

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

**Dated: 2<sup>nd</sup> Sept, 2014**

**APPEAL NO. 4,5,6,7, 8 AND 66 OF 2014**

**Present:**

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

**APPEAL NO.4 OF 2014**

**In the Matter of:**

**M/s. Salasar Steel & Power Ltd.,**  
**1<sup>st</sup> Floor, Bhatia Complex,**  
**Opp-Rajkumar College,**  
**G E Road,**  
**Raipur, Chhattisgarh-492 001**

**..... Appellant**

**Versus**

- 1. Chhattisgarh State Power Trading Company Limited.,**  
**Vidyut Sewa Bhawan, Daganiya,**  
**Raipur, Chhattisgarh-492 014**
- 2. The Chhattisgarh State Electricity Regulatory Commission**  
**Irrigation Colony, Shanti Nagar,**  
**Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Buddy A Ranganadhan  
Mr. Raunak Jain

Counsel for the Respondent(s):Ms. Suparna Srivastava for R-1  
Ms. Swapna Seshadri  
Mr. Anand K Ganesan for R-2

**APPEAL NO.5 OF 2014**

**In the Matter of:**

**M/s. Jagdamba Power & Alloys Ltd.,  
G/16, Hira Arcade,  
Pandri, Raipur,  
Chhattisgarh-492 004**

**..... Appellant**

**Versus**

**1. Chhattisgarh State Power Trading Company Limited.,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh-492 014**

**2. The Chhattisgarh State Electricity Regulatory Commission  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Buddy A Ranganadhan  
Mr. Raunak Jain

Counsel for the Respondent(s):Ms. Suparna Srivastava for R-1  
Ms. Swapna Seshadri  
Mr. Anand K Ganesan for R-2

**APPEAL NO.6 OF 2014**

**In the Matter of:**

**M/s. Hira Ferro Alloys Ltd.,  
567B, 568 & 553 B,  
Urla Industrial Complex,  
Raipur, Chhattisgarh-492 003**

**..... Appellant**

**Versus**

1. **Chhattisgarh State Power Trading Company Limited.,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh-492 014**
2. **The Chhattisgarh State Electricity Regulatory Commission  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Buddy A Ranganadhan  
Mr. Raunak Jain

Counsel for the Respondent(s):Ms. Suparna Srivastava for R-1  
Ms. Swapna Seshadri  
Mr. Anand K Ganesan for R-2

**APPEAL NO.7 OF 2014**

**In the Matter of:**

**M/s. Godawari Power & Ispat Ltd.,  
428/2, Phase-I  
Industrial Area, Siltara  
Distt-Raipur,  
Chhattisgarh-493 111**

**..... Appellant**

**Versus**

1. **Chhattisgarh State Power Trading Company Limited.,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh-492 014**
2. **The Chhattisgarh State Electricity Regulatory Commission  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Buddy A Ranganadhan  
Mr. Raunak Jain

Counsel for the Respondent(s):Ms. Suparna Srivastava for R-1  
Ms. Swapna Seshadri  
Mr. Anand K Ganesan for R-2

**APPEAL NO.8 OF 2014**

**In the Matter of:**  
**M/s. Vandana Global Ltd.,**  
**Vandana Bhawan,**  
**M G Road,Raipur-492 001**

**..... Appellant**

**Versus**

- 1. Chhattisgarh State Power Trading Company Limited.,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh-492 014**
- 2. The Chhattisgarh State Electricity Regulatory Commission  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Buddy A Ranganadhan  
Mr. Raunak Jain

Counsel for the Respondent(s):Ms. Suparna Srivastava for R-1  
Ms. Swapna Seshadri  
Mr. Anand K Ganesan for R-2

**APPEAL NO.66 OF 2014**

**In the Matter of:**

**M/s. S K S Ispat & Power Ltd.,  
Phase 2, Siltara Industrial Area,  
18 KM Mile Sgstone, Bilaspur Road,  
Raipur, Chhattisgarh-493 111**

**..... Appellant**

**Versus**

- 1. Chhattisgarh State Power Trading Company Limited.,  
Vidyut Sewa Bhawan, Daganiya,  
Raipur, Chhattisgarh-492 014**
  
- 2. The Chhattisgarh State Electricity Regulatory Commission  
Irrigation Colony, Shanti Nagar,  
Raipur, Chhattisgarh-492001**

**...Respondent(s)**

Counsel for the Appellant(s) :Mr. Alok Shankar  
Mr. Rajesh Shankar

Counsel for the Respondent(s): Ms. Suparna Srivastava for R-1  
Mr. Anand K Ganesan  
Ms. Swapna Seshadri for R-2

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

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

**“Whether the Appellants, the Generating  
Companies, are entitled to claim for the payment  
of “delayed payment surcharge” from the**

**Chhattisgarh State Power Trading Company, 1<sup>st</sup> Respondent, for the delay in making the payment towards the bills issued by the Appellants for the sale of electricity to the said Trading Company during the relevant period as per the Power Purchase Agreements executed between them?”**

1. This is the question posed in this Batch of Appeals.
2. The common judgment is being rendered by this Tribunal in these Appeals since the Impugned Order dated 31.10.2013 is a Common Order passed by the Chhattisgarh Commission dismissing the Petitions filed by the Appellant claiming for the delayed payment surcharge dealing with the common issue.
3. The short facts are as follows:
  - (a) The Appellants are the Captive Generating Plants. The Chhattisgarh State Power Trading Company Limited (Trading Company) is the First Respondent who is a Trading Company. The six PPAs were executed between the Appellants and the Trading Company (R-1) during the period between 1.2.2011 and 15.7.2011.

(b) In accordance with the PPAs, the Appellants have supplied electricity to the Trading Company (R-1) during the period between 1.2.2011 and 15.7.2011. The Appellants after supply raised the timely bills. However, the payments for various bills raised during the period between February, 2011 and July, 2011 were not paid by the Trading Company (R-1) within due date as stipulated in the PPAs. However, they were subsequently paid with considerable delay.

(c) As per the relevant Clauses of the PPAs which are identical, the Appellants are entitled for the claim for delayed payment surcharge for the period between Feb, 2011 and July, 2011 if there was a delay in payment. As per the PPAs, the payment shall be made within a period of 30 days from the date of the bill.

(d) In these Appeals, the delay occurred for payment of bills raised earlier would range from 6 days to 268 days as the case may be.

(e) Since there was a considerable delay, the claim was made for the delayed payment surcharge through the letters sent to the Trading Company by

the Appellants on various dates. Despite the receipt of the letters, there was no response from the Trading Company (R-1). Hence, all the Appellants approached the State Commission and filed separate Petitions praying for adjudicating the dispute and for giving a direction to the Trading Company to make the payment towards the delayed payment surcharge as per the PPA.

(f) The State Commission, after hearing the parties, dismissed all the Petitions filed by various Appellants by the order dated 31.10.2013 holding that the Appellants are not entitled to the payments towards the delayed payment charges on the ground that the Appellants had neither raised any objection at the time of payment by refusing to receive the payments without any delayed payment surcharge nor received the payment by making their protest reserving their rights for the delayed payment surcharge and thereby the Appellants by their own conduct, have waived their right to claim delayed payment surcharge.

(g) Aggrieved by this Impugned Order dated 31.10.2013 dismissing the claim of the Appellants, the Appellants have filed these separate Appeals



raising the common grounds challenging the findings rendered by the State Commission as against the Appellants.

4. In these Appeals, various Counsel have appeared in each of the Appeals and made elaborate submissions explaining that the reasonings given in the Impugned Order for the Impugned findings are not in accordance with the law and therefore, the same is liable to be set-aside and consequently, the relief sought for by the Appellants, may be granted.
5. The relevant arguments of the Appellants through different Counsel are as follows:
  - (a) According to the State Commission, the word “normally” used in the relevant Clause of the PPA means that a person, the supplier of electricity, may also accept payments from the Trading Company (R-1) even beyond the prescribed period of 30 days and hence the Appellants having accepted the payments with a delay, cannot claim delayed payment surcharge as of a right. This reasoning is wrong. The word “normally” used in the relevant Clause of the PPA could not take away the right of the Appellant conferred through the mandatory nature

of the Clause, by exercise of judicial interpretation as the same has been contractually agreed to by the parties and therefore, the parties are bound by the same. The mere acceptance of payment towards the principal amount made by the Trading Company beyond the prescribed period of 30 days, by the Appellant does not affect the right of the Generator to claim the delayed payment surcharge as provided in the PPA.

(b) The words “however” and “further” used in the relevant Clauses would clearly show that the right of the Generator to accept the payment for the electricity supplied and the right of the Generator to claim the delayed payment surcharge on the number of days the bills are outstanding beyond the prescribed period of 30 days are independent of each other. Hence, the Clauses have no bearing whatsoever with the mandatory nature of the Clauses providing payment of delayed payment surcharge.

(c) In a transaction involving sale and purchase of electricity, there can be no iota of doubt that the time period for making such payment is certainly of essence. It is the right of the seller to receive the

payment for electricity supplied within a reasonable time, as the delay in making payment of the same it suffered commercial and financial implications.

(d) The principle of a contractual interpretation mandates that the interpretation should be reasonable and arise out of the natural and probable course of human conduct. At any rate, the judicial Forums will not adopt an interpretation out of context with the commercial dealings between the parties.

(e) The State Commission is not justified in applying the provisions of Section 63 of the Indian Contract Act, 1872 to the facts and circumstances of the instant case. Section 63 cannot be applicable to the present case as there has been no dispensation or remission of the promise to pay the delayed payment surcharge from the promisee i.e. the Appellant. The fact that the principal amount paid after an enormous days of delay has been accepted by the Appellant without any protest is of no consequence as the claim for delayed payment surcharge can arise only after receiving the principal amount due under the bills and taking into account the number of days outstanding in the payment of principal amount.

(f) The findings given by the State Commission with reference to the waiver is palpably wrong. As per the provisions Clause 22 or Clause 23 of the PPAs, there is no applicability of the principle of waiver by conduct or otherwise in the facts and circumstances of the present case. It is settled law that the waiver of the delayed payment surcharge should be agreed to by the Appellants in writing under their signatures. Merely because the payments were not accepted under protest cannot be the basis for concluding that the Generating Companies have waived their right to claim delayed payment surcharge as per the terms of the PPA. In the present case, the ingredients for proving waiver has not been established. Therefore, the State Commission ought not to have held that the Appellant is not entitled to delayed payment surcharge as there was a waiver.

6. On these grounds, the Impugned Order is sought to be set-aside by the Appellants.
7. In reply to the above submissions, the learned Counsel for the R-1, the Trading Company as well as the State Commission have elaborately argued in justification of the Impugned Order contending that the interpretation given by

the State Commission and the findings that the Appellants are not entitled for delayed payment surcharge in the Impugned Order are perfectly valid and therefore, no interference in the Impugned Order is called for.

8. In the light of these rival arguments advanced by both the parties, the main question which would arise for consideration as quoted above is as follows:

**“Whether the Appellants, the Generating Companies are entitled to claim payment of “delayed payment surcharge” from the Chhattisgarh State Power Trading Company, the 1<sup>st</sup> Respondent for the delay in making the payment towards the bills issued by the Appellants for the sale of electricity to the said Trading Company during the relevant period as per the Power Purchase Agreements executed between them?**

9. While dealing with the above question, it would be worthwhile to refer to the relevant findings rendered by the State Commission in the Impugned Order which are as under:

*“6.....The dispute, between the parties, is limited only to the following issues:-*

(I) whether, the petitioners have accepted the payment of bills without raising any claim towards delayed payment surcharge?

(II) If yes, than what is the consequence of this acceptance?

7. Before discussing these issues, we would like to observe the intention of the parties in PPAs. The intention of the parties in a contract, in respect of its performance, can be ascertained from (I) the expressed stipulation of the contract (II) the nature of terms and conditions incorporated and (III) the surrounding circumstances.

8. The expressed stipulation of the contract or PPA is as follows:-

**“Normally, CSPTrdCL shall make the payment within 30days from the date of receipt of bill in the office CE/ED (Technical Cell), CSPTrdCL, Raipur. However, in case the company desires payment within fifteen days from the date of presentation of bill, they shall allow 2% (Two percent) rebate on the billed amount for supply of power. Further, in case payment is made after 30 days, a delayed payment surcharge of 1.00% (One percent) per month shall be paid by CSTRdCL. This delayed payment surcharge shall be calculated on simple interest basis on the number of days outstanding after the said period. In the event of 15th/30th day being a holiday, the next working day shall be the due date for the payment for this purpose”.**

9. In mercantile contracts, time is usually of the essence. When a promisor undertakes to do an act at a particular time, or within a particular period, his promise may be either-

(a) **indivisible, or**

*(b) as composed of several parts.*

*In the first case, the consequences are the same, whether the promisor failed to do what he agreed to do, or failed it at the time agreed. But a distinction should be made between a breach of a promise to do a thing and a breach of promise to do it at the time promised. Courts of Equity have treated stipulation as to time, as subsidiary and of less importance, than the thing promised, unless it appears that the time of performance is of the essence.*

10. *If, we think about the nature of terms and conditions, mentioned in para 8 above, it appears, from simple reading of the relevant provisions of the PPAs that, the respondent has in obligation to make payment normally within 30 days from the date of receipt of bill. The word “**Normally**” is used in this provision. It means, time is not essence of the contract. Therefore, payment may be made either before or beyond the period of 30 days. It is specifically mentioned in the PPAs that, in case, the company (this company word is used in agreement for petitioners) desires payment within 15 days, from the presentation of bill, they shall have to allow 2% rebate on the bill amount. On the other hand, it is defined in the agreement, in case of delayed payment, beyond 30 days from the receipt of the bill, the respondent is liable to pay @ 1% delayed payment surcharge. It is implied in this term according to the law of equity that, in case of delayed payment, the respondent may accept it without claiming surcharge.*

11. *Shri Raunak Jain, counsel of the petitioners, argued that, there is a specific term of delayed payment surcharge is incorporated in the PPAs and*

*both the parties have signed these PPAs. Both the parties are bound to the terms and conditions of the PPAs. So far as, the petitioners are the concerned, they have supplied electricity to the respondent, according to the provisions of the PPAs and have raised bills accordingly, to the respondent. The respondent has not made payment of the bills, within the stipulated time and therefore, the respondent is liable for payment of delayed payment surcharge, to the petitioners because, due to this act of the respondent, the petitioners have suffered substantial financial losses.*

*12. Smt. Suparna Shrivastava, the learned counsel, appearing on behalf of the respondent, argued that, the bills, raised before the respondent, were duly discharged and were accepted by the petitioners, without raising any claim towards delayed payment surcharge. Though, in some cases, the payment was made with some delay, but the petitioners have accepted it, in their full satisfaction and thus, there is no outstanding claim towards the respondent, in respect of power supply, by the petitioners, to the respondent.*

*13. During the argument, applicability of the Section 63 of the Contract Act, to this matter, was also come before us. Section 63 of the Contract Act, gives an option, to the promisee, (i.e. the petitioners in these cases), to extend the time for performance of promise made to it. The text of section 63 is referred below:*

***“Section 63 Promisee may dispense with or remit performance of promise.- Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may***



***extend the time for such performance, or may accept instead of it nay satisfaction which he thinks fit”***

14. *Shri Rounak Jain, advocate submitted written submission on behalf of the petitioners. In this submission, Shri Jain submitted that, there is no applicability of section 63 of the Contract Act, in these petitions. It is further argued that, claim for delayed payment surcharge can only arise, after receiving the principal amount due, under the bills.*

15. *After going through pleadings of the parties and arguments held, we observe that, the petitioners have supplied power to the respondent, between different periods, from April 2010 to July 2011 and have received payments for the same, in different dates up to July 2012. It is argued by the petitioners that, soon after receiving the principal amount, they have calculated the delayed payment surcharge on the number of days outstanding, as per PPAs and have written several letters, to the respondent, claiming delayed payment surcharge from time to time. This fact has to be proved by submitting material documents by the petitioners. Section 101 of the Indian Evidence Act, 1872 provides that:*

***“Burden of proof- Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.***

***When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that on that person.***

*On scrutiny of the records, it appears that, at the time of receiving payment, the petitioners have neither objected the delayed payment nor refused to receive payment without any delayed payment surcharge according to the agreement, nor received payment reserving their rights for the delayed payment surcharge. If any objection would have been made by them, in writing, no such document has been produced before us. After receiving payments, in due course of mercantile practice, naturally the petitioners would have issued receipts for the same, which might be given under protest, but no copies of such receipts are produced by the petitioners, which may strengthen their claim against the respondent.*

*16. It is further argued by the petitioners that, they have written several letters to the respondent, soon after receiving the payment, but the letters produced, which the petitions have written, after a considerable delay, and it can not be said that, the letters are sent soon after the payment received. contents of letters, also not show any forceful demand from the petitioners, but only show, formal information, sent to the respondent. Though the petitioners in their written submissions stated that, the petitioners have written several letters to respondent from time to time, claiming delayed payment surcharge and the Commission may call the records from the respondent, which may affirm the facts, no list, of those documents, has been filed by them, which they want to call from the respondent. The material documents, possessed by the petitioners, are not produced before us. In absence of there important documents, we are constrained to draw adverse inference, against the petitioners.*

17. *In these cases, though there is an expressed provision for payment of delayed payment surcharge, but it is not in a mandatory form. The promisee has option, either to extend the time limit prescribed in the contract, or to object the payment without surcharge. The promisee is always required to be careful at the time of accepting consideration, from the promisor, otherwise his right may be waived. It appears from the surrounding circumstances that, the petitioners, by their own conduct, have waived their right to claim delayed payment surcharge, at the time of receiving payment against the price of energy sold to the respondent, without any objection.*

18. *The petitioners have not produced material documents in these petitions and accordingly they have failed to prove their right, to get delayed payment surcharge, from the respondent.*

19. *It is a settled principle of civil practice that, the petitioners have to establish or prove their own case. Looking to the facts produced before us and after considering the legal status we arrive at the conclusion that the petitioners could not prove their cases and accordingly we dismiss the petitions. Both parties shall bear their own costs”.*

10. The crux of the findings referred to above are as under:

- (a) The time for making payment was not the essence of the contract.
- (b) At the time of receiving payment, the Appellant herein had neither refused to receive the payment of

principal amount without any delayed payment surcharge nor received payment reserving their rights for the delayed payment surcharge.

(c) No receipt was issued under protest for the payments made.

(d) The Petitioners have written letters to the Respondent demanding the delayed payment surcharges after considerable delay.

(e) The letters did not show any “forceful demand” from the Petitioners, but only shows, formal intimation to the Respondent.

(f) The letters alleged to have been written to the Respondent from time to time claiming delayed payment surcharge were not produced.

(g) Though there is an “expressed provision” for delayed payment surcharge but it is not in a mandatory form.

(h) By accepting payment without any objection the Appellant herein have waived their rights to claim the delayed payment surcharge.

11. Now let us deal with the issue framed above.

12. Though the issue in all the Appeals is common, the facts with reference to the relevant dates, events and the amounts claimed in each of the Appeals are somewhat different. Therefore, let us refer to the claims of the each of the Appellants as contained in the respective Petitions in the following paragraphs:

(a) Appeal No.4 of 2014 has been filed by M/s. Salasar Steels & Power Limited. They have filed a Petition before the State Commission in Petition No.40 of 2013. M/s. Salasar Steel & Private Limited in its Petition has claimed Rs.24,40,675.75 as delayed payment surcharge against the delayed payments made for the power supplied to the Trading Company by the Petitioner Appellant between February, 2011 and July, 2011. The Petition has given the details in this Petition regarding the period, bills submission dates, due date, bill amount and the date of payment etc., On the basis of these details, the Petition of the Appellant raised the claim of the delayed payment surcharge by sending the letters dated 5.6.2012 to the Respondent Trading Company but there was no response given by the Respondent.

Hence, this Petition has been filed before the State Commission seeking for the appropriate directions.

(b) Appeal No.5 of 2014 relates to M/s. Jagdamba Power & Alloys Ltd. They have filed Petition in Petition No.42 of 2013 before the State Commission claiming Rs.42,26,596.00 as delayed payment surcharge as against the delayed payment made for the power supplied by the Petitioner/Appellant to the Trading Company between 1.4.2010 and 31.7.2011. In this Petition also, the Petitioner gave full details regarding the period, bill submissions date, due date, bill amount and date of payment etc. Since the delayed payment surcharge was not paid, the Petitioner sent a letter on 8.10.2012 and another letter dated 7.1.2013 to the Trading Company claiming for a delayed payment surcharge. However, there is no response given by the Respondent. Hence, the Petition before the State Commission.

(c) The Appeal No.6 of 2014 would relate to M/s.Hira Ferro Alloys Ltd. The Petitioner filed a Petition in Petition No.44 of 2013 before the State Commission. In this Petition, the Petitioner has claimed Rs.24,73,692.00 as delayed payment surcharge

against the delayed payment made for electricity supplied by the Petitioner to the Trading Company between 1.4.2010 and 31.7.2011. In this Petition also the Petitioner has given all the details relating to the period, bills submission dates, due date, bill amount and date of payment etc., The Petitioner has raised his claim for delayed payment surcharges from the Trading Company through its letters dated 8.10.2012 and the letter dated 7.1.2013. Since no response was made by the Respondent, the present Petition was filed before the State Commission seeking for the appropriate direction.

(d) Appeal No.7 of 2014 would related to M/s. Godavari Powers & Ispat Ltd. The Appellant filed Petition No.45 of 2013 before the State Commission claiming Rs.33,82,664.00 as delayed payment surcharge against the delayed payment made for the power supplied by the Petitioner to the Trading Company between 1.4.2010 and 31.7.2011. All the relevant details have been referred to in its Petition. Since, the delayed payment surcharge was not paid, the Petitioner raised the claim for the same through its letters dated 8.10.2012 and 7.1.2013 addressed to

the Respondent Trading Company. However, there was no response. Hence, this Petition filed before the State Commission claiming the said amount.

(e) Appeal No.8 of 2014 would related to M/s. Vandana Global Limited. This Petitioner M/s. Vandana Global Limited filed Petition No.39 of 2013 claiming Rs.39,03,927/- as delayed payment surcharge against the delayed payment for the supply of power made by the Petitioner between April, 2010 and May, 2011. The Petitioner in its Petition has given all the details such as the period, bills submission dates, due date, bill amount and date of payment etc. The Petitioner raising its claim for delayed payment charges through two letters i.e. on 7.8.2010 and another letter on 6.7.2013. But, there was no response. Hence, the Petitioner filed this Petition.

(f) Appeal No.66 of 2014 would related to M/s. SKS Ispat & Power Limited. The Petitioner filed Petition No.41 of 2013 before the State Commission claiming Rs.14,13,524/- as delayed payment charges against the delayed payment made for the electricity supplied to the Respondent between 1.4.2010 and 31.7.2011.



In this Petition, the Petitioner has given all the details with reference to the bill submission dates, due date and date of payment etc. This Petitioner has raised a claim for the delayed payment surcharge by sending the letters to the Trading Company on 6.8.2012 and dated 15.10.2012. Since there was no response, this Petition in Appeal No.41 of 2013 has been filed.

13. As indicated above, the State Commission by the Impugned Order dated 31.10.2013 refused to allow the delayed payment surcharge claimed by the Appellants as per the terms of the PPAs entered into between the Appellant and the Respondent.

14. The following factual details are not disputed:

(a) The PPAs were executed between the Appellants and the Respondent and accordingly the Appellant supplied power to the Trading Company in accordance with the Short Term PPAs for the period between April, 2010 to July, 2011.

(b) The Appellants raised various bills during the said period but they were not paid by the Trading Company within the due dates as stipulated in the PPAs.

(c) The payments made by the Trading Company were inordinately delayed. The delay ranges from 6 days to 268 days with reference to the various claims made by the Appellants. Thus, the Trading Company did not make payment of the invoices amount on the due date of the respective invoice but made payment after significant delays.

(d) The fact of existence of the PPA, the terms and conditions contained in the PPA which prescribed delay payment surcharge in the event invoice amount is not paid within 30 days and the payment of invoices was made only after considerable delay are not disputed. Similarly, in the event of delay, the liability of the Trading Company to make the payment of delayed payment surcharge for the delay in making the payment of invoice amount was also not disputed.

15. In the light of the above undisputed facts, we now enter into the discussion to decide the issue.

16. The Appellants claimed these delayed payment surcharge since there was a delay in payment of the invoice amounts as per the agreed terms contained in the PPAs.

17. According to the Respondent, the word “normally” appearing in the relevant Clause dealing with the billing and payment would indicate that the Trading Company never agreed that in any case, the payment would be made within 30 days and since the Appellants continued to supply power by entering into a fresh PPAs raising a demand for delayed payment surcharge, it would show that the payments made by the Trading Company were accepted by the Appellant without raising any protest in regard to the delayed payment surcharge and as such, the right of the Appellants to claim the same was waived.

18. In the light of the above arguments, the two issues which have to be adjudicated by this Tribunal on the basis of the question framed above are as follows:

(a) Whether the word “normally” could be interpreted to mean that the Trading Company (R-1) was not required to make payment by the due date?

(b) Whether from the conduct of the Appellant, the waiver of its right to delay payment surcharge could be established?

19. In the light of the above issues, we have to see the relevant Clause that refers to the delayed payment surcharge.

20. The relevant provision of the PPA dealing with the delayed payment surcharge is extracted hereunder:

*“Normally, CSPTrdCL shall make the payment within 30days from the date of receipt of bill in the office CE/ED (Technical Cell), CSPTrdCL, Raipur. However, in case the company desires payment within fifteen days from the date of presentation of bill, they shall allow 2% (Two percent) rebate on the billed amount for supply of power. Further, in case payment is made after 30 days, a delayed payment surcharge of 1.00% (One percent) per month shall be paid by CSTRdCL. This delayed payment surcharge shall be calculated on simple interest basis on the number of days outstanding after the said period. In the event of 15th/30th day being a holiday, the next working day shall be the due date for the payment for this purpose”.*

21. While interpreting this provision, the State Commission concluded that the time for making the payment was not the essence of the contract since the word “normally” has been incorporated in the Clause. The said Clause related to the payment of delayed payment surcharge, is not mandatory and therefore, the Appellants were not entitled to claim the delayed payment surcharge.

22. Let us now understand the meaning of the said Clause by reading the entire Clause in which the word “normally” is

used. This provision relating to the delayed payment surcharge would provide three parts:

- (a) Payment of invoice would normally be made within 30 days;
- (b) If the Seller requires payment within 15 days then a rebate of 2% would be allowed to the Buyer;
- (c) In the event payment is not made within a period of 30 days, a delayed payment surcharge at the rate of 1% per month would be payable by the Buyer.

23. Thus, it is evident that the word “normally” appearing in the said Clause of the PPA refers only to the 1<sup>st</sup> part of the Clause for the time for payment.

24. In other words, it means that the payment is to be made normally within 30 days of the date of bill. Therefore, the word “normally” would apply to the first part which deals with the time for payment. In fact, the word “normally” would not apply to the other parts.

25. The second part of the Clause starts with the word “However”. The Second sentence in the second part provides an exception to the first sentence in the first part i.e. to say the Generator may exceptionally require the

Trading Company to pay the bills within 15 days. If the Generator so requires then a rebate of 2% shall be given by the Generator to the Buyer.

26. Therefore, the conjoint reading of the first part and second part would make it clear that the first part provides that normally payment has to be made within 30 days and the second part provides the Generator “however” may require the Trading Company to pay within 15 days by allowing the rebate of 2% in favour of the Trading Company.
27. According to the Respondent, the word “normally” would apply to last part of the Clause which provides for the payment of delayed payment surcharge.
28. This contention is not tenable for the following reasons:
- (a) The last part of the Clause which pertains to the delayed payment surcharges with the word “Further”. The word “Further” has to be given a meaning. This means that the provision of payment of delayed payment surcharge is a provision in addition to the first two parts of the Clause which provides for the normal payment in 30 days referred to in the first part and the exceptional payment within 15 days which refers to the 2<sup>nd</sup> part.

(b) Even assuming that the word “normally” were to be applied to the 3<sup>rd</sup> part relating to the delayed payment surcharge on the clear terms of the PPA, the delayed payment surcharge would have to be paid in the normal course if the payment was not made within 30 days.

29. This would be the appropriate interpretation.

30. In view of our above interpretation, the State Commission’s interpretation as projected by the learned Counsel for the Trading Company as well as the State Commission cannot be accepted as a valid one.

31. The learned Counsel appearing for the Trading Company as well as the State Commission by quoting the relevant commentaries as contained in the Principles of statutory stipulation submitted that the meaning of the word “normally” on the basis of the interpretation given by the State Commission is that the Clause relating to the payment on due date is directory and not mandatory.

32. We are unable to countenance this argument advanced by the Respondents for the following reasons.

33. It is settled law that a contract must be read as a whole even when meaning of one particular clause is being enquired into.
34. The Hon'ble Supreme Court in catena of cases has held that a commercial contract must be interpreted to give a meaning that would be intended by the parties who are dealing in the business. In *Satya Jain v Anis Ahmed Rushdie* (2013) 8 SCC 131, the Hon'ble Supreme Court has made the following observations:

*“....In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.”*

35. Similar observations have been made in yet another case in the case of *Bihar State Electricity Board V Green Rubber Industries* (1990) 1 SCC 731 as under:

*“Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties,*



*even though the immediate object of enquiry is the meaning of an isolated clause.”*

36. Thus, the entire Clause on payment would have to be interpreted in a manner that gives the provision a meaning that would be intended by a prudent businessman and which would be in line with the general objective of the entire PPA.
37. In these Appeals, the Appellants and the Trading Company have entered into a contract for sale and purchase of electricity. Hence, there cannot be any doubt that the payment as per due date of invoice was an essential part. In order to ensure that the Appellants are compensated in the event of delay in making payments by the Trading Company for the power supplied by the Generators, a provision for delayed payment surcharge was deliberately incorporated in the provisions dealing with the payments under the PPA.
38. So, the entire reading of the Clause as a whole would make it clear that the meaning of the word “normally” would indicate that the parties to the PPA intended that “Generally, the payment would be made within 30 days from the date of the receipt of the invoice; in the event the Generator demanded payment within 15 days, then a rebate of 2% would be allowed and if the payment is made after due date

i.e. after 30 days then the Trading Company would be liable to pay the delayed payment surcharge as per the PPA to the Generator”.

39. The learned Counsel for the Appellant in Appeal No.4 of 2014 has cited the following decisions in support of its contentions:

(a) Hon’ble Supreme Court in Civil Appeal No.4126 Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) Vs PPN Power Generation Company while upholding the judgment of this Tribunal on the issue of late payment charges has observed as follows:

**“57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays.”**

(b) In yet another decision rendered by this Tribunal in Appeal No.72 of 2013 in the case of Shamanur Sugars Limited Vs The Karnataka Power Transmission Corporation Ltd & Ors, has held that the claim for delayed payment surcharge gives a right to cause of

action different and distinguishes from the principal amount. The relevant portion is as follows:

***“The present claim for interest on the revised rate of tariff is a fresh cause of action. This claim has been made in view of the violation of the supplemental agreement which was entered into between the parties on 5.5.2006 on the basis of which the Appellant withdrew the OP No.10 of 2006 on 18.5.2006. This does not mean that the Appellant had completely abandoned his right of claim of interest as per the original PPA and Supplemental PPA.”***

40. In the light of the settled law as laid down by this Tribunal as well as Hon'ble Supreme Court, it cannot be said that the provision for payment of delayed payment surcharges was not mandatory and as such, the Appellants are not entitled to claim the delayed payment surcharge which is a different cause of action.

41. In view of what is stated above, we hold that the findings rendered by the State Commission that the relevant clause was not mandatory and as such, the time for making payment was not the essence of contract, is clearly wrong and as such, the same is liable to be set aside.

42. Let us now discuss over the **Second Issue** in regard to the findings rendered by the State Commission stating that the

conduct of the Appellant by way of accepting the delayed payment without any objection and without claiming the delayed payment surcharges at that point of time would show that the Appellants have waived their rights to the delayed payment surcharge and as such, the claim for delayed payment surcharge was not maintainable.

43. Let us now refer to the reasonings and findings on this issue given in the Impugned Order:

*“On scrutiny of the records, it appears that, at the time of receiving payment, the petitioners have neither objected the delayed payment nor refused to receive payment without any delayed payment surcharge according to the agreement, nor received payment reserving their rights for the delayed payment surcharge. If any objection would have been made by them, in writing, no such document has been produced before us. After receiving payments, in due course of mercantile practice, naturally the petitioners would have issued receipts for the same, which might be given under protest, but no copies of such receipts are produced by the petitioners, which may strengthen their claim against the respondent.*

*16. It is further argued by the petitioners that, they have written several letters to the respondent, soon after receiving the payment, but the letters produced, which the petitions have written, after a considerable delay, and it can not be said that, the letters are sent soon after the payment received. contents of letters, also not show any forceful demand from the*

*petitioners, but only show, formal information, sent to the respondent. Though the petitioners in their written submissions stated that, the petitioners have written several letters to respondent from time to time, claiming delayed payment surcharge and the Commission may call the records from the respondent, which may affirm the facts, no list, of those documents, has been filed by them, which they want to call from the respondent. The material documents, possess by the petitioners, are not produced before us. In absence of there important documents, we are constrained to draw adverse inference, against the petitioners.*

*17. In these cases, though there is an expressed provision for payment of delayed payment surcharge, but it is not in a mandatory form. The promisee has option, either to extend the time limit prescribed in the contract, or to object the payment without surcharge. The promisee is always required to be careful at the time of accepting consideration, from the promisor, otherwise his right may be waived. It appears from the surrounding circumstances that, the petitioners, by their own conduct, have waived their right to claim delayed payment surcharge, at the time of receiving payment against the price of energy sold to the respondent, without any objection.*

44. The crux of the findings is as follows:

- (a) **At the time of receiving the payments towards the invoiced bill, the Petitioner neither objected to the delayed payments nor accepted without pre-judice to the rights for claiming the delayed payment**

**surcharges. After receiving the payments, the Petitioners did not issue any receipt mentioning the protest.**

**(b) The Petitioners claimed that they sent several letters to the Respondents claiming the delayed payment surcharge but the letters which have been produced would show that same were sent after considerable delay and not immediately after payment was received. 'Further, the contents of the letters also would not show that the Generators Appellants made a forceful demand from the Respondent.**

**(c) Though there is an expressed provision for payment of delayed payment surcharge, it is not in the mandatory form. The promisee has the option either to extend the time limit or to object to the payments without surcharge. This has not been done. Thus, the Petitioners on their own have waived the rights to claim the delayed payment surcharge at the time of receiving the payments for the invoices without any objection.**

**(d) The Petitioners have not produced material documents to prove their right to get delayed payment surcharge from the Respondent.**

45. The perusal of the reasonings for this finding with regard to waiver would make it clear that since there was no protest at the time of receipt of the invoiced bill amount with reference to the delayed payment surcharges, it must be construed that the Petitioners have waived their right to claim the delayed payment surcharge.
46. The State Commission has filed the written submission. In this written submission, it is stated that the letters stated to have been sent by the Petitioners to the Respondents have not been produced. But, the State Commission has held in the Impugned Order that some letters sent by the Petitioners to the Respondent have been produced but the same would show that those letters have been sent to the Respondent with a considerable delay. Thus, the state Commission admitted that letters have been sent. Further, the contesting Respondent in fact, has not denied the plea of the Appellants that the letters were sent to the Respondent Trading Company claiming delayed payment surcharge.
47. In the light of the factual situation, let us now consider the issue.
48. The State Commission unfortunately failed to consider the expressed provision as regards the waiver contained in the

PPA. The relevant provision is Clause 22/23 of the PPA is extracted as below:

***“No Waiver***

*No waiver of any of the terms and conditions of this Agreement shall be binding or effectual for any purpose, unless expressed in writing and signed by the party giving the same and any such waiver shall be effective only in specific instance and for the purpose given, No failure or delay on the part of either party hereto in exercising any right, power of privilege hereunder shall operate as a waiver thereof.”*

49. So, the above provision would make it evident that as per the PPA, for a waiver to be binding, it must be specified in writing and signed by the parties giving the same. The PPA further provides that a delay in exercise of right would not construe waiver. So, the findings in regard to the Waiver has been rendered by the State Commission in the Impugned Order after having failed to apply its mind on the expressed provisions regarding waiver contained in the PPA.

50. This Tribunal in Appeal No.176 of 2009 dated 18.5.2010 has referred to various principles to be taken note of for deciding the issue of waiver. In this decision, this Tribunal took note of the guidelines given by the Hon’ble Supreme Court in various decisions and those principles are given below:



(a) **Waiver is a matter of intention and can be either expressed or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. In order to hand over a waiver some positive act on the part of the party which is supposed to have waived his right.**

(b) **Waiver is an intentional relinquishment of known right or advantage, abandoning claim or privilege, which except for such waiver, the party would have enjoyed. The waiver is a voluntary surrender of right. It implies the meeting of the minds. It is a matter of mutual intention. The essential element of waiver is that there must be a voluntary and intentional relinquishment of right.**

(c) **Whenever waiver is pleaded, it is for the parties claiming the same to show that an agreement waiving the right in consideration of some compromise came into being.**

(d) **Waiver actually requires two parties; one party waiving and the other party receiving the benefit of waiver. There can be waiver so intended by one party and was sought by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. The waiver is voluntary and conscious act which must be an affirmative act on its part. A mere omission to assert its right or insist upon its right cannot amount to a waiver or dispensation within the meaning of Section 63 of the Indian Contract Act.**

(e) **A person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the court to arrive at a conclusion that he did so with knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right.**

51. So, these principles which have been laid down by the Hon'ble Supreme Court and this Tribunal that the waiver should be an intentional relinquishment of known right or advantage, abandoning claim or privilege which except for such waiver, the party would have enjoyed. The waiver is a

voluntary surrender of right. It is a matter of mutual intention.

52. Whenever waiver is pleaded, it is for the parties claiming the waiver to establish that an agreement waiving the right in consideration of some compromise came into being.
53. The important principles laid down is that a person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the court to arrive at a conclusion that he did so with the knowledge that he had had a right but despite the same acted in such a manner which would imply that he has waived his right.
54. If these principles are adopted in the present case, it is evident that it is the Respondent who raised the plea of waiver has to establish that the Appellants have voluntarily surrendered their rights with a mutual consent.
55. Admittedly, in this case, the Appellants sent letters to the Trading Company claiming delayed payment surcharge. Admittedly, there was no response to the letters nor denied having received the letters. Only under such situation, the Appellant had to approach the State Commission seeking for the appropriate directions.

56. One more argument advanced by the Respondent is that the Appellants did not raise dispute at the time when the payments were delayed and on the other hand, they entered into a Long Term Agreement with Fuel Suppliers and Contractors and had built establishment and infrastructure to operate and maintain the project to discharge its obligations under the PPA.
57. The Appellants submitted that raising the disputes and resorting to litigation straightway would have strained the relationship between the parties which would result in hampering of the operation, and maintenance of the project and eventually generation of electricity and that therefore, the mere delay in sending the letters claiming the delayed payment surcharge cannot be considered to be a waiver.
58. It is quite strange to notice that the State Commission had gone to the extent of observing in the Impugned Order that the letters claiming the delayed payment charges after considerable delay sent by the Appellants did not show that there was any forceful demand made by the Petitioners (Appellants) from the Trading Company.
59. We are at loss to understand as to how the State Commission could conclude that those letters were given only to give some formal intimation and not for a demand for

delayed payment surcharge that too forceful. The fact remains that there was a demand for delayed payment surcharge subsequent to the receipt of the principal amount towards invoice amount.

60. The mere fact that the Appellant continued to supply electricity under the subsequent PPAs could not be construed to be the waiver of a delayed payment surcharge. The choice is always with promisee either to terminate his contract or to claim damages or to continue obligations under the contract and seek to enforce the terms contained therein.
61. The mere fact that the Appellant did not chose to enforce their obligation under the contract immediately by no stretch of imagination be equated the waiver of right under the contract.
62. The contention of the Respondent that by continuing its supply and executing the fresh PPA amounts to waiver of right to claim delayed payment surcharge is totally wrong for the following reasons:
  - (a) As indicated above, any such waiver under Clause 22/23 of the PPA had to be in writing and agreed to by both the parties. Nothing of that kind has been done in this case.

(b) All such fresh PPAs were also executed with same Clause of payment and delayed payment surcharge meaning thereby that both the parties continued with the liability for payment of delayed surcharge would continue.

(c) If the Trading Company wanted to avoid its obligation to pay delayed payment surcharge, it could have insisted for executing of fresh PPAs without the said Clause relating to the payment of delayed payment surcharge. The mere fact that the Appellant continued to execute the fresh PPA with the very same delayed payment surcharge Clause, obviously mean that they continued to re-enforce their liability to pay delayed payment surcharge.

63. Thus, it is clear that it is evident from what is stated above, the findings with regard to waiver rendered by the State Commission is totally wrong especially the ingredients of waiver as referred to in various authorities and as given in Clause 22/23 of the PPA have not been established.

64. Thus, this issue is also decided in favour of the Appellant.

## **65. Summary of Our Findings**

**(i) The entire reading of the Clause of the PPA relating to payment and delayed payment surcharge as a whole indicates that the parties to the PPA intended that generally the payment would be made within 30 days from the date of receipt of the invoice; in the event the Generator demanded payment within 15 days, then a rebate of 2% would be allowed and if the payment is made after 30 days, then the Respondent No.1 would be liable to pay the delayed payment surcharges as per the PPA to the Generator.**

**(ii) The findings rendered by the State Commission that the time for providing payment was not the essence of the contract is wrong and the same is liable to be set aside.**

**(iii) This Tribunal in judgment dated 18.5.2010 in Appeal No.176 of 2009 has referred to the various principles to be taken note of for deciding the issue of waiver. The waiver must show an intentional relinquishment of the known right or advantage, abandoning claim or privilege which except for such waiver, the party would have**

enjoyed. The waiver is a voluntary surrender of right. The person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the Court to arrive at a conclusion that he did so with the knowledge that he had a right but despite that, acted in such a manner which would imply that he has waived his right. Whenever waiver is pleaded, it is for the party claiming waiver to establish that an agreement waiving the right in consideration of some compromise came into being. In the present case, the Respondent has not been able to establish that the Appellants had voluntarily surrendered their rights with a mutual consent.

(iv) The mere fact that the Appellants accepted the payments and continued to supply electricity under the subsequent PPAs cannot be construed to be the waiver of the delayed payment surcharge.

(v) In view of the above, the Respondent No.1 is liable to pay to the Appellants delayed payment surcharge for delay in making payment beyond 30



**days of the date of the respective invoice @1% per month as per the terms of the PPA.**

66. In view of our above findings, the Impugned Order is set-aside. Appeals are allowed.
67. The Trading Company, the Respondent No.1 is directed to make the payment for the delayed payment surcharge to the Appellants as per the terms of the PPA within 30 days of communication of this judgment.
68. However, there is no order as to costs.
69. Pronounced in Open Court on this **2<sup>nd</sup> day of September, 2014.**

**(Rakesh Nath)**  
**Technical Member**  
Dated: 2<sup>nd</sup> Sept, 2014

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

✓ ~~REPORTABLE/NON-REPORTABLE~~