APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 272 OF 2014

Dated: 6th February, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

1. **KARNATAKA POWER TRANSMISSION CORPORATION LIMITED**
   Represented by Executive Engineer (Regulatory Affairs).
   A company incorporated under the Companies Act,1956. Having its registered office at KPTCL Building, Cauvery Bhavan, Bangalore – 560009. …Appellant No. 1

2. **HUBLI ELECTRICITY SUPPLY COMPANY LTD.**
   Represented by Executive Engineer (Regulatory Affairs)
   A company incorporated under the Companies Act, 1956. Having its registered office at P.B. Road, Navanagar, Hubli – 580029. …Appellant No. 2

VERSUS

1. **M/s GLOBAL ENERGY PRIVATE LIMITED**
   Represented by its Director
   Having its Registered Office at 1st Floor, Hostel Shangri La's, Eros Corporate Plaza, 19, Ashoka Road, Connaught Place, New Delhi – 110 001. … Respondent No.1

2. **KARNATAKA ELECTRICITY REGULATORY COMMISSION**
   Represented by its Secretary
   6th & 7th Floor, Mahalaxmi Chambers, No. 9/2, M.G. Road, Bangalore – 560 091. … Respondent No.2

Counsel for the Appellant(s): Sumana Naganand
Garima Jain
Nidhi Gupta
Tushar Kanti Mohindroo
Vismaya Simha for Appellants 1 to 2.

Counsel for the Respondent(s): Hemant Singh
Mridul Chakravarty
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Sourav Roy
Supriya Rastogi Agarwal
Chetan Kumar Garg
Lakshyajit Singh Bagdwal
Ankita Bafna
Robin Kumar
Harshit Singh
Nehul Sharma
Alchi Thapliyal
Sanjeev Singh Thakur
Lavanya Panwar
Indrayudh Chowdhury
Syed Fazl Askari
Nishant Kumar
Gyanendra Singh
Jay Lal
Pawan Singh
Sandeep Kumar
Kamesh Kumar Dvivedi
Rohit Raj Pal
Shailendra Singh for Res.1

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

This Appeal is preferred by the Karnataka Power Transmission Corporation Limited and others against the order passed by the Karnataka Electricity Regulatory Commission ("KERC" for short) in OP No. 20 of 2013 dated 19.06.2014 fixing the price payable by the Appellants to the 1st

Respondent, under Section 11(2) of the Electricity Act for the power supplied during the period April to June, 2010, at Rs. 5.72 per unit.

II. FACTS TO THE EXTENT RELEVANT:

The 1st Respondent herein has a 5 MW bio-mass based power plant in Belgaum District in the State of Karnataka. They were, hitherto, selling power, by availing inter-state open access, to third parties. The Government of Karnataka, in the exercise of its powers under Section 11(1) of the Electricity Act, issued directions to generating companies, operating within the State of Karnataka, to sell their entire surplus output, after meeting their captive requirements, to the State owned distribution companies, and fixed the provisional tariff at Rs.5.00 per unit. In compliance with the Section 11(1) order, the 1st Respondent supplied electricity from 01.04.2010 to 30.06.2010. They received payment for the electricity supplied by them, for the months April and May, 2010, at Rs.5.00 per unit.

The 1st Respondent filed OP No. 20 of 2013 before the KERC, under Section 11(2) of the Electricity Act, contending that they were supplying electricity to M/s Reliance Infrastructure limited, a distribution licensee in Mumbai, at a mutually agreed tariff of Rs.5.79 per unit; because of invocation of Section 11(1) by the State Government, they were forced to supply electricity to the Appellants during the afore-said period; and the adverse financial impact, caused to them thereby, be offset by allowing the price of electricity at Rs.5.79 per unit. The Appellants herein contended before the KERC that Rs.5.00 per unit, as provisionally fixed by the Government of Karnataka, was the reasonable and proper tariff for the electricity supplied to them during the subject period, and there was no reason for payment of Rs.5.79 per unit or any other rate to the 1st Respondent; certain payments were due from the 1st Respondent towards

the energy imported by the Appellants to the generating station of the 1st Respondent from February, 2009 to February, 2012; the said amount had been set-off against the payment due to the 1st Respondent for the electricity supplied during the month of June, 2010; however, they had not quantified the exact amount that was due to them from the 1st Respondent in respect of the electricity imported to the generating station of the 1st Respondent during the above-said period.

In its order, in OP No. 20 of 2013 dated 19.06.2014, the KERC noted that in similar other matters, i.e. in OP No.40 of 2010 and OP No.41 of 2010 decided on 14.02.2013, the Commission had awarded Rs.5.72 per unit, as against the provisional rate of Rs.5.00 per unit fixed by the Government of Karnataka, and this decision had become final as the appeal preferred was dismissed by APTEL on the ground of delay in filing the appeal; in the present OP, the main question that would arise for consideration was fixing of rate for the energy supplied under Section 11 of the Electricity Act; this issue had been finally settled; the Commission had, therefore, suggested that the Appellant prefer separate proceedings regarding set-off of the amount claimed by it, and the 1st Respondent to accept the rate of Rs.5.72 already fixed by the Commission; and it was submitted on behalf of the Appellant that an application had been filed before APTEL for recalling the Order dismissing the Appeal on the ground of delay, and that, subject to the outcome of the application and the Appeal before the Tribunal, they had no objection for fixing the rate at Rs.5.72 per unit.

As a result, the KERC passed the order directing (a) HESCOM (one of the Appellants) to pay Rs.5.72 per unit for the energy supplied by the 1st Respondent to them for the period 01.04.2010 to 30.06.2010, as per the directions issued under Section 11 of the Electricity Act, 2003, after

adjusting the amount already paid towards the same; (b) HESCOM to pay simple interest of the present base lending rate of the State Bank of India, (i) on the amount due to the 1st Respondent towards the electricity supplied by the 1st Respondent during the month of June, 2010, calculated at the rate of Rs.5.00 per unit, from the due date of payment till the actual date of payment; and (ii) on the difference amounts due to the 1st Respondent towards the electricity supplied by the 1st Respondents for the months of April 2010, May 2010 and June 2010 from the date of the Petition till the actual date of payment; (c) HESCOM was at liberty to file separate proceedings against the 1st Respondent in respect of the amount claimed by way of set-off towards the energy imported to the generating station of the 1st Respondent; (d) the rate fixed at Rs.5.72 per unit in this case was subject to the final outcome of the Appeal before APTEL against the Order in OP No.40 of 2010 and OP No.41 of 2010 dated 14.02.2013; (e) the amounts that became due to the 1st Respondent, as per the reliefs given at (a) and (b) above, should be paid by HESCOM to the 1st Respondent within two months from the date of the order.

Aggrieved thereby, the Appellants herein had filed Appeal No. 272 of 2014 before this Tribunal. In its order, in Appeal No. 272 of 2014 dated 05.05.2016, this Tribunal observed that the facts, as emerged from the record, indicated that, prior to invocation of Section 11 by the State Government, the 1st Respondent was supplying electricity to Reliance Infrastructure Ltd.(R-Infra), a distribution licensee in the city of Mumbai, in terms of their bilateral contract dated 25.06.2009 at an agreed tariff of Rs.5.79/kwh for the period 01.09.2009 to 30.06.2010; following the Government's directive to supply power to the state-owned distribution companies, the 1st Respondent had to abandon its contract with R-Infra and commence supply of power to HESCOM at the provisional tariff rate of Rs. 5/ Kwh; while the 1st Respondent received payment for supplies

made in April and May, 2010 at the provisional rate of Rs.5/kwh, it did not receive any payment in respect of the power supplied during June, 2010; furthermore, the 1st Respondent was, admittedly, not paid the differential amount of 72 paise/kwh after final determination of Rs.5.72/kwh as tariff for power supplied by biomass generators pursuant to the State Government Orders under Section 11 of the Electricity Act, 2003; being aggrieved by the Order dated 24.03.2011, of the State Commission, certain renewable energy generators had preferred Appeal Nos.141 and 142 of 2011 and 10 of 2012 and this Appellate Tribunal, vide its Judgment dated 03.10.2012, had upheld the methodology adopted by State Commission for fixation of tariff on the basis of short term market rates for the period April to June, 2010; it was in compliance with this Tribunal's Judgment dated 03.10.2012 that the KERC had revived the proceedings in order to determine the net amount that a generating company could realise after deducting any expenses, which were incurred by the generators, incidental to the sale of electricity based on the above mentioned average short term marketing system during April to June, 2010; the KERC had arrived at a weighted average rate of Rs.5.82/kwh in the said period; furthermore, the KERC had determined the expenses incurred by the generators towards marketing and transmission of electricity including trading margin at 10 paise per unit; accordingly, the KERC had concluded that the said generators like the 1st Respondent were entitled to Rs.5.72 per unit instead of Rs.5 per unit; and, thus, the KERC had fixed a tariff at Rs.5.72/kwh for power supplied pursuant to the State Government's directives under Section 11 of Electricity Act, 2003.

This Tribunal then observed that, in order to test the legality and correctness of the Impugned Order of the KERC dated 19.06.2014, it was proper to reproduce the relevant part thereof, which is as under:

"7- The Commission has noticed that in similar other matters, viz., in O.P. No. 40/2010 and O.P. No.41/2010, decided on 14.02.2013, this Commission had awarded Rs.5.72 per Unit, as against the provisional rate of Rs.5/- per Unit fixed by the Government of Karnataka, and that this decision has become final, as the Appeal preferred by the Respondents therein was dismissed by the Hon'ble Appellate Tribunal for Electricity (ATE) on the ground of delay in filing the Appeal. In the present Petition, the main question that would arise for consideration is fixing of rate for the energy supplied under Section 11 of the Act. As already noted, this issue has been finally settled. Therefore, this Commission suggested the parties concerned in the case that let the 2nd respondent prefer separate proceedings in regard to the set-off amount claimed by it and that the Petitioner to accept the rate of Rs.5.72 already fixed by this Commission. The learned counsel for the 2nd respondent submitted that an Application has been filed before the Hon'ble ATE for recalling the Order dismissing the Appeal on the ground of delay. He submitted that subject to the outcome of the Application and the Appeal before the Hon'ble ATE, the 2nd respondent has no objection for fixing the rate at Rs.5.72 per Unit".

In view of the above discussion, and considering the facts recorded in the Impugned Order passed by the KERC, this Tribunal did not find any merit in the contentions of the Appellants, and held that the Impugned Order passed by the KERC appeared to be just reasonable, legal and correct, requiring no interference at this stage by this Appellate Tribunal; and they agreed with the findings recorded by the State Commission in the Impugned Order. This Tribunal dismissed Appeal No.272 of 2014, and upheld the Impugned Order passed by KERC in O.P. No. 20 of 2013 dated 19.06.2014.

Aggrieved thereby, the Appellants herein filed Civil Appeal No. 12332 of 2016 before the Supreme Court. The said Appeal was taken up along with Civil Appeal Nos. 3577 and 3578 of 2015, and an order dated 16.07.2024 was passed by the Supreme Court disposing of all the three Civil Appeals.

With respect to Civil Appeal No. 12332 of 2016, (preferred against the judgement of this Tribunal in Appeal No. 272 of 2014 dated 05.05.2016), the Supreme Court observed that the Resolution Plan, under the Corporate Insolvency Resolution Process in the case of the 1st Respondent, had been approved as per the provisions of the Insolvency and Bankruptcy Code 2016; however, the proceedings/ order may not make any difference, if the successful resolution applicant was entitled to the amounts due and payable by the Appellant. On merits, the Supreme Court observed that they found that the impugned judgment was not sustainable, as the appeal preferred by the Appellant-KPCCL and another had been dismissed without substantive consideration and discussion; Para 20.11 of the Judgment of this Tribunal merely recorded that the order passed by the KERC dated 19.06.2014 was just, reasonable, legal and correct requiring no interference; this order did not deal with the issues and contentions raised by the Appellants on two counts, namely, (i) mode of computation of average cost and (ii) transmission and distribution cost of power up to the point of delivery; the contentions raised by the parties and the reasons and grounds to accept or reject the pleas, had to be spelt out and elucidated; and there had to be the judicial approach, even if the Appellate Tribunal was in agreement with the findings recorded. The judgment of this Tribunal was set aside and the matter remanded to this Tribunal for a fresh decision on merits. The Supreme Court made it clear that all issues were left open to be decided by APTEL; and that parties

should appear before APTEL for fixing a date of hearing. The said Appeal was allowed and disposed of in the above terms.

It is pursuant to the afore-said directions of the Supreme Court, in its order dated 16.07.2024, that Appeal No. 272 of 2014 has now been taken up for hearing.

III. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri S.S. Naganand, Learned Senior Counsel appearing on behalf of the Appellant, and Sri Saurav Roy, Learned Counsel appearing on behalf of the first respondent. It is convenient to examine the rival contentions under different heads.

IV. DOES THE ORDER OF THE SUPREME COURT REQUIRE THIS TRIBUNAL TO REFRAIN FROM EXAMINING THE APPELLANT'S CLAIM OF SET OFF?

A. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would submit that the remand order of the Supreme Court dated 16.07.2024 was restricted to two limited issues, i.e., (i) mode of computation of the average cost and (ii) transmission and distribution costs of power up to the point of delivery; thus, it is not open for this Tribunal to go into the issue of set-off as pleaded by the Appellants; and this bears reference to the law of limited remand, as settled by the judgement of this Tribunal in **Meghalaya State Electricity Board Lumjingsghai v. Meghalaya State Electricity Regulatory Commission: (Judgement of Aptel in Appeal No. 37 of 2010 dated 10.08.2010).**

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri S.S, Naganand, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the Supreme Court, vide order in Civil Appeal No. 12332 of 2016 dated 16.07.2024, remanded the matter to this Tribunal to consider not only the issue of deduction of transmission charges but also all the other issues that were raised by the Appellants before this Tribunal; therefore, this Tribunal ought to consider the issue of set-off as claimed by the Appellants in the present appeal or by the State Commission if the matter is remanded to it; and the KERC erred in not considering the issue of set-off made during the Section 11 period.

C. ANALYSIS:

Against the order of this Tribunal, in Appeal No. 272 of 2014 dated 05.05.2016, the Appellants herein preferred an appeal, in CA No. 12332 of 2016, to the Supreme Court. Appeals in CA No. 3577 and 3578 of 2015 were preferred by the Appellants herein against the order of this Tribunal in DFR No. 279 of 2014 dated 29.05.2014. A common order was passed by the Supreme Court on 16.07.2024 disposing of all the three Appeals in CA No. 3577 and 3578 of 2015 and CA No. 12332 of 2016.

In so far as CA No. 12332 of 2016, preferred against the order of this Tribunal in Appeal No. 272 of 2014 dated 05.05.2016, is concerned, the Supreme Court held, on merits, that the impugned judgment of this Tribunal was not sustainable as the appeal had been dismissed without substantive consideration and discussions; the order of this Tribunal merely recorded that the impugned order passed by the KERC dated 19.06.2014 was just, reasonable, legal and correct requiring no interference; the order did not deal with the issues and contentions raised

by the Appellants on two counts namely (i) mode of computation of average cost and (ii) transmission and distribution cost of power up to the point of delivery; the contentions raised by the parties, and the reasons and grounds to accept and reject the plea had to be spelt out and elucidated; and this had to be the judicial approach, even if this Tribunal was in agreement with the findings recorded by the Commission.

While setting aside the impugned judgment passed by this Tribunal, and remanding the matter to this Tribunal for a fresh decision on merits, the Supreme Court made it clear that all issues were left open to be decided by this Tribunal.

It is settled law that the Superior Court can set aside the entire judgment of the Court below and remand the matter to the subordinate court to consider all issues afresh. Such a remand is called 'open Remand'. The subordinate court can, in such cases, decide the entire matter afresh, on the available material, on its own accord. The Superior Court may also remand the matter on specific issues with a specific direction through a "Remand Order. This is called a 'Limited Remand Order'. In case of Limited Remand, the jurisdiction of the Court below is confined only to the matter remanded. When a matter is remanded by the appellate forum to the lower court or the lower authority, with specific directions, the lower court or the lower authority should restrict its enquiry to matters prescribed in the order of "Limited Remand". In other words, the Court below, to which the matter is remanded by the Superior Court, is bound to act within the scope of the remand order. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit. **(Meghalaya State Electricity Board versus Meghalaya State Electricity Regulatory Commission (Judgement of this Tribunal in Appeal 37 of 2010 dated 10.08.2010); Mohan Lal vs. Anandibat (1971)**

1 SCC 813; Paper Products Ltd. vs. CCE (2007) 7 SCC 352; Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad AIR 2004 Calcutta 63; K.P. Dwivedi vs. Tate of U.P. (2003) 12 SCC 572; Mr. Muneswar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368; Amrik Singh vs. Union of India (2001) 10 SCC 424; Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 367; Prakash Singh Badal & Anr. Vs. State of Punjab and Ors. (2007) SCC 1).

The remand order passed by the Supreme Court, in the present case, is an open remand, and is not confined to any particular issue or issues, in as much as the Supreme Court made it amply clear that the matter was remanded to the Appellate Tribunal for fresh decision on merits, and all issues were left open to be decided by this Tribunal. Reference made to the two issues in the earlier part of the order of the Supreme Court, ie (i) mode of computation of average cost and (ii) transmission and distribution cost of power up to the point of delivery, was only to show that the contentions raised on these two counts had not been dealt with by this Tribunal in its order which was under challenge before the Supreme Court. However, the remand order required this Tribunal to decide all issues and not merely those two referred to in the earlier part of the order.

We must, therefore, express our inability to agree with the submissions, urged on behalf of the first Respondent herein, that the order of remand of the Supreme Court disabled the Appellant from raising the contention of “set-off” since “set-off” was not one among the two issues specifically referred to in the order of the Supreme Court. The remand order of the Supreme Court, leaving all issues open to be decided by this Tribunal, would require this Tribunal to also decide the issue of “set off”

since such a contention was specifically raised by the Appellants herein in the appeal filed by them (ie in Appeal No. 272 of 2014).

V. IS THE FIRST RESPONDENT ENTITLED TO CLAIM THE RATE AT WHICH IT SUPPLIED ELECTRICITY TO R-INFRA MUMBAI?

A. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would submit that the 1st Respondent was supplying electricity to R-Infra Mumbai under its contractual obligation (*viz., Letter of Intent dated 25.06.2009*) at the rate of 5.79/kWh from 01.09.2009 to 30.06.2010 on a delivery point at the bus bar (*at the injection of power into the grid at the generation point*) basis; however, subsequent to the imposition in terms of an order under Section 11 of the Electricity Act, 2003 by the Government of Karnataka on 03.04.2010, they were compelled to supply power to the Appellants from 01.04.2010 to 30.06.2010 by discontinuing its running contract with R-Infra; Appellant No. 2-HESCOM was expected to buy power at the same price that R-Infra was paying in terms of the same, i.e., Rs. 5.79/kWh; the two issues referred to in the order of the Supreme Court i.e., (i) mode of computation of average cost, the same has no relevance in the matter, as it holds no bearing to the determination of rates of power supply (*whether of the rate pertaining to contract between GEPL or the unjustified rate arrived at by the KERC*); the calculation is as per the contracted price for sale of power between the 1st Respondent and R-Infra, which is the basis of the cost of power that needs to be paid as per Section 11(2), and not the average cost; (ii) transmission and distribution costs of power up to the point of delivery, it is submitted that in LoI dated 25.06.2009, the Delivery Point was "*Interconnection point between Generating Station and*

Karnataka STU", which is at the generating point connection at the BUS bar (*when power is injected into the transmission grid*), after which, all transmission charges and costs were to the account of the buyer, i.e., R-Infra and, accordingly, the Appellant No. 2-HESCOM, and not by the seller; and this supports the fact that there is no issue/ need of adjudication in respect of the determination of the same.

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would further submit that the KERC passed the Impugned Order in negation of Section 11(2) of the Electricity Act, 2003, and has not categorically provided reasons for determination of the rate, robbing the 1st Respondent of its rightful compensation, since the rate as per LoI dated 25.06.2009, i.e., Rs. 5.79/kWh ought to be applicable; and based on this rate, and, in light of the fact that the Appellants have not paid the dues till date, this Tribunal also ought to grant interest on the principal amount(s) which are due to the 1st Respondent.

B. ANALYSIS:

The first Respondent herein filed OP No. 20 of 2013 before the KERC seeking directions to the second Appellant-HESCOM to pay a sum of Rs.56,76,000/- for supply of power in the month of June, 2010; to direct the second Appellant-HESCOM to pay a sum of Rs.22,84,154/- towards offsetting the adverse financial impact suffered by the 1st Respondent herein, on account of the orders of the Government of Karnataka issued under Section 11(1) of the Electricity Act, 2003; and to direct the second Appellant-HESCOM to pay interest at 18% per annum on the principal amount under the earlier claims for the period commencing from the due date of payment till the actual payment thereof.

In its petition, in OP. No. 20 of 2013, the first Respondent herein had specifically stated that they were supplying electricity to M/s. Reliance Infrastructure Limited, a distribution licensee in the city of Mumbai, at a mutually agreed tariff of Rs.5.79 per unit and, due to the invocation of Section 11 by the Government of Karnataka, they were forced to supply electricity to HESCOM during the said period; and they were therefore unable to off-set the adverse financial impact of being entitled to be paid at Rs.5.79 per unit for the electricity supplied by them under Section 11(1).

In its order, in OP No. 20 of 2013 dated 19.06.2014, the KERC noted the submissions urged on behalf of the Appellants herein that Rs.5/- per unit, provisionally fixed by the Government of Karnataka, was the reasonable and proper tariff for the electricity supplied by the first Respondent, and there were no reasons for payment of Rs.5.79 per unit or any other rate to them; certain payments were due from the first Respondent towards the energy by HESCOM to the generating station of the first Respondent herein from February, 2009 to February, 2012, and the said amounts had been set-off against the payment due to the first Respondent herein for the electricity supplied during the month of June, 2010.

It is no doubt true that the first Respondent herein had sought payment of Rs.5.79 per unit before the KERC. The fact, however, remains that, in its order in OP No. 20 of 2013 dated 19.06.2014, the KERC observed that, in similar other matters ie OP No. 40 and 41 of 2010 dated 14.12.2013, the Commission had awarded Rs.5.72 per unit, as against the provisional rate of Rs.5/- per unit fixed by the Government of Karnataka, and this decision had become final, as the Appeal preferred against the said order was dismissed by APTEL on the ground of delay; and, in the present Petition (ie OP No. 20 of 2013), the main question for

consideration was fixing of rate for the energy supplied under Section 11 of the Electricity Act which issue had been finally settled. It is evident, therefore, that it is only in terms of the earlier order passed by it in OP Nos. 40 and 41 of 2010 dated 14.12.2013, that the KERC had disposed of OP No. 20 of 2013 by its order dated 19.06.2014.

It is relevant to note that, in its order in OP No. 20 of 2013 dated 19.06.2014, the KERC had issued directions, among others, that the rate fixed at Rs.5.72 per unit in this case was subject to the final outcome of the Appeal before APTEL against the Order in OP No.40 of 2010 and OP No.41 of 2010 dated 14.02.2013 (ie DFR No. 279 of 2014). Despite being aware that the rate fixed at Rs. 5.72 per unit was subject to the final outcome of the Appeal preferred earlier by the Appellants against the Order of the KERC, in OP No.40 of 2010 and OP No.41 of 2010 dated 14.02.2013, the first Respondent herein chose not to subject the said order of the KERC, in OP No. 20 of 2013 dated 19.06.2014, to challenge by way of an appeal even though, in terms of the said order, they were held entitled only to Rs. 5.72 per unit as against their claim of being entitled for payment of Rs. 5.79 per unit in terms of the mutually agreed tariff at which they were supplying electricity to M/s. Reliance Infrastructure Ltd. Mumbai. it is only the Appellants herein which had preferred an appeal against the order of the KERC in OP No. 20 of 2013 dated 19.06.2014 by filing Appeal No. 272 of 2014 before this Tribunal.

Having permitted the order of the KERC dated 19.06.2014 to attain finality, in so far as their claim in OP No. 20 of 2013 was concerned, the first Respondent cannot now, more than ten years after the said order dated 19.06.2014 was passed by the KERC, that too after the order of this Tribunal, in Appeal No.272 of 2014 dated 05.05.2016, was set aside by the Supreme Court by its order in Civil Appeal No. 12332 of 2016 dated

16.07.2024, seek to re-open the said issue to now contend that they ought to be paid Rs. 5.79 per unit.

It is clear from the order of this Tribunal, in Appeal No. 272 of 2014 dated 05.05.2016, that it had affirmed the decision of the KERC in O.P. No. 20 of 2013 dated 19.06.2014 which, in turn, had passed the said order dated 19.06.2014 strictly in terms of its earlier order in OP No. 40 and 41 of 2010 dated14.02.2013. Both against the order passed by this Tribunal in DFR No. 279 of 2014 dated 29.05.2014 (ie in the Appeal preferred by the Appellants against the order of the KERC in OP. Nos.40 and 41 of 2010 dated 14.02.2013), and the order of this Tribunal in Appeal No. 272 of 2014 dated 05.05.2016, it is the Appellants which had filed appeals before the Supreme Court. The orders of this Tribunal in Appeal No.272 of 2014 dated 05.05.2016, and in DFR No. 279 of 2014 dated 29.05.2014, were set aside by the Supreme Court by its order in Civil Appeal No. 12332 of 2016 dated 16.07.2024, and Civil Appeal Nos. 3577-3578 of 2015 dated 16.07.2024 respectively.

It is consequent upon the order of remand passed by the Supreme Court on 16.07.2024, in an appeal preferred not by the first Respondent herein but by the Appellants, that Appeal No. 272 of 2014 is now being taken up by this Tribunal for hearing. Having permitted the order of the KERC, in OP No.20 of 2013 dated 19.06.2014, to attain finality in so far as they were concerned, despite being made known that the rate fixed at Rs. 5.72 per unit was subject to the final outcome of the Appeals preferred earlier by the Appellants against the Order of the KERC, in OP No.40 of 2010 and OP No.41 of 2010 dated 14.02.2013 (ie DFR No. 279 of 2014, the orders passed in which were later set aside by the Supreme Court), the first Respondent herein cannot in an appeal preferred there against by the Appellants herein, that too more than a decade after the KERC had

passed the order in OP No.20 of 2013 dated 19.06.2014, seek a relief which the KERC had denied the first Respondent in its order in OP No. 20 of 2013 dated 19.06.2014.

The contentions urged on behalf of the first Respondent that they are entitled to be compensated under Section 11(2) at Rs.5.79 per unit, ie the rate at which it had been supplying electricity to Reliance Infrastructure Mumbai at the relevant time, therefore necessitates rejection.

VI. SHOULD THE STATE COMMISSION HAVE DETERMINED THE TRANSMISSION CHARGES?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri S. S. Naganand, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the order passed by this Tribunal, in Appeal Nos. 141 and 142 of 2011 dated 03.10.2012, was a specific remand directing the State Commission to determine the discount on account of transmission charges and marketing expenses; and, thereafter, re-determine the rate of the supplied energy to be paid to the generators for the period from April 2010 to June 2010; however, the KERC failed to determine the discount on account of transmission charges, and had instead arrived at a finding that the same was not payable by the Respondents; the order dated 03.10.2012 having become final, the same is binding on all the parties and on this Tribunal; pursuant to the specific remand by this Tribunal vide order dated 03.10.2012 in the case of *Himatsingka Seide*; the State Commission ought, therefore, to have arrived at a positive determination, rather than merely arriving at a finding that the Respondents herein were not liable to pay the same; while arriving at the said finding, the State Commission relied on material not disclosed

to the appellants; therefore, the Appellants produced the relevant material in the review petition, and also submitted a calculation sheet before the State Commission illustrating that the Respondents herein would have definitely incurred transmission charges for the sale of electricity for the period April 2010 to June 2010; however, the State Commission arrived at a finding that the Respondents were not liable to pay transmission charges, and dismissed the review petition; and the finding of the State Commission that no transmission charges and transmission losses were payable by the Respondents is erroneous and deserves to be set aside by this Tribunal.

B. ANALYSIS:

The order, impugned in the present appeal, was passed by the KERC in OP No. 20 of 2013 dated 19.06.2014 relying solely on its earlier order in OP Nos. 40 and 41 of 2010 dated 14.02.2013. In the impugned order, the KERC observed that the main question, that arose for consideration in the present petition, was fixing of the rate for the energy supplied under Section 11 of the Electricity Act; this issue had been finally settled in its earlier order in OP Nos. 40 and 41 of 2010 dated 14.02.2013; the Commission had suggested to the 1st Respondent to accept the rate of Rs.5.72 per unit already fixed by the Commission; and the Counsel for the Appellant had submitted that an application had been filed before APTEL to recall the order dismissing the appeal on the ground of delay; and, subject to the outcome of the application and the appeal before the Tribunal, they had no objection for fixing the rate of Rs.5.72 per unit. It is such circumstances that the KERC had directed the Appellant to pay the 1st Respondent Rs.5.72 per unit along with simple interest at the present lending rate of the State Bank of India.

The order, in OP Nos. 40 and 41 of 2010 dated 14.02.2013, was passed by KERC consequent on an order of remand passed by this Tribunal. Originally OP Nos. 40 and 41 of 2010 were disposed of by KERC, by its order dated 24.03.2011, fixing Rs.5/- per unit for all categories of generators for the period April to June 2010. Aggrieved thereby the petitioners, in OP Nos. 40 and 41 of 2010, had filed Appeal Nos. 141 and 142 of 2011 and this Tribunal, by its order dated 03.10.2012, had, while expressing its agreement with the principles laid down in the order of the KERC dated 24.03.2011, remanded the matter directing KERC to determine the price of power supply after discounting marketing expenses and transmission charges. Consequent on remand, KERC passed the order in OP Nos. 40 and 41 of 2010 dated 14.02.2013, the appeal against which had been dismissed by this Tribunal, by its order in DFR No. No. 279 of 2014 dated 29.05.2014, on the ground of delay.

As noted hereinabove, the impugned order passed by the KERC, in OP No. 20 of 2013 dated 19.06.2014, was strictly in terms of the order passed by the KERC earlier in OP Nos. 40 and 41 of 2010 dated 14.02.2013 (i.e. the order passed by the KERC consequent on the matter being remanded to it by this Tribunal by its Order dated 03.10.2012). Against the order in OP Nos. 40 and 41 of 2010 dated 14.02.2013, the Appellants herein had filed an appeal in DFR No. 279 of 2014 before this Tribunal, along with an application seeking condonation of delay. This Tribunal, by its order dated 29.05.2014, had dismissed the appellant's application for condonation of delay, and had rejected the Appeal in DFR No. 279 of 2014. As is clear from the contents of the impugned order in OP No.20 of 2013 dated 19.06.2014, the 1st Respondent herein was not only aware that an application to recall the order passed by this Tribunal dated 29.05.2014, rejecting the Appeal filed by the Appellants herein in DFR No. 279 of 2014, was pending on the file of this Tribunal, but also that the rate

fixed at Rs.5.72 per unit was subject to the result of the appeal in DFR No. 279 of 2014. Yet they chose not to prefer any appeal against the impugned order in OP No. 20 of 2013 dated 19.06.2014. On the other hand, it is only the Appellant herein who chose to prefer Appeal No. 272 of 2014 against the said order.

We are of the view, therefore, that, consequent on the appeal preferred by the Appellant in Appeal No. 373 of 2024, (the Appeal in DFR No. 279 of 2014 being numbered pursuant to the order of the Supreme Court dated 16.07.2024), against the order passed by the KERC in OP Nos. 40 and 41 of 2010 dated 14.02.2013, being now partly allowed by us, the findings recorded in the said order of this Tribunal would apply equally to the present appeal.

As noted by this Tribunal in its judgement in Appeal No. 373 of 2024, (ie the Appeal filed against the order passed by the KERC in OP No. 40 and 41 of 2010 dated 24.03.2011), the petitioners in the said OPs had filed Appeal Nos. 141 and 142 of 2011. In its judgment, in Appeal Nos. 141 and 142 of 2011 dated 03.10.2012, this Tribunal had expressed its full agreement with the principles adopted by the KERC, in off-setting the adverse financial impact on the generators for supplying electricity under Section 11(1), and had held that there was no infirmity in the KERC: (i) holding that estimation of the cost of generation would vary from one company to another, as also from one category of generators to another; (ii) it would, therefore, suffice if the rates determined were generally what generating companies could realize from the market when they were generating power without being compelled by the orders under Section 11 of the Electricity Act; (iii) therefore, the rates prevailing in the market during the relevant period became relevant for consideration; (iv) in arriving at the average short-term market price, of Rs.5.68, Rs.6.26 and Rs.5.57 per unit

respectively as prevailing in the months of April, May and June, 2010, based on the statistics of the price of traded power published by the Central Commission; and (v) in adopting the principle that the price of power supply should be determined after discounting the marketing expenses and transmission charges.

This Tribunal was, however, of the view that (a) the KERC had erred in fixing the price at Rs.5.00 per unit without determining the marketing expenses and transmission charges; (b) there was no explanation in the impugned order as to how the discount on account of marketing expenses, and transmission charges was arrived at Rs.0.68, Rs.1.26 and Rs.0.57 per unit during the months of April, May and June 2010; (c) if the traded price was for the energy supplied at the point of interconnection of the network of the State Transmission Licensee with the Inter-State Transmission system, then, for generators directly connected to State Transmission licensee's network, the transmission charges/ system losses of the State Transmission licensee will have to be discounted; and (d) marketing expenses could be the trading margin of the trader. On the basis of the afore-said conclusions, this Tribunal had directed the KERC to determine the discount on account of marketing expenses and transmission charges.

In our judgement in Appeal No. 373 of 2024, we have held that, while passing the order in OP Nos. 40 and 41 of 2010 dated 14.02.2013, the KERC was obligated in law to comply with the remand directions issued by this Tribunal in its judgement in Appeal Nos. 141 and 142 of 2011 dated 03.10.2012; as the said remand order required the KERC to determine the amount to be discounted towards transmission charges and marketing expenses, it was impermissible for the KERC, to go beyond the order of remand dated 03.10.2012, to consider whether or not any amount should be discounted towards transmission charges at all; and, in terms of the

remand order of this Tribunal dated 03.10.2012, the KERC was only required to calculate and determine the marketing expenses and transmission charges to be discounted from the weighted average market price for the period April to June 2010, and nothing more; the KERC went beyond the remand order passed by this Tribunal in causing an inquiry as to whether or not the transmission charges were to be determined, for the remand order passed by this Tribunal, in Appeal Nos.141 and 142 of 2011 dated 03.10.2012, obligated them to undertake the exercise of determining the transmission charges and marketing expenses.

The rate of Rs.5.72 per unit, as determined by the KERC in the impugned order, is in terms of the earlier order of the KERC in OP Nos.40 and 41 of 2010 dated 14.02.2013 whereby the said rate of Rs.5.72 per unit was determined without discounting transmission charges from the weighted average market price for the period April to June 2010, and therefore the impugned order of the KERC, in OP No. 20 of 2013 dated 19.06.2014, must, in terms of the judgement of this Tribunal in Appeal No. 373 of 2024, be set aside on this score.

VII. ARE TRANSMISSION CHARGES AND TRANSMISSION LOSSES TO BE BORNE BY THE BUYERS?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri S.S. Naganand, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the State Commission, without examining anything, has simply adopted the tariff of Rs.5.72, fixed in the case of *Himatsingka Seide* by the State Commission, in its order dated 19.06.2014; this order was challenged in this appeal which was dismissed vide order dated 05.05.2016 following the order made in the case

Himatsingka Seide wherein this Tribunal had dismissed the appeal on the ground of delay; the order dated 05.05.2016 has been set aside vide order dated 16.07.2024 by the Supreme Court in Civil Appeal No. 12332 of 2015, and the appeal has been remanded to this Tribunal for de novo consideration; the State Commission, while arriving at the tariff of Rs.5.72 per unit, has not considered the costs that would be borne by the seller or trader of electricity; if the transmission charges are reckoned, on the basis of the calculations presented by the Appellants, the tariff would be reduced by Rs.31 paise per unit; and the State Commission has failed to consider any factors in arriving at a higher tariff payable by the Appellants for the energy supplied by the Respondents during the Section 11 period.

Sri S.S. Naganand, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the short-term tenders invited by the buyers expressly provided that the seller/trader is required to bear the transmission charges up to the delivery point, and thereafter the charges shall be borne by the buyer; the determination of adverse financial impact is made across the board, and accordingly deduction of transmission charges is also made across all generators; therefore, it is imperative that the deduction of transmission charges ought to be extended to the buyer; even if transmission charges are not borne by the seller, such deductions cannot be attributed to specific generators; determination of adverse financial impact under Section 11 of the Electricity Act, is made across the board by considering the financial implications of all the generators, and consequently determination under Section 11 of the Electricity Act is uniformly applicable to all generators; If deduction of transmission charges is made, it must reflect across the board without attributing the same to a specific generator as in the present case; the State Commission has not considered any of these factors while arriving at a finding that the transmission charges are to be borne by the buyers; therefore, the findings

of the State Commission in the impugned order necessitates interference by this Tribunal; and this Tribunal should pass consequential orders and direct the Respondents herein to refund the excess amount, if any, along with interest .

B. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would submit that the KERC, in its order in O.P. No. 40 and 41 of 2010 dated 14.02.2013, based on the examination of contracts between generators and traders, rightly concluded that transmission charges are borne by buyers, and are not payable by the generators, and the same have therefore not been deducted while computing the tariff payable to them for power supplied in terms of the Section 11 order; in the present case, as per the LoI dated 25.06.2009, R-Infra was to bear the transmission charges as the Delivery point is "*Interconnection point between the Generating Station and Karnataka STU*"; and there is no infirmity in the impugned order dated 14.02.2013 so far as the issue of deduction of transmission charges is concerned.

C. ANALYSIS:

In the judgement of this Tribunal in Appeal No. 373 of 2024 (ie the Appeal preferred against the order passed by the KERC in OP Nos. 40 and 41 of 2010 dated 14,02,2013 - which order was applied in the impugned order passed in OP No. 20 of 2013 dated 19.06.2014), this issue has been specifically dealt with, and this Tribunal has observed that the order of remand, passed by this Tribunal in Appeal Nos. 141 and 142 of 2011 dated 03.10.2012, was limited only to determination of the transmission charges and marketing expenses, and did not permit KERC

to re-open issues to consider whether or not transmission charges should be borne by the Respondent-Sellers or the Appellants-buyers, and to hold that, since transmission charges was not required to be borne by the generators, no amount need be discounted towards transmission charges; the Appellants may also be justified in their submission that they were neither made aware of the material relied upon by KERC nor were they given an opportunity of placing relevant material before the KERC on the question regarding whose liability it was to pay transmission charges, and whether it was of the generators or the Appellants; and the order of the KERC appeared to have been passed in violation of principles of natural justice.

This Tribunal, in its judgement in Appeal No. 373 of 2024, expressed its dis-inclination to delve into the aspect of violation of principles of natural justice, as it was satisfied that, in the light of the order of limited remand, the KERC was required to determine the amount to be discounted towards transmission charges and marketing expenses, from the weighted average market rate, in determining the rate at which the adverse financial impact had to be off-set; it was impermissible for the KERC to go into the question as to whether it was the Appellant or the Respondents which were liable to bear the transmission charges; the contention of the Respondents that they, as Sellers, were not required to pay transmission charges, ought not to have been considered by the KERC, as it required the KERC to go beyond the limited remand order passed by this Tribunal in Appeal Nos. 141 and 142 of 2011 dated 03.10.2012, which they could not have done.

The afore-said observations of this Tribunal, in its judgement in Appeal No. 373 of 2024, would squarely apply to the present case also. We must, therefore, reject the submissions urged on behalf of the 1st Respondent under this head.

VIII. ARE THE APPELLANTS JUSTIFIED IN THEIR CLAIM OF SET-OFF?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri S.S. Naganand, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the Respondent herein, in its memorandum of original petition filed before the State Commission, had sought determination of tariff under Section 11 for 3 months as well as recovery of alleged dues for one month under Section 86 (1) (f) of the Electricity Act; the adverse financial impact that is determined under Section 11 of the Electricity Act, for the period from April 2010 to June 2010, would be uniformly applicable to all generators including the Respondent herein, and the determination of transmission charges would also be consequently applicable to all the generators; however, the petition filed under Section 86(1)(f) of the Electricity Act necessitated the State Commission's consideration of the defence that no sum is payable due to set off of amounts payable by the generator for the energy consumed by it; any set-off made, pertaining to the Section 11 period, ought to have been taken into consideration by the State Commission during the proceedings; the same has also been laid down in the judgement of the Supreme Court in ***Bharti Airtel Ltd. v. Aircel Ltd. & Dishnet Wireless Ltd. (Resolution Professional)*****: (2024) 4 SCC 668,** wherein it was held that the amount which were set-off or adjusted ought to be considered at the time at which parties owed dues to each other; the State Commission ought to have taken into consideration the material placed on record by Appellant No.2 during the original proceedings, which substantiated the amounts adjusted towards the payment for the month of June against the

dues owed by Respondent No.1 for importing power from the grid from February 2009 to February 2012; and the State Commission, without addressing the claim of Appellant No.2 of set off, has erroneously granted them liberty to initiate separate proceedings against the Respondent for the amount claimed by way of set-off towards the energy imported to the generating station of Respondent No.1.

B. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would submit that, despite full compliance of the obligations of supplying power under the Section 11 order, the 1st Respondent's power supply dues remained unpaid for June, 2010, including the differential power tariff for April and May, 2010, which ought to have been paid as per Section 11(2); the purported exercise of setting-off by the Appellants qua alleged outstanding in respect of power imported from the grid during the period February, 2009 to February, 2012 was rightfully disallowed by the KERC in the Impugned Order; O.P. No. 20 of 2013 was filed by the 1st Respondent before the KERC under Section 11(2) of the Electricity Act, 2003, and only became a dispute under Section 86 since even the rate as fixed by the KERC under Section 11(2) was not paid by the Appellants; under Section 11(2) of the Electricity Act there was no scope for the KERC to compensate a party/ buyer (the Appellants) which was supposed to pay the generator (GEPL) under a Section 11(2) order; this is because Section 11(2) is about undoing the adverse financial impact to the Generator and not the other way around; this squarely falls under the settled principle of law that if a statute provides a manner of doing a particular act in a particular way, then it must be done in that manner alone or not at all (Refer: **Mackinon Mackenzie and Company Ltd. vs. Mackinnon**

Employees Union: AIR 2015 SC 1373 [**Para 42**]; thus, the KERC was right in observing that the Appellants may file a separate petition, which remedy was however not availed by the Appellants.

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would further submit that, while claiming such set-off, the Appellants failed to meet the criteria under legal set-off under Order VIII Rule 6 of the Code of Civil Procedure, 1908, or even equitable set-off (Refer: ***Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others:*** *(2004) 3 SCC 504* [**Paras 15 to 19**]; the sum claimed as set-off by the Appellants is not an ascertained sum but a disputed sum; in the present case, Rs. 56,76,000/- was payable for the power supplied in June, 2010, which the Appellants claimed was set-off against import energy charges during February, 2009 to February, 2012; assuming the Appellants' case at the highest, the amount actually calculated by the Appellants for set-off under the said period was only Rs. 43,79,775/, as seen from its letter dated 09.04.2012, on which the Appellants extensively rely; and, thus, the difference of Rs. 12,96,225/- which was denied by the Appellants for the month of June, 2010 even after set-off was not at all justified.

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would also submit that another test is that the amount(s) ought to be legally recoverable from the other party, which was not fulfilled by the Appellants since there was no reasonable basis, evidence or calculations put forth for their purported claim; even otherwise, the test for equitable set-off is not met as per the criteria prescribed by the judgement of the Supreme Court in **Bharti Airtel Limited v. Vijaykumar V. Iyer: (2024) 4 SCC 688,** since they failed to establish that the debt pertains to "*mutual debts and credits or cross demands that have arisen out of the same transaction or are connected in their nature and circumstances*".

C. ANALYSIS:

"Set-off" is defined, in ***Black's Law Dictionary*** **(7th Edn., 1999)**, as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counter-balancing sum owed by the creditor. The dictionary quotes **Thomas W. Waterman**, from ***A Treatise on the Law of Set-Off, Recoupment, and Counter Claim***, as stating: "Set-off" signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand.

Any plea of set off should fall within any one of the five different meanings which can be ascribed to the said term, namely, (*a*) statutory or legal set-off; (*b*) common law set-off; (*c*) equitable set-off; (*d*) contractual set-off; and (*e*) insolvency set-off. (**Jurong Aromatics Corpn. Pte. Ltd. v. BP Singapore Pte. Ltd., 2018 SGHC 215 (High Court of Republic of Singapore); Bharti Airtel Ltd. v. Aircel Ltd. & Dishnet Wireless Ltd. (Resolution Professional), (2024) 4 SCC 668).** Contractual set-off is a matter of agreement. Statutory or legal set-off is created by a statute. For example, Order 8 Rule 6 of the Code of Civil Procedure, 1908. The claim for an equitable set-off must have a connection between the plaintiff's claim for the debt and the defendant's claim to set-off, which would make it inequitable to drive the defendant to a separate suit. Further, such a claim for equitable set-off should arise out of the same transaction, or transactions which can be regarded as one transaction. Equitable set-off is allowed in common law, as distinguished from legal set-off, which is a statutory right. **(Bharti Airtel Ltd. v. Aircel**

Ltd. & Dishnet Wireless Ltd. (Resolution Professional), (2024) 4 SCC 668) Professional), (2024) 4 SCC 668).

The general principles of set-off are that a person who is obliged to pay a sum of money to another person, and also has in his hands an amount of money which that other person is entitled to claim from him, then, instead of physically entering into two transactions by exchanging money twice, that person may utilize the money available in his hand to satisfy the claim due and legally recoverable from such other person to him. This equitable principle has its limitations. While a debtor, making an adjustment or set-off, may have done so on its own volition, the validity of such action can be called in question and decided by a court of law wherein the creditor seeks enforcement of his claim. (***Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504).**

Order 8 rule 6 CPC, which deals with legal set-off, requires that the claim sought to be set off should be for an ascertained sum of money and legally recoverable by the claimant. Both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. (***Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504)**. Legal set off can be sought, under Order 8 Rule 6 CPC, by a defendant against whom the plaintiff has filed a suit for recovery of money. It is only in such a suit that the defendant is entitled to present a written statement containing the particulars of the debt sought to be set off. Under the said provision, the defendant is entitled to seek set off only of the ascertained sum of money legally recoverable by them from the plaintiff.

The right of equitable set-off is independent of the provisions of the CPC. Such a relief is granted in the discretion of the court, and cannot be sought as of right. For extinction, by way of equitable set-off, mutual

debts and credits or cross-demands must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and deny the defendant the amount he is entitled to recover from the plaintiff, except in cases where he has filed a cross-suit of his own. (***Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504).**

A plea, in the nature of equitable set-off, is not available when the cross-demands do not arise out of the same transaction; and a wrongdoer, who has wrongfully withheld monies belonging to another, cannot invoke any principle of equity in his favour and seek to deduct therefrom the amounts which may have fallen due to him. (***Bhupendra Narain Singha Bahadur* v. *Bahadur Singh* [(1952) 1 SCC 436 : AIR 1952 SC 201; *Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504).**

Equitable set off is applicable in cases of natural debits and credits, that is in mutual open and current account cases and in cases where cross decrees arise out of the same transaction or cases where cross demands arise from different sets of connected transactions, as it would be inequitable to permit the decree-holder to recover from the defendant, and drive the judgement-debtor to a cross suit or execution petition. (***Bhoganadham Seshaiah* v. *Buddhi Veerabhadrayya*, 1971 SCC OnLine AP 104).**

The difference between legal set off and equitable set off is that, while in the former, the Court is bound to entertain and adjudicate upon the plea when raised, the defence of equitable set off cannot be claimed as a matter of right, and the court has a discretion either to adjudicate upon it or to order it to be dealt with in a separate suit. The discretion to grant

equitable set off is a judicial discretion which should be exercised according to settled rules rather than individual fluctuating and unsettled opinion. (***Bhoganadham Seshaiah* v. *Buddhi Veerabhadrayya*, 1971 SCC OnLine AP 104).**

The Appellant's claim of set-off, of the amounts payable by it to the 1st Respondent for the month of June, 2010, from the amounts due to it from the 1st Respondent during the period February 2009 to February 2012, has been brushed aside by the KERC directing the appellant, and in granting them liberty, to initiate separate proceedings against the 1st Respondent for the amount claimed by way of set-off. No reasons have been assigned by the KERC, in the impugned order, as to why such a claim could not be adjudicated in OP.No.20 of 2013, and why the Appellant should be driven to file a separate petition seeking recovery of the said amounts from the 1st Respondent.

As this issue of "Set-Off" has not even been examined by the KERC, we may not be justified in considering this issue for the first time in appellate proceedings. While an appeal, under Section 111 of the Electricity Act, is no doubt a continuation of the original proceedings, it is not the original proceedings wherein this issue ought to have been examined in the first instance. We consider it appropriate, in such circumstances, to remand the matter to the KERC directing it to consider the appellant's claim of set-off in accordance with law, after giving both the Appellant and the 1st Respondent a reasonable opportunity of putting forth their respective submissions in this regard. The KERC shall pass a reasoned order on this issue taking into consideration the contentions put forth both on behalf of the Appellant and the 1st Respondent.

IX. ORDER OF NCLT MUMBAI:

A. SUBMISSIONS URGED ON BEHALF OF THE 1ST RESPONDENT:

Sri Saurav Roy, Learned Counsel for the 1st Respondent, would submit that, in light of order passed by NCLT, Mumbai in Case No. CP (IB) No. 2520/MB/V/2018 dated 03.07.2024, no claims against the 1st Respondent survive for any past period(s); in the present case, the Appellants' claim only arises due to the passage of the Impugned Order; and yet the amount(s) awarded to 1st Respondent vide the said Order are still withheld till this date; Section 3(6)(a) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") describes a '*claim'* as "*a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured*"; in the present case, the claim of the Appellants existed at the time of the erstwhile Company's Corporate Insolvency Resolution Process ("**CIRP**"), but were not submitted before the Resolution Professional, and thus, stand extinguished and do not survive now; this is because post the Impugned Order, any right of the Appellants for setoff was reduced to a claim and has to be adjudicated in terms of the NCLT order; this finds reference under Para 27 of the NCLT Order, which is the basis for the principle that, after passage of the Resolution Plan, the Corporate Debtor ought to have a '*fresh start*' on a '*clean slate*', as per the judgement of the Supreme Court titled *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*, reported in *(2020) 8 SCC 531* [**Para 107**].

B. ANALYSIS:

It is for the first time, while putting forth their oral submissions which is followed by their written submissions dated 22.01.2025, that a reference was made, on behalf of the first Respondent, to the order of the NCLT, Mumbai dated 03.07.2024, to contend that, in the light of the said order,

the Appellant's claim for set off ought not to be considered. No IA was filed before this Tribunal even seeking to place the said order of the NCLT on record or raising any contentions as to how the said order would have a bearing on the present proceedings. Further, the Appellants were not even put on notice that such a factual contention was being raised at the appellate stage in the light of subsequent events.

From their Written Submissions, it appears that the order of NCLT Mumbai, on which reliance is placed on behalf of first Respondent, was passed on 03.07.2024 prior to the order of the Supreme Court dated 16.07.2024. In its order, in Civil Appeal No. 12332 of 2016 dated 16.07.2024, the Supreme Court observed that the resolution plan under the corporate insolvency resolution process, in the case of the first Respondent-Global Energy Private Limited, had been approved as per the provisions of the Insolvency and Bankruptcy Code, 2016; however, the proceedings/order may not make any difference if the successful resolution applicant is entitled to the amount due and payable by the first Appellant.

It is after taking note of the aforesaid facts, that the Supreme Court had remanded the matter to this Tribunal for a fresh decision on merits leaving all issues open to be decided by this Tribunal. The order of remand passed by the Supreme Court obligates us to decide all issues raised before us by the Appellants, and the order said to have been passed by the NCLT on 03.07.2024 would not require us, more so in the light of the subsequent order of the Supreme Court dated 16.07.2024, to refrain from examining all the contentions raised on behalf of the Appellant in the present appeal.

In any event, the question which would necessitate examination is whether the Appellant is entitled to any "set off" for the amounts due and

payable by them to the first Respondent for the month of June, 2010. It is only after the said issue is decided and, in case the said issue is decided in favour of the Appellant, would the question of the Appellant being entitled to set off arise for consideration. It is only at that stage that the effect of the NCLT order may, possibly, assume relevance. As we intend to remand the matter to the KERC to examine the issue of set-off, suffice it to leave it open to the first Respondent to put forth their submissions on the effect of the order of the NCLT, and their consequent entitlement to receive or liability to make payment to the Appellant. The KERC shall consider these contentions, in accordance with law, after deciding the issue of "set-off".

X. RELIEF TO BE GRANTED:

As noted in the judgement in Appeal No. 373 of 2024, the Appellant has not questioned the conclusion of the KERC, in its order in OP Nos. 40 and 41 of 2010 dated 14.02.2013, that the marketing expenses, to be discounted from the weighted average market price, should be taken at 10 paise per kWh, and that the rate of interest on belated payment should be at the base rate of State Bank of India on lending, which is at present 9.70% per annum. Even according to the Appellant, the total amount to be deducted both towards transmission charges and marketing expenses is Rs.0.31 per unit. Consequently, as against the amount determined by the KERC of Rs.5.82 per unit, there is no dispute that the Appellant is required to pay Rs.5.51 per unit to the 1st Respondent.

As the Appellant has not subjected the marketing expenses of 10 paise as determined by the KERC to challenge in the present appeal, the undisputed amount which the Appellants are required to pay the 1st Respondent, under Section 11(2) of the Electricity Act, would be Rs.5.61

per unit plus interest on belated payment i.e. simple interest at the base rate of the State Bank of India on lending.

During the course of hearing of Appeal No.373 of 2024 on 08.01.2025, both the Learned Counsel for the 1st and 2nd Respondents in the said appeal, had expressed their desire to give a quietus to the entire dispute by agreeing for the transmission charges to be fixed at 16 paise per unit. It is in such circumstances that we had proceeded to resolve the issue at the appellate stage.

However, Sri Saurav Roy, Learned Counsel for the 1st Respondent in Appeal No. 272 of 2014. would submit that the 1st Respondent does not agree to the fixation of 16 paise to be deducted towards transmission charges; and therefore this Tribunal may be pleased to decide on the facts, and pass directions for determination of the rate of power supply.

As we are remanding the matter to the KERC to decide the Appellant's claim of "Set-Off", we also deem it appropriate to remand the issue relating to the quantum of transmission charges to be discounted from the weighted average market rate, making it clear that since the transmission charges, even according to the Appellant, would be of 21 paise per unit, the KERC would only be required to ascertain whether the actual transmission charges to be discounted would be below 21 paise per unit and, if so, to reduce the said amount from the amount determined as payable under Section 11(2) of the Electricity Act.

XI. CONCLUSION:

For the afore-said reasons, we remand the matter to the KERC on two specific issues, the first relating to the Appellant's claim of "Set-Off", and the second, relating to determination of transmission charges to be discounted from the weighted average market rate. The KERC shall, after

giving both parties a reasonable opportunity of being heard, pass orders afresh on both these aspects, bearing in mind the observations made and the directions issued in this judgement.

The impugned order passed by the KERC, fixing the rate at Rs,5.72 per unit, is set aside, and the matter is remanded to the KERC for its consideration, of the issues remanded, in terms of the observations and directions issued in this judgement. The Appeal stand disposed of accordingly.

Pronounced in the open court on this the **6th day of February, 2025**.

(Seema Gupta) Technical Member	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd