

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

Appeal No.200 of 2013 & IA Nos. 279 of 2013 & 94 of 2014
Appeal No. 268 of 2013 & IA No. 359 of 2013

Dated 28th November, 2014

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No.200 of 2013 & IA Nos. 279 of 2013 & 94 of 2014

In the matter of:

M/s. Suryachakra Power Corporation Limited,
Suryachakra House,
Plot No. 304-L-III,
Road No. 78, Film Nagar,
Jubilee Hills,
HYDERABAD-500 096.

...Appellant

Versus

1. **Electricity Department,**
Rep. by its Superintending Engineer,
Port Blair, Andaman & Nicobar Islands,
Pin Code-744 101.
2. **The Chief Secretary,**
Andaman & Nicobar Administration,
Secretariat, Port Blair,
Port Blair, Andaman & Nicobar Islands,
Pin Code-744 101.
3. **Joint Electricity Regulatory Commission,**
For Goa & the Union Territories,
11nd Floor, HSIIDC Complex,
Vanijya Nikunj Complex, Phase-V,
Gurgaon-122016, Haryana.

...Respondent(s)

Counsel for Appellant : Mr. M.G. Ramachandran,
Mr. Rohit Rao

Counsel for the Respondents : Mr. Rakesh Khanna, Sr. Adv.
Ms. Ruchi Sindhvani
Ms. Megha Bharana

Ms. Bandana Shukla ,
Ms. R. Malick
Mr. Varun Pathak
Mr. Anish Garg (Rep.) for R-2

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Ms. Megha Bharana
Ms. Bandana Shukla

Counsel for the Respondents : Mr. M.G. Ramachandran,
Mr. Rohit Rao for R-1
Mr. Varun Pathak
Mr. Anish Garg (Rep.) for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

These Appeals are cross Appeals filed by M/s. Suryachakra Power Corporation Ltd. (hereinafter referred to as “Suryachakra Power”) and Electricity Department, Andaman & Nicobar Administration (hereinafter referred to as “Administration”) against the order dated 3.7.2013 of the Joint Electricity Regulatory Commission (“Joint Commission”) determining the capital cost of power project of Suryachakra Power along with issues of rebate, deemed generation, liquidated damages, payment of interest on delayed payments and payment of cost of HSD in volume at ambient temperature.

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

2.1 In the year 1995, the Electricity Department invited bids for setting up of a 20 MW DG Power Plant

in Bamboo flat, South Andaman. In June, 1995 Suryachakra Power was selected as the lowest bidder with a project cost of Rs. 52.25 crores. However, due to delay in obtaining approval from Government of India, Suryachakra Power in September, 1997 submitted a revised proposal with a project cost of Rs. 63.14 crores.

2.2 The Central Electricity Authority, hereinafter referred to as “Authority”, after scrutinizing the proposal worked out the project cost as Rs. 63.14 crores. Suryachakra Power vide letter dated 10.9.1997 agreed to the said cost of Rs. 63.14 crores.

2.3 On 20.11.1997, the Administration issued Techno Economic Clearance at a cost of Rs. 63.14 crores subject to certain condition that the cost shall not exceed except on account of variation in (i) Foreign

Exchange Rate of US dollars, (ii) interest during construction and financing charges as per actuals but not exceeding the amount as specified unless otherwise revised by the A&N Administration, (iii) taxes and duties on domestic component shall be as per actuals and (iv) change in Indian law resulting in change in cost.

2.4 On 20.11.1997, a Power Purchase Agreement ("PPA") was entered into between Suryachakra Power and the Administration for purchase of 20 MW power using 4 diesel generators (DG sets) of 5 MW each on BOOT basis. The PPA was followed by an Addendum – 1 to the PPA signed on 30.3.1999.

2.5 The PPA contemplated that Commercial Operation Date ("COD") of the first two units of project shall be achieved within the 19 months of the date of achieving

financial closure and next two units within 24 months of financial closure. On 1.8.2000, the financial closure of the Project was achieved. Accordingly, as per PPA, the CoD of Unit I and II was to be achieved by 1.3.2002 and CoD of Unit No. III and IV by 1.8.2002.

2.6 Under the PPA, the Administration was obligated to provide the design, construct and provide transmission lines for inter connection with the project 120 days prior to the CoD of the first Unit i.e. by 1.11.2011. Due to an interlocutory order passed by Hon'ble Supreme Court on cutting down of trees, the original transmission line needed realignment. As an alternative, the Administration strengthened their existing 33 kV system for evacuation of 6-7 MW power from the 20 MW power plant on 17.4.2002.

2.7 On 10.12.2002, the 33 kV double circuit line for evacuation of power from the 20 MW project was ready for charging. On 2.4.2003, the CoD of the project was declared.

2.8 In November 2003, Suryachakra Power furnished the relevant records to the Administration for approving the capital cost of the project. Though initially Suryachakra Power had claimed capital cost of Rs. 85.10 crores, the claim was reduced to Rs. 83.67 crores as per the Auditor's Report.

2.9 The Administration appointed numerous consultants between June 2004 to October 2012 for determination of the capital cost. However, the capital cost was not approved by the Administration.

2.10 Finally, Suryachakra Power filed a Petition before the Joint Commission for approval of the capital cost of the project.

2.11 The Joint Commission appointed an Independent Expert to consider the documents and give his recommendations. The Independent Expert gave his recommendations to the Joint Commission on capital cost and other issues.

2.12 Finally, the State Commission passed the impugned order dated 3.7.2013 determining the capital cost and deciding other issues.

2.13 Aggrieved by the impugned order, Suryachakra Power and the Administration have filed these Appeals.

3. Suryachakra Power in Appeal No. 200 of 2013 has raised the following issues:

(a) Capital cost of the project ought to have been determined at Rs. 80.38 crores.

(b) The rebate deducted by the Administration on invoices where there has been underpayment ought to have been refunded.

(c) The deemed generation ought to have been allowed with effect from 1.3.2002 for Units 1 & 2 and with effect from 1.10.2002 for Units 3 & 4.

4. The Administration in cross Appeal in Appeal No. 268 of 2013 has raised the following issues:

(a) The capital cost of the project ought to have been determined at Rs. 52.67 crores and not Rs. 78.2985 crores.

(b) The deemed generation ought not to have been allowed.

(c) Liquidated damages ought to have been levied upon Suryachakra Power for delay in achieving CoD.

(d) Interest on delayed payment ought not to have been allowed.

(e) Additional payment by converting the computation of cost of HSD for weight to volume ought not to have been allowed.

5. As both the Appeals are against the same impugned order and have some common issues, a common judgment is being rendered.

6. On the above issues, we have heard Mr. Rakesh Khanna, Sr. Advocate representing the Administration and Shri M.G. Ramachandran, learned counsel for Suryachakra Power. They also filed written submissions. The Joint Commission represented by

Shri Rohit Rao, learned counsel also filed written submissions in support of the impugned order.

7. Keeping in view the contentions of the parties, the following issues would arise for our consideration:

(i) Whether the Joint Commission has erred in determining the capital cost of the project?

(ii) Whether the Joint Commission was correct in allowing the deemed generation?

(iii) Whether the deemed generation ought to have been allowed w.e.from 1.3.2002 for Units 1 & 2 and from 1.10.2002 for Units 3 & 4?

(iv) Whether the rebate deducted by the Administration on invoices where part payment was made, ought to have been refunded to Suryachakra Power?

(v) Whether the Joint Commission has erred in not allowing Liquidity Damages to be levied on Suryachakra Power for delay in achieving CoD?

(vi) Whether the Joint Commission has erred in allowing interest on delayed payment?

(vii) Whether the Joint Commission was correct in allowing additional payment to Suryachakra Power by converting the computation of cost of HSD from weight to volume?

8. Let us take up the first issue regarding the capital cost.

9. The Administration has submitted as under in regard to capital cost determined by the Joint Commission:

9.1 The approach and methodology adopted by the Joint Commission for arriving at the completed cost of

the project is wrong and contrary to the PPA. The completed cost was required to be calculated by the formula D(A)-1 of Appendix-D of the PPA. The capital cost ceiling fixed by the PPA could increase or decrease only under certain conditions laid down under clause 2(i) of OM dated 20.11.1997 viz. variation in foreign exchange, IDC and FC as per actuals subject to certain conditions, taxes and duties on domestic component as per actuals and change in Indian Law resulting in change in cost. The capital cost was wrongly determined on the basis of fund tied up basis without verifying whether those funds were actually utilized for the approved works.

9.2 For allowing additional cost, the work should be part of TEC and if any additional work was done then prior approval of the Administration had to be taken under clause (vii) of Article-1 of the PPA.

9.3 The capital cost was required to be reduced to the extent of cost under run as per clause (xxii) (vii) of Article-1 of the PPA which was also not done.

9.4 Documents submitted by Suryachakra Power on 27.11.2002 clearly show that they had utilized only 9472653 DEM (equivalent to 5.13 Million US Dollars) as foreign currency for the purpose of importing the equipment which is mandated in the PPA. Thus, Foreign Exchange Rate Variation ('FERV') can be given only on 5.13 MUSD. The Joint Commission erred by giving foreign exchange variation on 7.96 MUSD without verifying the documents.

9.5 Though it is contended by Suryachakra Power that it had utilized the foreign loan towards purchase of indigenous equipments, but Inward Foreign Currency Remittance Certificate produced by

Suryachakra Power indicate utilization to the extent of 4.11 MUSD only. This has been ignored by the Joint Commission.

9.6 The Joint Commission has allowed additional expenditure out of loan availed after CoD. While allowing these loans, the Joint Commission should have examined the utilization of such loans and whether such expenditure are covered by the Techno Economic Clearance ('TEC') or not. The Joint Commission has allowed Rs. 3.54 crores as punch list items. In case of items already covered the cost agreed in PPA, allowing such expenditure again amounts to duplication of expenditure already included. In case the items are not covered, the expenditure could have been allowed if they had the prior approval of the Administration.

9.7 The Joint Commission also erred in allowing additional expenditure amounting to Rs. 2.8915 crores out of CITI Bank loan relying of TANGEDCO report dated 11.11.2011 ignoring the fact that TANGEDCO had revised their report on 5.9.2012.

9.8 The Joint Commission erroneously allowed an additional expenditure of 0.65 crores out of unsecured loans towards portion of outstanding liability to EPC contractor, resulting in duplication of expenditure.

9.9 The Joint Commission has erred in not making deductions which were required to be made as per the PPA under attachment D (A)-1 of Appendix D. The TEC cost was not limited to the extent of foreign currency utilization. The actual custom duty paid was Rs. 4.53 crores against Rs. 7.29 crores admitted in the PPA. Thus, Rs. 2.76 crores was required to be

deducted from the completed cost. The relaxation in land registration charges amounting to Rs. 32.34 lakhs were also to be deduced from the completed cost.

10. Suryachakra Power in support of its claim for capital cost of Rs. 80.38 crores has made the following submissions:

10.1 In the joint exercise during April 2010, the Administration agreed to works cost of Rs. 76.14 crores and that increased expenditure on account of Audit & Accounts, IDC and Preliminary and capital issue expenses totaling to Rs. 8.82 crores needs commercial expert opinion to arrive at the extent of admissibility for inclusion in the completed capital cost over and above Rs. 76.14 crores. The Administration agreed for dropping of the suggested

proportionate reduction of the cost by them due to deviation in the works executed by Suryachakra Power. According to Suryachakra Power these works over and above the TEC provisions were technically required for improved performance of the power plant.

10.2 After the above referred joint exercise, the matter was again referred to the Authority to decide on the additional amount of Rs. 8.82 crores claimed by the Appellant. The Authority after considering all the records and documents arrived that a completed cost of Rs. 80.38 crores in its report dated 15.3.2012. The Administration in the joint meeting with Suryachakra Power on 17.4.2012 agreed to implement the recommendations dated 15.3.2012 of the Authority. Despite this the Administration did not implement the report of the Authority.

10.3 The Independent Expert appointed by the Joint Commission recommended completed project cost of Rs. 80.1361 crores.

10.4 The Joint Commission correctly allowed Foreign Exchange rate variation on the amount of Rs. 7.96 Million US Dollars and considered the Citi Bank load and unsecured loan in determining the capital cost. However, the Joint Commission without any basis, arrived at completed cost of Rs. 78.2965 crores. This is completely erroneous. The Joint Commission should have followed the recommendations of the Expert Committee and should have allowed capital cost of Rs. 80.38 crores.

11. Let us examine the provisions of the PPA regarding capital cost. The relevant clauses are

described as under:

11.1 Capital cost as defined under clause (xvi) of Article-I of the Power Purchase Agreement:

“Capital Cost” means, subject to Article 3.11 and Article 3.10 (d) of the Agreement, the cost (expressed in rupees) actually incurred by the Company in completing the Project will be as follows:

<i>Sl. No.</i>	<i>Item</i>	<i>Cost in MINR</i>	<i>Cost in MUS Dollar Price at Rs. 36.00</i>
1.	<i>Imported eq.</i>	379.08	10.53
2.	<i>Indigenous eq.</i>	252.32	-
3.	<i>Mec. Elec. Civ. and sub station</i>		
	<i>Total</i>	631.40	10.53

which is as per foreign exchange rates assumed as in June 1997 and shall be included as “CAPITAL COST’ except to the extent that the THE ADMINISTRATION approves such excess costs as not having been attributable to THE COMPANY to

the Company's suppliers or contractors. In determining the amount of costs actually incurred in completing the project, account shall be taken of (i) any increase or decrease in capital cost resulting from changes in the rates of exchange of the foreign currencies in which project expenditures are authorized to be incurred from the level set forth in A&N TEC (ii) (A) any reduction in interest during construction and principal amount of loans through the application of delay liquidated damages received under the Construction Contractor other compensation paid by the EPC Contractor other compensation to the Company and applied to reduce capital Cost as provided in Article 3.11. (iii) any change to the debt equity ratio from the ratio assumed in the Approved Capital Schedule, and (iv) any excess insurance proceeds paid to the Company (after adjustment for the loss or damage to the Project and, to the extent not included in actual project cost, the cost of repaid and replacement attributable to such loss or damage) in respect of any claims for loss or damage to the Project incurred prior to the Commercial Operation

Date to this Appendix D. For purposes of determining the Capital Cost, all foreign currency loans and all foreign currency equity sources shall be converted into Rupees at the applicable Base Foreign Exchange Rate. It is understood and agreed that any increase or decrease in Capital cost due to changes in foreign currency exchange rates shall be reflected in the amount of actual capital cost. In case the actually incurred cost is less than the ceiling cost as mentioned in table, the lesser cost shall be taken as the capital cost. Capital cost includes interest during construction limited to a construction period of nineteen months for the first and second unit and twenty four months for Third and Fourth Units, and shall not include any additional amounts for a longer construction period, except with the approval of the THE ADMINISTRATION due to delays not attributable to the Company or the Company's suppliers or contractors. Further for estimating Interest During Construction 37.5% of the capital cost is allocated for the first unit, 23.5% of the capital cost allocated to the second unit, 21% of the

capital cost allocated to the third unit and 18% of the capital cost allocated to the fourth unit”.

11.2 The PPA provides for capital cost of Rs. 63.14 crores at the foreign exchange rate assumed as in June 1997 on the cost of imported equipment of 10.53 MSUD. The PPA envisages that in determining the completed cost actually incurred the following would be considered:

(i) Increase or decrease in capital cost due to changes in the rates of exchange of foreign currencies in which project expenditure are authorized to be incurred from the level set forth in the TEC.

(ii) Any reduction in IDC and principal amount of loans through the application of liquidated damages/ compensation received from the contractors.

(iii) Change in debt equity ratio.

(iv) Any excess insurance proceeds paid to the company prior to CoD.

(v) The capital cost included the IDC for the specified completion period and any additional amounts for longer construction period would be permissible only with the approval of the Administration due to delays not attributable to the Company or the Company's suppliers or contractors.

(vi) Excess costs not attributable to the company, its suppliers or contractors as approved by the Administration.

11.3 'Approved Modifications' are defined as any capital improvements or changes under the construction contract approved by the Administration or the Authority (to the extent required by law) from time to time to enhance the efficiency of the project or

increase its reliability or safety or otherwise to comply with laws of India.

11.4 “Completion cost” means the cost actually incurred by the company in completing the project subject to following principles:

(i) Costs in excess of Rs. 37.908 crores i.e. 10.53 MUS Dollars to the extent allowed by the Administration as not having been attributable to the company or its suppliers or contractors shall be added for arriving at the completed cost.

(ii) Any increase/decrease in project cost attributable to changes in foreign currency exchange rate.

(iii) Reduction in Capital cost by an amount equal to any reduction in IDC and principle amount of loans through application of LDs received from the contractors on account of delay in completion.

(iv) Reduction in cost due to reduction in capacity of the plant.

(v) Reduction in cost due to change in debt equity ratio.

(vi) Reduction in capital cost due to Insurance proceeds due to loss and damage to the project prior to COD.

(vii) All foreign currency loans and equity sources shall be converted into Rupees at the exchange rate applicable at the time of physical occurrence of the event. In case the actually incurred cost is less than the ceiling cost of Rs. 37.908 crores i.e. 10.53 Million US Dollars foreign currency component of the PPA, the lesser cost shall be taken as the completion cost.

11.5 Attachment D (A)-1 of the PPA stipulates the model calculation for determination of the capital cost. According to these calculations, the completed capital

cost will be capital cost ceiling as per the PPA plus excess cost allowed by the Administration in case the completed cost exceeds the ceiling. In case the completed cost is less than the ceiling cost, the amount of cost under run based on actual completion cost approved by the Administration will be reduced from the ceiling cost to derive the completed capital cost.

12. Thus, the PPA provides for Capital Cost as under:

(i) The capital cost agreed in the PPA was Rs. 63.14 crores with foreign exchange component of 10.53 MUSD at June 1997 price level.

(ii) The capital cost was subject to change in foreign exchange rates, additional IDC approved by the Administration due to delays not attributable to the company and other factors as defined in the PPA.

(iii) The company could carry out any capital

improvements or changes under the construction contract approved by the Administration or the Authority from time to time to enhance the efficiency of the Project, its reliability or safety or to comply with laws of India.

13. Let us examine the findings of the Joint Commission in regard to the capital cost. The relevant extracts are as under:

13.1 The Joint Commission noted that the computed capital cost of the project has been examined on the different occasions during the last ten years. The Administration obtained the views of the Authority and also obtained recommendations from KPCL and TANGEDCO on more than one occasion.

13.2 The Joint Commission appointed an Independent Expert to examine the issue of completed capital cost and other issues on 10.5.2013.

13.3 In the impugned order, the State Commission has analysed the capital cost determined by the Authority and consultants/Committees appointed by the Administration and the Report of the Independent Expert.

13.4 The Joint Commission on Foreign Exchange Rate Variation (FERV) decided to allow FERV on actual foreign exchange loan availed i.e. on 7.96 million USD as per the recommendations of the Expert considering that the foreign currency loan is used not only for import of equipment but also for other project related equipment and payment of taxes and duties by converting the foreign currency loan to Indian Rupees.

According to the Independent Expert, it is normal industry practice to take foreign currency loan not only for the purpose of import of capital funds and/or offshore services, but also on consideration of loan availability, cheaper interest rates, better terms and conditions compared to the domestic loans as a source of funding. The Joint Commission has allowed FERV on 7.96 MUSD even though the 5.13 MUSD was utilizing for foreign equipment stating that the balance (7.96 MUSD – 5.13 MUSD) was spent on custom duty ad freight charges. However, according to the Administration expenditure on custom duty was only Rs. 4.53 crores and no bills for freight charges were submitted by Suryachakra Power. The Joint Commission also referred to Annexure – I of the PPA to conclude that project cost includes the “landed cost” of the imported equipment including taxes and duties

and incidentals to bring the equipment to the project site.

13.5 On the Citi Bank's and unsecured loan, the Joint Commission did a prudence check of each item of expenditure to see whether the expenditure is incurred towards the project. The State Commission felt that even after COD of the Project a number of items called 'punch list items' which do not have a direct bearing on the COD of the project but a part of the project need completion. Such works are normally completed after the COD of the project. Certain payments for supply and erection of plant and machinery will be payable after the COD depending upon the terms of contract. The Joint Commission, therefore, allowed Rs. 2.8915 crores towards funding of the project out of Citi Bank loan. The State

Commission also allowed Rs. 0.65 crores of unsecured loan as one of the funding sources of the Project.

13.6 The Joint Commission approved completed cost of the project at Rs. 78.2965 crores on funds tied up basis.

13.7 The Joint Commission decided that imposition of LDs as per clause 3.10 of the PPA on delay in achieving COD is not justifiable as the Administration completed the transmission line only on 10.12.2002.

14. Thus, the Joint Commission fixed completed cost of the Project at Rs. 78.2965 crores on the basis of funds tie up basis and allowing FERV also on the actual foreign exchange loan availed.

15. The Joint Commission has arrived at the completed capital cost as under:

S.No.	Description	Amount (Rs. Crores)
1.	CEA approval as per funds tied -up basis	77.595
2.	Less: Foreign Exchange Rate Variation approved by CEA and included above	(-) 11.630
		65.965
3.	Add: Foreign Exchange Rate Variation as ascertained by the Commission based on Foreign currency loan utilization	(+) 8.790
		74.755
4.	Add: Citi Bank loan as per utilization	(+) 2.8915
5.	Add: Unsecured loan as decided by the Commission	(+) 0.65
	Competed cost of the Project as approved by the Commission	78.2965

16. The Authority in its letter dated 23.05.2011 arrived at completed cost as under:

Approved cost	Rs.63.14 crores
IDC	Rs. 3.00 crores
Cost excluding IDC	Rs.60.14 crores
Increase due to Exchange Rate Variation 10.53 MUSD x 11.0445 per \$	Rs.11.63 crores
Increase cost of Establishment	Rs. 3.30 crores
Completed hard cost Excluding IDC	Rs.75.07 crores
IDC	Rs. 5.31 crores
	<hr/> Rs. 80.38 crores <hr/>

However, the Project cost was limited at Rs. 77.595 crores on the basis of funds tied up for the Project.

17. We find that the Joint Commission has determined the capital cost on the basis of the funds tied up by Suryachakra Power. This is not a correct approach and is not in consonance with the provisions of the PPA. The PPA provides that the cost of Rs. 63.14 crores shall not exceed except on account of specified items viz., variation in foreign exchange rate, IDC as per actuals but not exceeding the specified amount unless otherwise revised by the Administration due to reasons not attributable to the company or its suppliers/contractors, taxes and duties on domestic component as per actuals and change in law, etc.

18. The capital cost as defined under Article-1 clause (xvi) in the PPA is also shown in terms of cost of imported equipment, indigenous equipment,

mechanical, electrical, civil and sub-station works.

The capital cost is indicated as Rs. 63.14 crores with foreign exchange component of imported equipment of 10.53 Million US Dollars at exchange rate of June 1997.

19. The PPA provides that in determining the cost actually incurred in completing the Project, the change in the rates of foreign exchange in which expenditure are authorized to be incurred as set forth in the Techno Economic Clearance would be taken into account. Thus, the FERV has to be applicable only on the expenditure incurred on foreign equipment. This would include payment of foreign equipment including its transportation cost made in foreign currency and customs duty on such equipment. The custom duty is levied as a percentage of cost of the equipment. The cost of the equipment is in the foreign exchange,

therefore, the custom duty will be calculated on the price of the equipment in foreign currency converted into Indian Rupees as on the date of import. As indicated in the impugned order, the actual custom duty paid was Rs. 4.53 crores on imported equipment. This amount has to be converted into US Dollars on the date when the custom duty was paid. The custom duty converted in US Dollar will be subjected to FERV along with the cost of the equipment in USD. However, the component of foreign loan used for funding expenditure incurred on indigenous equipment or works in India paid in Indian Rupees will not be subjected to FERV while determining the capital cost.

20. Annexure I of the PPA regarding Abstract of Project cost clearly indicates the break up of the foreign and indigenous components. The foreign

component includes \$ 8.77 MUSD for works cost related to foreign components excluding taxes and duties and 1.76 MUSD for taxes and duties. Thus, the expenditure in foreign currency actually incurred on foreign components and the custom duty and taxes on the imported equipment actually incurred will be subjected to FERV while determining the completed capital cost.

21. The PPA allows interest on foreign loan taking into account the actual repayment liabilities at the current foreign exchange rate in the tariff. Therefore, FERV on the foreign loan component utilized to finance indigenous equipment will not be added to the capital cost.

22. In view of above, the 5.131 MUSD incurred on foreign equipment and additional amount incurred on

custom duty and taxes on such imported equipment including transportation of the imported equipment paid in foreign currency will be considered as expenditure against the imported equipment while determining the completed capital cost and the same will be subjected to FERV.

23. The Joint Commission should have considered capital cost as per the PPA and allowed increase/decrease due to foreign exchange rate variation on expenditure on foreign equipment including custom duty on such equipment including transportation cost paid in foreign currency, additional expenditure due to any changes necessary for efficient operation of the plant, as approved by the Administration, IDC, financing charges and incidental expenditure incurred due to delay in completion of the project beyond the scheduled COD due to reasons not

attributable to Suryachakra Power, its supplier or contractors, any change in cost due to change in law and taxes and duties on domestic component as per actuals. As per the PPA the increase in cost due to expenditure (IDC/ FC etc.) over and above that specified in the PPA due to delay in project not attributable to the company, its suppliers and contractors has to be approved by the Administration. In view of enactment of the Electricity Act, 2003, this has to be decided by the Joint Commission. We feel that the Joint Commission should allow increase in IDC, Financing charges and incidental expenses incurred for the delay in COD of the Project due to reasons attributable to the Administration or for the reasons which are beyond the reasonable control of the Suryachakra Power and its contractors and suppliers. In case any modifications regarding capital

improvements or change under the construction contract has been approved by the Administration or which the Commission feels is necessary for efficient operation of the plant, the additional cost for such modifications has to be allowed. The Joint Commission should also verify the inward foreign currency remittance certificate for actual use of foreign currency and verify the customs duty paid as the Administration has disputed the same.

24. We feel that the Joint Commission has erred in allowing additional expenditure of Rs. 2.8915 crores out of Citi Bank loan for punch list items contrary to the provision of PPA. The Joint Commission has also wrongly allowed additional expenditure of Rs. 0.65 crores out of unsecured loans towards portion of outstanding liability to EPC contractor contrary to the terms of the PPA.

25. The PPA provides that if the actually incurred cost is less than the ceiling cost agreed in the PPA, the lesser cost will be considered. It was, therefore, necessary for the Joint Commission to verify the actual cost incurred by the Suryachakra Power instead of only verifying the tied up loans and determining the completed capital cost on the basis of the tied up loans.

26. Let us now discuss the issue relating to additional IDC and Financing charges due to delay in CoD of the Project.

27. The Scheduled CoD of Units 1 & 2 was 1.3.2002 and for Units 3 and 4, 1.8.2002. On 5.6.2002 it was mutually agreed between the parties to defer CoD of Units 3 & 4 to October 2002 or till completion of 33 kV line whichever is earlier. The 33 kV line was accorded

approval by the Electrical Inspector to change only on 10.12.2002. According to Suryachakra Power, the Administration was required to commission the transmission facilities 120 days before the required CoD. The delay in commissioning of the transmission line led to delay in achieving CoD of the plant. The CoD of the first unit was achieved within 180 days of actual commissioning of the transmission line.

28. We find that Article 3.3 (c) (i) of the PPA provides that the Administration shall be responsible for constructing the transmission facilities. Article 3.3 (c) (ii) provides that the Administration shall commission the transmission facilities and make ready for interconnection of the project 120 days before the required CoD of the first Unit. Article 3.3 (c) (iii) provides that if the CoD of any unit is delayed because the transmission facilities are not commissioned, the

Administration shall pay fixed charges (less return on equity) upto normative level of generation during the period of delay.

29. The transmission facilities were scheduled for commissioning in September 2001. However, the same was actually commissioned on 10.12.2002. According to the Administration, the delay in commissioning of the transmission line was due to the order passed by the Hon'ble Supreme Court banning felling of trees.

30. According to Suryachakra Power, the Hon'ble Supreme Court order banning felling of trees was passed only on 11.10.2011, less than a month prior to the original scheduled date of commissioning of the transmission line.

31. There is some force in the argument of Suryachakra Power. It cannot be said that the delay in commissioning of the transmission line from the scheduled date was only due to the Hon'ble Supreme Court's order as the order was passed less than one month prior to the scheduled date of commissioning of the transmission lines. The construction and commissioning of the evacuation line was the responsibility of the Administration and if the same is delayed for any reason, the delay caused to the commissioning of the project due to the same has accounted for while deciding the capital cost of the power project.

32. According to the Administration, they had offered on 18.5.2002 to Suryachakra Power to evacuate 6-7 MW power on the old existing line. However, Suryachakra Power by its letter dated 20.5.2002 had

refused to use the old existing line as it was unreliable. The Administration had also informed by its letter dated 18.5.2002 that even if the existing line were used, it would not pay fixed charges, less ROE for the unutilized capacity of the plant until the new transmission line was ready. In view of the above reasons, we cannot find fault with Suryachakra Power not utilizing the old/existing transmission line for testing and commissioning of its units and declaring COD, as transmission line was unreliable and the Administration had not agreed to pay fixed charges for the unutilized capacity due to transmission constraints.

33. Suryachakra Power has referred to the following to establish that their units were ready for test run in June 2002:

(i) On 1.12.2001 letter was sent to the Administration that Units I & II would be ready for synchronization and testing by Feb., 2002.

(ii) Minutes of the meeting dated 19.3.2002 between Suryachakra Power, the Administration and CEA indicating that Units 1 & 2 were ready for testing.

(iii) On 1.6.2002 it was informed to the Administration that Units I & II had been run successfully on the available load by running auxiliary equipment and made request for making arrangements for evacuation facilities urgently.

(iv) The EPC contractor on 3.6.2002 certified that they had completed test run of all 4 units and the project was ready for synchronization and COD.

(v) On 10.12.2002 the Chief Electrical Inspector permitted energizing the transmission line. The COD of all the four units was achieved on 2.4.2003 i.e.

within 120 days of the transmission facilities being made available.

34. According to the Suryachakra Power, for achieving COD, continuous testing for 72 hours was pre-requisite. In the month of June 2002, because of Warlike situation between India and Pakistan, the German Embassy in India issued an advisory for all German Nationals to leave India. The Original Equipment Manufacturer ('OEM') was M/s. Caterpillar from Germany. As such the German engineers who were to conduct and supervise the 72 hours testing had to leave India in June 2002. Therefore, Suryachakra Power claimed force majeure from June 2002 till October 2002. The transmission line, however, was made ready on 10.12.2002. Thus, there was no consequence of delay because of force majeure

claimed by Suryachakra Power. On 2.4.2003, the COD of the Project was achieved.

35. We feel that the delay in commissioning of the Units was beyond the reasonable control of the Suryachakra Power and it is entitled to additional IDC, financing charges and Incidental expenditure for the delay in commissioning of the Units. The delay has occurred mainly due to delay in commissioning of the transmission system by the Administration. Suryachakra Power also experienced force majeure from June 2002 to October 2002 due to warlike situation leading to recalling of the German commissioning engineers on the advice of the Embassy of Germany. The Joint Commission has not computed the IDC, Financing charges and IEDC for the period of delay in COD. The Joint Commission is directed to compute the IDC, FC and IEDC as admissible to

Suryachakra Power due to delay in achieving COD of the generating station.

36. Thus, the completed capital cost of the project will be sum of capital cost of Rs. 63.14 crores indicated in the PPA and charges on Foreign Exchange Rate Variation on 5.131 MUSD incurred on foreign equipment including their transportation cost, FERV on the customs duty/taxes on imported equipment applied on equivalent US Dollars, changes necessary for efficient operation of the plant as approved by the Administration or the Joint Commission, additional IDC, Financing cost and Incidental Expenses during construction for the period of delay in achieving the COD for reasons attributable to the Administration and beyond the reasonable control of Suryachakra Power from the Scheduled COD to the actual COD, change in cost due to change in law and taxes and

duties on domestic component as per actuals. The Joint Commission is directed to determine the completed capital cost accordingly. This will be subject to ceiling of actual funds tied up by Suryachakra Power for the project and the actual cost incurred. The Joint Commission will also verify the actual payment of custom duty and remittance of foreign loan.

37. The second and third issues regarding deemed generation are being dealt with together.

38. The Joint Commission has allowed deemed generation from 10.12.2002 when the transmission line was ready till the COD of the Project, namely 2.4.2003.

39. Suryachakra Power has claimed deemed generation from March 2002 for Units 1 & 2 and 1.10.2002 for Units 3 and 4.

40. According to the Administration deemed generation should not have been allowed by the Joint Commission as they had offered the Units for acceptance on 13.12.2002 even though the transmission line was ready on 10.12.2002.

41. We find that Suryachakra Power was ready for performance test in June 2002. However, in first week of June 2002 the Suryachakra Power also experienced force majeure till October 2012. In the meantime in the meeting held on 5.6.2002 between the parties, it was agreed by Suryachakra Power to defer COD of Units 3 and 4 to 15.10.2002. We do not find any merit in the contention of the Administration that deemed

generation should not have been allowed merely because the Suryachakra Power offered their plant for performance test three days after the commissioning of the transmission line. Suryachakra Power achieved COD of the Project within 120 days of the commissioning of the transmission line. Therefore, we do not find any infirmity in the Joint Commission allowing deemed generation from 10.12.2002 to 2.4.2010 as per the terms of the PPA as the Administration had delayed the construction of the line. We also do not find merit in allowing deemed generation from March 2002 as Suryachakra Power was ready for performance test only in June 2002 and thereafter they also experienced force majeure upto October 2012. Even if the transmission line had been ready in June 2002, they could not have achieved the COD as their engineers had to leave the country due to

force majeure. Suryachakra Power has taken about 120 days in achieving COD after the transmission line was made available. Thus, we uphold the findings of the Joint Commission on this issue.

42. The fourth issue is regarding rebate deducted by the Administration on invoices where part payment was made.

43. According to Suryachakra Power, the Administration had unilaterally deducted amount from their invoices contrary to the provisions of the PPA which contemplates that the Administration would be entitled to a rebate of 2.5% of the invoice amount, only if they paid the full invoice amount within the stipulated time.

44. As per the Administration, Suryachakra Power was legally required to submit the monthly tariff

invoices strictly in accordance with the provisions of Appendix D of the PPA. However, Suryachakra Power kept on including inflated charges in the monthly invoices such as high interest rates on debt servicing and interest on working capital, water charges, octroi, HSD, transportation and handling losses, high station heat rate @ 2080 Kcal/kWh which were beyond the provisions of the PPA. Further, despite receiving full supply of HSD and lube oil from the Administration, Suryachakra Power have all along been claiming full cost of HSD and lube oil in their monthly tariff invoices, which is legally impermissible. Since lawful/due payments were released by the Administration within the stipulated time of five business days, therefore, they were entitled to a rebate of 2.5% in accordance with the PPA.

45. Let us examine the findings of the Joint Commission.

46. The Joint Commission has examined the provisions of the PPA regarding billing and payment disputes and held as under:

“Now let us turn to Article 8.2 which stipulates that the Tariff invoice for the payments due to the company under this agreement..... which means that the IPP cannot raise invoice for any amount expecting that the Administration will pay in full in order to enjoy rebate. The amount for which the invoice has to be AMOUNT DUE. The Administration has submitted that the petitioner was raising invoices including the cost of fuel and lube oil which was being supplied on free charge basis. The Administration has been verifying the AMOUNT DUE before the release of payment as part of bill passing checks. The Commission observes that it is a routine prudential check. However, if the Administration has been making

unjustified deductions, they are liable to make balance payments with interest”.

47. We agree with the findings of the Joint Commission due to following reasons:

(i) The capital cost and the tariff had not been decided.

(ii) As per the Administration, Suryachakra Power was raising invoices including the cost of fuel and lube oil which was being supplied by the Administration.

(iii) The Joint Commission has decided that if the Administration has made unjustified deductions, they are liable to make balance payment with interest.

48. Thus, after the determination of final tariff, the invoices would be modified and if some amount is payable by the Administration, as a result of the modification, the same will be paid with interest.

49. Therefore, we uphold the findings of the Joint Commission with regard to rebate.

50. The fifth issue is regarding levy of liquidated damages (LDs).

51. According to the Administration, Suryachakra Power was required to achieve COD of 1st two Units by 1.3.2002 and rest of the Units by 1.8.2002. However, Suryachakra Power failed to achieve COD even as per the revised scheduled i.e. 31.8.2002 for first two units and 15.10.2002 for the rest of the Units as mutually agreed on 5.6.2002.

52. Let us examine the findings of the Joint Commission in this regard. The relevant extracts are reproduced below:

“Clause 3.3.0 (i) (ii) and (v) of the PPA stipulates that the Administration is obliged to cause the

transmission facilities by laying and rerouting new transmission line etc., for drawing and receiving electricity produced by IPP 120 days before COD of the first engine/power station. Accordingly, the line should have been ready by 1.4.2002 to meet the revised schedule of 31.8.2002 for the first two units. A&N Admn. informed on 20.5.2002 that existing transmission line was strengthened to receive 6 MW to 7 MW of power. But SPCL informed A&N Admn. that the existing 53 km. line was not reliable and requested for new 33 kV. transmission line as per the provisions of PPA. However, the A&N Administration completed the double circuit Panther transmission line on 10.12.2002. M/s. SPCL sent a letter to A&N Administration on 09.12.2002 regarding readiness to conduct acceptance test of all four units.

The process of organizing for testing, actual conducting of acceptance tests and final approval took its time and COD could be declared only on 2.4.2003. The provision of 120 days of readiness of the Transmission line is kept to take care of such

commissioning procedures and their party inspection. Further, Administration opened the letter of Credit on 1.4.2003 which as per PPA should have been opened one month before COD.

Thus, the Commission observes that imposition of liquidated damages as per clause 3.10 of Power Purchase Agreement (PPA) on M/s. SPCL for delay in achieving COD is not justifiable”.

53. We agree with the findings of the Joint Commission. We have already held in earlier paragraph the delay in COD of the plant was not attributable to Suryachakra Power but it was due to delay in commissioning of the transmission line by the Administration. We have also accepted the findings of the Joint Commission regarding allowing deemed generation from the commissioning of the transmission line till the actual COD. Therefore, for the same reasoning there is no justification in

deduction of the liquidity Damages for the capital cost of the project.

54. The sixth issue is regarding interest on delayed payment.

55. According to the Administration, the capital cost could not be determined in time due to submission of the documents by Suryachakra Power in piecemeal. The Administration had to approach various agencies for determination of the capital cost and even these agencies could not arrive at a common capital cost of the project for which the main reason was that the documents submitted by Suryachakra Power were not in accordance with the provisions of the PPA. Therefore, the Administration should not be responsible for non-finalization of the capital cost and should not be burdened with the delayed interest on

arrears due to non-finalization of completed cost of project which is attributable to Suryachakra Power.

56. Suryachakra Power on the other hand has submitted that the documents relating to capital cost were submitted in November 2003 and there is nothing on record to show that the Administration had ever raised the issue of belated or incomplete submission of documents at the relevant point of time. The Administration has itself recovered alleged excess payment made by it, with interest @ 18% p.a. from the Appellant and one such instance was as early as 26.4.2004.

57. The Joint Commission in the impugned order has allowed payment of arrears to Suryachakra Power on delayed payments as per the terms of the PPA. Similarly the recoveries from the Suryachakra Power

by the Administration has also been allowed with interest as per the terms of the PPA.

58. Suryachakra Power have stated that they had submitted all the documents relating to capital cost by November 2003 but the Administration did not determine the capital cost even after 10 years.

59. We find that the Administration appointed a number of consultants for determination of the capital cost. The Authority also determined the capital cost at the request of the Administration. The consultants were approached on more than one occasion. The Administration also appointed committees to recommend the capital cost and they also submitted their report. However, the Administration did not determine the capital cost even after 10 years and even after obtaining inputs from consultants and the

Authority on number of occasions. The Administration at the Appellate stage is raising the issue of incomplete data which was not raised by them earlier. We do not understand how the Administration could get the report from the various consultants and the Authority when complete data for capital cost was not available. The consultants and the Authority have also not raised the issue regarding non-availability of the data. We, therefore, do not find any merits in the contention of the Administration.

60. According to Article 8.6 of the PPA, if any amount due to one party to another party is not paid when due, then the interest will be payable at the rate which is $\frac{1}{2}\%$ (0.5%) above the cash credit rate. In the present case, the determination of capital cost has been delayed by the Administration. On the other hand, the Administration was deducting the amounts

from the invoice raised by Suryachakra Power. Therefore, if Suryachakra Power has been denied moneys that were due to him, then interest will be payable both for maintaining equity and also according to the terms and conditions of the PPA. Therefore, we do not find any infirmity in the Joint Commission granting interest and arrears payable to Suryachakra Power as a result of determination of capital cost and settlement of other issues.

61. According to the Administration, upon the advice of the Authority and the directives of Ministry of Home Affairs a new provision for conversion of HSD density from weight to volume was incorporated in the PPA considering the density at ambient temperature by issuing an Addendum-II to PPA on 18.8.2011 and accordingly the Administration has settled all the dues on this account in 2011, soon after the execution of

Addendum-II to the PPA. The provision for conversion of HSD consumption from weight to volume considering density at ambient temperature was not a part of the PPA and was only a subsequent addition to PPA. Payment on the basis of addition/change in agreement at a subsequent date cannot be treated as delayed payment. We agree with the Administration that no interest should be payable on the arrears on account of conversion of HSD density from weight to volume upto the signing of Addendum-II on 18.8.2011 as the amendment was made in the PPA on 18.8.2011 only and the payment became due on this account after signing of the Addendum-II on 18.8.2011.

62. The Administration have also stated that Suryachakra Power have not given documentary evidence in support of their claim for the prevailing rate of interest, payment of loss, interest amount due

on the reduced balance of loan, repayment and the interest amount actually paid by the Respondent. According to the Administration, Suryachakra Power have been claiming interest rates on debt servicing and interest on working capital on higher side on notional basis. Therefore, we direct Suryachakra Power to provide necessary supporting documentary evidence to the Administration for its claim relating to interest, repayment of loan, etc.

63. The last issue is regarding additional payment to Suryachakra Power on account of computation of cost of HSD on volume instead of weight.

64. The Administration has submitted that the Joint Commission has grossly erred in allowing HSD density at ambient temperature for the period from April, 2003 to March, 2007 ignoring the material fact that there is

no provision in the PPA/Addendum-2 for allowing HSD density at ambient temperature for the aforesaid period. The unit of measurement of HSD was indicated as Rs./kg. by Suryachakra Power in the project report. The Administration had allowed measurement/calculation of HSD consumption by conversion of weight into volume, with effect from April, 2007 in compliance of the directives of the Ministry of Home Affairs after careful consideration because the data regarding exact ambient temperature and correspondent density of delivery of each and every consignment measured from calibrated equipment of IOCL was available only from April, 2007 onwards. That is why Addendum-II of PPA was given effect from April, 2007 onwards. Accordingly, Addendum-II to PPA was executed only with effect from April, 2007. This agreement cannot be amended

except by prior written agreement between the parties. Allowing any benefit retrospectively in violation of the provisions of PPA is unlawful.

65. According to Suryachakra Power, they had obtained hour-by-hour data on the actual temperatures at Port Blair, from the Meteorological Department of India, Calcutta and submitted the same to the Electricity Department. Before the Joint Commission, the Electricity Department had stated that it would accept data only from the Indian Oil Corporation, the fuel supplier and not the data recorded by the Meteorological Department of India. The Joint Commission rightly rejected such unreasonable objection and directed that the data provided by the Meteorological Department of India shall be taken for the purposes of calculating the ambient temperatures. Now the Administration has

changed its objections stating that calculation of HSD on ambient temperature is against the provisions of the Power Purchase Agreement.

66. We find from the impugned order that the Administration had specifically raised the issue that since Addendum-II to PPA allows measurement of consumption of HSD in volume only with effect from 2007, no benefit whatsoever on this account can be extended retrospectively from April, 2003 to March, 2007. In fact the Commission has also noted that the amendment to PPA was given effect from April, 2007 onwards. However, the Commission decided that data submitted by Suryachakra Power for calculation of density of HSD should be allowed for the period April, 2003 to March, 2007.

67. The agreement provided for calculation of variable charge payment using the cost of liquid fuel in terms of Rs. /kg. The liquid fuel is billed by fuel supplier in terms of volume. Earlier the standard density at 15°C was being used for computation of weight received corresponding to volume of tanker. However, the actual loading temperature at the supplier end is not 15°C but is generally higher. On the advice of the Authority and the Ministry of Home Affairs, the Administration signed Addendum-II to PPA on 18.8.2011 to compute variable charge payment applying correction for volume to weight conversion at ambient temperature. The parties agreed to amend the Power Purchase Agreement for calculation of HSD oil consumption in volume at ambient temperature w.e. from April, 2007 because the data for ambient temperature with fuel oil supplier was available from

April, 2007. However, in the proceedings before the State Commission, Suryachakra Power sought the correction for density of HSD from April 2003 to 2007 also. Suryachakra Power supplied data of ambient temperature from the Meteorological Department.

68. We find that the State Commission without considering the provisions of the Addendum-II wherein the parties mutually agreed for the application for calculation of density of HSD at the ambient temperature w.e. from April, 2007 has decided to grant the same from April, 2003. It has been stated by Administration that they have already settled dues relating to density of HSD with effect from April, 2007. We, therefore, feel that Suryachakra Power cannot claim the same with effect from April, 2003 against the provisions of Addendum-II mutually agreed between

the parties. This issue is accordingly decided in favour of the Administration.

69. Summary of our findings:

(i) The capital cost has not been determined by the Joint Commission as per the terms of the PPA. Accordingly, the capital cost has to be determined as directed under paragraph 36 of this judgment.

(ii) We do not find any infirmity in the Joint Commission's finding regarding deemed generation.

(iii) We do not find any infirmity in the findings of the Joint Commission regarding rebate deducted by the Administration on the invoices where part payment was made.

(iv) The Joint Commission has correctly decided that LDs are not to be levied on

Suryachakra Power as the delay in COD of the project was due to delay in commissioning of the transmission line by the Administration.

(v) Interest is payable to Suryachakra Power by the Administration due to the delay in payment as per the terms of the PPA. If the Administration has settled all amounts due to Suryachakra Power on account of conversion of HSD density from weight to volume after signing of the Addendum to PPA on 18.8.2011 within the stipulated time then no delayed payment interest will be payable on that amount. Suryachakra Power shall also submit necessary supporting documents to the Administration for its claim relating to interest and repayment of loan.

(vi) Suryachakra Power cannot be allowed additional payment on account of computation of

cost of HSD on volume instead of weight prior to April 2007 in terms of the Addendum-II to the PPA signed on 18.8.2011.

70. In view of above, Appeal No. 268 of 2013 is allowed in part. Appeal No. 200 of 2013 is dismissed. The Joint Commission is directed to pass consequential order within three months of the date of this judgment. No order as to costs.

71. Pronounced in the open court on this **28th day of November, 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

vs