvt Ltd**
   IIIrd Floor, Jhaver Plaza
   1A, Nungambakkam High Road,
   Chennai-600 034

2. **Tamil Nadu Electricity Regulatory Commission**
   19 A, Rukmani Lakshmipathy Road,
   Egmore, Chennai-600 008,

...Respondent(s)

Counsel for the Appellant(s) : Mr. Guru Krishna Kumar,AAG
State of Tamilnadu,
Mr. S Vallinayagam
Mr. A Prasanna Venkat
Ms. Srikala Guru Krishna Kumar

Counsel for the Respondent(s): Mr. Jayant Bhushan, Sr Adv.
Mr. Rahul Balaji
Mr. Senthil Jagdeesan
Mr. Pallav Mongia
Mr. Krishna Dev

Mr. Shailendera
Mr. Kishore Singh
Ms. Smita Rajmohan for R-1

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Tamil Nadu Generation and Distribution Corporation Limited is the Appellant herein.

2. Aggrieved by the order dated 17.6.2011, directing the Appellant to pay the amount to be calculated by the generator, the 1st Respondent, after working of the invoices from the year 2001 to 2006, the Appellant has filed this Appeal.

3. The short facts are as follows:

   (a) PPN Power Company Private Limited, the 1st Respondent, is a Generating Company. The said Power Company entered into a Power Purchase Agreement with Tamil Nadu Electricity Board, the predecessor of the Appellant, on 3.01.1997 for sale of the entire energy generated by the Power Generating Station pursuant to the terms and conditions of the Power Purchase Agreement. Thereafter, the PPN Power Company set up a 330.5 MW Power

Generating Station. It had been generating power through a combine cycled gas turbine power station in Nagapattinam District of Tamil Nadu. The Power Company commenced its commercial operation on 26.4.2001.

(b) In respect of required supply of the power as per the Power Purchase Agreement, the Appellant failed to make payments towards its dues under the PPA. The PPN Power Company, the 1st Respondent, had been raising monthly invoices from 26.4.2001 for the electricity supplied by it to the Appellant.

(c) A notification was issued by the Government of India dated 30.3.1992 introducing a rebate scheme. As per the scheme, the Appellant, the purchaser, is entitled to rebate @ 2.5% if the payment is released within 5 days from the date of invoice and @ 1% if the payment is released within 30 days from the date of invoice.

(d) The Appellant, while making the payment of each amount, deducted 2.5% rebate to which it is entitled on making payment within 5 days from the date of receipt of the invoice.

(e) Since June, 2001, the Appellant had been paying only ad hoc payments without providing any

details for such ad hoc payments. Since the Appellant has not provided complete details to the Power Company, it had been adjusting the amount received by it on a “First In First Out” basis.

(f) On the basis of the particulars available, the Power Company, pursuant to the terms and the provisions contained in Article 10.2 (b) (2) (ii) of the PPA raised annual invoices for the period from Commercial Operation Date i.e. from 26.4.2001 till 31.3.2007.

(g) The PPN Power Company sent a communication dated 1.4.2009 to the Appellant giving the details of the arrears payable to the Power Company and informing it that unless the amount together with interest was paid, the Power Company would file appropriate Petition before the State Commission. Even then, the amount had not been paid.

(h) Therefore, the PPN power Company filed a petition in DRP No.12 of 2009, before the State Commission seeking for the direction to the Appellant to make a payment of sum of Rs.1,89,91,17,264/- being the sum due as on 19.3.2009 as per the invoices raised under the PPA and interest thereon in terms of Article 10.6 of

the PPA from the due date till the date of actual payment.

(i) The gist of the Petition filed by the PPN Power Company before the State Commission is as follows:

> "The PPN Power Company is a Generating Company. It entered into a Power Purchase Agreement with the Tamil Nadu Electricity Board on 3.1.1997 for the purchase of entire capacity and energy generated by the Power Company. The PPN Power Generating Company, thereafter, set-up 330.5 MW Power Generating Station. It achieved the Commercial Operation on 26.4.2001. From then onwards, the Power Company has been supplying power to the Electricity Board. However from the beginning there is continued failure on the part of the Electricity Board in making payments towards its dues under the Power Purchase Agreement. As per the Power Purchase Agreement, the Electricity Board has to pay from the entire output of the project in accordance with Article 10 of the PPA. As per Article 10 (2) (e) of the PPA, if the Electricity Board has got any dispute for the amount contained in invoice, it shall pay the entire

invoice amount first and thereafter raise the dispute. The PPN Power Company has been raising the invoices from time to time. Commencing from June, 2001, the Electricity Board has been paying only ad hoc amount without providing any details for such ad hoc payments. The PPN Company, therefore, has been adjusting the amount received by it from the Electricity Board in 'First In First Out' basis. This was also intimated to the Electricity Board through various letters. The PPN Power Company made several requests and sent reminders to the Electricity Board to make the payments. In spite of receipt of more than 100 letters from the PPN Power Company, there was no response. At last, the PPN Power Company sent a last letter on 1.4.2009 that the amount of Rs.1,78,72,72,534/- was due and payable to the Power Company and if not received by 16.4.2009 together with interest, the PPN Power Company would file an appropriate Petition before the State Commission. Thereafter, the Respondent Board sent a short reply on 16.4.2009 that the matter was under scrutiny and examination. However, there was no response therefore. Again, the PPN

Company sent a reminder. Then a letter came from the Electricity Board on 16.5.2009 that as per the accounts, a sum of Rs.31.12 Crores was due to the Appellant and the parties could meet to reconcile the accounts. Since the Board had not made payments as against the invoices as per the PPA, the PPN Power Company at last, filed a Petition before the State Commission on 22.5.2009 seeking for the directions to the Electricity Board for the payment of the outstanding dues under the PPA along with the interest raising various grounds in support of its claim".

(j) The Petition was entertained and enquiry was held. State Commission after hearing the parties ultimately passed the impugned order on 17.6.2011 allowing the Petition filed by PPN Power Company and directed the Appellant to pay the amount to be calculated by the Generating Company after re-working of the invoices from the year 2001 to 2006.

(k) Aggrieved by this order, the Appellant has presented this Appeal before this Tribunal.

4. The Appellant has raised the following issues in this Appeal:

(a) Entitlement of the Appellant to Rebate

(b) Jurisdiction of the State Commission u/s 86 (1) (f) of the Act, 2003;

(c) First In First Out method; for adjustment of payment;

(d) Limitation, delay and latches;

(e) Bar under Order 2 Rule 2 CPC;

(f) Non filing of Annual Invoices

(g) Determination of capital cost;

(h) Deduction on the monthly invoices;

(i) Excess Claims in the monthly invoice – unjust enrichment;

(j) Interest on Late Payments

5. Let us deal with these issues one by one in the light of the submissions made by the learned Counsel for the parties on these issues.

6. The submissions made by the Appellant in respect of the **First Issue** namely "**Entitlement of the Appellant to rebate"** is as follows:

"The PPA read as a whole would show that the payment of the full invoice amount within five days of the date of the raising of the invoice is not a pre-condition for seeking a rebate of 2.5%. Similarly, the

entitlement for rebate of 1% for full payment made beyond five days and within 30 days also is not a pre-condition. The definition of "Due Date" under Article 10.2 (a) and 10.2 (b) would not envisage the payment in full. The conjoint reading of the relevant Clauses in the PPA would show that the monthly invoices are in respect of estimated amounts which will attract rebate on substantial payment therein. The State Commission did not appreciate the various provisions of the PPA which provide for the rebate. The State Commission went wrong in holding that the PPA mandates that the entire payment should be made to be eligible for rebate".

7. In reply to the above ground, the 1st Respondent, PPN Power Company has made the **following submissions**:

"The Appellant is bound by the provisions of the PPA to pay the full amount of the monthly invoice to avail the applicable rebate. The plea of the Appellant that the monthly invoices are only estimated amounts and consequently the Appellant is eligible for 2.5% rebate on making substantial payment is not tenable. Under Article 10.2 (b) (i), the payments are to be made in full for every invoices by due date and under Article 10.2 (e) of the PPA, the payments are to be made in full when due, even after a portion of the invoice is

disputed. Under Article 10.3 (a to c) of the PPA, the Letter of Credit is to be established covering there months estimated billing one month prior to the Commercial Operation Date. The right to dispute any invoice is limited to one year from due date of such invoice in order to limit uncertainties to a limited period of one year from the due date. From these clauses, it is clear that in order to dispute an invoice, the Appellant is first obliged to make full payment of an invoice when due and then raise the dispute. The Appellant has no authority whatsoever to make any reduction from the invoice by unilaterally determining disallowances. The Power Purchase Agreement provides that if an invoice is not paid when due, the Power Company is within its right to draw upon the Letter of Credit and if this was insufficient at any point of time, the Power Company is at liberty to draw from the Escrow Account. The rebate of 2.5% is an incentive to ensure prompt and full payment. The Appellant admittedly, has not paid the full payment of the invoice and it had merely stated that it has been making substantial payment within five days. This act of the Appellant is completely contradictory to the provisions of the PPA which stipulates that the Appellant is eligible for the

rebate of 2.5% only if the full payment is made within five days from the date of the invoice".

8. In the light of the rival contentions referred to above, the question on this issue which arises for consideration is as follows:

> "**Whether the Appellant is entitled to rebate as claimed by it as per the Power Purchase Agreement?"**

9. Let us discuss this issue now. This requires the interpretation of the Clauses of the PPA. We now refer to the relevant clauses dealing with the issue of monthly invoice and monthly payments:

> **Clause 10.2 (a)**
>
> "*The Company shall submit to TNEB after the first day of each month that commences after the Commercial Operation Date an invoice ("invoice") for all amounts accrued in the preceding month under the Tariff and other applicable sections in this agreement for the estimated FC, VCC and incentive charges, which will come due during such month. Each invoice shall show the due date (Due Date) of the invoice to be the date that is thirty (30) after delivery of the invoice by the Company".*
>
> *"In the event that TNEB pays the invoice directly or through letter of credit within five business days from the presentation of the invoice, then TNEB shall be entitled to a 2.5% reduction of the invoice amount and if the payment is made after five days but within*

the due date, TNEB shall be entitled to 1% reduction of the invoice amount."

Clause 10.2 (b) (i)

"Monthly Payments: On the due date of an invoice, TNEB shall pay the Company for the full amount stated in the invoice. In the event that TNEB fails to pay the company on the due date, the company may immediately draw upon the standby Letter of Credit issued to TNEB pursuant to Section 10.3 by presenting to the issuing bank a certificate from an office of the Company stating the amount of the applicable invoice. If the invoiced amount exceeds TNEB's payment, the company may draw on the letter of credit to the extent of the unpaid portion of the invoice".

Clause 10.2 (b) (ii)

"Annual Invoice: As soon as possible after the end of each year, the Company shall submit to TNEB an annual invoice setting forth all amounts owed under the tariff and reconciliation of the actual amounts receivable from TNEB for the prior year against the sum of monthly estimated payment made by TNEB".

Clause 10.2 (e)

"Disputes: In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the company that the amount of an invoice is in dispute, in which event the provisions of article 16 shall be applicable. If the resolution of any invoices dispute requires the company to reimburse TNEB, the company will pay

TNEB interest on the amount rate being charged from time to time on cash credit rate of the company or in the event no such facility is in place, the rate for cash credit is extended by State Bank of India to comparable independent power companies plus one half % (0.5%) per annum to the extent permitted by law. TNEB shall not have the right to dispute any invoice after a period of one year from the due date of such invoice."

Schedule A: Clause 9 of the PPA

***"**Clause 9 of the PPA defines interest on working capital as including:*

(a) 30 days fuel cost;

(b) O&M expenses for one month;

(c) Maintenance spares and;

(d) receivables equivalent to two months average billing for sale of electricity.

The above schedule also refers to Schedule U to the PPA, which is Ministry of Power Notification dated 30.3.1992. Clause 1.5 (f) of the Notification again sets out components of interest on working capital.

***"1.5 (f) (v) –**Receivables equivalent to two months average billing for sale of electricity. For payment of bills through letter of credit a rebate of 2.5% shall be allowed. Where payments are made otherwise than Letter of Credit but within a period of one month of presentation of bill by the generating company a rebate of one percent will be allowed".*

10. The perusal of these clauses would reveal that the Power Purchase Agreement envisages as follows:

(a) Under Article 10.2 (b) (i), the payments are to be made in full for every invoice by due date;

(b) Under Article 10.2 (e), the payments are to be made in full when due even if entire portion or a portion of the invoice is disputed;

(c) Under Article 10.3 (a) to (c) of the PPA, Letter of Credit is to be established covering three months estimated billing, one month prior to Commercial Operation Date.

(d) Under Article 10.3 (d) of the Power Purchase Agreement, an Escrow Account is to be established by the Appellant in favour of the Power Company into which collections from designated circles are to flow in and be available as collateral security;

(e) The Government of Tamil Nadu under the Article 10.4 has guaranteed all of the financial obligations of the Appellant;

(f) Under Article 10.2 (e) of the Agreement of the PPA, the right to dispute any invoice by the Appellant is limited to one year from due date of such invoice.

11. The above clauses would clearly indicate that even if the amount of invoice is disputed, the Appellant is obliged to

make full payments of the invoice when due and then raise the dispute.

12. Early payment is incentivized under Article 10.2 (a) of the Power Purchase Agreement by way of a reduction in invoice amount of 2.5% if paid within five days of the invoice. Similarly, rebate of 1% is admissible if the invoice is paid within due date i.e. within 30 days. The rebate is an exception to the general rule requiring payment in full on due date. This can be claimed only upon strict compliance with the conditions for its applicability and does not accrue as a matter of right to the Appellant whenever he makes a part payment.

13. Under Article 10.2 (e) of the Power Purchase Agreement, the right of the Appellant to dispute limits to only within a period of one year from the due date of invoice. The PPA is so structured to ensure that the Power Company is aware of any liabilities that may arise due to the dispute raised by the Appellant within a maximum period of one year from due date.

14. The above mechanism had been agreed to between the parties primarily to ensure the objective of assured timely cash flow and promptitude. It is evident that timely cash flow and promptitude of action are the essence of the Power Purchase Agreement.

15. Under Article 10.2 (e) of the Power Purchase Agreement, the Appellant can raise a dispute over an invoice and serve notice on the Company but, it will not withhold the payment but it should pay the full amount of invoice. However, the Appellant shall not have the right to dispute any invoice after a period of one year from due date of the invoice.

16. The rebate is not compensation for interest. The rebate of 2.5% is for payment made within five days resulting in the payment being made 25 days ahead of due date. In other words, the rebate of 2.5% is an incentive to ensure prompt and full payment which is a pre-requisite for projects of this type which involves huge investment requiring certainty of cash flows and prompt payments.

17. The contention urged by the Appellant that the Article 10.2 (a) should be read to mean that rebate would be available to the extent of payments made as a part payment of the invoice amount, made within five days, is not tenable.

18. As mentioned above, Article 10.2 (a) of the PPA stipulates that “in the event that TNEB pays the invoice amount directly or through a Letter of Credit within five (5) business days from the presentation of the Invoice, then TNEB shall be entitled to a 2.5% reduction of the invoice amount”.

19. The wordings contained in the above Article are clear that the reduction of 2.5% is related to the **invoice amount** and

not to the **part payment amount**. If the Appellant's argument were to be accepted, then the language of the said article should have been like this "in the event that TNEB pays the portion of the invoice amount, directly or through a Letter of Credit, within five (5) business days from the presentation of the invoice, then TNEB shall be entitled to a 2.5% reduction of the said payment amount out of the invoice amount". These are not the wordings in the Article.

20. According to the Appellant, since they have been making substantial payments of the invoice amount within five (5) days from the Commercial Operation Date and more specifically from 01.4.2005 onwards, the Appellant would be entitled to avail 2.5% rebate. This argument is totally misconceived. The PPA stipulates that the Appellant would be entitled to 2.5% reduction of the invoice amount if the invoice amount is paid within five (5) days of the date of the invoice. The term 'invoice amount' means full value of the invoice not a portion of the invoice amount which may be substantial.

21. Article 10.2 (b) specifically provides that an invoice has to be paid in full. If that is not paid fully, the Power Company can draw upon the Letter of Credit to ensure that the full payment is received on monthly invoice. Similarly, Article 10.2 (e) also envisages that an invoice is to be paid in full

irrespective of any dispute being raised. The said article states that "In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an invoice is in dispute, in which event the provisions of Article 16 shall be applicable.

22. Therefore, the reading of the relevant clauses of the PPA would make it evident that all invoices including monthly invoices are to be paid in full by the Appellant. As such, the argument that substantial payments have been made and so the Appellant is eligible for 2.5% reduction in invoice value is completely untenable particularly, when the Power Purchase Agreement does not envisage rebate for such substantial payment.

23. According to the Appellant, Article 10.2 (a) does not stipulate full payment while Article 10.2 (b) specifically states the full payment and therefore, Article 10.2 (a) would not envisage full payment.

24. This is again a wrong argument. Article 10.2 (a) relates to invoice while Article 10.2 (b) relates to payment. Article 10.2 (a) covers reduction in invoice amount when payment is made before due date. It does not purport to be a clause relating to payment. The rebate relates to invoice

amount and hence rebate cannot be obtained unless full payment of invoice is made.

25. Thus, the argument of the Appellant that it is entitled to rebate if it makes the substantial payment of the invoice, has no basis. The reasons for the same are summed-up hereunder:

(a) The PPA envisages payment of the invoice amount in full within the stipulated time frame for the Appellant to be entitled to a reduction in invoice amount;

(b) There is no reference in the Power Purchase Agreement in relation to the terms “substantial payment”;

(c) What is “substantial” is very subjective. Any amount paid could be argued as being substantial. There is no definition given either in the Act or in authoritative pronouncements for what the substantial payment is. The structure of the Power Purchase Agreement is such that it lends to least amount of disputes. Hence, the Power Purchase Agreement could not have contemplated substantial payments.

(d) Apart from this, the reading of Article 10.2 (e) clearly expresses the intent of the parties to have all payments made within 30 days and the dispute over

the invoice have to be raised within a year and even in the event of a dispute, the disputed invoice amount is to be paid in full by due date.

26. The Appellant has sought to contend that the rebate is in lieu of working capital interest by relying upon the notification issued by Ministry of Power on 30.3.1992. This argument also does not deserve acceptance for the following reasons:

(a) The determination of reduction in invoice amount is governed specifically by the provisions of the PPA. The terms of the PPA are in consonance with the Ministry of Power notification dated 30.3.1992;

(b) The said notification does not permit availment of rebate for part payment against invoice;

(c) The claim of the Appellant that the rebate under the Notification and under the PPA are related to working capital interest is not borne out from the notification hence the only way to determine the rebate is to strictly follow the terms of the PPA.

27. The Appellant makes another plea that the Appellant has been making full payments since 2004. This contention is vehemently denied by the Power Company, as being completely untrue. As pointed out by the Respondent, the

records would reveal that the Appellant from the beginning had been making only ad hoc and part payments as admitted by the Appellant in its various letters.

28. As stated above, the scheme of the PPA is that the Appellant has to make full payment of monthly invoice and raise the dispute within a period of one year. In other words, if the payment of invoice amount is made by the Appellant within five (5) business days, the Appellant shall be entitled to 2.5% reduction on the invoice amount and if the payment is made after five (5) days, but within 30 days i.e. due date, it shall be entitled 1% reduction of the invoice amount.

29. As enumerated above, from the harmonious reading of clause 10.2 (a), 10.2 (b) (i) and 10.2 (e), it is manifestly evident that the Appellant is obliged to pay full amount of the invoice within the due date to be eligible for reduction of the rebate of 2.5% or 1% as the case may be. In other words, whenever the payment made by the Appellant, falls short of the full amount, the Appellant is not eligible for rebate or reduction of the invoice amount. In this case, admittedly, the Appellant neither paid the full amount for every invoice nor raised the dispute within one year. In view of the above facts, we hold that the Appellant cannot claim eligibility for the rebate.

30. The **Second Issue** is the **jurisdiction and Scope of Section 86 (1) (f) of the Act.**

31. According to the Appellant, the State Commission instead of referring the dispute for arbitration as this case involves various complicated issues, arbitrarily decided to adjudicate the dispute by itself, even though there are no provisions providing for adjudication of money claims and therefore, the State Commission has no jurisdiction to adjudicate the dispute involving money claims u/s 86 (1) (f) of the Act.

32. According to the PPN Power Company, this issue has already been decided by this Tribunal as well as the Supreme Court as against the point urged by the Appellant. So, **the question on this issue** is as this:

> "**Whether the State Commission is justified in adjudicating the matter on its own without referring to the arbitration especially when monetary claim is involved in the dispute?".**

33. In regard to the plea that the dispute must have been referred to arbitration, the Hon'ble Supreme Court at Para-60 in the Gujart Urja Vikas Nigam v Essar Power Limited (2008) 4 SCC 755 has held as under:

> *"60. In the present case, it is true that there is a provision for arbitration in the agreement between the*

parties dated 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003, there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86 (1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86 (1) (f) about the nature of the dispute".

34. As per the decision of the Hon'ble Supreme Court, it is with the discretion of the State Commission to decide as to whether the dispute should be adjudicated by itself or it should be referred to an arbitrator. Therefore, the Appellant cannot dictate that the State Commission ought to have referred the dispute to an arbitrator. Further, u/s 86 (1) (f), the State Commission can adjudicate all the disputes including the dispute on money claims between the licensees and Generating Companies. As pointed out by the PPN Power Company, this issue has already been decided by this Tribunal in Neyveli Ignite Corporation Vs

Tamil Nadu Electricity Board in Appeal No.49 of 2010 dated 10.9.2010.

35. In view of the above settled position of law, we hold that the State Commission is well within its jurisdiction to decide the dispute in question u/s 86 (1) (f) of the Act. Accordingly, this issue is decided as against the Appellant.

36. The **Third Issue** is with reference to adjustment **of the payment made by the Appellant on First In First Out Basis**.

37. On this issue, the Appellant has made the following submissions:

> "The Appellant has made payments against each monthly invoice every month from the date of commercial operation. Therefore, the adjustments of payments on First In First Out Basis, after receiving the monthly payment within the fifth day of the monthly invoice against that particular monthly invoice is illegal. The unilateral act of the Respondent Power Company cannot in any way legalize the wrongful First In First Out adjustment of payments made by the Appellant. The conclusion of the State Commission that the Respondent's claim that as the payment details had not been received from the Appellant, it had correctly been adjusting

the payment on First In First Out basis against the claims is unjustified. The reliance placed on Section 60 of the Contract Act by the Respondent is unjustified in view of the contemporaneous conduct of the parties. The provision of the Section 60 cannot be applied independently and it has to be read altogether u/s 59 of the Contract Act. Therefore, adjustments on First in First out Basis are illegal.

38. In reply, the Respondent Power Company has made following submissions on this issue:

"Admittedly, the Power Company (Respondent) after receipt of payments communicated to the Appellant on more than one occasion that it was setting off payments on First in First out Basis. The Appellant did not object to this. On the other hand, the Appellant sent a communication on 10.9.2001 stating that since it was in a financial difficulty, it was able to make some partial payments though it had accepted all the claims made by the Respondent. Thus, on its own admission, the Appellant was making the said part payments without questioning the adjustment on 'First in First out Basis'. Section 60 of the Indian Contract Act provides that the First Respondent Power Company is well within its right to set off payments received in any way it pleases, in the

absence of any communication to the contrary from the Appellant. Section 61 of the Contract Act, specifically provides that in the event of no communications being exchanged on the appropriation of payments, payments are to be appropriated on a First in First out Basis. Therefore, there is no illegality in resorting to the First In First Out method.

39. The question on this issue is as follows:

"Whether the State Commission is justified in holding that the principle of First In First Out under Sections 60 and 61 of the Contract Act for adjustment of the payments would be applicable to the facts and circumstances of the case?".

40. We have considered the submissions of both the parties on this issue. According to the Appellant, Section 59 of the Contract Act should apply. On the other hand, the Respondent submits that Section 60 and 61 of the Indian Contract Act alone would apply. Let us first quote Section 59 of the Indian Contract Act, 1872 which is as under:

"Section 59 of the Indian Contract Act,1872

"Application of payment where debt to be discharged is indicated: *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to*

be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly".

41. As per Section 59, where payment is made either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some **particular debt**, the payment, if accepted, must be applied accordingly. This shows that application of Section 59 can be attributed to a case by implication of existence of certain circumstances.

42. Section 59 of the Contract Act would not apply to the present case for the following reasons:

(a) Section 59 has two limbs. The first limb expresses intimation by the debtor at the time of making payment. The second limb provides for the circumstances implying that a payment has to be applied to the discharge of a **particular debt**.

(b) In the present case, there has been no express intimation that the payment has to be applied to the discharge of a **particular debt**.

(c) The requirement of the second limb of Section 59 has not been met in the instant case. The use of the words "payment is to be applied" instead of the words "payment has been made against" is quite significant. This shows that it is not sufficient, if in his

mind, the debtor was making payment against a particular debt. This communication can either be express or by necessary implication. For example, if a current invoice is paid in full, it will imply that the payment has been made against that invoice even if no communication is made by the debtor. In the present case, the circumstances do not imply that the Power Company was made aware by the Appellant that the payments were made against a particular debt.

(d) As a matter of fact, in the present case, the intimations by the Power Company were sent to the Appellant that payments would be applied and adjusted on First in First Out basis. These intimations were never refuted nor replied to. When such being the case, it can safely be held that the Power Company, was made to believe that the payments were being made on First in First Out basis in the absence of any communication whatsoever to the Power Company by the Appellant that payments were made against specific invoice. Under those circumstances, Section 59 of the Indian Contract act has no application.

43. Let us now refer to Section 60 of the Indian Contract Act, 1872 which is as under:

Section 60 of the Indian Contract Act, 1872

"Where the debtor has omitted to intimate and there are no other circumstances, indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits".

44. Section 60 of the Indian Contract Act, 1872 provides that the Power Company is well within its right to consider all payments received in any way as it pleases in the absence of any communication to the contrary from the Appellant.

45. Let us now refer to Section 61 of the Indian Contract Act, 1872 which is as under:

"Section 61 of the Indian Contract Act, 1872

"Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally".

46. Section 61 of the Indian Contract Act provides that in the event of no communication being exchanged on the appropriation of payments, payments are to be appropriated on a First In First Out basis. In the present case, there is no response or communication from the

Appellant over the information sent by the Power Company with regard to resort to adjustment of payments on First in First Out basis.

47. According to the Power Company, the First Respondent, it sent more than 100 reminders to the Appellant seeking details regarding the payments. However, the Appellant did not respond for even one of them.

48. Let us quote the letters dated 25.6.2001 and 2.12.2003 sent by the Power Company to the Appellant which are as under:

Letter dated 25.6.2001

PPN Power Generating Company Limited
Jhavar Plaza, III Floor,
1-A, Nungambakkam High Road, Chennai-600 034
Tel: 91—44-8271118 Fax: 91-44-8276621

PPN/TNEB/169 ***Dated:25.6.2001***

To
The Chief Financial Controller
Tamil Nadu Electricity Board,
NPKRR Maligai, 7th Floor,
Anna Salai, Chennai-600 002
Dear Sir,

Sub: PPN CCGTP-Overdue Bills

We had brought to the notice of TNEB vide letter No.PPN/TNEB/162 dated 16.6.01 that against our claim for Rs.83,80,31,013 as detailed below, we were

issued a cheque for Rs.41,84,72, 156 without any details as to how this amount was arrived at.

S.No.	Invoice Ref	Amount Rs.	Remarks
1.	001/2000-2001	32,17,656	Infirm Power-Feb 2001
2.	001/2001-2002	71,04,826	Infirm Power-March, 2001
3.	002/2001-2002	1,47,091,610	Infirm Power-April till COD
4.	003/2001-2002	1,31,984,438	Post COD till 30.4.2001
5.	004/2001-2002	5,18,332,483	Bill for May, 2001
	Total	8,38,031,013	

Our request for details has not been responded. Accordingly, in accordance with the provisions of general law, we have appropriated the amount of Rs.41, 84, 72,156 as detailed below:

Appropriated toward full settlement of bills as given below	Amount Rs.
001/2000-2001	32,17, 656
001/2001-2002	74,04, 826
002/2001-2002	1,47,091,610
003/2001-2002	1,31,984,438
Total	**2,89,698,530**

The balance amount of Rs.12,87,73,626 has been adjusted against invoice No.004/2001-2002 for Rs.51,83,32,483. Accordingly, the balance payable amounts to Rs.41,95,58,857. This amount will be dealt with as per the provisions of Article 10.2 and 10.6 of the Power Purchase Agreement.

Thanking you,

Yours truly,

For PPN Power Generating Co. Ltd.,
Sd/-
A.G Balaji
Financial Controller & Secretary

Copy to:
1. Accounts Member, TNEB, Chennai

2. Member (Generation), TNEB, Chennai
3. Sr. Vice President, IPP. TNEB, Chennai

Letter dated 2.12.2003

PPN POWER GENERATING COMPANY LIMITED
Jhaver Plaza- III Floor
1-A, Nungambakkam High Road, Chennai 600 034
Tel: 91-44-28214702 Fax: 91-44-8276621

PPn/TNEB/488 **2.12.2003**

Ms. Malarvizhi, B.A. (Corp), ACA,
Finincial Conmtroller, Tamil Nadu Electricity Board
VI Floor, Eastern Wing, NPKRR Moaligal
800, Anna Salai, Chennai – 600002

Madam,

Amounts due to the Company.

We thank you for your remittance of Rs. 16, 74, 07,500 vide your communication dated Nil received by us on 1.12.2003

The communication states "… the admitted claims upto 31.8.2003 has been settled in full with the above payment"

In this connection, we invite your attention to our communication sent to you directly with reference to the statements made by you pertaining to "admitted claims" as given below:

TNEB's communication	PPN's Response
Letter No. X/DFC/COST/IPP/Adhoc/Dated 4.9.2003	PPN/TNEB/474dated 6.9.2003
Letter No. X/DFC/COST/IPP/Adhoc/Dated 19.9.2003	PPN/TNEB/481dated 22.9.2003

We have not been favored with any details as to the remittances made by TNEB despite innumerable communications, reminders, personal request and so on. While this is so, we are surprised at your unilateral declaration that the admitted claims upto 31.8.2003 have been fully settled.

In as much as TNEB has not provided with any details pertaining to any of the remittances (except as stated above), the payments received by us are treated as ad hoc payments and these are being set off on **First In First Out basis** as was

communicated to you. As par our records, TNEB is due Rs 442.10 crores as of date.(details of billing and remittance are provided in the attachments)

We once again request you to provide with the following details:

1. Details for the remittances made by TNEB to the company since inception.
2. Details of claims admitted by TNEB.
3. Details of claims not admitted by TNEB wit reasons therefore.

a. relevant provisions of contract or law by which a rebate of 2.5% has been appropriated by TNEB as mentioned in your communications of 4.9.2003 and 19.9.2003

This is without prejudice to our rights as per the provisions of the Power Purchase Agreement dated 3.1.1997 and applicable laws.

Thanking you

Yours truly,

For PPN Power Generating Co. Ltd.

Sd/-

S.Krishnan
Financial Controller

Copy to:
Mr. S. Kathiresan, Chief Financial Controller, TNEB, Chennai"

49. The letters dated 25.6.2001 and 2.12.2003 would clearly indicate that after receipt of the payments, the Power Company communicated to the Appellant that it was adjusting the payments on First in First out Basis. The Appellant neither refuted nor objected to this position.

50. On the other hand, the Appellant had sent communication on 10.9.2001 which is quoted as under:

Letter dated 10.9.2001

From
K Gnandesikan, I.A.S,
Chairman,
TNEB, 880, Anna Salai
Chennai-600002

To
M/s. PPN Power Generation Co. Ltd.,
Jhavar Plaza III Floor,
No.1-A, Nungambakkam High Road,
Chennai-600 034

L.No.SR.VPAPP/EE/PP4/A2/D 762 /2001 dated 10.9.2001
Sirs,

Sub: Payment of Tariff Invoices – Reg.

****

Please refer to the discussions TNEB had with your promoters on 21st August, 2001.

As discussed, TNEB is currently undergoing temporary financial strain resulting in its inability to make full payment against tariff invoices. However, tariff payments as obligated under the PPA shall be made in full starting January, 2002 and so continue thereafter. TNEB acknowledges that arrears of overdue payments need to be made to you in full, being the balance payable over and above the part payments made till December, 2001, and agrees that these will be paid starting from January, 2002.

Your invoices have been accepted for payment in fully by TNEB. The part payment currently made is an Interim payment as opposed to full payment according to the PPA rate and does not in any manner prejudice your right to receive payment against invoices raised by the Company conforming to the terms and conditions of the PPA, the residual portion of the said invoices being now outstanding. TNEB herewith accepts liability to pay the said outstanding and reconfirms its commitment to meet all of its contractual obligations under the PPA.

TNEB appreciates your concern over the level of part payment of invoices being currently made which is insufficient to meet your payment obligations. TNEB has already discussed and reached an understanding with your company on the level of interim payment with respect to your project's requirements and payments to lenders on due dates.

Yours faithfully,
Sd/-
Chairman"

51. This letter would indicate that the Appellant admitted that since TNEB was undergoing temporary financial strain resulting in its inability to make full payment against tariff invoices, the said payments would be made in full starting from January, 2002 and the payments currently made was interim payment as opposed to full payment and same will not be to the prejudice to the rights of the Respondent Company to receive full payment against invoices raised by the Company.

52. These three letters referred to above, would clearly indicate that the Power Company duly informed the Appellant that the payments were being adjusted on First In First Out basis and same was acknowledged and endorsed by the Appellant.

53. The Appellant has also cited the decision in the following judgments to support its plea:

(a) Domingo John Picardo Vs Gregory Pinto AIR 1962 Mys 190

(5).....For the purpose of deciding whether a debtor can take advantage of the provisions under Section 59, it seems to me unnecessary to insist that intimation of appropriation should be necessarily synchronous with the payment. What is of greater importance is that what deprives the creditor of his right to make

appropriation is his accepting the payment with the knowledge that the payment is made by the debtor subject to an express appropriation. The creditor should, therefore, have an opportunity of considering the offer of payment made by the debtor subject to the appropriation suggested by him and deciding himself either to accept the payment or not upon such conditions. If the circumstances are such that money reaches the hands of the creditor and he accepts it without knowing the conditions subject to which the debtor proposed to make the payment or thought of making that payment, the creditor cannot be deprived of his normal right which he possess of making an appropriation which is to his best advantage. He even has the right of making a re-appropriation if he subsequently thinks that a prior appropriation is not sufficiently advantageous to him, subject only to the rule that an appropriation made by him once communicated to the debtor will be irrevocable.

(b) AIR 1927 PC 50 in the case of Radha Kishun and Ors Vs Hira Lal Sah and Ors

". …The burden is upon the defendants to prove the appropriation for which they seek. Indeed, in their Lordships opinion, it is a heavy burden and one which must be completely discharged".

(c) AIR 1951 T&C 80 in the case of K.G. Jacob vs Ittyavira George & Anr

"3….The law gives considerable latitude to the creditors in making appropriations of payments made by debtors. As pointed out in Damodara Sheonoi v Mohammad Rowther 57 TLR 1259 the creditors have the right of election up to the last payment. But they may do so only when debtors do not themselves make appropriations

of the payments they make at the time when the payments are made. Even under the provisions of Contract Act- Section 59, the time for the debtor to intimate the creditor how the amounts should be appropriated is at the time when he makes the payment.

54. There is no dispute over the settled position of law referred to in these decisions. In the present case, it is noticed that the creditor who has got the right of adopting First In First Out basis method, adopted the same after duly intimating to the Appellant and the same was acknowledged by the Appellant. Therefore, these decisions would be of no use to the Appellant.

55. Consequently, it has to be held that the Power Company is perfectly justified in adopting the First In First Out method and adjusting the amount accordingly as per Section 60 of the Indian Contract Act.

56. The **Fourth Issue** is relating to the **Applicability of Limitation Act or delay and latches.**

57. The submissions made by the Appellant on this issue are as follows:

> "The provisions of the Limitation Act would apply to the proceedings under the Electricity Act. The Electricity Act has made provisions for culling out specific type of disputes which would otherwise have to be agitated before the Civil court in the normal

course. As such, the adjudication under this Act is by judicial authorities considering the similar nature of disputes. Any nomenclature under the Act by designating the authorities as Tribunal is not determinative under the functions performed under the Act. The decision in Union of India v R Gandhi in (2010) 11 SCC 1 holding that the Limitation Act would not apply to the proceedings before the Tribunal would not apply to the present case. The various provisions contained in the Arbitration and Consideration Act, 1996 and the Electricity Act would show that the limitation Act would apply to the proceedings under the Electricity Act particularly by reason of the fact that there is no express exclusion of the provisions of the Electricity Act in the Electricity Act. Even assuming that the Limitation Act would not apply to the present case, the claims made by the Power Company are hit by delay and latches since the claimant has invoked the jurisdiction of the State Commission only in the year 2009 though the dues would relate to the period starting from 2001".

58. In reply to the above submissions, the learned Senior Counsel for the Respondent would make the following submissions:

"It is well settled that the Limitation Act is inapplicable to the proceedings before the State Commission for adjudicating the disputes. Electricity Act, 2003 being a complete code which is self contained and comprehensive for the cases under Electricity Act, the provisions of the Limitation Act would not apply. This principle has been laid down in (2008) 7 SCC 169 Consolidated Engineering Enterprises Vs Principal Secretary Irrigation Department. The stand of the Appellant that if the dispute had been referred to the arbitration, the Appellant would have had the benefit of the provisions of the Limitation Act is not correct since the Section 2 (4) of the Arbitration and Consideration Act, 1996 making the provisions of Section 43 inapplicable. In any event, the issue of Limitation Act does not arise in the present dispute since the principle governing the appropriation payments is contained in Section 59 and 60 of the Contract Act. The contention of the Appellant sought to have been urged with regard to delay and latches, also is not tenable since the Appellant itself admitted that it made only ad hoc payments through its letters. Therefore, the PPN Power Company, the Respondent was made to adjust the payments on First In First Out basis. Under those circumstances,

the question of any limitation, delay or latches would not arise".

59. The question on this issue is as follows:

"Whether the State Commission is justified in holding that the Limitation Act would not apply in the present case and there is no delay and latches?".

60. We have considered the submissions made by both the parties on this issue. The contention of the Appellant that the claim is barred by limitations is not valid in law in view of the decision of the Hon'ble Supreme Court in (2008) 7 SCC 169 Consolidated Engineers Enterprises Vs. Principal Secretary Irrigation Department. Further, the limitation point was discussed by this Tribunal vide Appeal No.12 and 116 of 2010 dated 7.3.2011 which in turn decided that the Limitation Act would not apply to the proceeding under the Electricity Act while confirming the order passed by the same State Commission in DRP No.18 of 2008 of TCP Vs TNEB and in DRP No.27 of 2009 CPCL vs TNEB. As a matter of fact, the very same argument relating to the applicability of the Electricity Act under arbitration had been raised before the State Commission. However, the said plea was given up by the Appellant in view of the provisions of Section 2(4) of the Arbitration and Conciliation Act making the provisions of Section 43 inapplicable to

arbitration conducted under other enactments. Even though the said plea was given up before the State Commission, the Appellant has now raised this point once again before this Tribunal.

61. As correctly pointed out by the learned Senior Counsel for the Power Company, the Respondent, under the Electricity Act, 2003 the State Commission exercises its discretion to refer any dispute for arbitration and the provision of limitation act would not apply by virtue of Section 2 (4) of the Arbitration and Conciliation Act.

62. That apart, the issue of limitation does not arise in the present dispute. As already discussed, the principle governing the appropriation of payments is contained in Section 60 and 61 of the Indian Contract Act. We have already held while discussing the other issue, that Section 60 and 61 of the Contract Act permit the creditor to adjust the amount on First In First Out method and hence, the question of limitation would not arise.

63. As discussed above, when there is no express intimation or circumstances implying that the payment is to be applied in discharge of some particular debt, the PPN power Company, the Creditor is entitled to apply its own discretion to adjust the payments to any lawful debt whether its recovery is barred by law or not.

64. As indicated above, in the present case, no payment was expressly stated to be made against any particular invoice.

65. On the other hand, the Appellant itself has admitted in its letters dated 10.9.2001 and 27.7.2004 that the Appellant made only ad hoc payments. As such, there is no single payment that has been made in full. That apart, there has been no communication at the time of payment intimating any rebate or disallowance. As indicated above, the PPN Power Company had sent several communications to the Appellant that it was adjusting the payment received on a First In First Out basis but this was neither refuted nor denied by the Appellant. So, when the method of First In First Out is permissible under law, the question of limitation does not arise.

66. It is contended by the Appellant that the disputes ought to have been raised long back without any delay. This question also does not hold good since even according to the Appellant, they made only the ad hoc payments and made a request to the PPN Power Company to wait for some time since they are experiencing the cash flow problems and assured for the payment in future. So, when the Power Company, the Respondent had been permitted to adjust the payment on First In First Out basis, the question of any delay and latches would not arise.

67. As indicated above, the Appellant had specifically mentioned in the communication dated 10.9.2001 to the PPN Power Company that it had accepted all claims made by the Respondent and it was making partial ad hoc payments only due to the financial difficulty. Thus, by its own admissions, the Appellant was only making part payments and had never made any full payments of any invoice. In other words, at no stage, the Appellant raised any issue over any of the invoice sent by the power company. The PPN Power Company had been receiving ad hoc payments from inception. Not a single invoice was ever paid in full. As mentioned earlier, no communication was ever sent by the Appellant that the payment was against specific invoice.

68. The Power Company, the Respondent was made to approach the State Commission only when a cause of action was thrust upon it by the Appellant through its letter dated 16.5.2009 stating that the Respondent Company had dues of Rs.31.12 Crores to be paid to the Appellant when in fact, nearly 190 Crores and interest thereon was due from the Appellant to the Respondent Company.

69. The judgment relied upon by the Appellant namely in 1976 4 SCC 634 in the case of KSEB Vs. T P Kunhaliumma would not apply to the present case since the State Commissions which are constituted under Electricity Act,

cannot be regarded as a Civil Court. Therefore, we hold that the Limitation Act would not apply to the present case and there is also no delay and latches on the part of the Power Company, the Respondent.

70. The **Fifth Issue** is the **Bar of Order 2 Rule-2, CPC**. The short submissions made by the Appellant on this issue is as follows:

> "The PPN Power Company, the Respondent cannot make the present claim in DRP No.12 of 2009 in view of the fact that the Company omitted to claim the same while filing earlier DRP No.7 of 2008 relating to specified taxes and as such the present claim would be hit by the provisions of the Order 2 Rule 2 of the CPC".

71. The reply by the Respondent Company is as follows:

> "The Bar under order 2 Rule 2 would apply only in cases where a party feels to make a claim that ought to have been part of the earlier claim. In the present case, the evidence for the claim in relation to earlier case claiming specified taxes is distinct and different from the present claim. Therefore, the bar under Order 2 Rule 2 cannot apply to the present case, where the causes of action in these two proceedings are separate and different"

72. The question on this issue is as under:

"Whether Bar under Order 2 Rule 2 CPC would apply to the present facts of the case?"

73. The argument of the Appellant is that the present claim would be barred by the provisions Order 2 Rule 2 CPC since the Power Company, Respondent failed to include the present claim in its earlier claims relating to the specified taxes. Let us Quote Order-2 Rule 2 of the CPC which is as under:

"Order 2 Rule 2 of CPC

2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) ***Relinquishment of part of claim****-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) ***Omission to sue for one of several reliefs****-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*

Explanation: *For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*

74. The reading of the above provisions would make it evident that the bar under Order 2 Rule-2 of the CPC would apply only to cases where the party fails to make a claim which ought to have been the part of the earlier claim. In determining such a question, we have to see whether the same evidence has to be let in for both the claims. The earlier claim was in relation to the specified taxes which is incorporated in Clause 10 (1) (d) of the PPA. Let us see Clause 10 (1) (d) of the PPA which is as under:

Clause 10 (1) (d) of the PPA

"(d) Specified Taxes on Income will not form part of regular billing. However, any advance tax payable for the Project in any month supported by a certificate of a Chartered Accountant approved by TNEB will be reimbursed in the succeeding Month. After the tax assessment is completed for any Year and the liability therefore is determined by the taxation authorities in India, the excess or shortfall in the tax liability so determined will be adjusted in the invoice for the month next following. The Company shall take reasonable steps to ensure that its liability on income tax in respect of its income from the Project is minimized by obtaining, by suitable arrangement, all permissible benefits, rebates, concessions and the like, in accordance with law".

75. The reading of the above Clause would reveal that specified taxes do not form part of the monthly invoice. Advance taxes paid by the Power Company are reimbursed in the following month. Similarly, excess and short fall in the tax liability will be adjusted in the following monthly invoice. Advance Tax is due every quarter. Therefore, the Power Company is required to submit claims for re-imbursement in the succeeding months. Therefore, it is clear that specified taxes and income are not part of the monthly invoice. The monthly invoice and specified tax invoice are distinct. Thus, the present dispute on monthly invoice is totally different and distinct from the earlier dispute on specified tax invoice. Admittedly, the evidence for the claim in relation to the specified tax is entirely different from present claim on monthly invoices. That apart, the right to sue and cause of action in respect of specified tax had already arisen since there was a refusal on the part of the Appellant to pay in that regard at that time. That is not the case here. In the case of the present claim, there was no refusal to pay at the initial stage. It was only when the repeated requests made by the Power Company to the Appellant to pay, went unheeded, the Power Company resorted to approach the State Commission that too, when the Appellant claimed through its letter dated 16.5.2009 dues of Rs.31.12 Cores from the Power Company which created cause of action resulting in

the present claim made on 22.5.2009 through the Petition filed by the Power Company before the State Commission.

76. It is a settled law that if the second suit has been filed, the defendant has to prove that second suit is based on the same cause of action on which the earlier suit was filed. Only then, the bar of Order 2 Rule 2 CPC would apply. In this case, the same had not been established by the Appellant. This principle has been laid down in the case of Kunjan Nair Sivaraman Nair V. Narayanan Nair, (2004) 3 SCC 277. The relevant Portion of the judgment in this case is as under:

> "***8****. A mere look at the provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action, he must include in his suit the whole claim pertaining to that cause of action. But, if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far, as sub-rule (3) is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit the plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had field to press into service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2 Rule sub-rule)(3) that the*

second suit of the plaintiff filed is based on the same cause of action on which its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit".

77. The above observation would clearly indicate that the Hon'ble Supreme Court mandates that whenever the question arises as to whether the cause of action in the subsequent proceedings is identical with that of the first proceedings, it has to be firstly found out as to whether the same evidence would maintain both the actions.

78. In the light of the said principle, if we look at the facts of the present case, it can be safely held that the evidence for the claims in relation to the specified taxes is entirely different from the evidence in relation to the present claim involving monthly invoice. Further, as indicated above, the cause of action in respect of specified taxes had already arisen in view of the fact that there was a refusal of the Appellant to pay in that regard at that time. But in the present claim, there was no refusal to pay through any of their letters. Only after receipt of last letter of the Appellant, dated 16.5.2009, claiming dues from the Power Company, raising the cause of action, the Power Company made its claim before the State Commission without any delay. Therefore, the Bar under Order 2 Rule 2 CPC would not apply to the present case since the cause of action in both the matters

is different and distinct which relate to the different issues involving different findings and different evidence. So, the contention of the Appellant on this point would fail.

79. The **Sixth Issue** is relating to the **non-filing of the annual invoices** by the Power Company, the Respondent.

80. The submissions made by the Appellant on this issue is as follows:

> "Admittedly, the Respondent Power Company has not raised the annual invoice. The State Commission in the impugned order has given specific finding that the Power Company Respondent should have filed annual invoices in time on the basis of the information available with it. The Power Company after having failed to comply with the provisions of the PPA by raising annual invoices at the end of each year cannot claim that they cannot raise annual invoices unless the details of payment are furnished by the Appellant. The contention that the annual invoices may be raised only once is clearly misconceived. As such, the default on the part of the Appellant could not have arisen if the Respondent Company did not act in due compliance of its obligation under the PPA by raising the annual invoices in time. So, the findings of the State

Commission as well as the facts would show that what was raised in the monthly invoice was only the estimated amount. The material breach committed by the Respondent Company, as found by the State Commission is primary reason which prevented the Appellant from reconciliation of accounts as provided under the PPA. As such, seven years delay in filing annual invoice by the Power Company had caused serious prejudice to the Appellant".

81. The reply to these Submissions by the Respondent Company is as follows:

"The Respondent Company could not submit the annual invoice at the end of each year for want of details from the Appellant and at last, they filed the annual invoice for the period from 2001 to 2007 which were submitted to the Appellant in July, 2007. The Appellant makes an untenable plea that delay in submission of the annual invoices prevented the reconciliation of the accounts as provided in the Power Purchase Agreement. The Power Company sent more than 100 reminders seeking the details of the accounts from the Appellant. However, there was no response. Hence, the only party that caused the delay in reconciliation was the Appellant. This delay was caused by the Appellant with deliberate

intention to ensure that there was neither litigation initiated by the Power Company against the Appellant, nor the Appellant was compelled to make payment of entire claim to the Respondent Company. In fact, no dispute relating to any of the parameters requiring for finalization of the annual invoices was ever raised by the Appellant. This specific issue was raised only in the year 2010-11 where the Foreign Exchange Rate Variation on return on equity was not capable of being computed. The Power Company was unable to raise any annual invoice as contemplated in the PPA prior to the resolution of the issues as per the minutes of the meeting dated 22.1.2005 and determination of the capacity by the Appellant on 31.5.2006. However, pursuant to the directions of the State Commission in the impugned order, the monthly invoice and the annual invoice for the respective years have been redrawn and the annual invoices were submitted on 30th September every year giving the benefit of interest on such annual invoices".

82. The question on this issue is as follows:

"Whether the State Commission is justified in granting the claim of the Power Company which includes the interest even after holding that the Power Company failed to raise annual invoices

as per the terms of the Power Purchase Agreement?".

83. The State Commission dealt with this issue elaborately and made thorough discussion and gave a finding. The same is as follows:

Annual Invoices:

242. Clause 10.2 (b)(ii) of the PPA stipulates as follows:-

"As soon as possible after the end of each Year, the Company shall submit to TNEB an annual Invoice setting forth all amounts owed under the Tariff and a reconciliation of the actual amounts receivable from TNEB for the prior Year against the sum of monthly estimated payment made by TNEB. If such Invoice shows net payment due to the Company by TNEB, the stated amount shall be paid by the Due Date. If such Invoice shows net payment due to TNEB by the Company, the stated amount shall be paid to TNEB by the date that is thirty (30) days after the Invoice is rendered"

243. The Petitioner contends that the PPA does not prescribe a time limit for submission of annual invoices. The Petitioner submitted all the annual invoices for the years of 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 at a time in July 2007. The Petitioner defends his inordinate delay in raising annual invoices on the ground that he awaited information from the Respondent covering long term interest outflows, wholesale price index and consumer price index for the purpose of computing operation and maintenance expenses, foreign exchange rate variation on return on equity, incentive

based on plant load factor and interest on working capital. His further defense is that the monthly invoices were not paid by the Respondent in full and details of deduction were not available to him. The Petitioner contends that he could not have raised the annual invoices without the above data, which he awaited from the Respondent.

244. The Respondent submits that delayed submission of annual invoices is a material breach of the PPA. The Respondent contends that the Petitioner need not depend upon information from him for the purpose of filing annual invoices and that annual invoices have to be prepared by the Petitioner with the data available with him such as actual interest rates, actual amount paid to the bankers, FERV, return on equity and interest on debt and other financial charges etc. The Respondent contends that this information is available with the Petitioner and there is no role for the Respondent in furnishing such details. The PPA according to the Respondent has not cast any obligation on the Respondent to furnish information for the purpose of filing annual invoices.

245. The Commission considers that the Petitioner should have filed the annual invoices on the basis of information available with him. As regards the dead line for filing annual invoices the Commission is unable to accept the plea of the Petitioner that the PPA does not provide any time limit for submission of annual invoices. The PPA states that annual invoices are to be submitted as soon as possible at the end of each year. The Petitioner is entitled for reasonable time for submission of annual invoices but it cannot be the case that he would take five years to submit annual invoices. The spirit of the PPA has to be observed. While there is a definite time limit for

submission of monthly invoices by the Petitioner, the PPA has been liberal in granting a reasonable time for submission of annual invoices. But this privilege should not be abused by the Petitioner for inordinately delaying annual invoices. The audited account and income tax returns of the Petitioner are ready by 30th Sept each year and therefore it would be reasonable to assume that annual invoices should be filed by 30th Sept of each year.

246. Accordingly, we direct the Petitioner to redraw the annual invoices of each year as on 30th of Sept of each year based on the data available for the previous financial year, except capacity reset which was affected by the Respondent on 31-5-2006. The ratio of 336.299 MW divided by 347.712 MW would be applicable for the period from 26-4-2001 to 21-11-2002 and thereafter 343.969 MW divided by 347.712 MW, as against the ratios of 321/330.5 and 330.5/330.5 adopted by the Petitioner for the respective periods.

247. This would result either in payment to the Petitioner or payment to the Respondent. Either party will make payment to the other of the principal amount. The annual invoice of 2001-02 would be due by Sept 2002. The annual invoice of 2002-03 would be due by Sept 2003. The annual invoice of 2003-04 would be due by Sept 2004. The annual invoice of 2004-05 would be due by Sept 2005. The annual invoice of 2005-06 would be due by Sept 2006. The annual invoice of 2006-07 would be due by Sept 2007.

248. The Respondent has submitted the following figures of refund due from the Petitioner year-wise for the annual invoices after taking into account the capacity reset.

Year	*Annual Invoice*	*Original claim of the Petitioner*	*Excess claim of Petitioner*
2001-02	*576.71*	*585.60*	*8.89*
2002-03	*930.41*	*953.71*	*23.31*
2003-04	*732.48*	*755.76*	*23.28*
2004-05	*508.76*	*539.66*	*30.90*
2005-06	*475.84*	*518.89*	*43.04*
2006-07	*819.79*	*822.49*	*2.69*
Total:	*4043.99*	*4176.11*	*132.11*

The statement shows that the Petitioner has to refund to the Respondent Rs.8.89 crores for 2001-02, Rs.23.31 crores for 2002-03, Rs.23.28 crores for 2003-04, Rs.30.90 crores for 2004-05, Rs.43.04 crores for 2005-06 and Rs.2.69 crores for 2006-07. The total is Rs.132.11 crores. The Petitioner may verify the figures.

249. The Petitioner is liable to pay interest on refund as per Clause 10.6 of the PPA for the period from November 2002, November 2003, November 2004, November 2005, November 2006 and November 2007 on account of delayed submission of annual invoices, on the understanding that annual invoice for 2001-02 is due by Sept 2002, annual invoice of 2002-03 is due by Sept 2003, annual invoice of 2003-04 is due by Sept 2004, annual invoice of 2004-05 is due by Sept 2005, annual invoice of 2005-06 is due by Sept 2006 and annual invoice of 2006-07 is due by Sept 2007. On the other hand, if it transpires that the Respondent owes money to the Petitioner, he is

liable to pay interest as per Clause 10.6 of the PPA.

250. The Respondent contends that the delay in submission of annual invoices by the Petitioner deprived him of the right to raise disputes on monthly invoices. According to the Respondent, if the annual invoices had been submitted in time in the following April or May, he would have been in a position to raise disputes on the monthly invoices based on the reconciliation of annual invoices and the monthly invoices of the previous year. This is a theoretical argument. By his own admission, the Respondent never made full payment against monthly invoices and therefore the condition for raising a dispute was not fulfilled by the Respondent. The Respondent justifies that he is entitled to prune the claim of the Petitioner, which makes it clear that he never made full payment against invoices. Therefore, for the Respondent to argue that he would have been in a position to raise disputes on monthly invoices, if the Petitioner had submitted annual invoices in time is theoretical. This plea of the Respondent has to be dismissed.

84. The above discussion and observation made in the impugned order by the State Commission would clearly indicate that the State Commission has given a clear finding that the Power Company should have filed the annual invoice in time on the basis of the information available with it even though all details have not been furnished to it by the Appellant despite the demand. It is further held that though the Power Company is entitled for reasonable time for submission of the annual invoices, the Power Company cannot take many years to submit the annual invoices and

even though the PPA has been liberal in granting a reasonable time for submission of the annual invoices, the Power Company cannot take it for granted by abusing this privilege by not submitting the annual invoices in time. On the basis of this finding, the State Commission directed the Respondent Power Company to redraw the annual invoices of each year as on 30th September of each year based on the data available for the previous financial year except capacity reset which was affected by the Appellant on 31.5.2006. Consequently, the directions have been issued by the State Commission to the Power Company to refund the estimated amount along with interest. However, the State Commission rejected the contention of the Appellant (Board) that the delay in submission of annual invoices by the Power Company deprived him the right to raise the dispute on monthly invoice. The State Commission specifically held that the Appellant on its own admissions never made full payments as against monthly invoices and that therefore, the condition for raising a dispute was not fulfilled by the Appellant.

85. For the above findings, proper reasonings have been given by the State Commission in various paragraphs as referred to above. Therefore, we do not find any infirmity in the above finding as against the Power Company Respondent as well as on the finding against the Appellant on this issue.

86. The **Seventh Issue** is **Determination of Capital Cost**. The submissions made by the Appellant on this issue is as follows:

> "The capital cost till date has not been determined by the State Commission despite the petition praying for the same was filed by the Appellant long back. The Respondent Power Company has claimed capital cost at Rs.1379.25 Crores but the Appellant has admitted only upto Rs.1251.37 Crores. Thus, there is nearly a sum of Rs.127.8 Crores in dispute. Since monthly invoice is only estimated amount in the absence of determination of the capital cost, the State Commission is wrong in deciding the issue without determining the capital cost by merely observing that after determination of capital cost by the State Commission, adjustment between both the parties would be made in accordance with the PPA".

87. In reply to the same, the Respondent Power Company has made the following submissions:

> "The Appellant even in his communication dated 17.12.2005 has intimated that the provisional completed capital cost is Rs.1379.25 Crores. As a matter of fact, the Appellant has been paying the fixed charges contained in the monthly invoice raised

on the basis of the provisional completed cost of Rs.1379.25 Crores. Therefore, the Appellant himself consented that the provisional completed cost of would be Rs.1379.25 Crores. The Power Company earlier filed an application for determining capital cost by taking the matter both with the Appellant as well as Central Electricity Authority. There was no response. Hence, the Appellant moved Madras High Court through Writ Petition for directing the Appellant to finalize the capital cost but in the meantime, the Appellant itself filed a Petition before the State Commission for finalization of the capital cost. After withdrawing the Writ Petition from the High Court, the Power Company also filed a Petition before the State Commission for finalizing the capital cost. Only because of the non-cooperative attitude of the Appellant, the State Commission was constrained to pass the order to the effect that after the determination of the capital cost; adjustments between the parties would take place in accordance with the Power Purchase Agreement. Hence, the contention of the Appellant has no merit.

88. On the basis of this submissions, the question that would arise for consideration is as follows:

"Whether the State Commission is justified in directing the Appellant to pay the invoice in full as claimed by the Power Company without determining the capital cost by getting the Petition for finalization of capital cost pending in the State Commission in the facts and circumstances of the case ?".

89. There cannot be any dispute in the fact that the Appellant in its communication dated 17.12.2005, consented for the provisional completed capital cost of Rs.1379.25 Crores. It is also noticed in another communication dated 29.7.2006 that the Appellant had informed the Respondent Power Company that the Appellant would continue to pay the Fixed Capacity Charges (FCC) payment to the Power Company in the monthly tariff invoice as has been done so far without any change as requested by the Power Company pending finalization of the capital cost. In fact, the Appellant had been paying the fixed capacity charges contained in the monthly invoice raised on the basis of the provisional completed cost of Rs.1379.25 Crores.

90. In the above situation, it cannot be contended by the Appellant that till the capital cost is finalized, no payments would be payable for the power supply. The Power Purchase agreement requires the Power Company to submit its claim for capital cost within three months from the Commercial Operation Date. The Power Company, the Respondent achieved Commercial Operation Date on

26.4.2001. Within three months i.e. on 20.7.2001, the Power Company, Respondent sent an application to the Appellant for finalizing the capital cost. However, the Appellant did not chose to do anything to finalize the capital cost. In fact, the Power Company, Respondent took up the matter with both the Appellant as well as with the Central Electricity Authority. The Respondent furnished over 130 volumes of data in multiple copies both to the Appellant as well as to the Central Electricity Authority for finalizing the capital cost. Even then, there was no proper response. Therefore, the Power Company had to move Madras High Court through the Writ Petition for directing the Appellant to finalize the capital cost. In the meantime, the Appellant itself filed a Petition before the State Commission for fixing the capital cost. Therefore, the Power Company withdrew the Writ Petition from the High Court and approached the State Commission and filed another Petition before the State Commission for finalization of the capital cost. On receipt of these Petitions, the State Commission appointed Evaluation Committee to look into the matter and to file a report. As a matter of fact, the Evaluation Committee filed a report indicating the non co-operative attitude of the Appellant (TNEB). So, in that context, the State Commission passed the order impugned holding that after the capital cost is determined by the State Commission, the

adjustments between both the parities would take place according to the Power Purchase Agreement.

91. The State Commission in the impugned order has also referred to the conduct of the Appellant Board stating that they have adopted all delaying tactics without co-operating for the finalization of the capital cost. The relevant observations of the State Commission are as under:

> ***Determination of capital cost***:
>
> *251. The Petitioner submitted the proposal for determination of capital cost to the Central Electricity Authority on 20-7-2001. The Authority conducted several meetings with the Petitioner and Respondent but returned the papers on 22-11-2005 with the direction that both parties approach the Tamil Nadu Electricity Regulatory Commission for determination of capital cost.*
>
> *252. The Respondent took another 2 years to file the petition with the Commission for determination of capital cost in M.A.P.No.1 of 2007. The Petitioner challenged the authority of the Commission to determine the capital cost before the High Court of Madras in W.P.No.34130 of 2007. The Petitioner, later, withdrew the writ petition from the High court and submitted himself to the jurisdiction of the Commission on 24-9-2008. He filed a petition M.A.P.No.2 of 2008 for determination of capital cost.*
>
> *253. The Commission appointed its Secretary to scrutinize the petitions of the Petitioner and the Respondent. He submitted his report on 11-5-2009 which was forwarded to the Petitioner and the Respondent on 8-7-2009. The Commission took up*

the case in the sittings on 29-7-2009, 26-8-2009, 8-9-2010, 2-11-2010, 21-3-2011 and 22-3-2011. The Respondent sought adjournment thereafter on the ground that their counsel is being changed. In the meantime vacation of the High Court set in and at the request of the counsels of both parties, the hearing was adjourned. The case will now be taken up after the vacation.

254. The plea of the Respondent that adjudication of this case be deferred till finalization of capital cost, does not merit consideration in view of the fact that both parties have consented for provisional capital cost in the PPA for the purpose of invoicing till the final capital cost is determined. As and when final capital cost is determined, adjustments between both the parties would take place in accordance with the PPA and therefore there is no case for deferring adjudication. We consider it as delay tactics of the Respondent.

92. The above findings would show that the Appellant has not shown any interest in expediting the finalization of the Capital Cost and on the other hand, the Appellant has tried to prolong the matter.

93. In view of the above findings with valid reasons, we do not find any infirmity in the impugned order on this issue.

94. The **Eighth Issue** is **Deduction on the monthly invoice.**

95. The gist of the submissions made by the Appellant on this issue is as follows:

"The Appellant had made deductions from the monthly invoices for bona fide and justifiable reasons. The reasons included the excess claims in the monthly invoices, deduction of 15 Paise per unit pending determination of capital cost, capital re-set, auxiliary consumption, higher claim for interest on debt etc. These reasons would show that the deductions were bona fide. The Appellant had placed before the State Commission charts and statements setting out the deductions made and the actual payment made in respect of each monthly invoice. Those materials have not been taken into consideration by the State Commission".

96. The reply submissions made by the Respondent Company on the issue is as under:

"The Appellant unilaterally made deductions on different heads in the monthly invoices and made only part payments and availed the rebate contrary to the provisions of the PPA. The Appellant's contention that the Power Company, Respondent has inflated the claim in the monthly invoice and hence they were forced to make deductions is untenable. The Appellant's contention that it is eligible for rebate by making substantial payment on

the monthly invoice is not mandated in the Power Purchase Agreement".

97. On this issue, the following question would arise for consideration:

"Whether the State Commission is justified in holding that the deduction on the monthly invoice amount despite the fact that substantial payment of the amount has been made, is not permissible under the Power Purchase Agreement?"

98. It cannot be debated that the Power Purchase Agreement mandates the Appellant to make full payment on monthly invoice within five (5) days for availing rebate of 2.5% and rebate of 1% within 30 days. With regard to the issue relating to full payment, we have already discussed and given a finding. Admittedly, in the present case, the Appellant admittedly did not make full payment but it was making only part payments and ad hoc payments and still availed 2.5% rebate. This shows that the Appellant was making arbitrary deductions contrary to the provisions of the PPA without providing any details to the Power Company even after several reminders. According to the Power Company, they came to know about these deductions only during the meeting with the Appellant held on 22.11.2005. During the above meeting, the issues were

discussed and resolved. This is mentioned in the minutes of the meeting dated 22.1.2005 which is as under:

"**Minutes of the meeting held on 22.01.2005 between TNEB and M/s PPN Power Generating Company Private Limited**.

Attendees:-

Board's Side:-

Thiru K. SKANDAN, IAS,	Chairman
Thiru S. Kathiresan,	CFC/GI
Thiru V. Naganathan,	CE/O
Thiru A. Sardar Mahaboob Jan,	CE/IPP,
Thiru A. Lionel Paul,	SE/LD & GO
Tmty M. Maheswari Bal,	FC/Accounts.

IPP Side:-

Thiru B. Sundaramurthy, G.M – Technical.

The payments allowed by TNEB were discussed itemwise and the following decisions were taken.

1. Capacity and Tested Capacity:

TNEB informed that the rated capacity of the machine is 347.712 MW and the tested capacity was 321.45 MW as per the Acceptance Test conducted from 23.4.2001 to 26.4.2001. Accordingly the capital cost has been proportionate reduced i.e. 321.45 MW/ 347.712 MW for the period 26.4.2001 to 21.11.2002, to arrive at the fixed capacity charges based on which the claims of the company were disallowed.

The capacity determined by TNEB as per the revised Acceptance Test Conducted from 18.11.2002 to 21.11.2002 was 330.5 MW and from 22.11.2002 the capital cost has been proportionately reduced i.e. 330.5 MW / 347.712 MW.

PPN did not agree with the same.

TNEB informed that PPN could have gone for a lesser capacity machine, resulting in a lesser capital cost. PPN explained that the Capacity as per the PPA was 300 MW and also provided for revising the Capacity if the Tested Capacity is higher than 5% as per the PPA. Accordingly, TNEB notified the Capacity as 330.5 MW as per Article 2.3 of the PPA vide TNEB's communication dt. 09.12.2002 and this was agreed to by PPN.

PPN also stated that the capacity is a function of the frequency and technical specification for the operation as per the PPA was 47.5 Hz to 51.0 Hz and accordingly rating in accordance with designed. TNEB informed that the maximum continuous rating in accordance with the equipment manufacturer recommendation with Temperature adjustment works out to only 330.5 MW.

After discussions it was agreed that MG/TNEB would examine in detail and revert back.

2. Deemed Generation:

PPN explained that the claim for Deemed Generation has been made as per the provisions of the PPA based on the daily declaration of the Availability and the dispatch instructions of the TNEB. If TNEB issued dispatch instructions for part load (90% of the capacity whilst on Naphtha and 85% natural gas or mixed fuel), DG is claimed on the differential. So also if TNEB had issued off line dispatch when the plant is available as per the daily declaration, DG is claimed.

PPN also explained that the DG is reckoned only for computation of PLF for the purpose of FCC i.e. 68.4932% and that the Dg is not reckoned for incentives and that incentive is based on actual generation.

TNEB informed that PPN has claimed Dg even for the days when the unit was under forced outage and this should be deleted. M/s. PPN agreed for the same.

After discussion it was further agreed as follows:

- When the plant is available, the PPN is eligible for DG for the off-line period and part load operations. Actual generation plus DG will be taken for cancellation of PLF and if the PLF is more than 68.4932% full FCC will be allowed for the billing period/annual.
- Based on the above decision, the PLF will be checked with reference to invoices and the FCC will be arrived at from COD onwards.
- For the period 10.4.2003 to 15.5.2003, PPN had shut down the plant due to non payment by TNEB and claimed DG for this period.

  PPN agreed to withdraw the DG claim during this period. Accordingly the DG for the year 2003-04 would be reworked and the PLF will be revised for the purpose of FCC.

- The disallowed amount on account of the DG will be reworked based on the above decision and the amount due to the company will be released.

3. Plant shut down :

TNEB informed that the plant was forcibly taken off bars during certain periods and the plant was not on generation when TNEB needed power from PPN. Hence proportionate FCC has been disallowed for these periods. TNEB informed that the plant was taken off bars due to forced outage during certain periods on 2001 and 2003 and hence not eligible for FCC.

PPN explained that immediately after the commissioning of the plant even though the EPC wanted to shut down the plant for tuning up operations prior to commencement of P G test, PPN prevailed upon the EPC contractor to continue generation due to the grid condition. However after about nearly 7 or 8 weeks, there was a major problem with the brick lining in the chimney falling off and the plant could not be on generation mode and was forced to shut down. PPN explained that detailed explanation was sent to TNEB and that

PPN has neither declared availability during this period of shut down nor claimed any DG for this period.

TNEB wanted PPN to furnish details of forced outages in 2001 to enable TNEB to examine the issue and admit claims in accordance with PPA provisions.

4. Backing Down:

The company informed that immediately after the COD, TNEB gave dispatch instructions to bring down the generation below the limit (90%) prescribed in the PPA. Whenever such instructions are received from MLDC, the plant operated at 90% and informed in the PPA and the energy supplied was absorbed, the claim is in order and hence it is payable.

TNEB agreed that energy charges for units generated above the dispatch instruction capacity will be admitted up to the technical minimum level. (90% of the capacity whilst operating on Naptha & 85% of the capacity whilst operating on mixed fuel/ entirely on natural gas as per PPA).

PPN agreed to bring their equipment manufacturer engineers from Japan during their next visit to explore the possibilities of running the plat below the Technical Limit.

5. Excess Auxiliary Consumption:

M/s PPN have claimed auxiliary consumption charges at 3% throughout even during the period when the actual auxiliary consumption is less. As per PPA, the maximum auxiliary consumption is 3%. M/s. PPN have agreed to take the actual auxiliary consumption or 3% of generation, whichever is less.

6. Gas Cost:

M/s PPN have produced relevant vouchers to satisfy the claim of gas cost. Hence, this will be allowed, subject to verification.

7. Excess Transmission Charges:

These charges will be admitted in accordance with PPA and GSA clauses.

8. Incentives:

M/s PPN have claimed incentive for performance above standard PLF of 68.4932% during 2002-03 including deemed generation. But, for the incentive, only actual generation is to be considered as per PPA norms Schedule A (page 5). Hence, the claim will be admitted to actual generation

9. Discrepancy in reading:

M/s PPN have claimed the bill for May 2001, based on check meter readings. As per PPA, the main meter readings are to be taken for billing as per PPA.

Hence, the claim was limited to the readings as shown by the main meters. Hence, the claim already admitted is in order.

10. FE Rate Variation:

M/s PPN have claimed the FERV. This will be admitted as per PPA terms and conditions.

11. General:

It was agreed that the amount due to the company out of the disallowed amount based on the above decisions will be released in due course.

Board's Side:-

Thiru K. SKANDAN, IAS, /Chairman
Thiru S. Kathiresan / CFC/GI
Thiru V. Naganathan / CE/O
Thiru A. Sardar Mahaboob Jan / CE/IPP,
Thiru A. Lionel Paul / SE/LD & GO
Tmty M. Maheswari Bal / FC/Accounts.

IPP's Side:-

Thiru S. Narayanan / Managing Director
Thiru B. Sundaramurthy / G.M – Technical."

99. Only thereafter, the Power Company, Respondent submitted annual invoices in July, 2007 taking into consideration the decision taken during the minutes of the meeting on 22.1.2005, the communication dated 31.5.2006 of the Appellant regarding fixing of the capacity and data given by the Appellant on 13.4.2007 and 16.5.2007. The letter dated 18.7.2007 by the Power Company to the Appellant enclosing the Annual Invoice is as under:

PPN POWER GENERATING COMPANY PRIVATE LIMITED

PPN/TNEB/805 **18th July 2007**

To
Chief Financial Controller / General
Tamil Nadu Electrcity Board
NPKRR Maaligai, VII floor
800, Anna Salai
Chennai – 600 002

Dear Sir

Annual Invoices

We are pleased to enclose the following Annual invoices as per the provisions of the PPA:

1. A1 dated 18.07.2007 for the Sub Year ended 31.03.2002.
2. A2 dated 18.07.2007 for the Year ended 31.03.2003
3. A3 dated 18.07.2007 for the Year ended 31.03.2004
4. A4 dated 18.07.2007 for the Year ended 31.03.2005
5. A5 dated 18.07.2007 for the Year ended 31.03.2006
6. A6 dated 18.07.2007 for the Year ended 31.03.2007

We request to kindly process the same early and effect payment as per the terms of the PPA

Thanking you,

Yours Truly,
Sd/-
For PPN Power Generating Company Private Limited

S. Narayanan
Managing Director

Copy to:

Chief Engineer – PPP, TNEB, Chennai – 600 002
Chief Engineer/Operation, TNEB, Chennai – 600 002"

100. The Appellant's statement that the Power Company has inflated the claims in the monthly invoice and hence they were forced to make deduction is untenable. The Appellant's contention that it is eligible for rebate even if substantial payments on monthly invoice were made is not

mandated in the PPA. In other words, the Appellant could not have made any deductions from the invoice or unilaterally determine the disallowance and claim rebate without making the full payment.

101. As indicated above, the Appellant mentioned for the first time in the meeting held on 22.1.2005 that it had been unilaterally admitting invoice partially without providing any further details of the amount disallowed under different heads. The another plea was sought to be raised by the Appellant that it was making payments on 5th day of every invoice and that therefore, the Appellant was entitled to 2.5% rebate. The Appellant has not provided the details of the various deductions made by them. If the details had been furnished to the Power Company, it would have raised a dispute and enforced the payment. According to the Power Company, the entire motive of the Appellant was to continue to make the convenient deductions and to ensure that the Power Company was not made aware of such deductions. There is also material to show that the Appellant had accepted the invoice in full which is evident from their letter dated 10.9.2001 in which it is stated that all the invoices of the Respondent Company have been accepted for payment in full in future.

102. As narrated earlier, the so called substantial payments as claimed by the Appellant are neither defined nor

contemplated in the Power Purchase Agreement for the purpose of 2.5% reduction in the invoice amount.

103. Let us now see the findings on this issue by the State Commission which is as under:

> ***Monthly Invoices:***
>
> *231. Clause 10.2 of the PPA on invoices is extracted below:*
>
> > *(a) Billing The Company shall submit to TNEB after the first Day of each month that commences after the Commercial Operation Date an invoice ("Invoice") for all amounts accrued in the preceding month under the tariff and other applicable Sections in this Agreement for the estimated FCC, VFC and incentive charge which will come due during such month. Each invoice shall show the due date ("Due Date") of the invoice to be the date that is thirty (30) days after delivery of the invoice by the company. In the event that TNEB pays the Invoice, directly or through a Letter of Credit, within five (5) business days from the presentation of the invoice, then TNEB shall be entitled to a 2.5% reduction of the invoice amount and if the payment is made after five days but within the due date, TNEB shall be entitled to a one percent (1%) reduction of the invoice amount. The Company shall include a copy of the certificate issued to the company by the SREB regarding the amount of deemed generation to which the company is entitled from the preceding month or if the certificate has not been issued a reasonable estimate of deemed generation as approved by TNEB. TNEB shall*

have access to all relevant information and records of the Company to confirm the accuracy of any invoice.

b) Payment (i) Monthly payments On the due date of an invoice, TNEB shall pay the company for the full amount stated in the invoice. In the event that TNEB fails to pay the company on the due date, the company may immediately draw upon the standby Letter of credit issued to TNEB pursuant to Section 10.3 by presenting to the issuing bank a certificate from an officer of the company stating the amount of the applicable invoice. If the invoiced amount exceeds TNEB's payment, the company may draw on the Letter of credit to the extent of the unpaid portion of the invoice.

(e) Disputes In the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an invoice is in dispute, in which event the provisions of Article 16 shall be applicable. If the resolution of any invoice dispute requires the company to reimburse TNEB, the company will pay TNEB interest on the amount to be reimbursed at a rate equal to the annual rate being charged from time to time on cash credit rate of the company or in the event no such facility is in place, the rate for cash credits extended by State Bank of India to comparable independent power companies plus one half percent (0.5%) per annum to the extent permitted by law. TNEB shall not have the right to dispute any invoice after a period of one year from the due date of such invoice.

232. The deterrent against the Petitioner inflating a monthly invoice is reflected in Clause 10.2(e) of the PPA, which obliges the Petitioner to refund the excess claim at an interest rate of 0.5% more than the cash credit rate of the Petitioner. The burden of song of the Respondent is that the Petitioner could inflate monthly invoices and therefore he has to disallow a portion of the invoice. In other words, the Respondent wants to exercise the role of an adjudicator in deciding what component of an invoice is to be admitted and what component is to be disallowed. This is a dangerous proposition to which we have drawn the attention of the Respondent in DRP No.10 of 2008 GMR Vs. TNEB.

233. The Petitioner is directed to submit re-drawn monthly invoices to the Respondent. If it transpires that the payment made by the Respondent during those months fall short of the quantum of the re-drawn invoices, the Petitioner is entitled to interest from the due date of the invoice to the actual date of payment by the Respondent in terms of Clause 10.6 of the PPA.

234. The scheme of the PPA is that the Respondent has to make full payment of monthly invoices and raise a dispute within a period of one year. There is no escape for the Respondent from this stringent obligation.

104. In view of the above observations made by the State Commission with which we fully agree, we do not find any infirmity in the findings rendered by the State Commission on this issue.

105. The **9th issue** is relating to **Excess Claim in Monthly invoices.** The contention of the Appellant on this issue is as follows:

> "The minutes of the meeting dated 22.1.2005 established the fact that the invoices raised by the Power Company were inflated and against the express provisions agreed to under the PPA. By way of further abusing the terms and conditions of the PPA, the Respondent is seeking for the interest on such inflated non reconciled disputed annual invoices"

106. The reply of the learned Senior Counsel for the Respondent is as follows:

> "With reference to the difference in the value between the annual invoice and monthly invoice has not been out of any sinister motive on the part of the Respondent Company. The primary difference between the monthly invoices raised originally relates to the tariff on the capital cost of Gas Boosting and Compressing Station. The issue of capacity reset stood resolved in the Financial Year 2006-2007. Therefore, there is no merit in this contention".

107. The question on this issue is as follows:

"Whether the State Commission has wrongly held that the Power Company did not make excess claim in monthly invoice?".

108. From the statement of the Respondent Company, it is noticed that the Power Company had set-up in good faith, a Gas Boosting and Compressing Station to utilize low pressure gas that it had sought and procured from GAIL (India) Limited. The Power Company had set-up the plant on the basis of the gas to be supplied at the requisite pressure from the Offshore PY-I fields and unfortunately it did not materialize till the end of 2009. As a matter of fact, the sole beneficiary of this investment by the Respondent Company was the Appellant. The Power Company in good faith raised invoices after including the cost of the Gas Boosting and Conditioning system. However, the Power Company finally gave up the said claim with the hope that the Appellant would finally clear up all over dues if the claim on the Gas Boosting and Conditioning System was given up. Even after this gesture, the Appellant did not pay over dues. The primary difference between monthly invoices raised originally and as revised relates to the tariff on the capital cost of Gas Boosting and Conditioning Station and the issue of capacity reset which stood resolved only in the FY 2006-07.

109. As per the Power Purchase Agreement, the primary fuel is natural gas and the alternative fuel is Naptha. The plant is

designed for use of 100% natural gas, 100% Naptha and mixture of Natural Gas and Naptha. With the approval of the Appellant the Plant was commissioned with 100% Naptha as fuel. The plant was being operated with the dispatch instructions of the Appellant with the fuel available at any point of time. In the meantime, the Power Company put in efforts to obtain low pressure natural gas on fallback basis. According to the Power Company, they had spent about Rs.66 Crores in the years 2001 and 2002 to put up a Gas Boosting and Conditioning Station to be able to utilize the low pressure gas. The claims of the Power Company in the monthly invoices for this additional cost was one of the primary reasons for the difference in the aggregate of monthly invoices and the annual invoices in the first few years. However, the Appellant refused to compensate the Power Company for such additional cost.

110. In view of the fact that Power Company has given up the claim, this issue does not survive.

111. The **Last and 10th Issue** is **Interest on Late payments**.

112. The submission of the Appellant on this issue is as follows:

> "The Power Company Respondent cannot claim interest for the period from 2001 – 2009 as the final amount to be paid by the Appellant did not crystallize at the end of each financial year from 2001-2009 in

view of the fact that the Respondent Company did not raise annual invoice in time. There cannot be late payment interest on each monthly invoice and then interest on late payments on annual invoice. Since the interest is compensatory in nature, the Power Company under the guise of claim the compensation cannot be allowed to enrich them unjustly. At any rate, the rate of interest claimed by the Power Company cannot be different rate from which is provided for in the PPA".

113. The reply of the Power Company on the issue is as follows:

"Article 10.6 of the Power Purchase Agreement provides that late payments shall bear interest accrued from the Due Date. Once the principal sum has been adjudged to be due and the PPA specifically contains a clause mandating interest for late payment, interest on the unpaid amounts would necessarily be payable".

114. The question on this issue is as follows:

"Whether the State Commission is justified in allowing the Power Company to get the interest on late payment of monthly invoice by the Appellant in view of failure to raise the annual

invoice by the Respondent No.1 at the relevant time?

115. The submissions of the Appellant on the issue are without merit. Once the principal sum has been adjudged to be due and the Power Purchase Agreement specifically contains a clause mandating interest for late payment, interest on the unpaid amounts would necessarily be payable. In this regard following judgments of Hon'ble Supreme Court would be relevant.

(a) Central Bank of India V Ravindra (2002) 1 SCC 367

"37. ….The essence of interest in the opinion of Lord Wright, in Riches Vs Westminster Bank Ltd (1947) 1 All E R 469, 472, is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had the use of the money, or conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was an compensation whether the compensation was liquidated under an agreement or statute.

A Division Bench of the High Court of Punjab speaking through Tek Chand, J.in C.I.T., Punjab Vs. Dr. Sham Lal Narula thus articulated the

concept of interest "the words interest "and "compensation" are sometimes used interchangeably and on to the occasions they have distinct connotation. "Interest" in general terms is the return or compensation of that use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, interest "is understood to mean the amount which one has contracted to pay for use of borrowed money..In whatever category interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance is demanding it, after it has fallen due, and thus, it is charge for the use of forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by customs or usage, for use of money, belonging to another, or of the delay in paying money after it has become payable"…

(b) Indian Council for Enviro-Legal Action Vs Union of India (2011) 8 SCC 161

"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above- or to simply levelise- a convenient approach is calculating interest. But here interest has to be calculated on compound basis- and not simple- for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws".

116. The State Commission in the impugned order directed the parties to the monthly annual invoice giving effect to the Rs.0.15 per kWh deduction for the period from 12.6.2001 to 4.9.2003 enabling the Appellant to get the benefit of rebate. Accordingly, the Power Company has claimed on the latter interest rates as directed by the State Commission.

117. Let us now see the findings of the State Commission on this issue which are as under:

"*241. Therefore, we direct the Petitioner to redraw the monthly invoices of 2008-09 on the basis of lower interest rates. The delay of the Petitioner in submitting the annual invoices deprived the Respondent from the gains of lower interest rates. We presume that the annual invoices submitted by the Petitioner in July, 2007 for the years of 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 captures the gains to the Respondent on account of lower interest rate and gains to the Petitioner on account of higher floating rate. If the annual invoices have not been drawn up in that way, the petitioner is directed to redraw the*

annual invoices capturing the lower interest rates and higher floating rates".

……
……..

"(h) If the actual payment by the Respondent against each monthly invoice falls short of the corresponding redrawn monthly invoice, the Respondent is liable to pay interest to the Petitioner in terms of clause 10.6 of the PPA till the date of payment by the Respondent. Conversely, if the Respondent has made excess payment against each monthly invoice compared to the corresponding redrawn monthly invoice, the Petitioner is liable to pay interest to the Respondent in terms of clause 10.6 of the PPA till the date of actual payment by the Petitioner.

(i) Rebate would be admissible to the Respondent, if the redrawn monthly invoices and the original payment made by the Respondent against the invoice of that month matches or if the Respondent has made excess payment.

(j) The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 as at September of respective years to capture the gains to the Respondent on account of lower interest rates and gains to the Petitioner on account of higher floating rate. The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 as at 30 Sept 2002, 30 Sept 2003, 30 Sept 2004, 30 Sept 2005, 30 Sept 2006 and 30 Sept 2007 respectively after taking into account the capacity reset. If the revised Annual invoices show refund to the Respondent, such refund shall be made with interest from November 2002, November 2003, November 2004, November 2005, November 2006 and November 2007 till the date of payment. If it transpires

that the Respondent owes money to the Petitioner on the basis of revised annual invoices, he will pay to the Petitioner with interest as per Clause 10.6 of the PPA till the date of payment.

118. In view of these directions, as conceded by the Power Company, it is to redraw monthly invoice and to redraw the annual invoices etc. If the Appellant has made excess payment against each monthly invoice compared to the corresponding redrawn monthly invoice, the Power Company is liable to pay interest to the Appellant in terms of the PPA till the actual payment. Similarly, if the actual payment by the Appellant falls short of the amount of redrawn monthly invoice, the Appellant has to pay interest on such shortfall in payment. The rebate will also be admissible to the Appellant if the redrawn monthly invoice matches with the actual payment made by the Appellant within due date. Similarly, if the revised Annual Invoice shows refund to the Appellant, the Power Company has to pay interest as per the PPA and vice versa. We do not find any infirmity in the directions given by the State Commission. Accordingly the Appellant is directed to carryout the directions.

119. This point is also answered accordingly.

105. Summary of Our Findings

(a) Entitlement to rebate: According to the PPA, the Appellant is entitled to a 2.5% reduction of the invoice amount if the payment is made within five business days from the presentation of invoice and to 1% reduction of the invoice amount if the payment is made after five days but within the due date i.e. 30 days after delivery of the invoice by the company. The Appellant is entitled to rebate only if the full amount of invoice is paid within the stipulated time. There is no substance in the argument of the Appellant that they are entitled to the rebate if a portion of invoice amount or substantial payment of the invoice is made.

(b) Jurisdiction and Scope of Section 86 (1) (f) of the Act: The State Commission is well within its jurisdiction to decide the dispute in question under Section 86(1) (f) of the Act on its own without referring to the arbitration.

(c) First in First Out Method for adjustment of payment: The Power Company (Respondent No.1) is perfectly justified in adopting First In First Out method and adjusting the amount accordingly as per Section 60 of the Indian Contract Act.

(d) Applicability of Limitation Act or delay and Latches: The Limitation Act would not apply to the present case as well as there is no delay and latches on the part of the Power Company, the Respondent No.1.

(e) Bar of Order 2 Rule 2 of CPC: Bar under Order 2 Rule 2 of CPC would not apply to the present case since the cause of action in both the matters are different and distinct, which relate to separate categories of the invoices and relate to different issues which involve different findings and different evidence.

(f) Non filing of Annual Invoices by the Power Company: The State Commission has correctly directed the Power Company to redraw the annual invoices of each year as on 30th September of each year and the power company is liable to pay interest on refund as per Clause 10.6 of the PPA for the period from Nov, 2002 to Nov, 2007 on account of delayed submissions of annual invoices and if the Appellant owes money to the Respondent Power Company, than the Appellant is liable to pay interest as per Clause 10.6 of the PPA. The State Commission has also correctly held that there is no force in the

argument of the Appellant that he would have been in a position to raise dispute on monthly invoices, if the Power Company had submitted annual invoices in time.

(g) Determination of Capital Cost: The State Commission has correctly held that the adjudication of the case should not be deferred till the finalization of the capital cost as both parties had consented for provisional capital cost in the PPA for the purpose of invoicing till the final cost is determined.

(h) Deduction of monthly invoice: There is no force in the contention of the Appellant that it is eligible to rebate even if substantiated payment against the monthly invoice is made. The Appellant could not have made any deductions from the invoice or unilaterally determined the disallowance and claim rebate without making the full payment. The State Commission has correctly directed the Respondent Power Company to submit re-drawn monthly invoices and if it transpires that the payment made by the Appellant during those months fall short of the quantum of the redrawn invoices, the Respondent Power Company is entitled to

interest from the due date of the invoice to the actual date of payment by the Appellant in terms of Clause 10.6 of the PPA.

(i) Excess Claim in Monthly Invoices: As the Power Company has given up the claim on account of capital cost incurred on Gas Boosting Station and Conditioning System and that the Power Company has been directed to redraw the monthly invoices as per the directions of the State Commission, this issue would not survive.

(j) Interest on late payment: We do not find any substance in the claim of the Appellant for the non payment of interest for late payment of the monthly invoices. The Respondent Company is entitled to interest on late payment of dues as per the provisions of the PPA. The State Commission has given directions relating to payment of interest against the redrawn monthly invoices and annual invoices and the parties have to comply with these directions.

120. In view of our above findings, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

121. Pronounced in the Open Court on 22nd day of February, 2013.

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: 22nd Feb, 2013

√REPORTABLE/~~NON-REPORTABALE~~