In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 259 of 2019 & IA NO. 1368 of 2019
and
APPEAL NO. 295 of 2019 & IA NO. 1504 of 2019

Dated: 14th July, 2021

Present: Hon'ble Mrs.Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Judicial Member

APPEAL NO. 259 of 2019 & IA NO. 1368 of 2019

In the matter of:

1. **Uttar Pradesh Power Corporation Limited**
   Shakti Bhawan, 14,
   Ashok Marg, Lucknow.
   Through its Chief Engineer (Planning) ...Appellant No.1

2. **Paschimanchal Vidyut Vitran Nigam Limited**
   Urja Bhawan, Victoria Park, Meerut-250001.
   Through its Executive Engineer (Commercial) ...Appellant No.2

3. **Purvanchal Vidyut Vitran Nigam Limited**
   Purvanchal Vidyut Bhawan, P.O. Vidyut Nagar DLW, Varanasi-220101.
   Through its Executive Engineer (Commercial)
   ...Appellant No.3

4. **Madhyanchal Vidyut Vitran Nigam Limited**
   4, GokhaleMarg, Lucknow-226001.

Through its Chief Engineer
(Commercial) ...Appellant No.4

5. **Dakshinanchal Vidyut Vitran Nigam Limited**
Urja Bhawan, 220, K.V. UP-Sansthan Bypass Road Agra, U.P.
Through its Superintending Engineer (Commercial) ...Appellant No.5

6. **Kanpur Electricity Supply Company Limited**
14/71, Civil Lines, KESA House, Kanpur, U.P.
Through its Executive Engineer (Commercial) ...Appellant No.6

Versus

1. **Uttar Pradesh Electricity Regulatory Commission**
Vidyut Niyamak Bhawan, Vibhuti Khand, Gomti Nagar, Lucknow – 2206010. ...Respondent No.1
2. **Sangam Power Generation Company Limited**
JA House, 63, Basant Lok, Vasant Vihar,
New Delhi-110057 ...Respondent No.2

Counsel for the Appellant(s) : Mr. Parag Tripathi, Sr. Adv.
Mr. Buddy A. Ranganadhan
Mr. AnirudhLekhi

Counsel for the Respondent(s) : Mr. C. K. Rai for R-1

Mr. Vikas Singh, Sr. Adv.
Mr. Vishal Gupta,
Mr. Divyanshu Gupta for R-2

APPEAL NO. 295 of 2019 & IA NO. 1504 of 2019

In the matter of:

Sangam Power Generation Company Limited
JA House, 63, BasantLok, VasantVihar,
New Delhi-110057 **...Appellant(s)**

Versus

1 Uttar Pradesh Electricity Regulatory Commission
Vidyut Niyamak Bhawan,
VibhutiKhand
Gomti Nagar, Lucknow – 2206010. **...Respondent No.1**

2. Uttar Pradesh Power Corporation Ltd..
14, Ashok Marg, Shakti Bhawan,
Lucknow (UP)
Through its Managing Director **...Respondent No.2**

3. Paschimanchal Vidyut Vitran Nigam Limited
Victoria Hydel Inspection House,
Hydel Colony, Victoria Park, Meerut – 25001
Through its Managing Director **...Respondent No.3**

4. Madhyanchal Vidyut Vitran Nigam Limited
4A, Gokhale Marg, Lucknow – 226001
Through its Managing Director **...Respondent No.4**

5. Purvanchal Vidyut Vitran Nigam Limited
Vidyut Nagar, Bhikharipur, PP.O. DLW, Varanasi – 220101
Through its Managing Director **...Respondent No.5**

6. Dakhsinanchal Vidyut Vitran Nigam Limited
4A, Gokhale Marg, Lucknow – 226001
Through its Managing Director **...Respondent No.6**

7. Kanpur Electricity Supply Company Limited
14/71, Civil Lines, KESA House, Kanpur
Through its Managing Director ...Respondent No.7

Counsel for the Appellant(s) : Mr.Vikas Singh, Sr. Adv.
Mr.Vishal Gupta
Mr.Sumeet Sharma
Mr.Abhishek Raj
Mr.ParasChoudhary
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Mr.Buddy A. Ranganadhan
Mr.Aashish Gupta,
Mr.Aditya Mukherjee
Mr.Arjun Pall
Mr.AnirudhLekhi
Ms.Krishna Tangirala for R-2 to R-7

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

APPEAL NO. 259 OF 2019

1. Prayer of the Appellant.

(a) That the present Appeal be allowed and the Impugned Order and Judgment dated 28.06.2019 in Petition No. 1353 of 2018 be set aside;

(b) That the claims made by the Appellants before the State Commission for damages on account of the Respondent

No.2's failure to commission the plant be allowed by this Tribunal;

pass any further order or orders as this Tribunal may deem fit and proper.

2. The Appeal No. 259 of 2019 has been filed by Uttar Pradesh Power Corporation Limited, Paschimanchal Vidyut Vitran Nigam Limited , Purvanchal Vidyut Vitran Nigam Limited, Madhyanchal Vidyut Vitran Nigam Limited, Dakshinanchal Vidyut Vitran Nigam Limitedand Kanpur Electricity Supply Company Limited (hereinafter referred to collectively as the **"Appellants"**) under Section 111 of the Electricity Act, 2003 against the Order dated 28.06.2019 (**"Impugned Order"**) passed by the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"State Commission/UPERC"**) in Petition No.1353 of 2018 whereby the State Commission has decided as under:-

> *"a. The Power Purchase Agreement dated 17.10.2008 and the Share Purchase Agreement dated 23.07.2009 would stand terminated. As a consequent of termination of share purchase agreement, the Respondents shall become the owner of Sangam Power Generation Company Limited.*
>
> *b. The Petitioner would transfer the entire land in their possession to the Respondents or their nominee.*
>
> *c. The Respondents will have a right to get the coal linkage for the project transferred in their name or their nominee subject to the guidelines of Ministry of Coal.*

d. The Respondents will pay a sum of Rs.251.37 crore along with interests @ 9% (simple) only on Rs.149.25 crore for the period from 11.04.2014 to 31.03.2019. The interest on cost of financing and interest on debt is not allowed. The reimbursement of advances to NCL, PGCIL etc. administrative expenses, cost of financing and interest on debt shall be subject to verification on the basis of relevant documents or through an independent firm of chartered accountants.

e. The Respondents will immediately release the Performance Guarantee provided by the Petitioner."

3. The Appellant No. 1, Uttar Pradesh Power Corporation Limited ("UPPCL") is a company incorporated under the provisions of the Companies Act, 1956 with the objective to supply electricity within the State of Uttar Pradesh. As per the provisions of the Electricity Act, 2003 ("Act"), UPPCL has five further subsidiaries which operate as distribution companies within the State of Uttar Pradesh. The said distribution companies are namely, Madhyanchal Vidyut Vitran Nigam Ltd., Purvanchal Vidyut Vitran Nigam Ltd., Paschimanchal Vidyut Vitran Nigam Ltd. and Kanpur Electricity Supply Company Ltd.

4. The Respondent No.1 is Uttar Pradesh Electricity Regulatory Commission discharging functions under the Electricity Act, 2003.

5. The Respondent No.2 is Sangam Power Generation Company Limited, a Special Purpose Vehicle, being the present Respondent No. 2, was incorporated by the Appellant No. 1 to undertake the developmental activities pertaining to the Thermal Project.

APPEAL NO. 295 OF 2019

6. **Prayer of the Appellant.**

(a) allow the Appeal and set aside part of the Impugned Judgment dated 28.06.2019 passed by the State Commission in Petition No.1353 of 2018; and

(b) pass any further order or orders as this Tribunal may deem fit and proper.

7. The present Appeal has been filed by **Sangam Power Generation Company Limited** (hereinafter referred to as the **"Appellant"**), under Section 111 of the Electricity Act, 2003 against the Order dated 28.06.2019 (**"Impugned Order"**) passed by the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"State Commission/UPERC"**) in Petition No.1353 of 2018 whereby the State Commission have erred in:

i. Not allowing the claim of Rs.313.24 crores made by the Appellant towards 'BTG Advance';
ii. Allowing only a simple interest merely at 9% when finance was taken by the Successful Bidder (Appellant's Promoters) at 14% from the banks to purchase the equity shares of the Appellant;
iii. Allowing interest only on the sum of Rs.149.25 Crores;
iv. Allowing interest only for the period from 11.04.2014 to 31.03.2019;

v. Not allowing the full claim of Rs.592.65 crores made by the Appellant towards the 'Financing cost of Expenditure @ 14% up to February, 2018 reckoned from middle of Financial Year'; and

vi. Not conclusively adjudicating the rights of the Parties in finality and awarding the reimbursement subject to verification by a chartered accountant, without appointing one and specifying a period within which such directions shall be complied with.

8. The Appellant was incorporated as a Special Purpose Vehicle ("*SPV*") by the Respondent Nos. 2 as the Nodal Agency for development of the Project through an international competitive bid to finance, develop, construct, commission, own, operate and maintain the Project.

9. The Respondent No.1 is Uttar Pradesh Electricity Regulatory Commission discharging functions under the Electricity Act, 2003.

10. The Respondent No.2 is Uttar Pradesh Power Corporation Ltd. The Respondent No.3 is Paschimanchal Vidyut Vitran Nigam Limited. The Respondent No.4 is Madhyanchal Vidyut Vitran Nigam Limited. The Respondent No.5 is Purvanchal Vidyut Vitran Nigam Limited. The Respondent No.6 is Dakhsinanchal Vidyut Vitran Nigam Limited. The Respondent No.7 is Kanpur Electricity Supply Company Limited, are companies incorporated under the provisions of the Companies Act, 1956 with the objective to supply electricity within the State of Uttar Pradesh.

11. This batch of two appeals have been preferred by the Appellants against the order dated 28.06.2019 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition No.1353 of 2018. The Impugned Order is common to both these Appeals and the issues raised are the same. Hence, both the Appeals have been heard together. Since the issues involved in the Appeals are common; a common judgment is being rendered. However, for the sake of brevity, specific figures and impugned order, etc., of Appeal no.259 of 2019 will be referred to by us

Brief facts of case in Appeal No. 259 of 2019

12. The Appellants are supplying electricity to consumers situated across the State of Uttar Pradesh after purchasing power from generating companies such as the Respondent No. 2 apart from State and Central generating stations.

13. On 19.01.2005, the Ministry of Power, Government of India in exercise of its powers under Section 63 of the Act, issued Guidelines for Determination of Tariff by Bidding Process ("Guidelines") for Procurement of Power by Distribution Licensees. The said Guidelines were issued with the objective of *inter alia* reducing the power purchase cost and to ensure transparency and fairness in the procurement process.

14. In pursuance of the above Guidelines, the Government of Uttar Pradesh ("GoUP") declared its intention to harness thermal power within the State of Uttar Pradesh. Accordingly, the GoUP decided to establish a 2 x 660 MW Thermal Power Project at Karchhana,

District-Allahabad ("Thermal Project"). By way of the Thermal Project's operation, the Appellant No. 1 sought to bridge the gap between the demand and supply of electricity within the State of Uttar Pradesh.

15. In view of the above, the Appellant No. 1 invited the private sector to participate, finance, construct, operate and develop the Thermal Project. Consequently on 13.02.2007, a Special Purpose Vehicle, being the present Respondent No. 2, was incorporated by the Appellant No. 1 to undertake the developmental activities pertaining to the Thermal Project. In this regard, it would be relevant to note that in order to identify a potential operator/developer of the Thermal Project, the Appellant No. 1 sought to initiate a competitive bidding process as per the Case-II Competitive Bidding Guidelines issued by the Central Government.

16. Accordingly, in August 2008, the Respondent No. 2 (owned by the Appellant No. 1 as it then was) issued a Request for Qualification **("RFQ")** to initiate a tariff based bidding process to set up the Thermal Project. In terms of the RFQ, the Appellant No. 1 set out *inter alia* the information and instructions for the bidders and the evaluation criteria of the bid. It is relevant to note that as per Clause 1.3.5 of the RFQ, proceedings to acquire certain tracts of land admeasuring 330 hectares and 253 hectares (on which the Thermal Project was to operate), had already been initiated under Land Acquisition Act, 1894.

17. Soon thereafter, on 24.09.2008, the Respondent No. 2 (owned by the Appellant No. 1 as it then was) issued a Request for Proposal

("RFP") as a part of the above bidding process. In terms of Clause 1 of the RFP, its objective was to select a successful bidder to operate the Thermal Project which would also eventually purchase the entire shareholding of the Respondent No. 2 from the Appellant No. 1.

18. Thereafter, on 17.10.2008, the Respondent No. 2 (owned by the Appellant No. 1 as it then was) entered into a Power Purchase Agreement with the Appellant Nos. 2-6 to build, own, operate and maintain the Thermal Project ("PPA"). In this regard, Article 3.1.2A of the PPA provided that the Appellant Nos. 2-6 were to assume possession of a tract of land admeasuring 253 hectares within three months from the date of issue of the Letter of Intent. Furthermore, Article 3.3.3A contains a detailed termination clause that lays out the consequences for non-fulfilment of conditions under Article 3.1.2A of the PPA ("Termination Clause"). The relevant extract of Article 3.3.3A of the PPA is reproduced hereunder:

> *"…In case if the Seller elects to terminate this Agreement, the Procurers shall, within a period of thirty days, purchase the entire shareholding in the Seller for the following amount. Provided such purchase of shares shall be undertaken by the Procurers in the ratio of their then existing Allocated Contracted Capacity:*
>
> *a) total amount of purchase price paid by the Successful Bidder to the shareholders of the Seller to acquire the acquire the equity shares of the Seller as per the RFP; plus*

b) total amount of the Declared Price of Land to the extent paid by the Seller after the acquisition of its 100% shareholding by the Selected Bidder; plus

c) an additional sum equal to ten percent (10 %) of the sum total or the amounts mentioned in sub-clauses (a) and (b) above

In addition to the above, the Performance bank Guarantee of the Seller shall also be released forthwith"

19. A bare examination of the above extracted Termination Clause would make it evident that the PPA itself details the consequences of the termination of the PPA in the event the Seller i.e. the Respondent No. 2 elects to do so. In other words, it is manifest that any termination of the PPA must necessarily be in conformity with the terms of Article 3.3.3A of the PPA and not outside its purview.

20. Soon after the PPA was entered into, the Respondent No. 2 (owned by the Appellant No. 1 as it then was) issued a Letter of Intent dated 20.02.2009 ("**LOI**"). As per the said LOI, the offer of Rs. 2.97/Unit Levellised Tariff of M/s Jaiprakash Associates Ltd. ("**JAL**") had been accepted and JAL had also been selected as the "Developer" of the Thermal Project.

21. Given that the bid offer of JAL had been accepted by the Respondent No. 2 (owned by the Appellant No. 1 as it then was), on 21.02.2009, the Respondent No. 2 also issued a Letter of Award to JAL ("LOA"). The said LOA provided that the bid of JAL had duly been accepted and JAL had also been declared as a "Successful Bidder". Moreover, in terms of the LOA, JAL had been

directed to submit a Performance Bank Guarantee as prescribed in the RFP within 22 days of the issuance of the LOI.

22. Subsequently, on 23.07.2009, and in accordance with Clause 2.7.4.2 of the RFP, one Jaiprakash Power Ventures Ltd.("JPVL") (an affiliate of JAL) entered into a Share Purchase Agreement with the Respondent No. 2 and JAL ("SPA"). As per Clause 2 of the SPA, JPVL agreed to buy from the Respondent No. 2 and the Respondent No. 2 agreed to sell to the JPVL 15,19,772 shares representing 100 per cent of its total issued, subscribed and fully paid up capital. It is therefore evident, that pursuant to the execution of the above SPA, the ownership of the Respondent No. 2 stood transferred to JPVL.

23. At this juncture it would not be out of place to mention that both JAL and JPVL are currently undergoing severe financial distress. In this regard, the Appellants crave leave of this Tribunal to refer and rely on certain documents demonstrating the same during the course of the hearing.

24. It is relevant to note that prior to the Respondent No. 2's takeover by JPVL, the Respondent No. 2 had sought clearance for establishing and operating the Thermal Project from the Ministry of Environment & Forests ("MoEF"). In this regard, the MoEF vide its letter dated 30.10.2009to the Respondent No. 2 accorded environmental clearance to the Thermal Project for a period of 5 years ("Environmental Clearance"). Significantly, though the RFQ and RFP had identified an area of land admeasuring 583 hectares for establishing the Thermal Project, the Environmental Clearance

provided that no land in excess of 555.63 hectares would be required for any activity/facility pertaining to the Thermal Project.

25. Thereafter, upon the receipt of the Environmental Clearance, a formal transfer/conveyance of the land identified for the Thermal Project, was made by the Appellant No. 1 to the Respondent No. 2. In this regard, while on 23.02.2010, an area of 273.448 hectares of land was transferred to the Respondent No. 2 by way of a conveyance deed; on 05.08.2010, another conveyance deed was executed for an area of land admeasuring 239.473 hectares ("Project Land"). Therefore, it is evident that a total of 512.921 hectares of land (constituting 92 % of 555.63 hectares of land approved by the MoEF), stood vested with the Respondent No. 2.

27. The aforesaid position is further buttressed by the fact that as per the Monthly Progress Report for July 2010 representing the monthly progress of the Thermal Project, land admeasuring 322.66 hectares was already recorded as being in the physical possession of the Respondent No. 2. Similarly, as per the Monthly Progress Report for June 2011, reference was drawn to the conveyance deeds dated 23.02.2010 and 05.08.2010 (as mentioned above), in terms of which the land had already been conveyed to the Respondent No. 2 for commencing the Thermal Project. In view of the aforesaid, it is an undisputed fact that the Respondent No. 2 was in possession of substantial tracts of land on which it was to commence the Thermal Project.

28. At this juncture, it would be equally relevant to note that another project such as the Thermal Project in issue was being undertaken

by the GoUP at Bara, District-Allahabad. In this regard, land admeasuring 771.442 hectares was also duly conveyed to the Jaypee Group, viz. JPVL for establishing another thermal power project at Bara. Accordingly, such conveyance of land was made to the JPVL through three separate conveyance deeds dated 23.02.2010, 05.08.2010 and 28.06.2012 for tracts land admeasuring 725.288 hectares, 20.884 hectares and 25.2761 hectares respectively.

29. It is the Respondent No. 2's case that during the intervening period i.e. 2008-2010, certain farmers who inhabited the land on which the Thermal Project was to be established, rose up in protest against the acquisition of the said land by the GoUP. Similar protests also arose when the land situated at Bara, District—Allahabad was acquired to set up another thermal energy project.

30. The proceedings initiated under the Land Acquisition Act, 1894 to acquire land were assailed before the High Court of Judicature at Allahabad ("High Court"). The said proceedings were challenged by way of numerous Writ Petitions before the High Court ("Writ Proceedings"). In this regard, it is also relevant to observe that proceedings to acquire land for establishing the thermal energy project at Bara, District—Allahabad were also assailed before the High Court by way afore-stated Writ Proceedings.

31. On 13.04.2012, the High Court rendered its decision in the above Writ Proceedings. By way of its judgment, though the High Court upheld the acquisition of land by the GoUP at Bara, District—Allahabad, it quashed the acquisition of land at Karchhana,

District—Allahabad that concerned the Thermal Project. In this regard, the High Court observed that unlike the site of the Thermal Project, substantial development/investment amounting to Rs. 1400 crores had been made at the site of the thermal energy project at Bara, District-Allahabad. Therefore, since the thermal energy project at Bara, District-Allahabad had gone far ahead, it was not viable to quash the land acquisition proceedings at the said location. The relevant extract of the aforesaid judgment of the High Court has been reproduced hereunder

> *"It is, thus, clear that the contents regarding development carried out after selecting the developer on the site towards the project and investment of huge amount running in about 1400 crores have not been denied. From the photographs enclosed development on the spot is apparent.*
>
> *In view of what has been stated above, we are of the view that present is not a case where the petitioners are entitled for the relief of quashing the notification under Section 4 read with Sections 17(1) and 17(4) of the Act and declaration under Section 6 of the Act. The Thermal Power Project for generation of electricity having gone far ahead, the prayer for quashing the notifications after lapse of more than two years of declaration under Section 6 of the Act, whereas petitioners were well aware of the proceedings from very beginning and were raising their voice against the rate of compensation only, no ground has been made out to quash the notifications. Thus the prayer of the petitioners in Writ Petition No.32270 of 2010 for quashing the notification under Section 4 read with Section 17(1) and 17(4) of the Act cannot be granted and refused."*

32. On the contrary, land acquisition proceedings concerning the land situated at Karchhana, District—Allahabad (concerning the Thermal Project), were quashed by the High Court. In relation to

the same, the High Court observed that the land on which the Thermal Project was to be operated stood on a different footing inasmuch as no material was brought on record to indicate that any development had taken place on it. However, it is important to note the acquisition of land on which the Thermal Project was to operate, was quashed subject to the farmers depositing the compensation received in lieu of the acquisition. Pertinent in this regard are following the observations of the High Court:

> "*In the present case, apart from letter of intent issued in favour of respondent No.5, execution of power project agreement and conveyance deed, nothing has been brought on the record to indicate that any development towards project has been undertaken. Thus the cases pertaining to Tahsil Karchhana, are on different footing and the relief for quashing the notifications cannot be denied.*
>
> *Writ Petition No.3689 of 2010 (Anand Prakash and another vs. State of U.P. and others) and five other writ petitions relating to Tahsil Karchhana, district Allahabad are allowed. The notification dated 23rd November, 2007 issued under Section 4 read with Section 17(1) and 17(4) of the Act as well as the declaration under Section 6 of the Act dated 3rd March, 2008 are quashed subject to deposit of compensation, if any, received by the petitioners before respondent No.3.*"

33. It is therefore manifest that since the Respondent No. 2 had failed to bring on record any material demonstrating the developmental activity that it had carried out at the site of the Thermal Project, the High Court was pleased to quash the acquisition of land at the site of the Thermal Project.

34. Pursuant to the judgment of the High Court, on 06.08.2012, the Principal Secretary, Energy, GoUP issued a letter to the District Magistrate, Allahabad. By way of the said letter, the District Magistrate, Allahabad was requested to ensure wide publicity of the notice informing persons that they would be able to take back their lands after depositing the compensation received. Accordingly, on 25.09.2012, such a notice was also duly published in the two newspapers being Hindustan Jagran and Dainik Jagran for the said purpose.

35. Thereafter, on 20.11.2012, the Respondent No. 2 issued a letter to the Appellant No. 1 stating that the Respondent No. 2 could no longer pursue the Thermal Project and therefore sought amicable settlement/payment of its dues. Incredibly, even though the Respondent No. 2 stated otherwise before the High Court, it sought to justify its position before the Appellant No. 1 on the ground that non-availability of land and hindrances form the land owners, served as obstacles in commencing the Thermal Project.

36. Soon afterwards, on 10.01.2013, the District Magistrate Allahabad convened a meeting to solicit the opinion of the farmers on the feasibility of establishing the Thermal Project on the tracts of land owned by them. It is important to highlight that the said meeting was attended by numerous farmers, including the Gram Pradhans and revenue officers of the concerned Tehsil. In fact, the farmers in attendance opined that as many as 98% of the farmers who had received compensation for acquisition of their lands, were of the firm belief that the Thermal Project should be established. In such light, given the proclivity of the farmers to establish the Thermal

Project, it is incredulous that the Respondent No. 2 has attributed its inability to establish the same to “hindrances caused by land owners”.

37. Since there were some farmers who had not availed compensation for acquisition of their lands, a proposal was made for their relocation/rehabilitation. It is towards this purpose that on 18.11.2013, a meeting was convened by the District Magistrate, Allahabad. At the said meeting, it was resolved that a list of farmers who had not availed compensation would be prepared and an alternate site would be chosen for their rehabilitation. The said scheme would also ensure that critical area for setting up the Thermal Project would also not be affected.

38. In view of the above, on 07.12.2013, the Appellant No. 1 issued a letter to the Special Land Acquisition Officer (“SLO”), Allahabad informing the SLO of the developments in a meeting convened with the concerned farmers. As per the said letter, the Appellant No. 1 intimated the SLO that a meeting was convened with the farmers who had not availed compensation for the acquisition for their land, but were nevertheless ready to shift to the adjoining tracts of land. However, given that no representative from the Respondent No. 2 was present, the SLO was informed that the meeting could not bear any fruit.

39. In order to reach a meaningful conclusion, on 30.12.2013, the District Magistrate, Allahabad yet again convened a meeting to resolve the issues plaguing the Thermal Project. However, much like the meeting on 07.12.2013, no representative from the

Respondent No.2 was present. Consequently, all efforts at resolving the ensuing issues pertaining to the Thermal Project were rendered futile.

40. At this juncture, it may be noted that almost all the affected farmers had availed compensation in lieu of their land acquired by the GoUP. Further, those farmers who had not availed such compensation had also consented to being rehabilitated within the adjacent tracts of land. Given that, in terms of the High Court's judgment dated 13.04.2012, the acquisition of land concerning the Thermal Project was conditional on the deposit of compensation, it is evident that the land concerning the Thermal Project legally stood acquired by the GoUP. Despite the same, it is stated that the Respondent No.2 failed to carry out, let alone demonstrate any interest in developing/commencing the Thermal Project. On the contrary, the Respondent No. 2 wilfully absented itself from the meetings convened by the District Magistrate, Allahabad and sought to evade its obligation to set up the Thermal Plant on specious grounds as illustrated above. Thus, it is palpable that it was never the Respondent No. 2's intention to establish and operate the Thermal Project.

41. Thereafter, despite the fact that the Respondent No. 2's own inertness was responsible for the failure of commencement of the Thermal Project, the Respondent No. 2 issued a letter dated 11.04.2014 to the Appellant No. 1. As per the said letter, the Respondent No. 2 suggested that continuing with the Thermal Project had become "impossible". Curiously, even though the farmers were amenable to receiving compensation for their land,

the Respondent No. 2 again attributed its unwillingness to continue with the Thermal Project to farmer unrest. Therefore, the Respondent No. 2 sought *inter alia* repayment of its investments incurred towards the Thermal Project.

42. In response to the aforesaid communication, the Appellant No. 1 vide its letter dated 16.05.2014 issued a letter to the Respondent No. 2. In terms of the said letter, the Appellant No. 1 stated that should the Respondent No.2 intend to terminate the PPA, then the same could only be done through specific clause of the PPA along with supporting documents. Accordingly, the Appellant No. 1 requested the Respondent No. 2 to take necessary action in accordance with the provisions of the PPA.

43. In pursuance of the above letter from the Appellant No. 1, the Respondent No. 2 issued a letter dated 11.06.2014 to the Appellants. According to the said letter, the procurers' failure to hand over the requisite land free from any encumbrances, resulted in an impossibility to perform any of the Respondent No. 2's obligations under the PPA. This, in the Respondent No. 2's view rendered by the PPA void in law and entitled the Respondent No. 2 to compensation due to the loss sustained. In view of the same, the Respondent No. 2 requested the Appellants to take necessary action to amicably settle the dispute.

44. Further thereto, on 04.04.2015, the Respondent No. 2 addressed a letter to the Appellants wherein it had highlighted the details pertaining to its previous communications/investments made towards the Thermal Project. In this regard, the Respondent No. 2

stated that certain events transpired, beyond the control of the Respondent No. 2 that led to the frustration of the PPA. Thus, in accordance with Article 17.2 of the PPA, the Respondent No. 2 requested the Appellants to finalise a settlement process and arrive at an amicable resolution of the Respondent No. 2's claims.

45. Thus, on 13.03.2018, the Respondent No. 2 issued a letter to the Appellant No. 1 highlighting its claims for investment towards the Thermal Project in great detail. However, it appears that the Respondent No. 2 lost faith in the ensuing settlement process and therefore revised the quantum of its investments to seek a higher claim of Rs. 1157.22 crores, purportedly incurred towards the Thermal Project.

46. Consequently, in August, 2018, the Respondent No. 2 filed a Petition being Petition No. 1353 of 2018 before the Uttar Pradesh Electricity Regulatory Commission under Section 86(1)(b) and Section 86(1)(f) of the Act read with Regulation 26 and Regulation 29 of the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and the relevant provisions of the RFP, RFQ and PPA ("Petition"). By way of the said Petition, the Respondent No. 2 sought *inter alia*, a direction from the State Commission to refund its investments in the Thermal Project on account of the Appellants' purported default under the RFQ, RFP and PPA. In this regard, the details of the Respondent No. 2's purported investments in the Thermal Project as at 31.03.2018 have been reproduced hereunder:

S.No.	Particulars	Total (Rs. in Crs)
1.	Land	89.97
2.	BTG Advance	313.24
3.	Other Advances (NCL, PGCIL, UPPCL) and BG Charges	40.40
4.	Administrative Expenses	18.88
5.	Cost of Financing	84.88
6.	Interest on Debt from ICICI Bank	17.24
7.	Total	564.61
8.	Financing Cost of Expenditure @ 14% upto February 2015 reckoned from middle of Financial Year	592.61
9.	Total Claims	1157.22

47. Further thereto, the State Commission held hearings. Amongst other issues, the Respondent No. 2 was during the course of these proceedings, directed to keep the Performance Bank Guarantee alive, pending the proceedings before the State Commission.

48. Thereafter, on 05.03.2019, a Preliminary Default Notice under Article 14 read with Article 4.6 of the PPA was issued to the Respondent No.2. As per the said Notice, since the Respondent No. 2 had failed to commence any of the units of the Thermal Project within 12 months after the scheduled commercial operation date, the Respondent No.2 had committed a Seller's event default.

49. In response to the Preliminary Default Notice, on 14.03.2019, the Respondent No. 2 issued a letter to the Appellant No. 1. In terms of the said letter, the Respondent No. 2 again reiterated its position that it was unable to commence/operate the Thermal Project on account of non-availability of any land that was free from

encumbrances. The Respondent No. 2 also sought to attribute its failure to commence/operate the Thermal Project to the purported default of the Appellant No. 1 for not providing any land to it.

50. Pursuant to the above, on 23.04.2019, a letter was addressed to the Respondent No. 2. According to the said letter, the Appellant No. 1 specifically highlighted that the Respondent No. 2 was only providing an evasive reply to overcome its default of the PPA. Moreover, the Appellant No. 1 stated that the Respondent No. 2 had concealed material information pertaining to its investments, during the proceedings before the High Court, which were subsequently being claimed by it. In any event, the Appellant No. 1 underlined that since the farmers had not returned the compensation paid to them, the acquisition of their land stood confirmed. Thus, it was the Respondent No. 2 that stopped showing any interest for the completion of the Thermal Project. Consequently, in exercise of powers under Article 14.3.5 of the PPA, the Appellant No. 1 terminated the PPA and called upon the Respondent No. 2 to pay compensation/damages amounting to Rs. 2324,46,41,280 to it.

51. Thereafter, on 28.06.2019, the State Commission passed the Impugned Order allowing the aforesaid Petition. In this regard, it is submitted that the State Commission entered into grave error in passing the Impugned Order inasmuch as it exceeded its jurisdiction by terminating the PPA and the SPA. Moreover, the State Commission has failed to appreciate that despite not showing any indication to commence let alone operate the

Thermal Project, it has allowed certain claims of the Respondent No. 2 pertaining to its purported investments.

Accordingly, the Appellants are assailing the Impugned Order on the grounds as mentioned hereunder.

Submissions of Appellant/ UPPCL

I. Arguments on limitation:

52. This argument proceeds on the demurrer, without any admission whatsoever by UPPCL viz., that the case of Sangam is wholly meritorious and will necessarily succeed. The only question which is being addressed is that even if the merits are squarely in favour of Sangam (i.e. on a demurrer) whether the petition of Sangam is not liable to be thrown out on the ground of limitation? Thus, nothing stated herein amounts to an admission on the allegation of breach of the PPA, as that is not the issue being addressed herein.

53. The point is well settled that on account of Section 3 of the Limitation Act, 1963, irrespective of whether the ground of limitation has been urged, it shall be the duty of the Tribunal to throw out the case if it is barred by the limitation. Section 3 of the Limitation Act reads as follows:-

"3. Bar of limitation.—

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

Reference is invited to the following judgment:-

A. *V.M. Salgaocar & Bros.* v. *Board of Trustees*, (2005) 4 SCC 613 (Ashok Bhan; A.K. Mathur, JJ)

54. In any event, it is a settled position of law that irrespective of the merits of the case, if a petition is filed beyond the period of limitation, the same is liable to be rejected at the threshold on the ground of limitation alone. Reference is invited to the following judgment in this regard, and the relevant portion is reproduced below:

A. *Abdul Hamid Rowther* v. *Samsunnissa Begum*, (1967) 2 MLJ 195 [Para 1]:

"*1. The defendants who have failed in both the Courts below are the appellants and the only question is whether the suit is barred by limitation, the plaintiff having otherwise a good case on the merits. As will be seen presently, the plaintiff unfortunately will have to fail under the inexorable law of limitation. Learned Counsel for the respondent urged the merits of his client's case; but the Courts have no discretion in the matter of applying the law of limitation and when it does fall on the facts of the case it has to be applied."*

55. The argument on limitation is being dealt with under the following three sub-heads:-

A. The core case of the UPPCL on limitation.

B. The confusing/changing defence of Sangam at the question of limitation.

C. The two scenarios qua limitation i.e., whether or not Sangam has unencumbered possession of the land.

(A) The core case of UPPCL on limitation

i. Article 55 of the First Schedule of the Limitation Act, 1963 reads as follows:-

For the breach of contract express or implied not herein expressly provided for	*Three Years*	*When the contract is broken or (when there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases*

A perusal of the above indicates that in a case of breach of contract, the limitation period begins to run when the breach is committed and the limitation period is three years from such time.

ii. Section 9 of the Limitation Act provides as follows:

"***9.Continuous running of time. –*** *Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:*

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

From the aforesaid provision of the Limitation Act, it is clear that when once cause of action accrues in favour of a party, the limitation period starts running from that day itself, and no subsequent disability or inability on part of the said party can prevent the said limitation period from running.

iii. On this basis, according to UPPCL the dates when the breaches occurred (accepting the pleadings of Sangam as gospel truth on a demurrer) and, therefore, the dates on which limitation must necessarily commence i.e., *terminus a quo* are as under:-

16.01.2009	It was Sangam's pleaded case in its Petition before the UPERC that UPPCL was required to handover possession of the land to Sangam by 16.01.2009, which however was not done. Therefore, the breach by UPPCL occurred on this date which entitled Sangam to file the Petition before the UPERC. Note : Clearly therefore, the purported breach of the PPA if any, according to Sangam itself, had occurred on 16.01.2009. Accordingly, the limitation period for filing a claim for compensation of breach of contract would have expired on 15.01.2012 in terms of Article 55 of the Schedule of Limitation Act, 1963. Pertinently, even the meeting dated 21.11.2015, reliance on the minutes of which has been placed by Sangam to argue that UPPCL admitted its liability took place after the expiry of period of limitation.

20.05.2009	UPPCL was required to hand over land to SPGCL within 3 months of issuance of the Letter of Intent dated 20.02.2009 in accordance with Clause 3.1.2A(iii) of the PPA. Note : Clearly therefore, the purported breach, if any, would have occurred on 20.05.2009 i.e., on the date by when the land had to be handed over to SPGCL and UPPCL allegedly failed to do so. The result is that the limitation period for filing a claim for compensation for breach of contract would commence to run on the said date and would have expired on 20.05.2012 in terms of Article 55 of the Schedule of Limitation Act, 1963.
04.07.2010	Counter Affidavit filed by JPVL before the Hon'ble Allahabad High Court. The said Counter Affidavit suffered from two crucial non-disclosures / non-averments: (i) No averment was made in the Counter Affidavit to the effect that "unencumbered land" had not been given by UPPCL; (ii) No averment was made with regard to the planning / eventuality of the order placed with L&T of Rs. 308 crores, which was subsequently placed immediately after on 23.07.2010. Note: When a counter affidavit was filed by Jaypee before the Allahabad High Court, Jaypee cannot deny that the land in question was subject to litigation. Thus even from the

	date of filing the Counter Affidavit, the Petition filed by Sangam before the UPERC is barred by limitation, as the limitation period in this respect expired on three years from the date of filing the Counter Affidavit, which comes out to 04.07.2013. Moreover, this is to be contrasted with the Bara Thermal Project, wherein a Supplementary Affidavit, bringing on record the expenses incurred by Jaypee for the Bara Project was filed before the Hon'ble Allahabad High Court (after filing of the counter affidavit) [Pgs. 715, 722/CV III]. Pertinently, the only basis on which Bara acquisition was upheld was the work done thereupon and monies invested thereon (admittedly an amount of approximately Rs. 1,400 Crores had been invested by the parent company of Sangam in the Bara project). As against the above, Sangam is alleging to have incurred Rs. 1157 Crores for the present project, none of which was disclosed by it before the Allahabad High Court.
09.12.2010	Annexure filed before the Hon'ble Allahabad High Court demonstrating that the ADM had informed the landowners that work on the project site will not commence till the demand of the landowners are met. It may be pointed out that from a perusal of the record and to the best of UPPCL's knowledge, there was no interim order passed by the Hon'ble Allahabad High Court in this regard.

	Note: It is Sangam's own case that failure to provide unencumbered land was a fundamental breach of the PPA. Assuming its case to be correct that it could not carry its obligation under the PPA, as encumbrance free land was not provided and that it was asked not to carry out work. It again became aware of the alleged breach on 09.12.2010. Three years from such date would expire on 08.12.2013.
13.04.2012	The Hon'ble Allahabad High Court, by its judgment, quashed the land acquisition proceedings subject to the return of the compensation paid to the landowners. Note: Certainly on such date, assuming the case of Sangam to be correct, there was a complete clarity that UPPCL has allegedly breached its obligations of providing encumbrance free land. The limitation period from such date would expire on 12.04.2015.
20.11.2012	SGPCL, by its letter to UPPCL, stated that it can no longer pursue the development of the thermal power plant due to non-availability of land and hindrances from landowners. In this letter, it is also stated that Boiler, Turbine and Generator ("BTG") equipment was ordered and an advance of Rs.313 crores was paid.
11.04.2014	being the date on which SPGCL issued a letter requesting foreclosure of the PPA. In this light, therefore, limitation period for filing a suit / petition for setting aside the PPA or rescission

	thereof as per Item 59 of the Schedule of the Limitation Act, 1963 would expire on11.04.2017.
11.6.2014	The date on which SPGCL issued a letter stating that the PPA had been rendered void. Therefore, limitation period for filing a suit / petition for rescission of contract as per Item 59 of the Schedule of the Limitation Act, 1963 would expire on 11.06.2017.
04.04.2015	The date on which SPGCL issued a letter stating that the PPA stood frustrated due to impossibility. This being the final communication, limitation period for a claim for compensation for breach of a contract (i.e. the PPA) as per Item 55 of the Schedule of the Limitation Act, 1963 would expire on 04.04.2018.

iv. The Petition was filed only on 01.08.2018 and, therefore, the petition was barred by limitation. As such period had expired on 15.01.2012.

v. Hence, from any or all of the aforesaid events, Sangam's petition was barred by limitation.

(B) The confusing/changing defense of Sangam on the question of limitation.

i. The ground of limitation was squarely raised by UPPCL at Grounds E, F, G & H**,** stating that it was Sangam's own case that UPPCL was liable to compensate SPGCL for alleged investments made by it in the Project, due to breach of the PPA on account of non-handing over of encumbrance free land by UPPCL. It is Sangam's case that the breach of the PPA occurred in 2009, i.e. within three months of the issue of LOI. Accordingly, under Article 55 of the Schedule to the Limitation Act, the limitation period of three years for filing a suit for compensation for breach of contract expired way back in 2012, and hence the Petition filed by SPGCL is hopelessly barred by limitation.

ii. The only reply to this ground of limitation by Sangam was in the Rejoinder to their Appeal (and no reply was given by Sangam in its reply to UPPCL's appeal):-

"*..the above contention is misconceived and baseless on the very ground that the Respondent Nos. 2 and gravely failed to appreciate that there was a* ***continuing cause of action*** *for filing the Petition before the Hon'ble State Commission as the Appellant was pursuing this matter with the Respondent Nos. 2 to 7 and had in fact also tried for amicable settlement for the same which ultimately failed constraining the Appellant to file its Petition No. 1353/2018 before the Hon'ble State Commission.*"

iii. It, therefore, follows that the only defense to limitation was, that under Article 55, the cause of action was of a continuing nature. It is to be noted that this argument was not even touched by the learned counsel for Sangam during the first full day of hearing.

With respect rightly so, the concept of continuing cause of action has absolutely no applicability.

Kindly See:-

a. State of Gujarat v. Kothari & Associates, (2016) 14 SCC 761 (Vikramjit Sen; S.K. Singh, JJ)

"It also appears to us that the contract was clearly not broken as the respondents chose to keep it alive despite its repeated breaches by the appellant State. The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as each delay in handing over the canal/site by the appellant State constituted to a breach that was distinct and complete in itself and gave rise to a separate cause of action for which the respondent could have rescinded the contract or possibly claimed compensation due to prolongation of time and resultant escalation of costs... In our opinion, the suit was required to be filed within three years of the happening of each breach, which would constitute a distinct cause of action. Article 55 specifically states that in respect of successive breaches, the period begins to run when the breach in respect of which the suit is instituted, occurs..."

iv. Instead, Sangam orally argued that their starting point of limitation was 20-11-2012 and they got the benefit of extension of time under Section 18 and for this purpose they argued that there were settlement talks which resulted in acknowledgement of the liability by UPPCL. It is pertinent to mention that Section 18 of the Limitation Act and any reliance thereto was not even pleaded by Sangam. However, this is not the pleaded case of Sangam that

limitation was extended by virtue of Section 18 of the Limitation Act. Moreover, this is factually incorrect as will be clear from the fact that the Minutes of Meeting dated 21.11.2015 contemplate the following:-

a. Claim for administrative expenses to be decided in next meeting.
b. Rejecting the claim towards interest payable to ICICI bank as project has not been founded yet.
c. UPPCL will not accept any liability in relation to UPPCL's contract with L&T.
d. Committee to express its acceptance of expenses incurred by R2 after it has appointed an independent auditor and considered its report.

v. It is submitted that prior to dealing with the argument that whether the minutes of meeting dated 21.11.2015 would result in extension of time period of limitation or not, it is pertinent to note that no such averment has been made by Sangam in its Petition before the UPERC. It is submitted that on this ground alone no reliance can be placed by Sangam on provisions of Section 18 of the Limitation Act. In this regard reliance is placed on provisions of Order VII Rule 6 of the CPC, which is extracted herein below :

"Where the Suit is instituted after the expiration of the period prescribed by the law of limitation, the Plaint shall show the ground upon which exemption from such law is claimed.

Provided that the court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set in the Plaint is such ground is not inconsistent with the ground set out in the Plaint."

vi. The aforesaid provision has been interpreted by the High Court of Delhi in the following manner :

"17. I may in this regard notice that Order 7 Rule 6 of the CPC requires the plaintiff, where the suit is instituted after the expiration of the period prescribed by law of limitation, to show the ground upon which exemption from such law is claimed. A perusal of the plaint shows the appellant/plaintiff to have utterly failed to do so. The argument now raised, of acknowledgement of liability contained in communication dated 28th May, 2009 does not find any mention in the plaint. A mere reference in the plaint of the communication dated 28th May, 2009 without pleading the same to be an acknowledgement of liability, does not amount to a pleading within the meaning of Order 7 Rule 6 of the CPC. Rather, the appellant/plaintiff, in the plaint, has pleaded the said communication as "not denying the non-payment of dues of the plaintiff" and as "making counter allegations against the plaintiff and trying to scuttle the real issue". The counsel for the respondents/defendants is correct in his contention that the appellant/plaintiff at the time of institution of the suit was perhaps oblivious of the law of limitation and for this reason only no computation in that regard was made and the argument of acknowledgment of liability is being taken only after realising that the suit filed was beyond time."

[*Rajiv Khanna v. Sunrise Freight Forwarders Pvt. Ltd. and Ors*. (2016) (158) DRJ 334]

A bare perusal of the above, makes it evident that it is imperative for a Plaintiff (Sangam in the present case) to plead exemption from the law of limitation, to claim the benefit of extension under Section 18 of the Limitation Act. No such averment has been made by Sangam in its Petition before the UPERC. Therefore, no reliance can be placed by it on Section 18 of the Limitation Act.

vii. Without prejudice to the above, even on merits, it is submitted that Section 18 has no application to the facts of the present case. It may be pointed out that there are two requirements of Section 18 of the Limitation Act:-

a. acknowledgement of liability in writing; and

b. made "before the expiration of the limitation period for the suit".

Reference here may be made to J.C. Budhiraja v. Orissa Mining Corporation Limited & Anr., (2008) 2 SCC 444 (H.K. Sema; G.P. Mathur; R.V. Raveendran, JJ)

viii. The meeting took place on 21.11.2015. The Minutes are signed by UPPCL on 06.02.2016. While referring to the Minutes dated 21.11.2015, assuming that the Minutes amount to admission of liability by UPPCL, that admission took place only on 06.02.2016 (which even according to Sangam is the so-called "acknowledgment in writing" as contemplated in Section 18) and, therefore, could only revive and extend the limitation if the cause of action had accrued only after 07.02.2013 or later. As pointed out in Para 3(A)(ii), the cause of action, even according to Sangam itself, had accrued much prior to the said date i.e. 16.01.2009.

ix. We now come to the 2nd issue as to whether the minutes of the meeting dated 21.11.2015 communicated on 6.2.2016 can be said to amount to an acknowledgement of liability of UPPCL in writing. There is nothing in the said minutes which lead to such a conclusion. The Hindi version appropriately translated as follows-

"UPPCL shall convey to the Government the issue of acceptance of the supply order placed on M/s. L&T. The matter shall be discussed with L&T. If the Government gives its approval, then the question of taking over of the said contract of L&T by UPRVNL on agreed terms will be examined/ considered."

x. It is thus, clear that the so called points of agreement was not only to be only examined/considered but also dependent on permission by the Government of UP. This permission was never given. Thus, it was at best, a conditional understanding between the parties, subject to permission by the Government of UP. Factually also, it is nobody's case that any such approval was either given, much less communicated to the Sangam. The pleadings in this regard in the Written Submissions filed by Sangam before the Commission, are as follows:-

"In the meeting of Respondent and Petitioner for amicable settlement it was proposed that the Karchana STPP may be executed by Uttar Pradesh Rajya Vidyut Utpadannigam Limited (UPRVUNL) and BTG order given to L&T will be transferred to UPRVUNL subject to necessary approval and same will be reimbursed by L&T or UPPCL to Petitioner. BTG advance given by petitioner will be adjusted with the understanding that either party i.e. L&T and petitioner would not have any further claim interse on this account in furtherance of this understandings were sought by the Respondent and same duly signed by L&T and petitioner were submitted.

However, no confirmation has been received in this regard from Respondents for a period of 16 months and in the meanwhile, in March 2017, L&T filed a case against Petitioner in the High Court at Delhi for damages and release of performance bank guarantees submitted by L&T. Hon'ble High Court stayed the encashment of BG and matter was referred to arbitration."

xi. Even if the Government of UP gave such an approval, all that was agreed was that the question of acceptance of the supply order on L&T by UPRVUNL was only agreed to be considered/ examined for working out the agreed terms. As pointed out, this stage was never reached. In other words, the minutes dated 6.2.2016 do not amount to any admission of any liability.

xii. In any event, the discussions between the parties during the settlement discussions cannot be relied upon for the purpose of adjudication of disputes. In fact Sangam in its Appeal have themselves admitted that the settlement discussions between the parties cannot be referred to.

xiii. The said Minutes do point out that there was a demand of Rs. 921.46 crores from Sangam. It shows, with respect, the fair and reasonable approach adopted by UPPCL that even after getting the approval of the State Government, an agreement to that effect was to be entered into between UPRVNL and L&T for acceptance of the supply order, then the alleged principle investment of Sangam may be utilized by the new project proponent, namely UPRVUNL. Naturally, the question of whether the supply order represented the correct total value, whether the technology was

apposite, whether the rates quoted by L&T were reasonable for the specifications etc. would all be aspects, which would be considered at the time of entering into a contract for acceptance of supply order and that too after the Government of UP could have given the permission. Then the question of fulfilling the rigorous requirement no. 2 does not arise. Even the requirement no.1 of Section 18 namely acknowledgement within the period of limitation is not fulfilled, as for the reasons set out in Para 3(B)(v).

(C) The two scenarios qua limitation i.e., whether or not Sangam has unencumbered possession of the land.

i. There are 2 scenarios which are possible – 1st scenario is that unencumbered possession of land was not made available to Sangam – which is the explicit case of the Sangam; 2nd scenario is that Unencumbered land was made available to Sangam, which is the stand of the UPPCL.

ii. Since, it is the question of limitation which is being examined, it is always on a demurrer, it would be appropriate to first proceed on the case set up by Sangam, namely that it did not receive unencumbered possession of land.

iii. If this is correct, on Sangam's own case, then it is not only a breach, but a fundamental breach of RFP and PPA. Naturally, therefore the breach occurred and the cause of action accrues and arises on the date when under the RFP & PPA, Sangam was entitled to unencumbered land (which as per Sangam is

16.01.2009. This aspect was referred to Para 3(A)(ii) above. Clearly, therefore, the petition is barred on the ground of limitation.

iv. The 2nd scenario is that Sangam got possession of the unencumbered land. If that is so, the issue of limitation may take a back stage, for the simple reason that then there would be no cause of action whatsoever, as the only ground for filing the present petition disclosed by Sangam is that the contracts are frustrated, as it did not get unencumbered possession of land. This position (*viz.,* Sangam was in possession) is also borne out from Sangam's own letters dated 29.09.2014 and 22.10.2016 to the Ministry of Environment & Forests, wherein Sangam has expressly admitted that it was in physical possession of a total of 552.719 hectares of land demarcated for the Project.

56. The crucial question, which is a disputed question of fact whether or not Sangam got possession of the unencumbered land. The oral pleas of the parties are not material, particularly when there are contemporaneous documents on record.

57. Three documents in this connection are very vital towards conclusion of the dispute sought to be raised by Sangam:-

A. The 1st Conveyance Deed/ Sale Deed dated 23.2.2010 wherein it has been stated as follows:-

"*The Vendor hereby for a consideration mentioned in Clause 3 grants, conveys, sells, transfers and assigns to the vendee the property and all its estate, right, title, interest and claim*

therein whether held in law or in equity and the possession thereof together with all liberties, easements, privileges, rights and advantages and appurtenances attached thereto. The Vendor do hereby covenant that there is no claim, right, title or interest therein by any Third Party and that the Vendor is lawfully seized and possessed of the property free from any hindrance, restriction, disturbance, encumbrance, attachments, liability or defect whatsoever…"

The fact that in the pending Writ Petition challenging the acquisition filed by the land owners which was a batch of Writ Petitions including CWP 20772/2008, CWP 32270/2010, etc., a Counter Affidavit was filed by Sangam on 04.07.2010.

The said Counter Affidavit is bereft of any reference to very important facts, which are the fountain head of the case and cause of Sangam before the State Commission and before this Tribunal, namely:

(a) that Sangam had invested a sum of Rs.308 Crores by placing a supply order on L&T for supply of 3x660 BTG (Boiler Turbine Generator) units (quite apart from the fact that only two were needed)
(b) that no possession of the land was given to Sangam by UPPCL

B. In fact, after filing of the Counter Affidavit dated 4.7.2010, the 2nd Conveyance Deed dated 05.08.2010, similar to the first, was executed inter parties. Therefore, despite being fully

aware as to the alleged issues plaguing the land acquisition, Sangam chose, with open eyes, to proceed with executing even the 2nd Conveyance Deed. In the 2nd Conveyance Deed, the following has been recorded in relation to the possession of the land

"*The Vendor hereby for a consideration mentioned in Clause 3 grants, conveys, sells, transfers and assigns to the vendee the property and all its estate, right, title, interest and claim therein whether held in law or in equity and the possession thereof together with all liberties, easements, privileges, rights and advantages and appurtenances attached thereto.*

The Vendor do hereby covenant that there is no claim, right, title or interest therein by any Third Party and that the Vendor is lawfully seized and possessed of the property free from any hindrance, restriction, disturbance, encumbrance, attachments, liability or defect whatsoever…"

58. From the above, the following important aspects emerge:-

A. It is settled law that a document reduced in writing sets out what is transpired is to be accepted as correct, save and except exceptional circumstances in which case, the party who has executed the document is under an obligation to specifically plead that the document is false and incorrect and to prove it in a manner known to law.

B. It has been suggested in the Appeal hearing that no credence be given to the registered Conveyance Deed

stating that physical possession of land was handed over to the Sangam. This argument is not only unacceptable but is prohibited in law. Reference is made to Sections 91 and 92 of the Indian Evidence Act, 1872.

Kindly see:

(i) Deccan Chronicle Holdings Ltd. v. Yes Bank Limited, 2016 (3) CTC 651 – wherein it was held as follows:

"*10. The sale deeds executed contain an identical clause of handing over possession. We are of the view that once the sale deed is executed and registered, nothing contrary can be pleaded to what is already being specified therein in view of Section 92 of the Indian Evidence Act, 1872. Thus, even the story of possession being retained by the plaintiff does not hold good and is an endeavour to create a question mark on the possession issue of the property even when the sale deed has specified to the contrary."*

(ii) Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595, wherein it was held as follows:

"*17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of*

credit than parol evidence. it is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Strake on Evidence p. 648).

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. having regard to the jural position of Sections 91 and 92 and the deliberation omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing."

C. The only exception where oral evidence can be lead to explain or detract from the express word from a written document are the ones set out in those Sections and illustrations therein. The present case is not covered by any one of them. More importantly, there is no pleading either in the Petition or before this Court. Therefore, they cannot when confronted with the contents of the documents simply wish them away.

59. Secondly and even more importantly, there was no whisper of this huge alleged investment of Rs.308 crores before the High Court.

As pointed out by the other side during the hearing, that land acquisition in the two matters, namely Karchana land acquisition (present matter) and Bara land acquisition (other matter) were pending at the same time. The only basis on which Bara acquisition upheld was the work done thereupon and monies invested thereon (admittedly an amount of approximately Rs. 1,400 Crores had been invested by the parent company of Sangam in the Bara project).

60. Had these averments been made by Sangam of investment of Rs.308 crores, or of the exaggerated amount of Rs. 1157 Crores allegedly incurred by Sangam as expenditure, and claimed in the present appeal, the Writ Petitions before the Hon'ble Allahabad High Court may well have been dismissed as well (thereby upholding the land acquisition proceedings in respect of the present Project). It may be pointed out that the date of Counter Affidavit was 04.07.2010 and the LOI was placed on L&T on 23.07.2010. There is no explanation as to why thereafter this very important aspect was not brought to the notice of the High Court by way of a Supplementary Affidavit. Pertinently, such a Supplementary Affidavit, bringing on record the expenses incurred by Jaypee for the Bara Project was filed before the Hon'ble Allahabad High Court**.** The judgment was pronounced on 13.04.2012. Obviously, Sangam was looking at ways of exiting from the PPA.

61. The Hon'ble Allahabad High Court, after considering the submissions made by Sangam in its Counter Affidavit, expressly recorded that Sangam did not get unencumbered land in order to

complete the work at site. In other words, the Counter Affidavit was so structured as to assist the Petitioners in succeeding before the High Court so that Sangam could then back out from the PPA because of the competitive rate offered by them, namely 2.97 per KWH as opposed to 3.02 per KWH at Bara. This difference of 5 paise per unit in the project of 2x660 MW over the life of the PPA would aggregate to a potential revenue to Sangam of Rs. 49.14 crores per annum.

62. In fact, the contents of the 2 Conveyance Deeds were affirmed and acknowledged by Sangam in its letters dated 29.09.2014 and 22.10.2016 written to MOEF. In fact, in its letter dated 22.10.2016,Sangamcategorally admits that:

"*A total of 552.719 Ha Land was acquired as on 07.10.2016 and it is in physical possession of SPGCL. Construction of 14.7 km long boundary wall (1 m above the plinth level) along the periphery of project site has been completed.*"

63. Hence, the documentary evidence before the Commission was not only contrary to the oral stand of Sangam but downright destructive of the same. Far from pleading and proving that the Conveyance Deeds were wrong, Sangam actively canvassed before a Statutory Authority, i.e. the MoEF on two different occasions that it was in possession of the land.

64. In a bid to distance itself from the categorical admissions made in the above referred two letters written by Sangam to MoEF, Sangam has orally argued in this Appeal that these letters were

written by it under compulsion from UPPCL. This is completely contrary to the pleaded case of Sangam in its Petition before the UPERC, where it has averred as under:

"*The Respondent has obtained environmental clearance on 30.10.2009. The Petitioner subsequently made all efforts to renew the same from time to time hoping that Respondent will provide land to the Petitioner for execution of the Project.*"

65. Further, it was contended by Sangam that the UPERC while adopting the levelized tariff of Rs. 2.97/kWh noted as follows:

"*In respect of handing over of possession of land ...(UPPCL statement)..., the same would be completed very shortly*."

It is to be noted that the hearing before the UPERC was concluded on 15.02.2010 and this statement, therefore, relates to 15.02.2010 before the execution of the first conveyance deed. The order was passed nearly 6 months later on 27.08.2010.

66. It is wrong to infer from the order that even on 27.08.2010 after the execution of the two conveyance deeds, UPPCL was submitting that the land would be handed over "*very shortly*". The handing over "*very shortly*" refers to the status of 15.02.2010 after which on 23.02.2010 and 05.08.2010 (more particularly 05.08.2010), the land was indeed handed over as witnessed by the conveyance deed.

67. In dealing with the letters dated 09.12.2010/21.01.2011, a reference is made that the DM, Allahabad had assured the land owners that the work for the power plant "*shall not start unless the demands of the land owners are met*".

68. The subsequent letter of the DM dated 24.01.2011 is mentioned but its clarification in respect of the earlier letter referred to at S. No. 23 of LOD has not been set out.

69. While dealing with a reference is made to the fact that out of 1942 land owners, only 1850 had received compensation. However, this aspect had been fully answered at the stage of the written submissions, wherein, it was pointed out that in all only 5 hectares of land was in the possession of farmers who had not handed it over back out of the total 555 hectares and not 583 hectares as is sought to be contended

70. As regards the map handed over by Sangam during the course of arguments, it is noteworthy that the map was never filed with the pleadings and came to be handed over across the Bar at the stage of final hearing and was for the first time filed before the UPERC along with the written submissions submitted after the final arguments. No detailed explanation in respect of the map was given.

71. In the written submissions which were filed by Sangam, nearly 30 days after conclusion of the final hearing, the following was stated in respect of the map:

"*In this regard, the Petitioner had submitted a detailed layout plan before this Hon'ble Commission during the hearing which clearly depicts that the land for which land owners had not received compensation was scattered throughout the project site and the superimposition in the layout of the proposed power plant clearly shows that various key elements of the power plant were to be constructed on places where the land was not available.*"

72. It is to be noted that this is the only place in the entire proceedings before the UPERC where any reference is made to the map. This was answered by UPPCL in the following terms:-

"*during the course of hearing of the aforesaid matter, the Petitioner had the furnished a copy of the map to establish that complete land free from encumbrances could not be handed over to the Petitioner as people are still living on the land. Photocopy of the map as provided by the Petitioner would itself make it clear that there was no disturbance in the critical area where the plant was to be established.*

However, the following chart would establish that there were only very few farmers who were encroaching on the land, despite the land having been acquired. It may also be needless to say, it that some of the encroachment on the land is attributable to the Petitioner, since the Petitioner was not taking any interest in keeping the possession of the land and creating necessary security infrastructure. The Respondent was to provide land which under the terms and condition of the PPA was already done and

not to maintain law and order, for which the Petitioner company was free to approach local administration.

Land Owners	*Total No. of Persons*	*Related Land*	*Note*
Those who have not taken compensation	*122*	*31.0543 ha*	
Those who have taken compensation upto 2014	*75*	*23.40 ha*	*After quashing of land acquisition order in 2012.*
Rest land owners	*47*	*-*	*-*
Those who are agreed for exchanging the land	*26*	*2.56 ha*	*-*
Those who have neither taken compensation nor land in exchange	*21*	*5.091 ha*	

Therefore, the map handed over by Sangam during the oral arguments of the present Appeal is entirely misleading inasmuch as Sangam has failed to disclose the date as on which the said map purports to show the status of the project site. Neither before the UPERC nor this Tribunal has Sangam stated the date as on which this map was drawn up.

In contrast, UPPCL has in its written submissions before the UPERC, which was the very first occasion when UPPCL could respond to the map handed over by Sangam, UPPCL has provided a detailed break-up of the amount of 31.0543 hectares of land that Sangam has alleged was the encumbered land. As would be evident from the table above, which shows that Sangam's averment that 31.0543 hectares of land was encumbered was incorrect.

73. UPPCL had expressly denied the claim and the quantification thereof by Sangam before the UPERC. It was the stated case of UPPCL that there was a significant difference in the alleged expenditure made by Sangam towards the Project, as shown before the Hon'ble Allahabad High Court, and as shown before the UPERC. Pertinently, before the Hon'ble Allahabad High Court, Sangam had taken the position that no significant investments were made towards the Project, which in fact was the basis on which the Hon'ble Allahabad High Court was pleased to quash the land acquisition proceedings. On the other hand, before the UPERC, Sangam was claiming that it had made an investment to the tune of Rs. 1157 Crores.

74. Pertinently, while raising exaggerated claims of Rs. 1157 Crores, Sangam has failed to produce even a single document in support of the expenditure allegedly incurred by it. The only document filed by Sangam before the UPERC in respect of its claims was a single-page tabular statement highlighting purported expenditures incurred by it.

75. It has been contended by Sangam that the PPA did not envisage a situation such as the one that has arisen in the present case, namely, alleged failure to handover possession of encumbrance free land to Sangam. This submission is incorrect, in light of the express provisions of Clause 3.3.3A of the PPA.

76. In terms of Clause 3.1.2A.iii) of the PPA, UPPCL was to hand over possession of land to Sangam. The provision provides as under:

"3.1.2A. The Procurers shall ensure that the following activities are completed within the time period mentioned below:

…

iii) Handing over possession of additional land of 253 hectares within 3 months from the date of issue of LOI;"

77. According to Clause 3.3.3A of the PPA, SPGCL would be entitled to terminate the PPA on account of UPPCL's failure to hand over possession of land to SPGCL in the manner aforesaid.

78. UPPCL replying to the letter of Sangam dated 11.04.2014, wherein Sangam had alleged that the plant had become "financially unviable" and "impossible" due to land issues, had pointed out any termination could only be done under clause 3.3.3A. At no point did Sangam Power proceed to terminate the contract in the only manner which was available to it, *vis a vis* reference to clause 3.3.3A. The reason is not far to seek. The reason is that the PPA provides for cap / ceiling on the damages on the termination of contract which aggregates to approximately Rs. 124 Cr.

79. In this regard, Clause 18.13 of the PPA assume significance, and has been reproduced below:

"*18.13 Breach of Obligations*

The Parties acknowledge that a breach of any of the obligations contained herein would result in injuries. The Parties further

acknowledge that the amount of the liquidated damages or the method of calculating the liquidated damages specified in this Agreement is a genuine and reasonable pre-estimate of the damages that may be suffered by the non-defaulting party in each case specified under this Agreement."

It is a settled position of law that when such a sum has been named in the contract as liquidated damages (and which is a genuine pre-estimate of the loss), no amount in excess of such amount can be granted to the injured party. Moreover, even in such cases, the injury caused has to be pleaded and proved by the injured party. [*Kailash Nath Associates v. DDA*, (2015) 4 SCC 136]

80. Further, as per Clause 18.17 of the PPA**:**

"*No Consequential or Indirect Losses*

The liability of the Seller and the Procurers shall be limited to that explicitly provided in this Agreement. Provided that notwithstanding anything contained in this Agreement, under no event shall the Procurers or the Seller claim from one another any indirect or consequential losses or damages."

81. Sangam has argued that the UPERC was correct in overlooking the above referred provisions and grant to it amounts over and above those specified under Clause 3.3.3A of the PPA, since the PPA only provides for Sangam's remedy in a case where UPPCL fails to hand over possession of 253 hectares of land, and does not provide any remedy if UPPCL failed to hand over possession of the entire 583 hectares of land.

82. Such a submission is a complete misreading of Clause 3.3.3A of the PPA inasmuch as it is very clear that the said provision also covers a case where the possession of the entire land of 583 hectares is not handed over to Sangam. This is because, in the event that Sangam elects to terminate the PPA, it would inter alia be repaid the total amount of the price of land, and not just the price of land for 253 hectares. The provision cannot be read as Sangam suggests as that would mean that while UPPCL is to repay the total amount of the price of land paid by Sangam, Sangam would only be required to return 253 hectares of land – on Sangam's strict (and wrong) interpretation of Clause 3.3.3A of the PPA. In fact, if Sangam's argument were to be accepted (i.e. 253 hectares and 330 hectares of land is to be treated distinctly), then there is no obligation on UPPCL under the PPA to provide 330 hectares of land. Resultantly, Resultantly, Sangam cannot hold UPPCL liable for breach of an obligation that does not exist.

In any event, Clause 3.1.2A.iii) of the PPA, which refers to the "additional land of 253 hectares" has to be read in conjunction with Clause 1.4 of the RFP, wherein it is stated that of the 583 hectares of land, possession of land free from all encumbrances would be obtained prior to issuance of the LOI and that it was only for the balance 253 hectares that 3 months from the date of LOI was required.

83. On a joint reading of the RFP and the PPA, it is evident that the obligation of providing land was a composite one, with the obligation being to provide 583 hectares of land and not 253 hectares and 330 hectares disjunctively.

84. The only document that Sangam has produced in support of its claim (towards Financing Cost of Expenditure @14% p.a.) is a letter dated 09.11.2016 issued by ICICI Bank to UPPCL**.** However, the said letter issued by ICICI Bank is bereft of any material particulars, and contains vague and notional statements. The said letter does not mention any specific amount that was due and payable by Sangam (in respect of which Sangam has made its claim towards Financing Cost of Expenditure @14% p.a.) and does mention any rate of interest on such amount. The said letter even fails to mention which entity made the payment (whether JPVL or Sangam) to ICICI Bank, and therefore any reliance on the same by Sangam is misplaced.

85. According to Clause 3.3.3A of the PPA,SPGCL would be entitled only to the following amounts in the event SPGCL elected to terminate the PPA on account of UPPCL's failure to hand over possession of land to SPGCL:

(i) Total amount of purchase price paid by the Successful Bidder (Jaiprakash Power Ventures Limited) to acquire the entire shareholding of SPGCL;

(ii) Total amount of declared price of land to the extent paid by SPGCL after acquisition of its 100% shareholding by the Successful Bidder;

(iii) An additional sum equal to ten percent (10%) of the sum total of the amounts mentioned in the aforesaid clauses.

86. As per Clause 1.2 (i) of the Share Purchase Agreement dated 23.07.2009,the aggregate consideration paid by the Successful Bidder towards purchase of the entire shareholding of SPGCL and for taking over of all assets and liabilities of SPGCL was INR 151,97,72,375/- (approx. Rs. 151.98 Crores)

87. However, the amount of money that SPGCL would actually be entitled to under Clause 3.3.3A of the PPA is Rs. 121.43 crores, which is to be calculated in the following manner:

(i) Rs. 151.98 crores – Total price consideration paid by the Successful Bidder to purchase 100% shareholding of SPGCL under Clause 3.3.3A (a) of the PPA;

(ii) SUBTRACT Rs. 45.29 crores from Rs. 151.98 crores = Rs. 106.69 crores– As on the date of purchase of SPGCL by the Successful Bidder (i.e. the date of execution of the Share Purchase Agreement – 23.07.2009), SPGCL had cash and bank balances amounting to Rs. 45.29 crores, which would have to be deducted from the total purchase consideration paid by the Successful Bidder. Therefore the effective acquisition price of SPGCL stands at Rs. 106.69 crores;

(iii) ADD Rs. 17.44 crores to Rs. 106.69 crores = 124.13 crores – As on the date of purchase of SPGCL by the Successful Bidder, land amounting to Rs. 72.53 crores already stood transferred to SPGCL, and the same was reflected in its books of accounts as an asset. Accordingly, an amount of Rs. 72.53 crores would have to be deducted from the total

amount paid by SPGCL for acquiring the land, which admittedly was Rs. 89.97 crores. Accordingly, only 17.44 crores would be payable to SPGCL in addition to the share acquisition price under Clause 3.3.3A (b) of the PPA towards the total declared price of land. The amount now stands at Rs. 124.13 crores;

(iv) ADD Rs. 12.41 crores to Rs. 124.13 crores = Rs. 136.54 crores – This is the additional 10% amount that SPGCL is entitled to under Clause 3.3.3A (c) of the PPA. The amount now stands at Rs. 136.54 crores.

(v) SUBTRACT Rs. 15.11 crores from Rs. 136.54 crores = Rs. 121.43 crores – Rs. 15.11 crores would be deducted from the said amount towards income tax liabilities of SPGCL not provided for.

Accordingly, the total amount that SPGCL would have been entitled to under the PPA had it terminated the same under Clause 3.3.3A thereof is only Rs. 121.43 crores. However, the UPERC has awarded Rs. 251.37 crores to SPGCL without clarifying any basis for the same.

88. The aforesaid calculation has been tabulated in the following chart for ease of reference:

S. No.	Particulars	Rs. In Crores
	Acquisition Price	151.98
LESS	Cash & Bank Balances	45.29
	Effective Acquisition Price	106.69

ADD	Further land payment by SPGCL (Rs. 89.97 crores – Rs. 72.53 crores)	17.44
	TOTAL	124.13
ADD	10% Additional amount as per PPA	12.41
	TOTAL	Rs. 136.54
LESS	Income Tax liabilities not provided for	15.11
	NET AMOUNT PAYABLE	121.43

89. The UPERC has directed in Para 82(d) of the Impugned Order that payment is to be made first and after which the amounts payable would be verified, without any requirement of refund if the verification finds that a sum lesser than Rs. 251.37Cr. was actually spent. It is pertinent to note that interest @ 9% has been awarded by R1 on the entirety of the amount of Rs.149.25Cr. which is a part of the principal amount of 251.37Cr, a part of which is itself *"..subject to verification.."*

90. Sangam in its appeal has pleaded the same ground to pray that the Impugned Order must be set aside. Sangam pleads that the adjudication of a dispute must be complete in respect of all rights so that the parties are not compelled to initiate further litigation as a consequence of the judgment. Therefore, UPERC ought to have appointed an independent chartered accountant and rendered the judgment basis that.

91. Apart from the elementary principle that there could not be a decree for the payment of money till the amount so payable were established, it is equally elementary to state that no judicial tribunal can delegate its responsibilities unless expressly authorized to do so. Such delegation is illegal and fraught with undesirable consequences. In the present case, such delegation is expressly barred u/s 97 of the Act.

Kindly See

3.36 State of West Bengal v. Subhas Kumar Chatterjee, (2010) 11 SCC 694 @pr. 21, 23, 27 (Coram: B. Sudershan Reddy and S.S. Nijjar JJ.)

3.37 Bombay Municipal Corporation v. Dhondu Narayan Chowdhury, (1965) 2 SCR 929 @pr. 3 (Coram: P.B. Gajendragadkar, C.J., M. Hidayatullah, J.C. Shah, S.M. Sikri, JJ.)

92. It has been contended that u/S. 94(1)(g) of the Electricity Act, 2003, the procedure has to be prescribed. The expression prescribed has been defined u/S. 2(52) as meaning "*prescribed by rules made by appropriate government*". It provides for power of the Commission in respect of the following matters including any other matter which may be prescribed. It was, therefore, contended that since nothing is prescribed in respect of Counter Claim, no counter claim can be filed or alternatively any counter claim filed has to be strictly in accordance with CPC. Both these arguments are without substance.

93. As rightly pointed out by the Tribunal, the entirety of the dispute between the parties is contemplated to be decided by the Tribunal u/Ss 86(1)(f) including the counter claims.

94. Even if there be no specific provision permitting a Counter Claim, there is absolutely no bar to the Commission drawing upon the principles of the CPC in the conduct of its proceedings. [New Bombay Ispat Udyog Limited v. MERC &Anr., 2010 ELR (APTEL) 653 [Para 26-27]

95. In point of fact, the Commission's Conduct of Business Regulations 2004 (Clause 157 and 158) and 2019 [Clause 57 (a) and (b) which are *in parimateria* contain the following provision:-

> ***"..157**. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the applicable legal framework, a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient for dealing with such a matter or class of matters."*
>
> ***"..158**. Nothing in these Regulations shall, expressly or impliedly bar the Commission to deal with any matter or exercise any power under the applicable legal framework for which no regulation have been framed, and the Commission may deal with such matters powers and functions in a manner it thinks fit."*

96. The argument made by Sangam is that no counter claim was raised by UPPCL in its written statement and UPPCL is therefore, as per Order 8 Rule 6A CPC, barred from raising it subsequently. This is an incorrect argument. As would be seen from the record of the proceedings before the UPERC, UPPCL had at first filed a

short counter affidavit limited to the issue of extension of the bank guarantees furnished by Sangam during the pendency of the proceedings before the UPERC. This was thereafter filed by a detailed counter affidavit on the merits of the matter. In this latter detailed counter affidavit, a counter claim for the damages under Clause 14 of the PPA was made. In its rejoinder, Sangam has not pleaded that UPPCL's counter is not maintainable, on any of the grounds that it is now avers before the Tribunal.

97. In fact, the said counter claim was also averred by UPPCL in its written submissions and its short additional affidavit. In fact, the UPERC despite expressly recording the counter claim made by UPPCL in the Impugned Order, does not proceed to either deal with it or even reject it. There is nothing in the findings of the Impugned Order even remotely addressing the counter claim made by UPPCL. At the very least, UPPCL is entitled to a finding rejecting its counter-claim made before the UPERC. It has not even been afforded that privilege.

98. Sangam has also argued that the cause of action for UPPCL's counter claim only arose on 23.04.2019 (i.e. the day that the PPA was terminated), which date is after the filing of the counter affidavit before the UPERC.

99. With great respect, the whole approach of Sangam is flawed. Sangam has with great respect, misconstrued the case of UPPCL and then attempted to show that the case is without merit. The real

case of UPPCL has not either been captured by Sangam much less dealt with.

100. The real case of UPPCL as argued before the Learned Tribunal is that as specifically set out in Article 55, 1st Schedule of the Limitation Act, if there are several causes of action, the period of limitation commences from the date and time that the cause of action accrues and arises. Article 55 of the First Schedule of the Limitation Act reads as follows:-

For the breach of contract express or implied not herein expressly provided for	*Three Years*	*When the contract is broken or (when there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases*

101. The cause of action can only accrue and arise once. There is nothing called cause of action accruing or arising more than once, i.e. only in a case of continuing cause of action and pleading though set out in response by Sangam, has been abandoned and not argued.

102. In the instant case, the entirety of the alleged cause of action is that Sangam did not get the land. Sangam was entitled under Clause 3.1.2A(iii) of the PPA to get the land in 3 months after the signing of the LOI, i.e., 3 months from 20.02.2009, i.e., on or before 20.05.2009.

103. The complaint filed by Sangam before the Commission on 01.08.2018 is hopelessly barred by limitation. This is sought to be answered at an emotional level by saying how can a cause of action be barred within 3 months from the date of signing of the contract. This is not the argument of UPPCL.

104. The 2nd and fundamental point raised by UPPCL is that it is the duty and obligation of the Plaintiff/complainant to fully plead as to how he is within the period of limitation and if he is prima facie, barred by it. No pleading was made by Sangam before the State Commission. [Rajiv Khanna v. Sunrise Freight Forwarders Private Limited &Ors., (2016) 158 DRJ 334 (Rajiv Sahai Endlaw, J)]

105 It is true that UPPCL did not raise the ground of limitation before the State Commission. But this issue is no longer *res integra* in view of clear mandate of Section 3 of the Limitation Act and as clearly interpreted by the Supreme Court, namely that irrespective of plea of limitation is taken or not, if the claim is barred by limitation, it has to be thrown out where the defect is observed.

106. The 3rd non-sequitor which was argued was that the negotiations are good for the society and a party cannot be penalized by declaring his claim to be barred by limitation when it is negotiating.

107. This is a complete misunderstanding of law of Limitation. The judgment cited by Sangam in the case of *Geo Miller & Co., 2019 SCC Online SC 1137 (N.V. Ramana; M.M. Shantanagoudar; Ajay Rastogi, JJ) [Para 29]* refers to the breaking point. The concept of breaking point for limitation is that the cause of action accrues only when the parties have reasonably abandoned efforts for arriving at a settlement. The judgment does not deal with a situation where a cause of action has already accrued and alleged negotiations takes place thereafter.

It is settled law that no amount of alleged negotiations can stop a cause of action which has already accrued.

108. Once a cause of action accrues, negotiations can of course still be held and if in the negotiations a document is signed by the parties wherein the Defendant acknowledges its liability, then alone will time be extended from date of acknowledgment in writing in terms of Section 18 of the Limitation Act. This is so because it is settled law that cause of action once it accrues, time will not stop running.

109. It is thus seen that the judgment of *Geo Miller* does not deal with, much less conclude that once a cause of action has arisen, negotiations will defer the cause of action and it will accrue again once the breaking point of negotiations has been reached.

110. It is also pertinent to note that the Supreme Court in *Geo Miller* found that that the claims raised by the Appellant therein were

hopelessly barred by limitation, an aspect which has not been brought to the notice of this Tribunal by Sangam.

111. Further, the Respondent has not even sought to answer the direct judgment of this Tribunal in *Gujarat Urja Vikas Nigam Ltd*., *MANU/ET/0013/2010* wherein the very same contention was raised in the context of cause of action which has accrued. This Tribunal held that once a cause of action accrues, the commencement of negotiations will not arrest the running of time. The relevant para is extracted below:-

"It is a settled law that mere correspondence with the parties would not extend the cause of action or suspend the period of limitation. The discussions and negotiations held between the parties for a possible settlement even by way of conciliation as a prelude to arbitration will not stop the cause of action accruing to the party by the reason of denial of a claim, nor such cause of action once accrued gets extended or suspended by the period during which the efforts for an amicable settlement were in progress. The State Commission held so in the light of the facts admitted by the parties and also in view of the well settled legal principle on computation of compensation." (Emphasis added)

112. Lastly, as far as settlement talks are concerned, they were last held on 20.11.2015 and the written minutes prepared on 06.02.2016. On a demurrer it is, if at all, the minutes dated 06.02.2016 which alone can amount to an acknowledgement in writing within the meaning of Section 18 of the Limitation Act.

113. The complaint which was filed on 01.08.2018 is barred in respect of any cause of action which has accrued on or before 30.07.2015. Even if the negotiations held in the form of a meeting on 20.11.2015 are treated to amount to acknowledgement in writing, that acknowledgement in writing happened only on 06.02.2016. This acknowledgement in writing has to be within a period of 3 years from the accrual of original cause of action. The original cause of action accrued at the earliest on 20.05.2009 (3 months from LOI dated 20.02.2009).

114. Indeed even if the date of 20.2.2009 has to be kept aside for a moment, on 20.11.2012 the Respondent made it clear that "it can no longer pursue the development of the thermal power plant". Assuming the limitation arises from this date, this limitation get over on 19.11.2015 before the so called negotiations commenced, which was held on 20.11.2015 after the period of expiry of 3 years. Thus, even if there was an alleged acknowledgement on 20.11.2015, it would still be clearly barred by limitation.

115. The judgment of the Supreme Court in *Hari Shankar Singhania, (2006) 4 SCC 658* was rendered in the context of a completely different factual matrix and is not applicable to the facts of the instant case. While upholding the sanctity of family arrangements, the Supreme Court proceeded to hold as under:-

"In our opinion, the High Court has committed an error in construing Article 137 in a manner, which would unduly restrict the remedy of arbitration especially in family disputes of the present kind. It is a well-settled policy of law in the first instance, always to promote a settlement between the parties wherever possible and particularly in family disputes.

As already noticed, the correspondence between the parties, in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties.... None of the correspondence referred to by the learned Judges spells out the existence of any disputes as a result of which the properties could not be distributed prior to 31-5-1987.

Furthermore, the respondent did not ever dispute the claim of the appellants.

Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eye of the law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well-being of a family.

The concept of "family arrangement or settlement" and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation, etc. should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered

into to allay disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in Ram Charan Das v. Girjanandini Devi [(1965) 3 SCR 841 : AIR 1966 SC 323] ."

The Respondent has failed to place this aspect before this Tribunal.

116. The judgment in *Shree Ram Mills, (2007) 4 SCC 599* also does not help the cause of the Respondent. In *Shree Ram Mills* case, the questions were whether there was a live dispute and whether reference to arbitration was within limitation (Article 137 of the Schedule – when the right to apply occurs vs. Article 55 of the Schedule – when the breach occurs). The Bench (H.K. Sema, V.S. Sirpurkar, JJ) held as follows:-

i. That the Court u/s 11(6) has only recorded its satisfaction that prima facie the issue has not become dead by lapse of time.
ii. The Court found that the issue between the parties "kept haunting the parties time and again and several agreements and steps were taken by the parties to vindicate their rights".
iii. *Shree Ram Mills* rightly interpreted *Hari Shankar Singhania's* judgment and laid down that *"till such time settlement talks are going on directly or by way of correspondence no issue arises and with the result that clock of limitation does not start ticking".* In other words, the cause of action does not accrue if

the parties enter into a settlement or negotiation mode before its accrual. Neither *Singhania* nor *Shree Ram Mills* deals with the fundamental question that if the cause of action has already accrued and thereafter negotiations take place, whether that cause of action would stand suspended. The answer is self evident and in the negative.

iv. *Shree Ram Mills* further points out that in Para 24 of *Singhania*, the Supreme Court held as follows:

> *"As already noticed, the correspondence between the parties, in fact, bears out every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties."*

In other words, no efforts were made to comply with or carry out any obligation spelt out in the agreement between the parties.

v. Lastly, the Supreme Court held that the question of limitation is open for the arbitral tribunal to decide, thus the Supreme Court did not itself decide the issue.

The crucial point to be noticed is that in all the judgments, namely *Singhania*, *Shree Ram Mills* and *Geo Miller*, the question was initiation of arbitration, i.e., Article 137 of the Schedule. Article 137 makes it clear that "*time from which period begins to run*" is "*when the right to apply accrues*." The right to apply would only accrue once the dispute has arisen. If, on the other hand, before the dispute arises, parties get into the negotiation mode, the cause of action for reference to arbitration itself will not arise.

On the other hand, Entry 55 refers to "*when a breach occurs"* as the point of time from when the period begins to run. Once the breach occurs, the clock of limitation begins running. If, after the occurrence of the breach, the parties sit down for negotiation, the period of limitation would not stop running nor would the cause of action be pushed back. The only exception is the one provided in Section 18.

Submissions on behalf of second Respondent/SPGCL

117. The captioned Appeal is challenging the part of the final Judgment dated 28.06.2019 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition No.1353/2018, by which the State Commission despite coming to the conclusion that the delay in completion of Project was completely attributable to the Respondent Nos.2 to 7 herein ["**UPPCL**"] and thereby held that the agreement between the Parties has been rendered void and the SPGCL shall be restored to a position it was at before the agreements, the State Commission however have erred:

i) Not allowing the claim of Rs.313.24 Crores made by SPGCL towards the 'BTG Advance';
ii) Allowing only a simple interest merely at 9% when finance was taken by the Successful Bidder (SPGCL's Promoters) at 14% from the banks to purchase/ invest the equity shares of the SPGCL;
iii) Allowing interest only on the sum of Rs.149.25 Crores;

iv) Allowing interest only for the period from 11.04.2014 to 31.03.2019;

v) Not allowing the full claim of Rs.592.65 Crores made by the SPGCL towards the 'Financing cost of Expenditure @14% up to February, 2018 reckoned from middle of Financial Year'; and

vi) Not conclusively adjudicating the rights of the Parties in finality and awarding the reimbursement subject to verification by a chartered accountant, without appointing one and specifying a period within which such directions shall be complied with.

118. That the UPPCL have also filed a cross appeal bearing Appeal No.259/2019 against the same Impugned Judgment wherein they have claimed that:

i) the Petition filed before the State Commission was time barred;

ii) the State Commission erred in not considering the purported Counter-Claim;

iii) the land was duly handed over to SPGCL and therefore SPGCL abandoned the Project; and

iv) SPGCL failed to provide any evidence to substantiate their claims.

Therefore, for sake of brevity, the SPGCL by way of the present Written Submissions is dealing with each of the aforementioned contentions/ grounds in a point wise manner in the following manner:

119. Although it is a settled principle of law that the limitation period starts running from the day itself when the cause of action accrues in favor of a party and no subsequent disability or inability on part of the said party can prevent the said period from running (unless permitted by/ under law). However, the entire argument made by UPPCL is misconceived for the sole reason that it is based on the premise that the UPPCL's date for performance of its obligation was a fixed one (i.e. 16.01.2009) and therefore the limitation period must start from that date itself.

120. It is a settled principle that even though a contract may have a fixed date for performance, the same can be extended by an act of forbearance or non-insistence on performance. The same may be proved by oral evidence or even by conduct of the parties, as is also held by the Hon'ble Supreme Court in "*S. Brahmanand & Ors. v. K.R. Muthugopal (Dead) &Ors.*" *[(2005) 12 SCC 764]*:

"*34. Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party… …Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd. [AIR 1953 Trav Co 161] was a similar instance where the*

contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time was fixed for its performance" and held that what was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said article because of the supervening circumstances of the case.

35.*In the present case, it was only on 31-8-1995/1-9-1995 that the plaintiffs realised that there was a refusal to perform, when they were forcibly evicted from the godown. It is only then that the plaintiffs had notice of refusal of performance. Counted from this date, the suit was filed within 15 days and, therefore, was perfectly within the period of limitation. We, therefore, disagree with the High Court on this issue of limitation and hold that the suit filed by the plaintiffs was within the period of limitation and was not liable to be dismissed under Section 3 of the Limitation Act. All other issues concurrently have been held in favour of the plaintiffs. Hence, there is no impediment to the plaintiffs succeeding in the suit.*"

121. It is submitted that such a submission (on limitation) is *ex facie* and absolutely misleading as well as incorrect for the following reasons:

i) At the outset, it is submitted that the cause of action could not have arisen on 16.01.2009 for the fact that the Letter of Intent was issued to M/s Jaiprakash Associates Ltd. (the Successful Bidder for the Project) on 20.02.2009, which was accepted by M/s Jaiprakash Associates Ltd. on 05.03.2009; and

ii) Following are the sequence of events which demonstrates, *inter alia*, that the cause of action for initiating the proceedings before the State Commission was a continuous one and the 'fixed date' of UPPCL's performance of its obligations was extended time and again which is evidenced by UPPCL's conduct and forbearance by SPGCL until the agreements/ Project became impossible and unfeasible to execute:

S.No.	Date	Particulars
1.	16.01.2009	As mentioned in the Petition filed before the State Commission as background facts as per the PPA signed by SPGCL with Procurers land was to be handed over to SPGCL by Procurers by 16.01.2009 (i.e. 3 months from the date of the PPA). However, this statement cannot give rise to a cause of action to SPGCL (as a part of Jaypee Group). It may be noted that the PPA was executed between SPGCL and the UPPCL on 17.10.2008.
2.	20.02.2009	Letter of Intent was issued to Jaiprakash Associates Limited to complete Phase-I in 54 months i.e. up to 19.08.2013 and phase II in 59 months i.e. upto 19.01.2014 in terms of RFP. Clearly, in terms of the agreement, various milestones had to be achieved at various stages and not achieving any particular milestone would not give rise to a cause of action to sue as if the contract stands terminated unless one of the parties to the contract expresses unequivocally within the said period to not perform its obligation under the contract either on the plea that it has

		become void or by terminating the contract.
3.	05.03.2009	LoI was accepted by M/s Jaiprakash Associates Ltd.
4.	23.07.2009	In term of provisions contained in RFQ/ RFP Document, a Share Purchase Agreement (SPA) for transfer of SPGCL to JPVL was executed on 23.07.2009 between UPPCL, SPGCL, Jaiprakash Power Ventures Ltd and Jaiprakash Associates Ltd. wherein JPVL paid Rs.151.98 Crores to UPPCL as purchase consideration. Investment in Assets mainly land & coal advances, etc. were already made by UPPCL.
5.	22.01.2010	Writ Petition (C) No.3689/2010 was filed by the farmers of Tehsil Karchana (i.e., the Project site) before the Hon'ble High Court of Allahabad against the acquisition of land for establishment of thermal power plant at Karchana. ***NOTE:*** *Between the years 2008 – 2011 a large number of writ petitions were filed by the farmers of Tehsil Bara and Karchana before the Hon'ble High Court of Allahabad against the acquisition of land for establishment of two thermal power plants at Bara and Karchana.*
6.	23.02.2010	The first Deed of Conveyance executed between UPPCL & SPGCL giving paper possession for 273.44 Ha of land. It may be noted that though no unencumbered physical possession was provided but the act of executing Conveyance Deed gave an assurance to SPGCL that unencumbered physical possession will be given soon.
7.	05.07.2010	Letter issued by SPGCL to the Procurers stating that

		SPGCL is intending to establish one additional unit of 660 MW while proposing that the Schedule CoD for the additional unit shall be 64 months from the date of issue of LoI and therefore requested that the necessary action, as deemed fit, may kindly be taken.
8.	05.08.2010	The second Deed of Conveyance was executed between UPPCL and SPGCL giving paper possession for 239.473 Ha of land. No unencumbered physical possession was provided this time as well but the act of executing the conveyance deed again gave an assurance to SPGCL that unencumbered physical possession will be given soon.
9.	09.12.2010 21.01.2010	The District Magistrate, Allahabad as well as the Additional District Magistrate, Allahabad had given assurances to the landowners that the work of the Power Plant shall not start unless the demands of the Landowners are met.
10.	20.10.2011	Meeting was held under the Chairmanship of CMD, UPPCL in the presence of District Magistrate and DIG wherein it was decided that SPGCL shall make necessary arrangement to start the project work from 01.11.2011. This again assured SPGCL that efforts are being made by/on behalf of the Procurers to hand over the unencumbered land to it for starting the work.
11.	24.10.2011	Letter of Collector Allahabad to Secretary Power GoUP informing about the demonstration/ strikes/ hunger strike/ violence by villages against the land acquisition for Karachan Power Plant and merely

		saying that the aforementioned letter dated 09.12.2010 to the farmers/ landowners was not an assurance that a higher compensation has been agreed to be paid. This letter in fact reiterated the contents of the letter dated 09.12.2010 issued to the farmers/ landowners.
12.	13.04.2012	The Hon'ble Allahabad High Court passed its Judgment dated 13.04.2012 on various petitions before it and quashed the land acquisition proceedings subject to deposit of compensation, if any, received by the petitioner of the writ petitions.
13.	06.08.2012	UP Government wrote to the District Magistrate, Allahabad that in view of the judgment a notice in two newspapers shall be published to the effect that if affected farmers desire to return back their land than they can deposit the compensation received with the District Magistrate revenue Treasury within 30 days from the date of the publication of the notice in the newspaper, and if not deposited, then action will be taken accordingly.
14.	20.11.2012	SPGCL till date had been talking of steps to perform its obligation under the contract and upon being faced with a situation where no work could be carried out on site due to non-providing of land for the plant. SPGCL after 45 months of the issuance of LOI stated unequivocally as under: *"10. In view of the aforesaid facts and circumstances, it is evident that the Project as envisaged vide various documents executed*

		between the parties cannot be pursued further and therefore the matter needs consideration to reach an amicable settlement for closing the agreements and payment of our dues. *11. We hope you will kindly appreciate the necessity and urgency of the matter and settle it at the earliest. We shall readily provide any further information/clarification as may be required in the matter."* Normally, this date would be the date for start of limitation if UPPCL also considered this letter to be a valid letter terminating the contract. However, UPPCL notwithstanding the letter by SPGCL kept on inviting SPGCL to participate in discussions to settle with the landowners and thus according to UPPCL the contract was not terminated and accordingly, cause of action did not commence in favour of SPGCL.
15.	13.12.2012	UPPCL informed SPGCL that in view of judgment passed by Hon'ble Allahabad High Court, the District Magistrate, Allahabad has already initiated the proceedings accordingly and in case they received directions from the UP govt. the same shall be intimated to Sangam Power immediately. Clearly according to this letter, UPPCL wanted SPGCL to continue with the contract and performance of its obligations thereunder.
16.	12.01.2013	As directed by the UP Govt., the DM conducted a meeting with the farmers and submitted a report.
17.	28.11.2013	UP Power Transmission Company Ltd. (UPPTCL) informed SPGCL that out of 1942 landowners only

		1850 have received compensation and rest of them didn't receive the compensation despite it being deposited with the revenue. It was informed that district administration and project developer will decide that those landowners who have not received the compensation can be shifted to a suitable place as per their willingness so that the land can be made available to Sangam Power.
18.	11.04.2014	SPGCL made it clear to the UPPCL that it has no role to play in getting the land for power plant which is clearly the responsibility of the UPPCL. Due to non-availability of land, SPGCL requested that the PPA needs to be closed amicably & SPGCL's dues and investments be returned.
19.	16.05.2014	UPPCL finally wrote to SPGCL that in case SPGCL wants to terminate the contract, then they should do the same by referring to specific clauses of the PPA through a formal notice with reasons and supporting documents.
20.	11.06.2014	SPGCL issued the said formal letter as requested by UPPCL informing that SPGCL has been prevented to perform its obligations under the agreement and thus suitable action should be taken to amicably settle the issue for payment of SPGCL's investments.
21.	04.04.2015	SPGCL again issued a formal notice referring to Clause 17.2.1 of the PPA for amicable settlement of the dispute.

22.	07.04.2015	UPPCL acknowledged the claims raised by SPGCL against UPPCL for which a settlement committee was constitutedwherein all claims and counter claims were discussed. Confirmation of the said meeting was communicated to SPGCL by letter dated 02.05.2015. Clearly, even if 20.11.2012 is considered to be the start date for the purposes of limitation then the constitution of the committee for settlement on 07.04.2015 is within time from the said date being within three years. However, since UPPCL did not consider 20.11.2012 as the start date and kept on requesting SPGCL to perform its obligation under the agreement, the start date should be 11.06.2014 when SPGCL issued the formal notice in terms of the PPA. Since the committee for amicable settlement was constituted within three years of either of the two dates, the question of limitation will have to be considered only from the date on which the settlement talks finally broke down. Interestingly, UPPCL issued the Preliminary Default Notice claiming liquidated damages on 05.03.2019 and issued the final claim pursuant to this Preliminary Default Notice on 23.04.2019, clearly acknowledging the fact that UPPCL expected SPGCL to perform the contract up to the said date and it is only after the Termination Notice issued on 23.04.2019 can it be said that UPPCL took the stand that, from the said date, the contract could not be performed. *<u>Note:</u> Section 18 of the Limitation Act, 1963 makes it*

		clear that a fresh period of limitation shall be computed when there is acknowledgment of a claim.
23.	06.02.2016	UPPCL forwarded minutes of the meeting held on 21.11.2015 of committee for Amicable Settlement wherein the UPPCL admitted and acknowledged the amounts payable to SPGCL which was duly signed by the officers/ representatives of UPPCL. <u>Note:</u> *Senior officials of UPPCL that participated in the meeting:* *i) Mr. A. P. Mishra, Managing Director UPPCL;* *ii) Mr. S. K. Agarwal, Director (Finance) UPPCL;* *iii) Mr. RakeshTrivedi, Director (Planning & Commerce) UPPCL;* *iv) Dr. Sanjay Kumar Singh, Director (Commerce) UPPCL;* *v) Mr. R. N. Yadav, Director (Corporate Planning) UPPCL;* *vi) Mr. Subhash Chand Sharma, Law Officer UPPCL; and* *vii) Mr. Athar Hussain Khan, Chief Engineer (Planning) UPPCL.*
24.	17.03.2016	UPPCL communicated to SPGCL its view on the administrative expenditure and the interest @ 9%
25.	18.05.2016	Meeting of the Committee for amicable settlement was held on 18.05.2016 and the Minutes of meeting were issued wherein it was decided that SPGCL & L&T will give joint undertaking in anticipation UPRUVNL allowing the survival of BTG contract to L&T. <u>Note:</u> *Senior officials of UPPCL that participated in the meeting:*

		i) Mr. A. P. Mishra, Managing Director UPPCL; *ii) Mr. R. N. Yadav, Director (Corporate Planning) UPPCL;* *iii) Mr. RakeshTrivedi, Director (Planning & Commerce) UPPCL;* *iv) Dr. Sanjay Kumar Singh, Director (Commerce) UPPCL;* *v) Mr. R. K. Sharma, Executive Director (Planning) UPPCL; and* *vi) Mr. Rakesh Gupta, Chief Engineer (Planning) UPPCL.*
26.	21.05.2016	SPGCL issued a letter to UPPPCL requesting for an early settlement of its claims.
27.	21.05.2016	SPGCL issued a letter to UPPCL agreeing to provide a Joint Undertaking (by both SPGCL and L&T) indemnifying UPPCL during transfer of the BTG contract from SPGCL to UPRUVNL.
28.	26.07.2016	Accordingly, SPGCL along with L&T duly submitted their Joint Undertaking to UPPCL indemnifying UPPCL and the intending procurer on the understanding that the settlement process will end soon.
29.	30.07.2016	Meeting of the Committee for amicable settlement was held on 27.07.2016 and the Minutes of meeting were issued wherein it was noted that No Objection Certificate from lenders had not been provided by the SPGCL which was to be provided at the earliest. Further, UPPCL gave its consent to pay the cost towards land and BTG advance & charges along with 9% interest. *<u>Note:</u> Senior officials of UPPCL that participated in the meeting:* *i) Mr. A. P. Mishra, Managing Director UPPCL;*

		ii) Mr. Sudhanshu Dwivedi, Director (Finance) UPPCL; *iii) Dr. Sanjay Kumar Singh, Director (Commerce) UPPCL;* *iv) Mr. RakeshTrivedi, Director (Planning & Commerce) UPPCL;* *v) Mr. Rajinder Prasad, Law Officer UPPCL; and* *vi) Mr. Athar Hussain Khan, Chief Engineer (Planning) UPPCL.*
30.	17.10.2016	UPPCL requested the SPGCL to modify the joint undertaking to exclude the condition regarding payment of simple interest @9% per annum.
31.	18.10.2016	SPGCL informed UPPCL that the amount disbursed by ICICI has been repaid in full and all the charges created on the Project assets have been released.
32.	19.11.2016	ICICI Bank Limited issued a No Dues/Objection Letter to UPPCL.
33.	09.12.2016	Amendment No.1 was made to the Joint Undertaking as per the request of the UPPCL, subject to fulfillment of certain conditions by UPPCL/UPRUVNL. However, it was stipulated therein that the Joint Undertaking will remain valid till 10.01.2017.
34.	09.12.2016	UPPCL requested SPGCL to withdraw the validity timeline of 10.01.2017
35.	10.12.2016	Accordingly, Amendment No.2 was also made to the Joint Undertaking withdrawing the validity timeline of 10.01.2017 as the settlement was likely to take more time.
36.	14.12.2017	The dispute between L&T and SPGCL was finally settled on 14.12.2017 wherein the advance given as

		BTG advance of Rs.313.24 Crores was forfeited and Performance Guarantees were to be returned to L&T.
37.	13.03.2018	Lastly, the cause of action to file the petition arose when the SPGCL withdrew from the settlement (as no settlement was reached during which SPGCL was forced to enter into a Settlement Agreement with L&T) and issued a final breakdown notice with a claim of Rs.1157.22 crores which was based on the expenditure up to 28.02.2018.
38.	01.08.2018	Within five months thereafter the Petition was filed before the State Commission and since the settlement talks were on till 13.03.2018, there was no question of limitation either raised before the State Commission or such question rising for consideration by the State Commission. UPPCL having nothing to argue on merits before this Tribunal has tried to divert the attention of this Tribunal on the issue of limitation when clearly there was no question of the issue of limitation arising in the instant case.

122. UPPCL contends to avoid its present liabilities on a frivolous and misconstrued hyper-technical ground that the argument of continuous cause of action would not be acceptable as it was not argued specifically and, on the ground, that the argument regarding Section 18 of the Limitation Act was not explicitly pleaded by SPGCL.

123. This contention do not hold any water on account of the settled principle that the duty of a pleader is to set out the facts upon which he relies and not the legal inferences which are to be drawn, as is also held in "*Maharashtra State Electricity Board v. Madhusudan Dass and Brothers*" *[AIR 1966 Bom 160]*:

"*12. It is difficult to appreciate the contention that the question as to whether or not the supply was properly discontinued has not been raised in the pleadings. The defendant's contention was all along that he was prepared to pay the charges according to the contractual rate, the contract was for a period of five years and the Board had no right to apply the new tariff rates and that the charges under the new tariffs were excessive. In para. 1 of the written statement the defendant alleges that the disconnection of the supply on all these occasions was wrongful. As to the minimum charges in para. 2(b) of the written statement it says that the plaintiff wrongfully cut off the supply and hence it was not entitled to claim the minimum charges. True that it is not contended that the Board was not entitled to discontinue the supply under s. 24 of the Electricity Act as there was a dispute between the parties. But then law need not be pleaded. It is our duty to apply the law to facts proved and found. Though, therefore, the point was not argued in the Court below, we would not be justified in not allowing the defendant to argue the point.*"

124. It is further pertinent to note that the issue of limitation was not raised by UPPCL throughout the proceedings before the State Commission.

125. It is submitted that the Petition was filed before the State Commission on 01.08.2018, i.e. within a period of 5 months of the 'breaking point' at which the SPGCL had to abandon the efforts for

the amicable settlement. In this regard, it is submitted that it is a settled principal of law that the period of *bonafide* negotiations towards an amicable settlement must be excluded for the purposes of computing the period of limitation[1] as is also held by the Hon'ble Supreme Court in "*Geo Miller & Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*" *[2019 SCC Online SC 1137]*:

"***28.*** *In Shree Ram Mills Ltd. (supra), this Court found that the parties were continuously at loggerheads over joint development of certain land. They had entered into a Memorandum of Understanding to settle their dispute, however the respondent cancelled this Memorandum; hence the dispute was referred to arbitration under Section 11(6) of the 1996 Act. This Court, upon considering the complete history of negotiation between the parties which was placed before it, on the facts of that case, concluded that the claim would not be barred by limitation as there was a continuing cause of action between the parties.*

29. *Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record.The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such*

[1] "*Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*" ***[(2007) 4 SCC 599]*** (Para 29 & 30); and "*Hari Shankar Singhania&Ors.v. GauriHariSinghania&Ors.*" ***[(2006) 4 SCC 658]*** (Para 22, 24, 25 &32)

a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

30. *Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.*"

126. Furthermore, the sequence of events provided herein above that tenor of the contemplations/discussions throughout the amicable settlement between the Parties was that:

i) there was a dispute between the Parties;
ii) such dispute is regarding the breach of agreements by the UPPCL;
iii) because of such breach, UPPCL is liable to reimburse SGPCL; and
iv) the quantification and the methodologies of such reimbursement.

Therefore, such meetings were clearly an acknowledgement of a liability under Section 18 of the Limitation Act wherein only the quantification of the same was left to be amicably settled.

127. Moreover, UPPCL's argument that the amicable settlement meetings cannot be construed an acknowledgement as it never made an unconditional promise to pay and the liability was never quantified is completely baseless and falls short for the very fact that an 'acknowledgment' under the Limitation Act and a 'promise to pay' under Section 35(3) of the Contracts Act are two distinct things, and an 'acknowledgement' may not be coupled by a 'promise to pay', as is also held by the Hon'ble Supreme Court in "*Khan Bahadur Shapoor Freedom Mazda v. Durga Prasad Chamaria*" *[AIR 1961 SC 1236]*:

"*6. It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such*

statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter."

128. UPPCL's argument that 06.02.2016 shall be taken as the acknowledgement date since the minutes were signed then cannot be accepted. The said argument is *ex-facie* frivolous and hyper-technical for the reason that the substantive contemplations/ discussions took place on 21.11.2015 whereas the parties ratified the same on 06.02.2016 by signing the minutes as a mere formality. It is a settled principle that mere technicalities cannot come in the way of substantive justice.

129. Furthermore, UPPCL's contention that Section 18 would not apply to the aforementioned acknowledgement as any specific reliance thereto was not pleaded by SGCL is merely a frivolous and misconstrued hyper-technical ground which deserves to be outrightly rejected in light of the settled principle that the duty of a pleader is to set out the facts upon which he relies and not the legal inferences which are to be drawn from them.

130. UPPCL's reliance on the letters dated 29.09.2014 & 22.10.2016 to substantiate its claim that it handed over unencumbered possession of land is completely misplaced as UPPCL disregarded the subsequent contents of the same *(B. MAJOR RESON FOR*

DELAY IN IMPLEMENTATION OF PROJECT) wherein SPGCL have specifically stated that it has made several attempts to start the construction at the Project site however the same were rendered futile due to the agitations caused by the farmers/ landowners.

131. Furthermore, UPPCL has repeatedly failed to disclose the annexures of the aforementioned letters which evinces the real reason for issuing such letters. It is pertinent to note that the aforementioned letters were issued on the specific request made by UPPCL for SPGCL to seek requisite extensions for all the statutory/ other clearances which is also evident from the letter dated 29.09.2014 wherein the SPGCL specifically informed the MoEF that "*UPPCL vide letter No.1032/Plg./UMPP/SPGCL dated 30th May 2014 has advised SPGCL to revalidate all the statutory clearances.* This further demonstrates that SPGCL has always been ready and willing to perform its obligations under the agreements, whereas on the other hand, UPPCL took a lackadaisical approach in performing its own obligations and is now seeking to take advantage of its own defaults.

132. UPPCL further claimed that land was handed over and the same is accepted by the SPGCL in the conveyance deed. As claimed by SPGCL we have not received the unencumbered land for implementation of Karchana Plant and work was stopped by the local administration as evident from the assurance given to villagers *vide* letter dated 09.12.2010 and letter dated 24.10.2011 to GoUP informing about the demonstration/ strikes/ hunger strike/

violence by villages against the land acquisition for Karachan Power Plant.

133. The position of land availability has been informed in every monthly progress report submitted to UPPCL w.e.f July 2010 stating the problems being faced in taking physical possession of land.

134. At the outset, it is pertinent to note that the UPERC (Conduct of Business Regulations), 2004 is completely silent with respect to a 'Counter Claim' filed by any party. Thus, provisions and principles contained in Civil Procedure Code, 1908 [the "**CPC**"] has to be relied upon while dealing with a counter claim filed, if any, in view of the clear language of Section 94(1) of the Electricity Act, 2003 [the "**Act**"].

135. As per Order 8 Rule 6B of the CPC, when the respondent seeks to rely upon any ground as supporting a right of counter claim, he shall explicitly state in his written statement that he is doing so by way of a counter claim.

136. The averment that the UPPCL filed a counter claim before the State Commission cannot be countenanced, in any manner whatsoever, for the following reasons:

i) In accordance with Order 8 Rule 6A of the CPC and the settled principle of law as held by the Hon'ble Apex Court of India, a

counter claim can be filed by a defendant provided that the cause of action had accrued before the defendant had delivered his defense or the time limited for delivering his defense has expired. Furthermore, it is also a settled principal that a counterclaim filed after the filing of the written statement is *ipso facto* not maintainable. In this regards, it is apropos that this Tribunal may kindly note the following facts/ events:

S. No.	DATE	PARTICULARS
1.	19.12.2018	The UPPCL filed their Short Counter Affidavit before the State Commission on 19.12.2018 wherein the UPPCL did not raise any counter claim before the State Commission
2.	05.03.2019	The UPPCL filed its complete defense (detailed Counter Affidavit) on 05.03.2019 wherein also no counter claim was filed or stated by the UPPCL. It appears that the UPPCL is trying to seek shelter under paragraphs 66 and 67 of the detailed counter affidavit wherein the UPPCL mentions about liquidated damages under Article 4.6.4 and alleges that the SPGCL is liable to pay damages under Article 14 read with Article 4.6 of the PPA, however the same, by no stretch of imagination, can be construed as a counter claim by the UPPCL against the SPGCL before the State Commission as the mention of a purported claim was without any basis.

3.	05.03.2019	UPPCL issued a Preliminary Default Notice.
4.	14.03.2019	SPGCL replied to the aforementioned Preliminary Default Notice *vide* its Reply dated 14.03.2019 in accordance with the PPA.
5.	23.04.2019	The cause for filing the counter claim by the UPPCL only arose when it terminated the PPA *vide* its Termination Notice dated 23.04.2019, after more than a month and a half of filing its defense before the State Commission on 05.03.2019.
6.	25.04.2019	UPPCL filed another Short Counter Affidavit dated 25.04.2019 wherein also no formal counterclaim was made and as discussed above could not have been made as the cause of action arose only on 23.04.2019 and as the detailed Counter Affidavit had already been filed on 05.03.2019 and the hearing in the matter had already started on 07.02.2019.

The above facts clearly demonstrate that the UPPCL did not file any counter claim before the State Commission, valid or otherwise, since the UPPCL alleges that it filed the so called counterclaim on 25.04.2019 by way of the 'Short Counter Affidavit' when the cause for filing the counter claim by the UPPCL arose only on 23.04.2019, both of which was more than a month and a half after the UPPCL filed its defense (i.e. on 05.03.2019) before the State Commission.

ii) The UPPCL admittedly did not deposit any Court Fee before the State Commission payable in support of the purported Counter Claim which evidences that the UPPCL's averment that it duly filed a counter claim before the State Commission is nothing but merely an afterthought.

iii) Without prejudice to the aforementioned, even if it is assumed hypothetically that the UPPCL did file a counter claim before the State Commission, it is pertinent to note that the premise for raising the same was that the SPGCL had failed to develop the Project and had abandoned that same. Therefore, the purported counter claim is deemed to be duly rejected which is implied from the fact that the State Commission has already observed and held that the default was completely attributable to the UPPCL when it failed to perform its reciprocal promise/ obligation of handing over the unencumbered physical possession of the Project land to SPGCL, without which SPGCL cannot proceed with the completion of the Project in any manner whatsoever.

137. SPGCL in all its communications to UPPCL has been indicating the amount that SPGCL is entitled to claim. SPGCL has also been sending all supporting documents to UPPCL with regard to the manner in which claims are being made for the investment made by SPGCL. SPGCL in fact has only claimed actual loss and has not claimed any loss of profit or loss of opportunity due to the defaults committed by UPPCL. The claims of SPGCL are primarily on 2 heads:

i) direct investments made by SPGCL in the form of cost of purchase of land, cost of BTG equipment, administrative expenses, cost of financing, interest on loan taken for a short while and other advances and BG charges. The detail and document for the above said expenditure were submitted to UPPCL in the meeting held on 07.04.2015 and same were discussed in detail as per the minutes of meeting dated 07.04.2015 (the said amount comes to Rs.564.6 Crores and apart from Rs.313.2 Crores which is the BTG advance, everything else has been allowed by the State Commission); and

ii) during the subsistence of the agreement the parent company of SPGCL invested equity & paid off the loan taken from ICICI bank in March 2011. SPGCL has made a claim of 14% on the said investment from the respective dates of the investment till the making of the claim and the same was Rs.592.61 Crores in the claim petition (i.e., claim as on February 2018 which was wrongly typed as February 2015 in the petition).

138. The above facts are clearly borne out by the SPGCL's Petition before the State Commission and there is no specific denial to these facts in the Reply filed by UPPCL before the State Commission. The averment with regard to the BTG advance is actually admitted by UPPCL and there is no specific denial to the other claims in.

139. Furthermore, it is submitted that the UPCL during the hearing before this Tribunal has time and again harped upon that the reason for which the Hon'ble Allahabad High Court passed the

Judgment dated 13.04.2012 for setting aside the land acquisition was because SPGCL allegedly failed to plead any expenses made by them towards the Project before it 'on purpose' or for ulterior motives. It is pertinent to note that this is belied upon the fact that SPGC explicitly pleaded before the Hon'ble Allahabad High Court *vide* its Counter Affidavit that SPGCL has duly expended an amount of Rs.152.77 Crores (till 31.03.2010) on the project preparatory exercise and has further incurred an expense of Rs.100.06 Crores during April 2010 and June 2010. Furthermore, the expenditure incurred on account of advance for BTG paid on 23.07.2010 was informed to UPPCL *vide* SPGCL's monthly progress report of July 2010 wherein it was duly mentioned that the expenditure incurred on Karchana Power Plant till 31.07.2010 is Rs.561.19 Crores.

140. Furthermore, SPGCL had duly pleaded before the Hon'ble Allahabad High Court that the land it had received was encumbered as a majority of the landholder had received compensation but were to be rehabilitated as per the policy framed by the State Government.

141. As regards the argument of claiming under Clause 3.3.3A of the PPA is concerned, it is submitted that Clause 3.1.2A does not contemplate failure to provide for the original parcel of land (as per the RFP) and the said clause only deals with delay of handing over the additional parcel of land which was 253 hectares. The issue of claiming under the Contract Act, 1872 is not barred in case of any eventuality which is not contemplated in the agreement between the parties as held in *"SAIL v. Gupta Brother Steel Tubes*

Ltd."*[(2009) 10 SCC 63* (Para Nos. 20, 24–26 & 30)*]*. The said Judgment was argued before the State Commission as mentioned in the written submissions filed by the State Commission and finds acceptance by the State Commission in the Impugned Judgment without referring to the aforementioned SAIL Judgment.

142. Clause 3.1.2(ii)(a) of the PPA explicitly stipulated that SPGCL shall award and give an "*irrevocable notice to proceed*" with the works regarding Engineering, Procurement and Construction contract [the "**EPC contract**"] or the main plant contract for boiler, turbine and generator [the "**BTG**"] for the Project within a period of 12 months from the date of issue of Letter of Intent [the "**LoI**"] which was issued on 20.02.2009.

143. The provisions of the RFP and Thermal Power Generation Development Policy, 2008 issued by the GoUP provides for establishing the one additional unit of 660MW at the same plant location (third unit). Thus, SPGCL issued a letter dated 05.07.2010 to UPPCL stating that it is intending to establish one additional unit of 660 MW at the stage along with the implementation of 2X660 MW Karchana Thermal Power Plant.

144. Accordingly, SPGCL placed the order for the BTG and awarded the EPC contract on 23.07.2010 while paying an advance of Rs.313 crores to in an attempt to expedite the construction of the Project, in the right earnest, which was already riddled with continuous delays and empty assurances by the UPPCL that the physical possession of the encumbrance free land shall be handed to SPGCL soon.

145. However, the State Commission rejected the claim towards 'BTG Advance' on the assumption that SPGCL did not keep adequate safeguards in the contract with L&T. In this regard, it is pertinent to note that Clause 3.1.2(ii)(a) of the PPA explicitly mandated SPGCL to give an "*irrevocable notice to proceed*" with the works regarding EPC Contract and the BTG.

146. Furthermore, the contract included all the key 'safety clauses' which are usually provided in such agreements. As a matter of general trade practice, no company accepts an open contract with a provision of take or leave because the companies supplying such plants & machinery start their production only after being in receipt of properly executed orders/ agreements. In such kind of an advance for an equipment which is tailor made for a particular project, a manufacturer of the equipment cannot be expected to start the manufacturing activity without an earnest money advance which would be liable to be forfeited in case the order were to be cancelled for any reason not attributable to the manufacturer.

147. SPGCL, in its right earnest, endeavored to mitigate the claim on account of 'BTG Advance' by getting L&T to assign this agreement to UPRVUNL, however UPPCL failed to take advantage of the SPGCL's efforts towards mitigation of any loss on account of the 'BTG Advance'.

148. It was proposed during the amicable settlement that the Project may be executed by UPRVUNL for which the BTG order given to L&T shall be transferred to UPRVUNL and upon such transfer the

advance paid by SPGCL was to be reimbursed to SPGCL by L&T or UPPCL. In furtherance of this understanding, undertakings were sought by UPPCL from SPGCL as well as L&T that such transfer of the equipment order will be on the clear understanding that there will be no liability arising out of the said order upon UPPCL. The said undertakings were duly submitted by the SPGCL and L&T. However, since UPPCL failed to take advantage of the efforts put in by SPGCL of getting the Project assigned to UPRVUNL, after a period of 16 months thereafter, L&T filed a petition against SPGCL before the Hon'ble High Court, New Delhi, *inter alia*, for damages which was referred to arbitration. Thereafter, SPGCL was constrained to settle the matter by accepting a simple forfeiture of the 'BTG Advance' as against the larger claim by L&T against SPGCL.

149. UPPCL was well aware that in case it does not get the agreement with L&T transferred in favor of UPRVUNL, the 'BTG Advance' made to the L&T will be forfeited and the same shall be claimed by SPGCL from UPPCL. However, despite all the undertakings, UPPCL did not get the contract assigned in favor of UPRVUNL which resulted in termination of the contract with L&T in accordance with the agreement.

150. The agreement with L&T was in furtherance to SPGCL's commitment to develop the power plant at the earliest.

151. The State Commission has allowed UPPCL to take advantage of their own wrongs/ defaults even after rightly observing that SPGCL duly kept on meeting the milestones for the completion of the

Project, and it was UPPCL which failed to meet its primary obligation to hand over unencumbered physical possession of the Project land and later failed to assign the L&T contract to UPRVUNL.

152. The State Commission has duly observed that it was UPPCL which retracted from the proposal of assignment of the L&T contract in favor of UPRVUNL.

153. The State Commission allowed a Simple Interest of merely 9% solely on the basis that SPGCL had earlier agreed for the same during the process of amicable settlement without considering the fact that such rate of interest was agreed upon, in good faith, merely for want of an early settlement of its disputes in an amicable manner, without prejudice to SPGCL's other rights. Clearly the views expressed during conciliation were not admissible as evidence while adjudicating the matter being barred under section 81 of the Arbitration and Conciliation Act, 1996.

154. Such negotiations subsequently failed, however the fact on record remains that the finance was raised from the banks by the SPGCL's holding company at a much higher rate of interest (i.e. @14%) to purchase SPGCL's equity shares.

155. That State Commission had already observed and held that SPGCL should be allowed reimbursement of around Rs.251.37 Crores along with "*reasonable interest*".

156. The most reasonable interest would have been at least in parity with rate of interest paid by the Successful Bidder (SPGCL's Promoter) which was admittedly @14.11% p.a. and the said fact was pleaded before the State Commission without any denial from UPPCL.

157. That State Commission observed and held that SPGCL should be allowed reimbursement of the following expenses along with "*reasonable interest*":

S. No.	*Particulars*	*Total (Rs. in Crs.)*
I.	*Land*	*89.97*
II.	*Other advances (NCL, PGCIL, UPPCL) and BG Charges*	*40.40*
III.	*Administrative expenses*	*18.18*
IV.	*Cost of financing*	*84.88*
V.	*Interest on Debt from ICICI bank*	*17.24*
VI.	*Total*	*251.37*

158. However, the State Commission arbitrarily proceeded with a direction of payment of a simple interest @9% merely on a sum of Rs.149.25 Crores despite observing that a reasonable interest is payable on the total sum of Rs.251.37 Crores.

159. Despite allowing the other claims and the interest thereon, the State Commission erred in not specifying the rate of interest and the interest period with respect to other claims, being for ‘cost of financing’ and ‘interest on debt from ICICI bank’.

160. It is a settled principal of law as also held by the Hon’ble Supreme Court in “*Kerala State Electricity Board &Anr. v. M.R.F. Limited*” *[(1996) 1 SCC 597]* that in an action by way of restitution, no inflexible rule can be laid down and that while giving full and complete relief in an action for restitution, the court has not only power but also a duty to order for mesne profits, damages, costs, interest etc.

161. As per the settled principle of law, restitution in contracts law is designed to restore the injured party or the party who suffered damages to the position they were in before the formation of the contract.

162. The State Commission directed for payment of interest only for the period from 11.04.2014 (when SPGCL referred its disputes for Amicable Settlement) to 31.03.2019, rather than from 2009 onwards when the actual expenditure actually started, despite observing that SPGCL is duly entitled to its claim of restitution of contract and allowing the same under the provisions of the Contract Act.

Findings and analysis:-

163 We have heard the Appellants, Respondents in both the appeals i.e. 259 of 2019 and 295 of 2019, gone through the Appeals and written submissions and we are of the opinion that following issues arise for our consideration:

Issue No.1: Whether the Appeal of Sangam PGCL can be dismissed on the ground of limitation?

164. It is the case of the Appellant that the petition of SPGCL is liable to be dismissed on the ground of limitation. The Appellant has

165. The Appellant have submitted that on account of Section 3 of the Limitation Act, 1963, irrespective of whether the ground of limitation has been urged, it shall be the duty of the Tribunal to dismiss the appeal if it is barred by the limitation. Section 3 of the Limitation Act reads as follows:-

"3. Bar of limitation.—

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

The Appellant has also referred to judgment:-*V.M. Salgaocar& Bros.* v. *Board of Trustees*, (2005) 4 SCC 613 (Ashok Bhan; A.K. Mathur, JJ).

166. The Appellant has also referred to Article 55 of the First Schedule of the Limitation Act, 1963 which reads as follows:-

For the breach of contract express or implied not herein expressly provided for	*Three Years*	*When the contract is broken or (when there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases*

It is the case of the Appellant that in a case of breach of contract, the limitation period begins to run when the breach is committed and the limitation period is three years from such time.

167. Further, Section 9 of the Limitation Act reads as under:

"***9. Continuous running of time. –*** *Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:*

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

From the aforesaid provision of the Limitation Act, it is clear that when once cause of action accrues in favour of a party, the limitation period starts running from that day itself, and no

subsequent disability or inability on part of the said party can prevent the said limitation period from running.

168. On this basis the Appellant has tried to make out a case that even if assuming the day i.e. 04.04.2015, as the day, on which SPGCL issued a letter stating that the PPA stood frustrated due to impossibility. This being the final communication, limitation period for a claim for compensation for breach of a contract (i.e. the PPA) as per Item 55 of the Schedule of the Limitation Act, 1963 would expire on 04.04.2018. Since the petition was filed only on 01.08.2018 therefore the petition was barred by limitation.

169. ***Per contra**,* the Respondent SPGCL has submitted that although it is a settled principle of law that the limitation period starts running from the day itself when the cause of action accrues in favor of a party and no subsequent disability or inability on part of the said party can prevent the said period from running (unless permitted by/ under law). However, the entire argument made by UPPCL is misconceived for the sole reason that it is based on the premise that the UPPCL's date for performance of its obligation was a fixed one (i.e. 16.01.2009) and therefore the limitation period must start from that date itself.

170. It has been further submitted that it is a settled principle that even though a contract may have a fixed date for performance, the same can be extended by an act of forbearance or non-insistence on performance. The same may be proved by oral evidence or even by conduct of the parties, as is also held by the Hon'ble

Supreme Court in "*S. Brahmanand & Ors. v. K.R. Muthugopal (Dead) &Ors.*" *[(2005) 12 SCC 764]*:

"***34.*** *Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party… …Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd. [AIR 1953 Trav Co 161] was a similar instance where the contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time was fixed for its performance" and held that what was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said article because of the supervening circumstances of the case.*

35.*In the present case, it was only on 31-8-1995/1-9-1995 that the plaintiffs realised that there was a refusal to perform, when they were forcibly evicted from the godown. It is only then that the plaintiffs had notice of refusal of performance. Counted from this date, the suit was filed within 15 days and, therefore, was perfectly*

within the period of limitation. We, therefore, disagree with the High Court on this issue of limitation and hold that the suit filed by the plaintiffs was within the period of limitation and was not liable to be dismissed under Section 3 of the Limitation Act. All other issues concurrently have been held in favour of the plaintiffs. Hence, there is no impediment to the plaintiffs succeeding in the suit."

171. It has been submitted that such a submission (on limitation) is *ex facie* and absolutely misleading as well as incorrect as the cause of action could not have arisen on 16.01.2009 for the fact that the Letter of Intent was issued to M/s Jaiprakash Associates Ltd. (the Successful Bidder for the Project) on 20.02.2009, which was accepted by M/s Jaiprakash Associates Ltd. on 05.03.2009.

172. It is the case of Respondent SPGCL that UPPCL acknowledged the claims raised by SPGCL against UPPCL for which a settlement committee was constitutedwherein all claims and counter claims were discussed. Confirmation of the said meeting was communicated to SPGCL by letter dated 02.05.2015.Clearly, even if 20.11.2012 is considered to be the start date for the purposes of limitation then the constitution of the committee for settlement on 07.04.2015 is within time from the said date being within three years. However, since UPPCL did not consider 20.11.2012 as the start date and kept on requesting SPGCL to perform its obligation under the agreement, the start date should be 11.06.2014 when SPGCL issued the formal notice in terms of the PPA. Since the committee for amicable settlement was constituted within three years of either of the two dates, the question of limitation will have

to be considered only from the date on which the settlement talks finally broke down.

Interestingly, UPPCL issued the Preliminary Default Notice claiming liquidated damages on 05.03.2019 and issued the final claim pursuant to this Preliminary Default Notice on 23.04.2019, clearly acknowledging the fact that UPPCL expected SPGCL to perform the contract up to the said date and it is only after the Termination Notice issued on 23.04.2019 can it be said that UPPCL took the stand that, from the said date, the contract could not be performed. Section 18 of the Limitation Act, 1963 makes it clear that a fresh period of limitation shall be computed when there is acknowledgment of a claim.

173. It is the case of the Respondent SPGCL that the cause of action to file the petition arose on 13.03.2018 when the SPGCL withdrew from the settlement (as no settlement was reached during which SPGCL was forced to enter into a Settlement Agreement with L&T) and issued a final breakdown notice with a claim of Rs.1157.22 crores which was based on the expenditure up to 28.02.2018.Within five months thereafter the Petition was filed before the State Commission and since the settlement talks were on till 13.03.2018, there was no question of limitation either raised before the State Commission or such question rising for consideration by the State Commission. UPPCL having nothing to argue on merits before this Tribunal has tried to divert the attention of this Tribunal on the issue of limitation when clearly there was no question of the issue of limitation arising in the instant case. The Respondent has further submitted that the issue of limitation was

not raised by UPPCL throughout the proceedings before the State Commission.

We agree with the submissions made by the Respondent SGPCL that even though a contract may have a fixed date for performance, the same can be extended by an act of forbearance or non-insistence on performance. The same may be proved by oral evidence or even by conduct of the parties.

In that view of the fact, we are of the opinion that this case filed by Respondent SGPCL cannot be dismissed on ground of limitation.

Issue No.2: Whether the State Commission has erred in adjudicating the dispute and deciding as per the impugned order dated 28.06.2019.

174. The State Commission vide its Impugned Order dated 28.06.2019 has adjudicated the dispute with the following directions at para 82 of the Impugned order:

a) The Power Purchase Agreement dated 17.10.2008 and the Share Purchase Agreement dated 23.07.2009 would stand terminated. As a consequence of termination of share purchase agreement, the Respondents shall become the owner of Sangam Power Generation Company Ltd.

b) The Petitioner would transfer the entire land in their possession to the Respondents or their nominee.

c) The Respondents will have a right to get the coal linkage for the project transferred in their name or their nominee subject to the guidelines of Ministry of Coal.

d) The Respondents will pay a sum of Rs. 251.37 Crore, along with interest @ 9% (simple) only on Rs. 149.25 Crore for the period from 11.04.2014 to 31.03.2019. The interest on cost of financing and interest on debt is not allowed. The reimbursement of advances to NCL, PGCIL etc., administrative expenses, cost of financing and interest on debt shall be subject to verification on the basis of relevant documents or through an independent firm of chartered accountants.

e) The Respondents will immediately release the Performance Guarantee provided by the Petitioner.

175. The State Commission in the Impugned Order dated 26.06.2019 have recorded its view under the heading Commission's View which reads as under:

"78. The Commission has gone through the Petition, Counter Affidavits, arguments and written submissions of both the parties and has observed the following:-

a) In this petition the primary issue which is responsible for non-setting up of the Project is the non-availability of incumbrancers free land to the promoter of the project. The Petitioner has stated that though the conveyance deed for 512.91 Ha land

was executed by the respondents but they could not get the actual physical possession of the land due to the agitation by the landowners. Subsequently the Hon'ble High Court Allahabad quashed the land acquisition for this project with a condition that those land owners who have received the compensation may get back their land after returning the compensation amount to the Revenue.

b) *This was a case-2 bidding project as per the guidelines of Govt. of India with certain deviations approved by the Commission. The conditions subsequent were provided in the PPA and both the parties were under obligation to meet these conditions subsequent within the given timelines. The petitioner has listed the various milestones, that were met by them and from the procurer side the most important condition was providing 555.63 Ha of land, out of which 512.91 Ha land was transferred to the petitioner by way of conveyance deeds.40 Ha of land was reserved by District Magistrate concerned and was handed over to the petitioner. Out of the acquired land, 122farmerswho were the owners of about 31.05 Ha land had not taken compensation, and continued to occupy the acquired area. Without these scattered patches of land, the construction of power plant would not have been possible keeping in view the lay out plan submitted. Though the Hon'ble High Court Allahabad quashed the land acquisition but put a condition that the acquired land would be returned to farmers when they refund the compensation amount. Nobody came forward to refund the compensation and the land still belongs to the petitioner.*

c) *As per the LOI dated 20.02.2009 issued to the petitioner the first unit of 660MW was to be commissioned within 54 months from effective date and the second unit was to be commissioned within 59 months from the effective date. In the PPA the effective date has been defined to be the date of acquisition of 100% equity share holding of the SPV by the selected bidders. The Share Purchase Agreement was signed on 23.07.2009 and according to the LOI the first unit was to be commissioned by 22.01.2014 and second unit was to be commissioned by 22.06.2014. The land was transferred to the Petitioner in February and August 2010. In the RFP it was provided that the possession of 330 Ha of land free from all encumbrances will be obtained before issue of LOI to the successful bidder. It also provided that 253 Ha land will be acquired by authorized representative within three months from the date of issue of LOI. But the respondents failed to transfer the aforesaid land to the Petitioner as per the timelines provided in the RFP.*

d) *After the transfer of land the Petitioner could not enter the area due to agitations by the farmers and ultimately the acquisition was quashed on 13.04.2012. During the period from the effective date till the date of issue of High Court order the agitations continued and despite the best efforts by the District Administration the Petitioner could not carry out the construction activity at the site. The Respondents have pleaded that after the transfer of land in the name of the Petitioner their obligation under the PPA was over. But this*

averment of the respondents cannot be accepted because the State after acquiring the land failed to provide the physical possession of land to the Petitioners.

e) *Clause 3.3.3A of the PPA provides that in case of inability of the Procurers to perform the activities specified in Clause3.1.2Awithin the time period specified therein, otherwise than for the reasons directly attributable to the Seller or Force Majeure event, the Condition subsequent as mentioned in Clause 3.1.2 would be extended on a 'day to day' basis, equal to the additional time which may be required by the Procurers to complete the activities mentionin Article3.1.2A, subject to a maximum additional time of six (6)months. Thereafter, this agreement could be terminated by the seller at its option by giving a termination notice of at least 7 days in writing to the procurers. In case the seller elects to terminate this Agreement, the Procurers shall, within a period of thirty days, purchase the entire shareholding in the Seller for the following amount. Provided such purchase of share shall be undertaken by the Procurers in the ratio of their then existing allocated Contracted Capacity. The Procurers were liable to pay the declared price of land plus the purchase price of shares and a sum equal to 10% of land price and share purchase price.*

f) *The Petitioner did not exercise his right of termination of PPA and waited for resolution of dispute regarding land and when a considerable period elapsed approached the Respondents on04.04.2015 for amicable settlement of the*

issue under clause 17.2.1 of the PPA. The Respondents constituted a Committee for amicable settlement of the dispute and the committee met a number of times to discuss as to what amount can be paid to the petitioner in the given circumstances. The Petitioner had spent a large sum of Rs.313.00 crore in giving an advance to L&T for procurement of boiler, turbine and generator. At one stage it was decided that the contract with L&T can be assigned in favour of UP Rajya Vidyut Utpadan Nigam Ltd. and a joint undertaking was also taken but later the Respondents retracted from this proposal. In one of the meetings they agreed to pay the land price and the amount of advances along with 9% interest to the Petitioner but later they back tracked from the offer of payment of interest.

g) *Now after the amicable settlement process has failed the Petitioners have approached to this Commission under Section 86 (1) (f) of the Electricity Act 2003 for adjudication of this dispute. They have claimed restitution as per provisions of Section 51, 52 and Section 54 of the Indian Contract Act, 1872.*

h) *AG, UP appearing on behalf of the Respondents raised an objection and stated that since the Petitioner has claimed compensation under the Contract Act this petition is not maintainable in the Commission. He stated the view that Commission can only decide the dispute within the four corners of the PPA. The Respondents stated that in Gujarat Urja Vikas Nigam Ltd. Versus Essar Power Limited it has been decided that the disputes of any nature relating to generating companies and the licensee can only be decided by the*

state commission or the arbitrator appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the state Commission or the arbitrator (or arbitrators) nominated by it.

79. *In fact the judgement of Gujrat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. not only holds that any dispute related to generating companies and licensees can only be decided by State Commission or the arbitrator appointed by it but it also holds following, which establishes that the powers under Section86(1)(f)has an overriding effect over arbitration and Conciliation Act 1996 —*

"27. Section 86 (1)(f) is a special provision and hence will override the general provision in section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that special law overrides the general law. Hence, in our opinion, section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only section 86 (1)(f) shall apply in such situation.

32. Section174 provides that the 2003 Act will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86 (1)(f) is a special provision for adjudicating disputes

between the licensee and generating companies, in our opinion by implication section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely section 86 (1) (f) of the 2003 Act. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes."

Therefore, it is well settled now that any dispute between generating company and licensee shall be adjudicated by the Commission or its appointed arbitrator.

80. *Further the contention of Advocate General UP appearing on the behalf of respondents, that since the petitioner has claimed compensation under the Contract Act hence the petition is not maintainable as the Commission can only decide the dispute within the four walls of PPA, does not cut much ice. In fact Section 175 of the Electricity Act, 2003 clearly provides that "the provision of this Act are in addition to and not in derogation of any other law for the time being in force". Further, the PPA entered into between the petitioner and the respondents define "Law" as following —*

"Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule

or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules , regulations, decisions and orders of the Appropriate Commission; "

Subsequent to it, article 17.1 of PPA also defines governing law as "this agreement shall be governed by and construed in accordance with the laws of India." Hence it is abundantly clear that four walls of PPA include all laws of India unless these are inconsistent to the express provisions of Electricity Act, 2003 as per with Section 173 of Electricity Act, 2003. In such a situation, the contention of Advocate General is not acceptable.

81. *Having established the supremacy of the adjudicatory function of the Commission in relation to disputes between generating companies & licensees and also that the applicable legal framework available to the Commission for resolution of such disputes is the Electricity Act, 2003 as well as other laws of India to the extent these are not inconsistent to the express provisions of Electricity Act, 2003, the Commission has considered the claims of petitioner as per provisions of Section 51, 52 and Section 54 of the Indian Contract Act, 1872 and the findings of the Apex court in different cases.*

a) *In the present case the Petitioners have claimed the following amounts towards reimbursement of expenses incurred by them:*

S.No.	*Particulars*	*Total (Rs. in Crs)*
1.	*Land*	*89.97*
2.	*BTG Advance*	*313.24*
3.	*Other Advances (NCL, PGCIL, UPPCL) and BG Charges*	*40.40*
4.	*Administrative Expenses*	*18.88*
5.	*Cost of Financing*	*84.88*
6.	*Interest on Debt from ICICI Bank*	*17.24*
7.	*Total*	*564.61*
8.	*Financing Cost of Expenditure @ 14% upto February 2015 reckoned from middle of Financial Year*	*592.61*
9.	*Total Claims*	*1157.22*

b) *The Petitioner would have been entitled to get the cost of land, the share purchase price, and additional 10% on these two amounts if they would have terminated the PPA as per clause 3.3.3A but in the hope of resolution of land dispute they continued with the project and kept on meeting the milestones prescribed for them in the PPA. In 2014 they moved for an amicable settlement which was acted upon by the Respondents. Ultimately no solution could be found and now under Section 51, 53 and 54 of the Contract Act the Petitioners are claiming the above amount.*

c) *The PPAs cannot provide for all the eventualities in the contract therefore cannot have elaborate provisions of compensation in different situations. The PPA is also a contract and the Petitioner cannot be debarred from taking shelter under the provisions of Contract Act, particularly in the matters not clearly dealt with by the PPA. In this case the equity and justice demands that the petitioner should get a fair deal in the matter of compensation for the loss it has suffered on account of non-availability of land and thereby making the performance of the contract impossible. In view of provisions in Section 51, 53 and 54 of the Indian Contract Act 1872 and also the findings in the judgement of Hon'ble Supreme Court in the case of Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Limited and others (2018) 3 Supreme Court Cases 133, the Commission finds that reasonable amount of investment should be reimbursed to the Petitioner.*

d) *After examining the claim of the Petitioner we are of the view that the Petitioner is not entitled for compensation of the following amounts:*

a) BTG Advance	*313.24 Cr.*
b) Financing cost of Expenditure	
@ 14% upto February, 2015	*592.61 Cr.*

The Petitioner gave the advance to L&T knowing fully well that the undisputed land was not available and the Project

may not come up. Further they did not keep adequate safeguards while signing the contract with L&T to get back their advance in case the project is abandoned. Further they themselves settled the dispute with L&T and agreed for forfeiture of the advance of Rs.313.24 Crore. When the amicable settlement was going on they should not have settled with L&T without the concurrence of the Respondents. Further the orders to L&T were for 3 units of 660 MW whereas the PPA was only for two units. Therefore, they are themselves liable for this loss. Regarding financing cost of expenditure it appears that the petitioner is asking for a return on his expenditure @ 14% as a business profit without completing the project. Expecting any return on investment in the present case is not covered by doctrine of restitution. Therefore this claim cannot be allowed.

e) *The Commission is of the view that the remaining claims as enumerated below are in the nature of actual expenditure incurred by the Petitioner and should be allowed to be reimbursed to the Petitioner along with reasonable interest:*

S. No.	*Particulars*	*Total (Rs. in Crs.)*
I.	*Land*	*89.97*
II.	*Other advances (NCL, PGCIL, UPPCL) and BG Charges*	*40.40*
III.	*Administrative expenses*	*18.18*
IV.	*Cost of financing*	*84.88*
V.	*Interest on Debt from ICICI*	*17.24*

	bank	
VI.	*Total*	*251.37*

f) The Petitioners had earlier agreed for payment of interest@9%therefore the Commission would like to allow the interest on Rs.149.25 crore (Land Cost Rs. 89.97 crore+ Advances Rs.40.40 crore +Admin. Exp. Rs.18.88 crore) with the simple interest rate of 9% for the period from 11.04.2014 i.e. the year when they approached for amicable settlement till 31.03.2019.

g) The Commission also finds that during the last 10 years the value of land which the Respondents will get back has multiplied manifold. Even the land acquisition price is now four times the circle rate. The Respondents can use this land for setting up any new power project. The coal linkage can also be transferred in favour of Respondents which can be used in another project. Thus the Respondents are not a looser even after reimbursement of the aforesaid amount to the Petitioner."

176. We have gone through the findings and the decision of the State Commission in its impugned order and are of the considered opinion that the Impugned Order dated 26.06.2019 passed by the State Commission does not require any intervention of this Tribunal, except the last part of para at *serial no. d) under para 82,* which reads as under:

"The interest on cost of financing and interest on debt is not allowed. The reimbursement of advances to NCL, PGCIL etc., administrative expenses, cost of financing and interest on debt shall be subject to verification on the basis of relevant documents or through an independent firm of chartered accountants."

We are of the opinion that it would be appropriate on the part of the State Commission to complete the verification at their end itself. Accordingly, we direct the State Commission to complete the verification within a period of three months from the date of pronouncement of this judgment and crystallize the total amount to be paid to Respondent SGPCL. In view of this, the impugned order dated 28.06.2019 passed by the State Commission (Uttar Pradesh Electricity Regulatory Commission) is hereby set aside to the extent as indicated herein above.

177. The appeals and pending applications stand disposed of in above terms. No order as to costs.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 14th DAY OF JULY, 2021.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

√

REPORTABLE/NON-REPORTABLE

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