

**In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)**

Appeal No. 74 of 2013

Dated: 4th April, 2014

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

IN THE MATTER OF:

1. Paschim Gujarat Vij Company Ltd.,
Corporate Office at
Nana Mava Main Road,
Laxmi Pura, Rajkot.
2. Gujarat Energy Transmission Corporation Ltd.
Sardar Patel Vidyut Bhavan,
Race Course, VadodaraAppellants

Versus

1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower, Ashram Road
Ahmedabad-380009 ... Respondent
2. Shaifali Rolls Ltd,
Tuna, Survey No. 160
On Adipur-Tuna Road,
Anjar, Gandhidham
-370205. ... Respondent/
Petitioner

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Swapna Seshadri

Counsel for the Respondent : Mr. Nikhil Goel for Respondent No.2
Shri Vinod C. Shah

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an appeal under Section 111 of the Electricity Act, 2003, filed by the appellants against the Order dated 19.01.2013 passed by the Gujarat Electricity Regulatory Commission (hereinafter called the 'State

Commission'), in Petition No. 1222 of 2012 whereby the State Commission has allowed the petition filed by the Shaifali Rolls Ltd, challenging the levy of Parallel Operation Charges (POC). The Parallel Operation Charges (POC) had been charged by the appellants on the basis of the undertaking given by the respondent no 2. Shaifali Rolls Ltd. The State Commission, by the impugned order, has held the Parallel Operation Charges levied by the appellants as illegal and invalid and has also held that the claim of the appellants before September, 2008 is barred by limitation.

2. The facts of the case giving rise to this appeal are as follows:-

2.1 that the appellant no. 1, Paschim Gujarat Vij Company Ltd, is a company owned and controlled by the Government of Gujarat and incorporated under provisions of the Companies Act, 1956 having registered office at Laxmi Nagar, Nana Mava Road, Rajkot.

2.2 that the appellant no.1 has succeeded to the functions of distribution and retail supply of electricity in Western Gujarat of the erstwhile Gujarat Electricity Board (hereinafter referred to as `GEB'), a statutory body constituted under the Electricity (Supply) Act, 1948 as was applicable at the relevant time. Gujarat Energy Transmission Corporation Limited (hereinafter referred to as `GETCO') appellant No. 2 herein has succeeded to the transmission activities of erstwhile GEB.

2.3 that the respondent no.1 is the Gujarat Electricity Regulatory Commission ('State Commission') which is a regulatory Commission for electricity in the State of Gujarat initially under the provisions of the Electricity Regulatory Commissions Act, 1998 and now functioning under the provisions of the Electricity Act, 2003.

2.4 that the respondent no.2 is generating company which owns and operates a Captive Power Plant (herein after referred as 'CPP') having an installed capacity of 12 MW at village Tuna Di, Kutch in the State of Gujarat.

2.5 that on 21.12.1998, the Gujarat Electricity Board (GEB), the predecessor of the appellants, issued a commercial circular no. 687 levying

the parallel operation charges (POC) on Captive Power Plants (CPPs) @ 7.5% of the demand charges corresponding to the CPP capacity.

2.6 that on 28.01.2000, the GEB modified the rates of parallel operation charges by issuing commercial circular no. 706 whereby the said charges were revised *ad valorem* ranging from 10% to 2.5% with increase in capacity of the CPP.

2.7 that the Gujarat Electricity Regulatory Commission (hereinafter 'State Commission') passed an Order dated 31.08.2000 in Petition No. 24 of 2000 and quashed the Commercial Circular no. 706 and gave liberty to GEB to approach the State commission with proper application in regard to the levy of Parallel Operation Charges.

2.8 that GEB filed Petition No. 256 of 2003 before the State Commission seeking levy of Parallel Operation Charges on the Captive Power Units which were running in parallel with the GEB grid.

2.9 that on 25.06.2004 the State Commission held that the petition was maintainable and Parallel Operation Charges were leviable. It further directed GEB to conduct study to verify and quantify the Parallel Operation Charges to be levied on Captive Power Units. The State Commission had not then decided the quantum of Parallel Operation Charges.

2.10 that the order dated 25.06.2004 passed by the State Commission was challenged before the Hon'ble High Court of Gujarat in Special Civil Application No. 14742 of 2004 filed by Hindalco Industries Ltd. under Articles 226 and 227 of the Constitution of India praying for issuance of Writ of Mandamus quashing and setting aside the order dated 25.06.2004 passed by the State Commission. It was also prayed that the High Court should declare Regulation -62 of Gujarat Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005 (hereinafter to be referred to as "Regulations of 2005") to the extent that "in addition the Commission may also determine the charges on account of service rendered by the Utility to the consumers, e.g. Grid Support Charges" as ultra vires the Act, null and void. Apart from Special Civil Application No. 14742 of 2004, other

Special Civil Applications were also filed by different Public Limited Companies.

2.11 The questions emerging before the Hon'ble High Court of Gujarat from the different Special Civil Applications were mainly as follows:-

- i) Whether the Commission was justified in holding the petition of GEB for determination of POC to be legally maintainable despite holding that GEB had not established whether any Grid Support had at all been made available for Parallel Operation or that any costs had been incurred by GEB for that purpose.
- ii) Whether the State Commission had jurisdiction under the law to issue a declaration that POC were leviable by GEB for determination of such charges in the absence of data evidencing service rendered or costs incurred by GEB for Parallel Operation.
- iii) Whether the State Commission was justified in granting liberty to GEB to file a fresh petition on POC in the facts and circumstances of the case.
- iv) Whether Regulation-62 of GERC (Terms and conditions of Tariff Regulations) 2005 is either ultra vires or inconsistent to the relevant statutory provisions?

Thus, the State Commission's order dated 25.06.2004 was challenged before the Hon'ble Gujarat High Court through various Civil Applications by the Captive Power Plant owners.

- v) that the Hon'ble High Court of Gujarat at Ahmedabad vide judgment dated 21.10.2008 partly allowed all the Special Civil Applications with the following observations:-

"88. In view of the discussion made and the reasons aforesaid, the present petitions are required to be partly allowed and accordingly are partly allowed. Impugned order under challenge in the present petitions is hereby quashed and set aside with a direction to the respondent GERC that it shall now make deliberations on both the petitions, i.e. one under which

impugned order has been passed and the second petition which is filed by the State Transmission Utility as ordered by the GERC, simultaneously and conjointly as if they are one petition. The GERC shall afford an opportunity to the petitioners to assail the legality, validity, propriety and justifiability including entitlement to pray for fixation and levy of such grid support charge de novo. The GERC shall do this exercise without being influenced by the earlier findings recorded by it. The GERC shall also decide the matter without being influenced by the observations made by this Court in the present judgment independently.

89. It is clarified and ordered that this Court, has not recorded any finding either positive or negative qua sustainability of assailed Regulation-62 of 2005 and it will be open to the petitioners to assail the vires of the said Regulation if need be. The GERC, while dealing with the case between the parties shall exclude existence of Regulation-62 treating the said Regulation as inoperative qua the present dispute to avoid prejudice and likelihood of other further legal complications. The GERC shall hear and decide the matters as expeditiously as possible.

90. It is hereby ordered that the petitioners shall continue to pay charges @ 7.5% that are being paid as per the Commercial Circular No. 687 dated 21st December, 1998, but such payment that may be made by the petitioners shall be treated as payment without prejudice to the rights and contentions of the petitioners that they have raised before this Court.

91. Before parting with the order, the Court is tempted to observe that in the ultimate interest and development of the State and growing industrial zones, scope of installations of other CPPs being need of time, some mediation or conciliation proceedings, if possible, can be initiated by GERC if it thinks fit and try to resolve the issue amicably, keeping the battle of the Court under suspension, because, State Transmission Utilities and private generating activity, both need substantive development.

92. As the substantive petitions are partly allowed, no formal orders are required to be passed on both the Civil Applications seeking stay of the impugned order passed by the GERC. Rule is made absolute accordingly in each of the petitions. Registry is directed to keep copy of this judgment in each of the petitions."

2.12 that some of the other captive power units approached this Appellate Tribunal against the order dated 25.06.2004 of the State Commission and this Tribunal vide judgment dated 28.09.2007, in Appeal No. 276 of 2006, approved collection of Parallel Operation Charges for a limited period i.e. 06.09.2002 as per the Commercial Circular No. 687 of

1999 of erstwhile GEB and held that merely by quashing commercial circular no. 706, the commercial circular no. 687 does not get set aside.

2.13. that respondent no.2 Shaifali Rolls also on 17.06.2006 set up a captive power plant and wished to avail parallel operation facility and submitted an undertaking for payment of parallel operation charges provisionally equivalent to commercial Circular No. 706 dated 26.11.2000 i.e. at the same rate as per POCs provided under the Commercial Circular No. 706 as may be revised and decided by the State Commission from time to time in the pending proceedings.

2.14 GETCO vide letter dated 03.07.2006 granted permission for Parallel Operation to the Shaifali Rolls Ltd for operating the 12 MW Captive Power Plant in parallel with the grid. It was specifically stated that:-

"8. You shall pay Parallel Operation Charges, Transmission Charges, Open Access Charges and all other charges relating to Parallel Operation as may be decided by Hon'ble Gujarat Electricity Regulatory Commission (GERC) applicable from time to time/ as per the prevailing norms of GETCO."

2.15 that many of the CPPs during 2004-07 wanted parallel operation pending the decision on parallel operation charges by the Hon'ble Gujarat High Court and they were given parallel operation based on an undertaking given by them to pay charges as per circular no. 706 subject to adjustment on final decision.

2.16 that pending the matter before the Hon'ble Gujarat High Court, the appellant no.2, (hereinafter referred to as 'GETCO') filed petition No. 867 of 2006 on 18.01.2006 for determination of parallel operation charges based on the results of the study conducted by their consultants.

2.17 that on 20.07.2006 the CPP of respondent no.2 Shaifali Rolls commenced operation in parallel with the grid and got the benefit of parallel operation and therefore became liable to pay the POC to

compensate appellant no.1 and GETCO for the services effective from the said date.

2.18 that bill of Rs. 37,97,971.00/- for the Parallel Operation Charges was raised by the Appellant No.1 for the period of service of the Parallel Operation availed by Respondent No.2 from July 2006 to May 2008.

2.19. that respondent no.2 Shaifali Mills on 24.06.2008 disputed the bill and remitted only part of the claimed bill amount.

2.20. that notice of the disconnection was issued to respondent no.2 calling upon the payment of the Parallel Operation Charges failing which the connection would be discontinued. When the notice of disconnection was given, respondent no.2 requested the appellant no.1 for withdrawal of parallel operation facilities which request was forwarded to GETCO.

2.21 that on 04.07.2008, the Consumer Education Research Society filed Petition No. 941 of 2008 before the State Commission seeking a stay on the collection of Parallel Operation Charges by the appellants.

2.22 that on 28.08.2008, GETCO disconnected Parallel Operation to respondent no.2 Shaifali Mills.

2.23 that the Hon'ble High Court of Gujarat, as stated above, by the judgment dated 21.10.2008 in Special Civil Application No.14742 of 2004 set aside the order of the State Commission and remanded the matter to the State Commission for hearing the parties and further directed to hear the Petition No. 265 of 2003 and 867 of 2006 together.

2.24 that the State Commission, in the proceedings before it, vide an interim order dated 30.12.2008 refused to stay the collection of POCs from existing CPPs who had entered into a mutual agreement.

2.25. that in the month of January, 2009 some of the CPPs, in the aforesaid Special Civil Applications and others filed miscellaneous Civil Application No. 2967 of 2008 for review of the Hon'ble Gujarat High Court's order dated 21.10.2008.

2.26. that the State Commission vide order dated 17.04.09, in the remanded petition specifically sought for information from the appellants about 18 CPPs to whom parallel operation was granted. The said informations were provided and placed before the State Commission by the appellants as under:-

"Shri J.D. Tamhence on behalf of the respondent no.1 submitted that as per the directive dated 30.12.2008, they have submitted the details of 18 nos. of the CPP from whom they are recovering POC on the basis of undertaking given by CPP during the year 2006-07, 2007-08 and 2008-09. He further submitted that there are 33 CPPs which are also connected with the grid and operating in parallel with the grid. At present they are not charging any amount from these 33 nos. of CPP holders. The 18 nos. of CPP holders have willingly given undertaking for paying POC charges as per Commercial Circular No. 706 dated 28.01.2000. The earlier order of the Commission in Petition No. 256/2003 was challenged by some of the CPP holders in the Hon'ble High Court of Gujarat. The Hon'ble High Court of Gujarat has, in CAV Judgment dated 21.10.2008 directed both the parties to arrive at an amicable settlement for which deliberations are going on between the parties. The original petitioner had filed Review Petition against this judgment which is pending before the Hon'ble High Court."

2.27. The Hon'ble Gujarat High Court vide its order dated 28.04.2009 in Miscellaneous Civil Application No. 2967 of 2008 (Review) allowed the Captive Power Plants to enter into a settlement with the GETCO to either accept payment of POCs as per commercial circular 706 with certain conditions or agree for installment of meter with three minute integration and billing of demand charges based thereon. Many of the Captive Power Plants chose one of the above two options.

2.28. that respondent no.2 Shaifali Rolls again requested on 04.05.09 for reconnection of the parallel operation facilities and acknowledged that it had given an undertaking for payment of POC and as and when the State Commission pronounces the order, the respondent no.2 would pay accordingly.

2.29. that on 22.05.2009, GETCO called upon the respondent no.2 for payment of outstanding Parallel Operational Charges if respondent no.2

desires to have the parallel operation facilities. Since the amounts were not paid, the Parallel Operation was not re-connected.

2.30 that the State Commission, vide order dated 01.06.2011 decided the Petition No.256 of 2003 and 867 of 2006 and held that Parallel Operation Charges are leviable at Rs. 26.50 per KVA to all CPPs operating in parallel with the grid. Thus, the appellant no.1 issued a notice for disconnection on account of non-payment of charges to respondent no.2.

2.31. that the respondent no.2 Shaifali Rolls vide its letter dated 01.08.2011 requested the appellants for details of the period for which the Parallel Operation facilities were availed and further requested not to dis-connect on account of non-payment of the charges.

2.32. that, on 27.03.2012, GETCO informed respondent no.2 of the period of July, 2006 to September, 2008 when the parallel operation was availed and that the respondent no.2 is liable to pay the POCs with delayed payment surcharge.

2.33. that, on 02.05.2012, the respondent no.2 Shaifali Rolls paid the principal amount of Rs. 36,28,424/- and the delayed payment surcharge of Rs. 25,05,034.65/- to the appellant in the monthly bill dated 20.06.2012.

2.34. that the respondent no.2, on 27.07.2012, challenged the levy of POCs by the appellant by filing Petition No. 1222 of 2012 before the State Commission and raised the issue that the claim by the appellant is barred by limitation.

2.35. that the State Commission, vide impugned order dated 19.01.2013, allowed the petition of respondent no.2 Shaifali Rolls holding that the commercial circular no. 706 was quashed and set aside by the State Commission on 31.08.2000, and therefore Parallel Operation Charges levied by the appellant cannot be sustained and also held that the claim for parallel operation charges, for the period till September, 2008 is barred by time being three years after the amounts had become due. Consequently,

the State Commission had directed the refund of the amount collected as such from the respondent no.2 Shaifali Rolls.

3. This appeal has been filed by the appellants being aggrieved by the order dated 19.01.2013 of the State Commission which requires consideration by us.

4. Now, we deal with the submissions raised by the contesting parties. The learned counsel for the appellants has made the following submissions while assailing the impugned order:-

4.1. That the Parallel Operation Charges were payable by the Shaifali Rolls as per the:-

- (a) undertaking given by Shaifali Rolls dated 17.6.2006;
- (b) as per the parallel operation permission dated 3.7.2006 given by appellant no. 2 - in response to the undertaking dated 17.6.2006;
- (c) as per the consistent practice in dealing with similarly placed Captive Power Plants after the State Commission had decided that the Parallel Operation Charges were payable but the quantum need to be determined.

4.2. that the State Commission has proceeded on the basis that the commercial circular no. 706 having been set aside vide order dated 31.08.2000, no claim for the Parallel Operation Charges could be made by the appellants till 01.06.2011, when the State Commission decided on the quantum of the Parallel Operation Charges.

4.3. that the claim for Parallel Operation Charges was not by enforcement of the Commercial Circular No. 706 dated 31.8.2000. If the Commercial Circular No. 706 dated 31.8.2000 was valid and enforceable, the appellants could have demanded the Parallel Operation Charges without the need to take any consent or approval or undertaking from the Captive Power Plants including Shaifali Rolls. The appellants were not enforcing the Commercial Circular No. 706.

4.4. that in the absence of Parallel Operation Charges being payable to the appellants, there was no need for the appellants to allow the services of Parallel Operation to the Captive Power Plants including Shaifali Rolls. The appellants could have refused to provide such services to those captive power plants seeking such facilities after the setting aside of Commercial Circular 706.

4.5. that due to the peculiar situation which developed after quashing of Commercial Circular No. 706 by the State Commission vide order dated 31.8.2000 and thereafter vide order dated 25.6.2004, whereby the State Commission directed the appellants to conduct a study to decide the matter of parallel operation charge. Since the number of Captive Power Plants were desirous of having Parallel Operation with the grid and willing to pay the Parallel Operation Charges for such services, although the said issue was pending consideration before the State Commission.

4.6. that in order to facilitate the Captive Power Plants, at their instance including Shaifali Rolls, the appellants agreed to provide Parallel Operation services subject to the payment of the Parallel Operation Charges of the amount equivalent to what was specified in the Commercial Circular No. 706 dated 28.1.2000. This was a voluntary offer with an undertaking from the Captive Power Plants to get the Parallel Operation services even pending the decision on the jurisdiction of the State Commission to levy the Parallel Operation Charges.

4.7. that the Hon'ble Gujarat High Court vide order dated 21.10.2008 directed the captive power plants to continue to pay the charges at 7.5% as were being paid as per Commercial Circular No. 687 dated 21.12.1998.

4.8. that the review of the order dated 21.10.2008 was sought by some CPPs by filing Miscellaneous Civil Application No. 2967 of 2008 and after hearing the matter, the Hon'ble High Court vide order dated 28.04.2009 allowed the CPPs to enter into a settlement with the GETCO. The learned counsel for the appellants taking us through the review order dated 28.04.2009, passed by the Hon'ble Gujarat High Court, has submitted that

it was actually the High Court which had proposed the parties to arrive at a mutually agreeable settlement and in that context took note of the adoption of the commercial circular with certain conditions. There was, therefore, a clear recognition of the Captive Power Plants paying the Parallel Operation Charges as per the Commercial Circular No. 706, notwithstanding that the said Commercial Circular had already been set aside by the State Commission vide Order dated 31.8.2000.

On this submission, we have already mentioned above the details of review order dated 28.04.2009, passed by the Hon'ble Gujarat High Court.

4.9. that in any event the respondent no.2, Shaifali Rolls having sought the services of Parallel Operation with an undertaking to pay, is required to pay the charges on the principle of quantum meriut under Section 70 of the Indian Contract Act, 1872.

4.10. that the Parallel Operation Charges/Grid Support Charges are levied in several States by the orders of the State Commission.

4.11. that this Appellate Tribunal in its judgment dated 12.09.2006 in Appeal No. 99 of 2006 has held as under:-

"11. The parallel operation is definitely a service that the second respondent renders to all the CPPs like the appellant. It is the contention of the appellant that no charges could be levied or collected for the said service. As rightly pointed out by the Expert who appeared for the second Respondent, the parallel operation is a service which extend support to the system and at the same it causes voltage dip in the system, harmonics, injection, additional reactive power requirement etc. By parallel operation the CPP gains more and hence it is liable to pay the charges for the service."

12. The contention that no charges at all is payable for parallel operation or transmission system cannot be sustained and such a claim is contrary to factual position. There is no escape of CPP to pay charges for parallel operation by which the CPP gains while the transmission system of the second respondent CSEB is affected apart from the admitted fact the transmission grid is strengthened by the power injected by CPP....."

"18. However, we make it clear that in the tariff petition which is pending consideration, the Commission may fix the charges for parallel operation on the basis of the data, materials and scientific inputs relating to parallel operation charges already placed by the parties or that may be placed by

the parties before the conclusion of hearing and such exercise shall be carried out by the first respondent Regulatory Commission independently and without in any manner being influenced by this judgment."

4.12. that this Appellate Tribunal again in judgment dated 18.02.2011 passed in Appeal No. 120 of 2009 in para no. 18 has held as under:-

"18. In short, the gain to the Captive Power Plant is quite substantial in case there is grid support. Owing to the above said substantial gains to the Captive Power Plant by operating in parallel with the grid, the parallel operation charges are levied from the Captive Power Plant"

4.13 that the arguments of Shaifali Rolls that in view of the order dated 31.08.2000 of the State Commission whereby the Commercial Circular No. 706 had been set aside, there was no legal sanction of the levy of POC by the appellants is not acceptable. The collection of POC by the appellants was on the basis of the undertaking given by the Shaifali Rolls and recognized by the Hon'ble High Court and State Commission in various orders.

4.14 that again the Shaifali Rolls contention that clause 13 of the Parallel Operation permission must be read subject to clause 8 is not correct. Clause 13 prescribes the charge to be paid by Shaifali Rolls for obtaining Parallel Operation permission while clause 8 requires Shaifali Rolls to pay charges as may be decided by the State Commission from time to time.

5. The learned counsel for the appellants on the point of limitation has made the following submissions:-

5.1 that at the outset, the proceedings before the State Commission were filed by Shafali Rolls for refund of the amount recovered by the appellants. It was not a case of the appellants filing a petition or proceedings for recovery of its dues. The issue of limitation was to be considered with reference to the claim of Shafali Rolls against the appellants and not on the aspect of recovery of the charges already made by the appellants. There is, therefore, a fundamental error in the impugned order regarding limitation.

5.2 that the recovery of POC was not barred by limitation when the appellants had enforced the recovery of the same in July, 2011. The claim relates to the

period July, 2006 to September, 2008. The appellants had raised the bill for the amount due for the period from July, 2006- May 2008 on 16.06.2008, well within the period of three years. Initially the Shaifali Rolls disputed the bills but ultimately vide letter dated 04.05.2009 acknowledged that it had given an undertaking for the payment of POCs and represented that it had not gone to the Court challenging the POCs like other CPPs to have cordial relations with the appellants and it can also opt for three minutes integration as per the settlement proposed in the High Court proceedings and as regards the POCs, Shaifali Rolls confirmed that it shall abide by the orders of the State Commission or any other court.

5.3 that the letter dated 04.05.2009, sent by Shaifali Rolls is a clear admission of the liability to pay the POCs as per the undertaking given and that Shaifali Rolls is considering the three minute integration option to avoid payment of the Parallel Operation Charges. Accordingly, the limitation for any enforcement of the claim by the appellants need to be calculated from 04.05.2009.

5.4 Infact the limitation has to be calculated from the date of decision dated 01.06.2011 of the State Commission because of the representation by Shaifali Rolls to pay when the decision is made by the State Commission. Though, Shaifali Rolls was considering the option of three minute integration in the letter dated 04.05.2009, no option was exercised by Shaifali Rolls at any time till the order dated 01.06.2011 was passed. Accordingly, the Shaifali Rolls should be deemed to have exercised the option as per the settlement proposed and particularly, the payment of POCs as per commercial circular no. 706 (quashed) by the State Commission long back.

5.5 that after the decision of the State Commission on 01.06.2011, the appellants claimed the amount from Shaifali Rolls by letter dated 26.07.2011. If the State Commission in its order dated 01.06.2011 had decided that no POC charges were leviable for the first period, then the bills raised would not have been enforced. If POC was held to be payable, Shaifali Rolls was required to pay the same and Shaifali Rolls cannot take advantage of the accommodation shown by the appellants.

5.6 Article 55 of the Limitation Act, 1963 is applicable to the matter in this appeal. Article 55 deals with suit for compensation for the breach of any contract, express or implied not therein specially provided for and the period of limitation prescribed is three years. The limitation begins to run from the date contract is broken or in case of successive breaches when the breach in respect of which the suit is filed occurs. According to the learned counsel for the appellants, Article 55 of the Limitation Act, 1963 covers the case of the appellants, which is based on the undertaking given by Shaifali Rolls. Since the breach on the part of Shaifali Rolls occurred in July, 2011, when the appellants issued notice after the order dated 01.06.2011 and Shaifali Rolls failed to pay the charges.

5.7 that the argument of the Shaifali Rolls that limitation applies qua the claim and not qua the claimant supports the case of the appellants.

5.8 that the issue of limitation was not raised by the Shaifali Rolls before the State Commission and the argument of Shaifali Rolls that even if the issue of limitation was not raised it was the duty of the State Commission to go to the same is wrong.

5.9 that the impugned order of the State Commission is contrary to the decisions of the Hon'ble High Court in the following two cases:-

i) that as per the law laid down in Hari Shankar Singhania V. Gaur Hari Singhania (2006) 4 SCC 658 where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration and as long as the parties are in dialogue and even the differences would have surfaced, it cannot be asserted that a limitation under Article 137 has commenced.

ii) that the same view has been reiterated in Sri Ram Mills Ltd V. Utility Premises Ltd (2007) 4 SCC 599.

6. Per contra, Shri Nikhil Goel, on behalf of the respondent no.2 Shaifali Rolls has made the following submissions:-

a) that the present appeal is restricted to the Parallel Operation Charges for the period July, 2006 to May, 2008, though already paid and therefore refund claimed and the purported late payment charges respecting the payment to POCs. The State Commission, in the impugned order at page 206, has allowed the petition and declared the demand of parallel operation charges as illegal and invalid and directed refund, a great part of which has been adjusted towards the future bills.

b) that the permission to operate POC was preceded by two undertakings. First undertaking was demanded by the GETCO vide letter dated 24.04.2006 which required the respondent no.2 Shaifali Rolls to undertake to pay such charges as may be determined by the State Commission in the pending petition. At the time of this letter, Petition No. 867 of 2006 was pending before the State Commission. Respondent No.2/Shafali Rolls executed an undertaking on 29.04.2006 to GETCO to undertake to pay the parallel operation charges as may be determined by the State Commission in petition pending for determination of POCs. The second undertaking was thereafter demanded again from the respondent no.2. Second undertaking was again submitted on 17.06.2006 (though wrongly typed as 17.04.2006) stating that the charges would be paid as may be determined by the State Commission. Clause 2 of which also indicated that charges would be such as are mentioned in Commercial Circular No. 706 dated 28.01.200. Finally the permission for Parallel Operation was granted on 03.07.2006. Clause 8 of the permission conditioned payment of POC as determined by the State Commission.

c) that what could have been charged from the respondent no.2 was either in terms of commercial circular no. 706 or what was determined by the State Commission from time to time. This circular no. 706 was quashed on 31.08.2000 by the State Commission.

Accordingly, the commercial circular no. 706 was not in existence at the time when respondent no.2 was asked to agree to pay parallel operation charges in accordance with the aforementioned commercial circular no. 706. If the circular already stood quashed, the only interpretation available is that the parties agreed to abide by the terms and conditions contained in that circular.

d) that for the period which concerns the present appeal, POCs were held to be illegal and therefore, the State Commission has only adjudicated upon the applicability and quantum of POC only and from 01.06.2011.

e) That the Hon'ble Gujarat High Court in its review order dated 28.04.2009 gave parties two options under which CPPs could enter into settlement with appellants' authorities or agree for installation of meter with three minute integration. The review order dated 28.4.2009 of the Gujarat High Court did not disturb the direction to de novo determine POC leviability and charges directed in the main order of the High Court.

f) that the main order dated 21.10.2008 and review order dated 28.04.2009 of the Hon'ble Gujarat High Court reveal that the earlier order of the State Commission which upheld leviability of POC was quashed by the High Court and the State Commission was asked to decide the issue de novo for the period for which the present appeal is filed and the right to collect POCs was not decided by the High Court.

g) that in compliance of the order of the Hon'ble High Court to decide de novo, the State Commission decided the leviability of POC only from 01.06.2011 vide order dated 01.06.2011. Thus, the order of the State Commission dated 01.06.2011, being an administrative order or at best in nature of subordinate legislation could not have been retrospective but prospective. This position is also clear from para 24 (iii) at page 108 which makes the order restricted to CPPs operating on the date of passing of the order. This finding of the State Commission in the impugned order has to be read with pages 112-113 of the impugned order, being letters of the second appellant GETCO indicating that no parallel operation was being used by the respondent no.2 and in fact respondent no.2 was ultimately deleted as a party respondent from the proceedings which led to the order dated 01.06.2011 vide GETCO's letter dated 28.01.2010.

h) that the Paschim Gujarat Vij Company Ltd. which was respondent no.1 before the State Commission, at para 5 of the written submissions took the stand that the 'petitioner is not being charged POC in terms of the Hon'ble Commission's order dated 01.06.2011'. The levy of POC is for the period, namely,

July, 2006 - September, 2008 when the petitioner enjoyed the parallel operation and the bill has been raised strictly in terms of the permission granted by letter dated 3rd July, 2006. Thus, the appellant no.1 before the State Commission clearly took the stand that the demand imposed before the State Commission was not in terms of the order dated 01.06.2011, once this be the admitted scenario, there was no leviability of the parallel operation charges.

i) that before the State Commission the appellants took the stand that there are 33 CPPs from whom no POC is being collected. There is absolutely no basis or reason for making this distinction between these 33 CPPs and the respondent no.2. As per page 30 of the appellants written submissions before the State Commission, POC could have only been collected from those who were willing to give it.

j) The learned counsel for the respondent no.2, on the point of limitation, has made the following counter submissions:-

(i) that the undertaking read with the order permitting parallel operations makes the billing monthly.

(ii) Admittedly, the period, for which the parallel operation was used, was July, 2006 to May, 2008. No monthly bills were issued as was provided for in terms of the agreement between the parties. The first demand was raised on 16.06.2008. This demand was itself not in consonance with the terms of the contract and was therefore illegal. Assuming the said demand was illegal, the appellants ought to have taken action against the respondent no.2 within three years thereof. However, next notice issued to respondent no.2 was on 26.07.2011. Thus, the whole demand is barred in view of Article 55 of the Limitation Act, 1963. The only explanation provided is communication error between two co-petitioners. This can hardly be said to be a just cause and the delay is not condonable. The Commission's finding recorded in this regard cannot be found fault with.

(iii) The provisions of Limitation Act apply to a claim. In the present case had the respondent no.2 not paid (since it is an essential service), instead of going to the Court, the appellants would have and actually terminated the

electricity supply. Payment under protest is not an acknowledgement of liability and the only recourse available to a consumer is to then apply for refund as held in the case of State of Kerala and Ors. Vs. Kalliyankutty and Anr. (1999) 1 KLJ 811, the relevant paragraphs of which are reproduced below:-

"9. The same reasoning would apply in the present case also. The Kerala Revenue Recovery Act does not create any new right. It merely provides a process for speedy recovery of moneys due. Therefore, instead of filing a suit, (or an application or petition under any Special Act), obtaining a decree and executing it, the bank or the financial institution can now recover the claim under the Kerala Revenue Recovery Act. Since this Act does not create any new right, the person claiming recovery cannot claim recovery of amounts which are not legally recoverable nor can a defence of limitation available to a debtor in a suit or other legal proceeding be taken away under the provisions of the Kerala Revenue Recovery Act. In fact, under Section 70 of the Kerala Revenue Recovery Act, it is provided that when proceedings are taken under this Act against any person for the recovery of any sum of money due from him, such person may, at any time before the commencement of the sale of any property attached in such proceedings, pay the amount claimed and at the same time deliver a protest signed by himself to the officer issuing the demand or conducting the sale as the case may be. Sub-Section (2) of Section 70 provides that when the amount is paid under protest, the officer issuing the demand or the officer at whose instance the proceedings have been initiated, shall enquire into the protest and pass appropriate orders. If the protest is accepted, the officer disposing of the protest shall immediately order refund of whole or part of the money paid under protest. Under Sub-Section (3) of Section 70, the person making a payment under protest shall have the right to institute a suit for the refund of the whole or part of the sum paid by him under protest.

10. Therefore, under Section 70(3) a person who has paid under protest can file a suit for refund of the amount wrongly recovered. In law he would be entitled to submit in the suit that the claim against which the recovery has been made is time barred. Hence no amount should have been recovered from him. When the right to file a suit under Section 70(3) is expressly preserved, there is a necessary implication that the shield of Limitation available to a debtor in a suit is also preserved. He cannot, therefore, be deprived of this right simply by making a recovery under the said Act unless there is anything in the Act which expressly brings about such a result. Provisions of the said Act, however, indicate to the contrary. Moreover, such a wide interpretation of "amount due" which destroys an important defence available to a debtor in a suit against him by the creditor, may attract Article 14 against the Act. It would be ironic if an Act for speedy recovery is held as enabling a creditor who has delayed recovery beyond the period of limitation to recover such delayed claims."

(iv) Lastly, the appellants' submission that the letter dated 04.05.2009 is the acknowledgement and re-affirmation of the liability of respondent no.2 and therefore the period of limitation has to be counted from that date is untenable

because Section 18 of the Limitation Act which deals with the effect of acknowledgement in writing is against the appellants. The appellants are now searching for means to say that the liability was acknowledged. Section 18 of the Limitation Act, 1963 is produced as under:

“18. Effect of acknowledgement in writing.

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.”

(v) On the basis of above, the learned counsel for the respondent no.2 submits that the letter dated 04.05.2009 of the respondent no.2 does not acknowledge payment of claimed amount in the year 2006 but merely says that if the appellants were to provide fresh POC permission, the undertaking (to pay as and when and in terms of what State Commission decides) alone was acknowledged. There is a wide difference between a specified past liability and undertaking to pay a future liability, if the same arises.

By making the aforesaid submissions, the learned counsel for the respondent no.2 supports the impugned order and prays for dismissal of the instant appeal with realistic costs in favour of the respondent no.2.

9. On perusal of the impugned order and material available on record and after hearing the submissions made by rival parties, the following two issues arise for our consideration.

(1) Whether the claim of the appellants is barred by limitation as observed by the learned State Commission in the impugned order?

(2) Whether the parallel operation charges recovered by the appellants from the Shaifali Rolls, respondent no.2 for the

period from July, 2006 to September, 2008 are legal and valid? Is the respondent no.2 entitled to get the refund of the Parallel Operation Charge amount with delayed payment charges (DPC) recovered by the appellants?

Decision on Issue No.1.

10. Whether the claim of the appellants is barred by limitation?

10.1 The main objection of the appellants on this issue is that this issue was not raised or argued before the State Commission by the respondent no.2 Shaifali Rolls, who was petitioner before the Commission but the learned Commission unnecessarily entered into the merits of limitation and ultimately held that the claim of the appellants is barred by limitation. The discretion adopted by the State Commission on this issue has been aggressively assailed before us on behalf of the appellants.

10.2 The time period of dispute for levy of Parallel Operation Charge between the parties is from July, 2006 to September, 2008. The bill which consisted of parallel operation charges and was required to be issued by the appellant no.1 was on monthly basis, but appellant no.1 had issued the supplementary bill of Rs. 37,97,971/- towards Parallel Operation Charge for the first time on 16.06.2008 to the respondent no.2 Shaifali Rolls, who disputed the said bill stating that he had not availed the facility of parallel operation of the CPP. Moreover, the matter of determination of parallel operation charge was sub-judice and respondent no.2 had not received any bill for the earlier 23 months and requested the appellants to disconnect the parallel operation of the CPP of respondent no.2 Shaifali Rolls. Thereafter, no action was taken by the appellants for recovery of the amount shown in the supplementary bill dated 16.06.2008, till July, 2011 when a disconnection notice was served by the appellant no.1 on 26.07.2011 to the respondent no.2 Shaifali Rolls on the grounds of non-payment of Parallel Operation charges. It is also a fact that the respondent no.2 had paid Rs.

36,28,324/- towards parallel operation charge on 02.05.2012 against the disconnection notice issued by the appellant no.1.

10.3. The rival contentions have been made on the issue of limitation during hearing before us. According to the respondent no.2 Shaifali Rolls, the parallel operation charges claimed by the appellants are barred by limitation as the dues claimed by the appellants are beyond the period of three years. The rival contention of the appellants is that there is no vested right in law or equity for the respondent no.2 to claim that he is not liable to pay the Parallel Operation charge and there cannot be a defence on the part of respondent no.2 to avoid the payment of Parallel Operation charge. The delay in issuance of the bills for parallel operation charge as argued by the appellants' learned counsel was due to a communication error between PGVCL- appellant no.1 and GETCO- appellant no.2.

10.4. In the present case, the parallel operation of the CPP was availed by the respondent no. 2 Shaifali Rolls, who is also consumer of the appellant no.1 from July 16, 2006 to September, 2008. The bills have been issued by the appellant no.1 on monthly basis. However, the appellants have not raised the bills for the POC upto 14.06.2008 and the bill for recovery of POC was issued for the first time, vide letter dated 15.06.2008 for the period July, 2006 to May, 2008 for an amount of Rs. 37,97,971/-, which bill was disputed by respondent no.2 through its letter dated 24.06.2008. the appellants remained silent on the disputed bill amount till 25.07.2011 viz., for more than three years and lastly the appellant no.1 issued the disconnection notice on 26.07.2011 for non-payment of the POC. It is abundantly clear from the record that the claim of the appellants for the parallel operation charge for the period prior to 26.07.2011 is after more than three years. The learned Commission in the impugned order dated 19.01.2013 has clearly observed as under:-

"8.4 As the petitioner has raised the issue of period of limitation applicable to the disputed bill amount, it is necessary to refer to Article

55 under Section 3 of the Law of Limitation Act, 1963 which reads as under:

3. Bar of Limitation - (1) Subject to the provisions contained in Section 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

Article 55 as provided under Part-II of the Limitation Act, 1963 which relates to contracts reads as under:

For compensation for the breach of any contract, express or implied not herein specially provided for three years. It is also provided that the time from which period begins to run is when the contract is broken or when the breach in respect of which the suit is instituted occurs or when it ceases.

The above provisions provide that any compensation sought by the party for breach of any contract beyond 3 years period is barred by limitation. It is necessary to decide in the present case the existence of breach of the contract. It is a fact that the respondents were required to recover the POC on monthly basis for the month from July, , 2006 to September, 2008. However, they had not recovered the same. The respondents had for the first time demanded the POC on 16.06.2008 which was for the period of July, 2006 to May, 2008, which was disputed by the petitioner. Thereafter, the respondent no.1 demanded the POC for an amount of Rs. 85,55,405.61 through the disconnection notice dated 26.07.2011 i.e. after 3 years, 1 month and 9 days which is beyond the period of limitation of 3 years as specified in the Limitation Act, 1963 for the period from July, 2006 to June, 2008. The claim of POC by the respondents for the months of July, to September, 2008, falls within the period of three years. Hence, the dues, if any, for the months of July to September, 2008 claimed by the respondents are not barred by the period of limitation.

8.5. Thus, the dues only for the period from July to September, 2008 are not barred by limitation. In other words, most part of the claim of the respondents is barred by limitation. Furthermore, even if it is assumed, for the sake of analysis, that there is no case for limitation, the important question is whether the action of the respondents in recovering the Parallel Operation Charges for the period from July, 2006 to September, 2008 was legal in view of the fact that the relevant commercial circular no. 706 had already been set aside by the Commission."

10.5. After perusal of the findings of the learned State Commission recorded in the impugned order on the issue of limitation, we agree with the same as we do not find any cogent reason to differ from the findings

recorded in the impugned order. Thus, this issue is decided against the appellants.

Decision on Issue No.2

11. The most relevant facts to decide this Issue No.2 are as under:-

11.1 that the Shaifali Rolls, respondent no.2 herein is a consumer of Paschim Gujarat Vij Company Ltd., appellant no.1 and is having a contract demand of 8000 KVA. The respondent no.2 Shaifali Rolls had set up the Captive Power Plant (CPP) of 15000 KVA.

11.2 that the respondent no. 2 Shaifali Rolls had sought an approval from the appellant no.2 , GETCO for permission to run its CPP in parallel with the grid, when respondent no.2 was advised to submit an undertaking stating that he agrees to pay POC levied by the appellants as per the rate mentioned in the commercial circular no. 706 dated 28.01.2000 or as may be revised or decided by the State Commission from time to time. This undertaking was furnished by the respondent no.2 in May, 2006. Accordingly, GETCO appellant no.2 granted permission for parallel operation on 03.07.2006 and the CPP of respondent no.2 commenced operation in parallel with the grid from July, 2006. Since the respondent no.2 was having a contract demand of 8000 KVA which was more than 25% of the capacity of the CPP, no parallel operation charges were payable in terms of the commercial circular no. 706 dated 28.01.2000.

11.3. that the learned State Commission vide its order dated 31.08.2000 in Petition No. 24 of 2000 quashed and set aside the circular no. 706 dated 28.01.2000. Therefore, the undertaking given by the Respondent no.2, Shaifali Rolls stating that the recovery of POC, for the erstwhile GEB, based on commercial circular no. 706, was not valid as the State Commission in its order had already disallowed charging of POC.

11.4. that as stated above, learned State Commission vide order dated 25.06.2004, passed in Petition No. 256 of 2003 filed by the GEB held that Parallel Operation Charges were leviable under the Electricity Act but Commission directed GEB to conduct studies and to identify and quantify the support extended by the grid to the CPP.

11.5. that the order dated 25.06.2004, passed by the learned State Commission in Petition No. 256 of 2003 was challenged by some of the CPPs before the Hon'ble High Court of Gujarat through Special Civil Application no. 14742 of 2004 and others and the Hon'ble High Court vide judgment dated 21.10.2008 quashed and set aside the order dated 25.06.2004 passed by the State Commission and directed the Commission to hear the Petition Nos. 256 of 2003 and 867 of 2005 together giving an opportunity of hearing to the parties to the said petition and decide the grid support charges de novo.

11.6. that the Hon'ble High Court of Gujarat in Miscellaneous Civil Application No. 2967 of 2008 seeking review of the order dated 21.10.2008 of the Hon'ble Gujarat High Court passed review order dated 28.04.2009, whereby it directed the State Commission to give chance to the CPP holders to adopt the options agreed between the parties and to act upon accordingly. The learned State Commission, in compliance of the judgment/orders dated 21.10.08 and its review order 28.04.2009, after going through the whole exercise and after hearing the parties decided the aforesaid Petition Nos. 256 of 2003 and 867 of 2005 vide order dated 01.06.2011 holding that the parallel operation charges are leviable from the date of the order, namely, 01.06.2011.

11.7. that the appellant no.1 vide its letter dated 16.06.2008 demanded Parallel Operation Charges of Rs. 37,97,971/- for the period of July, 2006 to May, 2008 which was disputed by the respondent no.2 Shaifali Rolls saying that the same were not chargeable. The appellant no.1 had, thereafter, issued disconnection notice vide letter dated 26.07.2011 and claimed an amount of Rs. 85,55,404.61/-, the appellant no.1 revised the amount to Rs. 36,28,324/- on the objection being raised

by the respondent no.2. The respondent no.2 had to pay the revised amount due to threat of disconnection extended by appellants.

11.8. It was at that stage that the respondent no.2 Shaifaili Rolls filed the impugned petition no. 1222 of 2012 before the State Commission seeking the following reliefs:-

- i) to declare the recovery of parallel operation charges by the appellants as illegal and direct the appellants to refund the said amount along with interest.
- ii) to stay the recovery of delayed payment charges amounting to Rs. 25,05,034/- included in the bill dated 24.05.2012.

12. The learned State Commission, after receiving the reply of the appellants and others and hearing both the parties at length, in the impugned order dated 19.01.2013 held as under:-

"8.15. Considering the above facts we decide that the POC levied by the respondents for the period from July 2006 to May 2008 is in contravention and violation of the orders passed by the Commission.

8.16. The Hon'ble Appellate Tribunal for the Electricity had passed judgment dated 28.09.2007 in Appeal No. 276 of 2006 and decided that the POC is not leviable from 31.08.2006. The said judgment also provides that the POC was leviable up to 06.09.2002 as per the Commercial Circular No. 687 of 1999, of erstwhile GEB.

The relevant para of the judgment reads as under:

".....4) The Circular No. 706 was quashed and set aside vide the order dated 31.08.2000. The appellant did not challenge this order in any Appellate Forum. The order dated 31.08.2000 also suggested that the appellant could approach the Commission for approval of the earlier Circular No. 687. The appellant did not avail of this course of action either. The appellant is satisfied with the situation that after 31.08.2000 it is not entitled to recover any amount by way of parallel operation charges. However, it insists that prior to 31.08.2000 the parallel operation charges recovered can be retained by it. Now let us examine the legal situation.

5) The Circular No. 687 was issued on 21.12.1998. This was based on the resolution of Government of Gujarat adopted on 09.11.1998. The resolution of 09.11.1998 permitted imposition of parallel operation charges but rate of such charge was left to be determined by GEB. The

GEB determined the rate on 21.12.1998. Before the resolution of 09.11.1998 the ERC Act 1998 had been passed and had been brought into force on 25.04.1998. The Act gave the power and responsibility to fix the tariff to the ERCs. However, on the date, when the resolution was adopted, there was no Commission in place. Although one notification of 12.11.98 declared establishment of GERC, the other notification appointed only the members of the selection committee. Naturally the establishment of GERC by notification on 12.11.1998 did not take effect till the members of GERC were actually selected and appointed and those appointed actually took charge of their office. Admittedly the Commission became operative on 19.04.1999. Thus there was no Commission in place on 21.12.1998 when the Circular No. 687 was issued. The Commission came into existence on 19.04.1999. The Commission's order dated 06.09.2002 holds the commercial circular no. 687 to be bad because the Commission had come into existence on 12th November, 1998 which was a mistake of fact.....

.....7) The subsequent Circular No. 706 was issued when the Commission was in existence. The GEB could not have any jurisdiction to alter the parallel operation charges which was in the nature of tariff and had been fixed by GEB in exercise of authority vesting in it. The Circular No. 706 altered the established tariff situation and was therefore, invalid unless approved by the Commission. There is no quarrel that the Circular was invalid and was liable to be quashed.

8) There is no dispute over the legal situation that till the Commission issued its tariff orders the tariff regime, as prevalent on the date of constitution of the Commission, continue to remain in force. The Circular No. 687 had imposed one such tariff and therefore had to continue in force till it was superseded by another tariff order or was specifically set aside. The Circular No. 687 is quashed, rightly or wrongly, vide the order dated 06.09.2002. The Circular 687 of 2006 was not void ab initio. Therefore, it continued to remain in force till order dated 06.09.2002.

9) When the Circular No. 706 is struck down, the Circular No. 687 naturally has to hold the field. The Commission itself was aware of this situation when it passed the order dated 31.08.2000. It did not strike down Circular No. 687. Nor did it approve the Circular NO. 687. It suggested that approval under Section 29 could be obtained by GEB for this Circular. As stated earlier, this approval was not required to be taken as the circular was not ab initio void and continued to remain in force till it was superseded by another order or was specifically set aside. The appellant is however, satisfied with the amount recovered towards parallel operation charges upto 31.08.2000 itself. We need not consider the situation about the entitlement of the appellant after 31.08.2000.

10) In view of the above analysis the appellant was certainly entitled to recover parallel operation charges as fixed by Circular NO. 687 at least up to 31.08.2000. The claim for refund made by the

respondent no.2 was not sustainable. The impugned order allowing refund of parallel operation charges paid during this period...."

From the above decision of the Hon'ble Appellate Tribunal for Electricity, it is clear that the Commercial Circular No. 706 dated 26.01.2000 was quashed and set aside by the Commission on 31.08.2000 and thereafter the POC is not leviable on that basis. Hence, the recovery of the POC cannot therefore be sustained."

13. After the deep and careful analysis of the above material, we find ourselves in agreement with the findings recorded by the learned State Commission in the impugned order on this issue as the findings are based on legal and correct appreciation of the material available on record. There is no cogent or convincing reason to deviate from the findings recorded in the impugned order as regards the issue no.2. Thus, the issue no.2 is accordingly decided against the appellants.

14. Consequently, issue nos. 1 and 2 are decided against the appellants and in favour of the respondent no.2 Shaifali Rolls and the appeal merits dismissal.

SUMMARY OF OUR FINDINGS

15. The learned State Commission has rightly held that the claim of the appellants for the parallel operation charge for the period prior to 26.07.2011 is after more than three years and by virtue of Article 55 of the Limitation Act, 1963, a limitation of three years has been prescribed for claiming compensation for any breach of contract and any such claim or compensation beyond a period of three years is barred by limitation.

16. The learned State Commission has also rightly noted that the appellants were required to recover the parallel operation charge on monthly basis for the month from July, 2006 to September, 2008 but they had for the first time demanded the parallel operation charge on 16.06.2008 which was for the period of July, 2006 to May, 2008 which was disputed by the respondent no.2 Shaifali Rolls.

17. The learned State Commission has also rightly observed that the appellant no.1 demanded the parallel Operation Charge for an

amount of Rs. 85,55,404.61/- through the disconnection notice dated 26.07.2011 i.e. after three years, one month and nine days which was beyond the period of limitation of three years as specified in Article 55 of the Limitation Act, 1963 for the period from July, 2006 to June 2008. The claim of parallel operation charge by the appellants for the months of July to September, 2008 since falls within the period of three years, is not barred by the period of limitation.

18. The learned State Commission has not committed any illegality in recording a finding to the effect that since relevant commercial circular no. 706 dated 28.01.2000 had already been set aside by the State Commission vide its order dated 31.08.2000 in Petition No. 24 of 2000, the action of the appellants in recovering the parallel operation charges for the period from July, 2006 to June, 2008 was illegal. The learned Commission has also rightly concluded that from the stipulation in Commercial Circular No. 706 dated 28.01.2000, it is evident that if CPP owner is having contract demand of more than 25% of the CPP capacity installed by it and running in parallel with the grid, no POC is leviable on the CPP owner. The contract demand of the respondent no.2 Shaifali Rolls was more than 25% of the capacity of the CPP. Hence levying of POCs by the appellants upon the respondent no.2 - Shaifali Rolls was against the terms and conditions of the undertaking given by respondent no.2. Therefore, the POC levied by the appellants through the disconnection notice dated 26.07.2011 was illegal and invalid and the same has rightly been quashed/set aside by the learned State Commission by the impugned order.

19. The learned State Commission has not committed any illegality in the impugned order in holding that the disconnection notice dated 26.07.2011 issued by the appellant no.1 for recovery of POC for an amount of Rs. 85,55,404.61/- is illegal and invalid. The learned State Commission has rightly directed the appellants to refund the amount of parallel operation charge along with delayed payment charges, if any,

recovered by them from the respondent no.2 Shaifaili Rolls for the period specified in the impugned order.

20. The instant appeal is dismissed as it has no merits and the impugned order dated 19.01.2013 passed by the learned State Commission is hereby upheld. No order as to costs.

Pronounced in open Court on this 4th day of April, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/~~NON-REPORTABLE~~

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