IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 2 OF 2015

Dated: **07th April 2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

GUJARAT URJA VIKAS NIGAM LIMITED
Sardar Patel Vidyut Bhavan,
Race Course,
Vadodara – 390007
Gujarat ….. Appellant(s)

VERSUS

1. **GUJARAT ELECTRICITY REGULATORY COMMISSION**
6th Floor, GIFT ONE, Road 5C, Zone 5,
GIFT City,
Gandhinagar – 382355
Gujarat

2. **ESSAR POWER LIMITED**
Essar House,
11, Keshavrao Khadye Marg,
Mahalaxmi
Mumbai - 400 034 ….. Respondents

Counsel for the Appellant (s) : **Mr. M.G. Ramachandran, Sr. Adv.**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Harsha Manav
Ms. Srishti Khindaria

Counsel for the Respondent (s) : Ms. Suparna Srivastava for R-1
Mr. Sajan Poovayya, Sr. Adv.
Mr. Alok Shankar
Ms. Raksha Agrawal for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

PREFACE

1. The appeal at hand under Section 111 (1) of the Electricity Act, 2003 by the procurer of electricity assails the grant of certain reliefs to the generator (supplier) having impact on financial obligations.

2. The appeal was preferred by *Gujarat Urja Vikas Nigam Limited* (for short, “GUVNL” or “the appellant”), the procurer, a Government of Gujarat enterprise and a Company incorporated under the Companies Act, 1956, one of the successor companies of erstwhile *Gujarat Electricity Board* (“GEB”) upon its reorganization in terms of the provisions of Sections 131, 133 etc. of the *Electricity Act, 2003* enacted by the Parliament and the *Gujarat Electricity Industry (Re-organization and Regulation) Act, 2003* enacted by the State Legislature of Gujarat, brought into force from 01.04.2005, it having succeeded to the business of bulk purchase and bulk sale of electricity earlier undertaken by the GEB. It may be mentioned here that the under the *Gujarat Electricity Industry Re-organization and Comprehensive Transfer Scheme, 2005* framed by the Government of Gujarat, GEB was bifurcated into seven companies, one of them being the appellant GUVNL it being the holding company of the other six entities. The Appellant has succeeded to all the *power purchase agreements* (“PPAs”) and power procurement arrangements which the erstwhile GEB had entered into with third parties including the agreement which is subject matter of these proceedings.

3. The second respondent *Essar Power Limited*, herein (for short, “Essar” or “EPL” or “the second respondent” or “the generator”) is a company incorporated under the provisions of the Companies Act, 1956, engaged as a generating company under Section 2 (28) of the Electricity Act, 2003 and operates and maintains a 515 MW generating plant in the State of Gujarat, its generating plant having

been commissioned and become commercially operational on 01.10.1997.

4. On 30.05.1996, the erstwhile *Gujarat Electricity Board* (predecessor of the appellant) and second respondent had entered into a *Power Purchase Agreement* (hereinafter “the PPA”) in regard to sale and supply of electricity by second respondent to GEB from the said 515 MW generation station to be established by Respondent No. 2 at Hazira, in the State of Gujarat. The PPA was subsequently amended by the parties by executing supplementary agreement dated 18.12.2003.

5. The appellant assails the order dated 22.10.2014 passed by the first respondent *Gujarat Electricity Regulatory Commission* (for short, “GERC” or “the State Commission” or simply “the Commission”) in Petition No. 1002 of 2010 which had been filed by the second respondent Essar under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of the disputes with respect to the monetary claims under the PPA, it having been partially modified by a Corrigendum Order passed on 21.11.2014.

6. One of the prime arguments of the appellant is that the petition of the generator was barred by law of limitation and yet entertained to the prejudice of the appellant. It is also a grievance of the appellant that the Commission failed to take a timely decision having passed the final order only on 22.10.2014, after having reserved the order on 20.04.2013, this having resulted in dispensation which is replete with inconsistencies and in breach of judicial discipline in adjudicatory functions. The appellant raises specific grievances

vis-à-vis certain issues dealt with by the impugned order viz. depreciation; Sinking Fund/UTI Non-Convertible Debenture impact; Bill Discounting; Bill Discounting; Rebate Interest on working capital; and Delayed Payment Surcharge.

7. *Per contra,* the second respondent contests the appeal submitting that GERC has adjudicated its claims as per the terms of the PPA and other documents on record, having allowed some but rejected certain others on the ground of being time barred, by a reasoned order based on the interpretation of the provisions of the PPA and the applicable law, the grounds urged by the appellant being not sustainable in law and the appeal liable to be dismissed with costs, it being necessary that the appellant be directed to make payments to Essar forthwith.

8. We may observe at this very stage that the fact that the Commission passed the impugned order on 22.10.2014 after elapse of eighteen months post conclusion of hearing on 20.04.2013 cannot be approved of. It is well settled that adjudicatory function has to be discharged expeditiously and decision-making process must receive due priority even at the hands of a regulatory authority which is statutorily responsible for multifarious regulatory and administrative functions as well. Borrowing the words of Hon'ble Supreme Court, we say that "*unreasonable delay between hearing of arguments and delivery of judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable*" [*R.C. Sharma v. Union of India and Others*, 1976 (3) SCC 574; *Anil Rai v. State of Bihar*, (2001) 7 SCC 318]. It is the case of the appellant that the delay

has led to some factual errors creeping in the order of the Commission reflecting that the order was rendered mechanically without application of mind, vitiating the process. At this stage we only say that the effect of factual inaccuracies, if any, on the final outcome shall have to be examined by us in context of specific issues on merits.

9. But we cannot ignore the fact that this appeal has come up for final hearing after a gap of seven years. Since merits of the decisions taken by the impugned order are also questioned, it would not be proper to displace the order at this distance in time to require the Commission to undertake "de-novo proper consideration", as is solicited, only on basis of inordinate delay in decision-making by the GERC subject, of course, to view being taken on the preliminary issue of limitation.

10. In the submission of the appellant that the State Commission has not determined the actual quantum of amount payable by it to Essar and, therefore, the correctness of the substantial amounts claimed due and payable under the Impugned Order by Essar cannot be gone into in this appeal.

THE FACTS

11. Before taking up the objection of limitation or the challenge on merits to conclusions of GERC on specific issues, it is essential to take note of basic factual background.

12. As noted earlier, the PPA was signed between the parties on 30.05.1996 for sale and purchase of 300 MW from the 515 MW Generating Station to be established by Essar, it also signing a separate PPA with its Group Company (Essar Steel Limited) for sale of the balance of 215 MW capacity on 29.06.1996. Earlier, on 06.08.1995, Central Electricity Authority, by its letter to Essar had approved the total project cost of EPL's proposed 515MW Thermal Power Plant situated in the State of Gujarat at Rs.1745 Cr, *inter alia*, stating that the "*completed capital cost of the scheme shall not succeed US 284.33 million plus Rs.770.87 Cr. except on account of statutory requirement and foreign exchange rate variation of foreign component to be used beyond 31.03.95.*"

13. Under the terms of the PPA, it was agreed between the parties that Essar shall set up and operate 515 MW Thermal power plant and the Appellant was allocated 300 MW capacity from the aforesaid power plant on the terms and conditions and provisions contained in the PPA. The generator entered in to another PPA with Essar Steel Limited on 29.6.1996 for sale of balance capacity of 215 MW.

14. During July 1996 to September 1997, the Power Plant was operating in open cycle mode, as opposed to combined cycle mode. The power supplied by Essar during this period was treated as infirm power and thus the invoices were paid on the basis of actual energy exported and not on the basis of declared availability. The amounts pertaining to depreciation and variable charges were not included in these invoices. As per the Minutes of the Meeting between the parties it was decided that the tariff for

supply of power during the Open Cycle operation will be determined on the basis of parameters corresponding to Combined Cycle operations as incorporated in the PPA.

15. The parties to the PPA which is subject matter of this case exchanged certain correspondence in the year 1997 envisaging creation of a Sinking Fund which would also earn interest in foreign currency so as to reduce/cover the foreign currency risk. On 18.03.1997, Essar, by its letter to GEB, provided certain clarifications/compliances that were to be followed under the PPA seeking approval for creation of a Sinking fund. By letter dated 10.9.1997, confirmed by another letter dated 6.10.1997, Essar statedly agreed on the project cost of Rs.945 Crores for the contracted capacity of 300 MW which was later increased to Rs.957.82 Crores due to exchange rate difference.

16. The salient points of the letter dated 10.09.1997 are that (i) Depreciation will be calculated on the basis of depreciated Project Cost arrived at by subtracting the cost of land, working capital margin and cost of leased assets and then apportioned to the allocated capacity; (ii) Project cost should be Rs.945 Cr.; and that (iii) Essar will create a Sinking Fund Account towards Essar's liability for *external commercial borrowings* ("ECB") bullet payment so as to save GEB from the exchange fluctuation risks on that much portion of ECB loans as funded in the Sinking Fund Account. The letter dated 06.10.1997 statedly provided clarifications to the Financing Plan provided by GEB including that the cost of the project excluding working capital was Rs.957.78 Cr. and the total depreciation amount of the Plant per annum was Rs.126 crores and depreciation for the allocated capacity to GEB being Rs.73.63

Cr. Essar confirmed that Sinking Fund will commence from March 1998 and shall be funded at the end of every six months.

17. The generating station was commissioned and declared under Commercial Operation on 01.10.1997.

18. Concededly, GEB paid Rs.73.64 Cr per year to Essar on account of depreciation, amounting to Rs.424.14 Cr. during October 1997 to June 2003, also having commenced payment of tariff invoices of EPL on the basis of declared availability, as prescribed under the PPA from January 1998 onwards.

19. By order dated 10.10.2000, the GERC directed GEB, in petition no. 19/1999 to re-negotiate the PPAs entered with Independent Power Producers ("IPPs"), including Essar, to bring down the cost of power purchase in the larger consumer interest. On 02.09.2002, GEB, filed Petition No.90/2002 before GERC, praying it to set parameters for determination of tariff for negotiations with IPPs and in the event of failure of negotiation, review all the PPA and determine tariff at which power shall be procured by GEB.

20. It is alleged that that due to the defaults in payment of invoices by GEB, Essar was unable to repay its dues by the scheduled repayment date (in 2002) for its Non-Convertible Debentures that had been placed with Unit Trust of India ("UTI") and, thus, the payment schedule was extended for another year, increasing the liability to pay Rs.3.82 Cr as additional interest to UTI. Admittedly, the payment of Rs.3.82 Cr was initially made by GEB to Essar, for

the additional amounts paid to UTI, but subsequently deducted with additional interest.

21. In 2002, Government of Gujarat constituted a committee ("1st Negotiation Committee") for re-negotiation of PPA entered into by GEB with all IPPs with respect to the cost of power purchase, in the larger interest of the consumer. In order to resolve the differences that had arisen between them the parties entered into the Supplementary Agreement on 18.12.2003. On 19.12.2003, a Letter issued by GEB along with the Supplementary Agreement recorded the settlement reached on the outstanding issues during the renegotiation of the PPA, GEB having agreed to pay the outstanding dues of Rs.289.40 Cr, if Essar agreed to 40% reduction of DPC up to September 2003. It is the stand of the appellant that the issue relating to rebate had been considered as a one-time settlement and not an amendment to any basic provision of the PPA, the letter concluding with observation *"(w)ith the issuance of this letter, all the outstanding issues between GEB and EPOL in relation to the Power Purchase Agreement dated 30-5-1996 stand as fully and finally resolved.*"

22. It is stated that Essar, by its letter dated 14.06.2004 to GEB, requested them to reconfirm the acceptance of Delayed Payment Surcharge and Rebate claims as refundable so that the invoices raised in that regard could be processed.

23. On 07.07.2004, Essar repaid the entire US$ denominated loan at the exchange rate of Rs.45.9295/ US$, as against the base foreign exchange rate Rs.35.17/ US$. This meant that GEB was liable to

pay Rs.78.27 Cr towards the foreign exchange rate variation. Essar raised an invoice accordingly on 14.07.2004 for payment of Rs.78.27 Cr towards the foreign exchange rate variation for repayment of its external commercial borrowing.

24. The Government of Gujarat constituted another Negotiation Committee chaired by Mr. SK Shelat ("2nd Negotiation Committee") on 20.08.2004 for further negotiation with all the IPPs to reduce the cost of power purchase. Essar admittedly did not participate in any negotiations/discussions before the 2nd Negotiation Committee. Instead, by its letter dated 22.09.2004, it requested GEB to release the excess amount of Rs.32 Crore on account of depreciation which had been withheld. GEB, by its response dated 08.10.2004, refuted the claims of Essar and stated that the actual amount refundable was Rs.26.39 Cr. Admittedly, on 30.09.2004, GEB had made payment of Rs.26 Cr to Essar towards Delayed Payment Charges.

25. On 15.10.2004, Essar, by its letter to GEB, conveyed its disagreement with the working and basis of recomputing the depreciation amount stating that the depreciation amount agreed upon after renegotiation of the PPA was Rs.4084.85 lakhs per annum for the period 1st July 2003 to 1st July 2013. On 31.12.2004, GEB made a payment of Rs.39.10 Cr to Essar, against the invoice of Rs.78.27 Cr raised by Essar on 14.07.2004, contending that the interest accrued from the Sinking Fund would cover the balance amount of Rs.39.17 Cr, despite the fact that no Sinking Fund was formed due to the non-payment of invoices by GEB.

26. On 19.01.2005, GEB, by its letter to Essar, informed them about the reversal of Rs.26.73 Cr as per the view of the 2nd Negotiation Committee, also deducting payments of Rs.5.40 Cr that had been paid towards the additional interest that had been paid to UTI (Rs.3.82 Cr + Rs.1.58 Cr further interest), and deducted Rs.10.48 Cr towards interest on working capital. On 27.01.2005, Essar, by its letter to GEB, submitted its objections to the reversal of payment.

27. During May 2005 to March 2013, the appellant deducted rebates of 1% and 2.5% from all the invoices raised by Essar, the second latter taking exception on the ground that the payments had not been made within the prescribed timelines to avail such rebate. Essar, by its letter dated 06.08.2005 demanded payment for various Monthly/Supplementary invoices raised by EPL under various heads.

28. Disputes between the parties persisted and Essar raised claims in regard to admissible depreciation, it being the stand of the appellant that the amount of Rs.73.63 Crores per annum had been computed by Essar on a wrong basis such mistake having been carried forward in the computation of Rs.40.85 Crores at the time of signing of Supplementary Agreement. It is stated that error was conceded by Essar and GUVNL's stand that depreciation amount to be paid over the life of the PPA should be limited to 90% of the project cost allocated to Gujarat Electricity Board was accepted by letter dated 22.9.2004 of Essar. It is stated that vide letter dated 22.9.2014, GUVNL had offered the amount payable as depreciation as per the accepted principles, the revised

computation made by GUVNL having been agreed by Essar vide their letter dated 15.10.2004.

29. On 21.07.2005, the State Government decided that the disputes and differences raised by the respective parties should be settled through adjudicatory process of the State Commission under the Electricity Act, 2003. On 14.9.2005, the appellant filed a Petition (No. 873 of 2006) before the State Commission under Section 86 (1) (f) of the Electricity Act, 2003 seeking adjudication of disputes under the PPA dated 30.5.1996 on the issues of (i) Diversion of Capacity allocated to the Appellant and (ii) the admissibility of Deemed Generation Incentive. In the said proceedings, Essar contended that the State Commission did not have jurisdiction and invoked the arbitration clause of the PPA and sought arbitration under the Arbitration and Conciliation Act, 1996. It sent a notice of arbitration on 14.11.2005 to GUVNL under the Arbitration and Conciliation Act, 1996 and initiated proceedings under Section 11 of the Arbitration and Conciliation Act,1996 before the Hon'ble High Court of Gujarat on 08.02.2006. The request was resisted by the appellant pleading that the adjudication of disputes should be under Section 86 (i)(b) of the Electricity Act, 2003 and not under the Arbitration & Conciliation Act, 1996. The High Court allowed the petition and referred the dispute to arbitration as per arbitration clause in the PPA. GUVNL challenged the decision of the Hon'ble High Court before the Hon'ble Supreme Court. On 13.3.2008, the Hon'ble Supreme Court in the case entitled *Gujarat Urja Vikas Nigam Limited v. Essar Limited* (2008) 4 SCC 755_held that the adjudication of dispute is between the procurer and the generator and should be under Section 86(1) (f) of the Electricity Act, 2003

and not by way of reference under the Arbitration and Conciliation Act, 1996.

30. After the above decision by Supreme Court on 13.3.2008, the State Commission took up the hearing the Petition No. 873 of 2006 filed by the appellant. The request of Essar by an application for reference to arbitration was rejected by the State Commission by Order passed on 20.11.2008 in Petition No 873 of 2006.

31. Concededly, the second Respondent did not raise any issue or file any counter claim in the said proceedings on Petition No. 873 of 2006 which was decided by the State Commission decided on 18.2.2009. The rejection of the claims of the appellant beyond three years prior to the date of filing of the petition before the State Commission on the ground that they were barred by time was unsuccessfully challenged by the appellant first before this tribunal by appeal (No. 77 of 2009) decided by Order dated 22.02.2010 and later before Supreme Court by second appeal (No. 3454 of 2010) decided by Order dated 02.09.2011.

THE CLAIM PETITION

32. On 29.01.2010, the second respondent Essar filed the Petition (no. 1002 of 2010) in which impugned order was passed before the State Commission raising certain disputes and sought adjudication thereof, the grievance raised being that the appellant had unilaterally and illegally withheld or deduced monies from the tariff payable under the PPA, without any express understanding

between the parties, invoking Section 86 of the Electricity Act, 2003 for recovery of the withheld amounts, the claims being in respect of Delayed Payment Surcharge, Depreciation, Foreign Exchange Variation, Interest on UTI Non-Convertible Debentures, Discounting Charges, Wrongful Deduction of Rebate, and Interest on Working Capital. Essar explained the delay in lodging the said claims beyond the period of three years before the filing of the petition by pleading that it (Essar) had been prosecuting a proceeding under the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court and before the Hon'ble Supreme Court seeking the exclusion of the period spent till the decision of the Hon'ble Supreme Court (on the aspect of jurisdiction of the State Commission) vide Order dated 13.3.2008 on the principle of Section 14 of the Limitation Act. The petition was entertained by the Commission allowing the prayer for exclusion of the period under Section 14 of Limitation Act and allowed by order dated 22.10.2014 granting reliefs to Essar.

33. The impugned order dated 22.10.2014 was followed by a corrigendum order issued on 21.11.2014. It is submitted by the appellant that the Corrigendum modified the conclusions in Para 22 of the Impugned Order relating to Interest on Working Capital, the State Commission having deleted the findings on deduction of $1/5^{th}$ spares which had not been raised agreeing with the contention of GUVNL on methodology of computation of one year requirement of maintenance spares and two months' average billing.

34. It is submitted by the second respondent Essar that by the impugned decision, the GERC has allowed its claims from

29.09.2004 onwards, holding that the claims prior to that date to be time barred. It is submitted that wrongful withholding monies due under the PPA and express understanding of the parties has resulted in the appellant unjustly enriching itself for a period of over 15 years at the cost of Essar which has complied with all its obligations.

35. It appears that the Commission had directed the parties to compute the amounts payable in terms of the principle decided and submit the same before the Commission within a month of the impugned order. It is stated that post the impugned decision, the second respondent (Essar) by its letter dated 12.11.2014 to GUVNL, informed them that they have computed an amount of Rs.653 Cr. which GUVNL is liable to pay them as per the principles laid down by GERC in its order dated 22.10.2014 requesting for a time-bound (seven days) response, this being reiterated by another latter dated 25.11.2014. By a subsequent communication dated 28.11.2014, Essar provided to the appellant a recomputed amount with regard to the interest on working capital as per the corrigendum issued by GERC dated 21.11.2014 and stated that the revised computation of the total amount receivable by Essar is Rs.663 Cr., this being submitted to the GERC on 01.12.2014.

36. Pursuant to directions, the appellant and the second respondent had submitted their respective calculations (as on the date of the impugned order i.e. 10.12.2014) before this tribunal in their pleadings, the differences having been depicted by Essar in a tabular form as under:

Claim amount in terms of Impugned Order as on 10.12. 2014			
Heads	**EPOL Calculation**	**GUVNL Calculation**	**Difference**
Depreciation	98.17	39.40	58.77
Rebate	79.92	-	79.92
Bill Discounting	0.55	0.55	-
FERV	39.17	39.17	-
UTI - NCD	5.40	5.40	-
Interest on Working Capital	9.23	8.13	1.10
Interest on Working Capital on Depreciation	1.33	-	1.33
Sub Total	**233.77**	**92.66**	**141.11**
Delayed Payment Charges	446.89	92.99	353.90
Total Amount	**680.65**	**185.65**	**495**

37. It is submitted by Essar that the variance is primarily on account of difference in computation of amount due qua 'depreciation' and 'rebate', it also pressing for levy of delayed payment charges as per Article 5.3.4 of the PPA on the differential.

INTERIM ORDER

38. The appeal at hand was filed against the above backdrop and, on application of the appellant, this tribunal, by order dated 29.01.2015 directed as under:

> *"We are, therefore, of the opinion that the Appellant should pay an amount of Rs.100 Crores to the 2nd respondent within a period of four weeks from the date of receipt of this order. Needless to say that this amount would be subject to the*

outcome of this appeal. Further, this payment is subject to the 2nd respondent furnishing a bank guarantee of a nationalized bank for the sum of Rs.100 Crores in favour of the appellant. It is made clear that all observations and calculations in this order are prima facie observations and calculations."

39. Indisputably, the above interlocutory order was complied with by each side.

THE CHALLENGE

40. We now take up the issues pressed by the appellant to assail the impugned order of the Commission.

Limitation

41. The State Commission has held that the petition was filed on 29.01.2010 and, therefore, as per Article 137 of Part - 2 of the Schedule to the Limitation Act, 1963, a claim period of three years applies. It further held that the time spent by Essar for prosecuting arbitration petition both before the Gujarat High Court and the Supreme Court should be excluded for the purpose of determining whether the claims involved are within the prescribed period of limitation or not. Accordingly, it concluded that the claims of Essar against the appellant under the PPA for the period commencing from 29.09.2004 are within time.

42. The petition was filed by Essar under Section 86 (1) (f) of the Electricity Act for adjudication by the State Commission of the dispute related to monetary claims under the PPA. Indisputably, law on limitation applies to such claims brought before the

regulatory authority under the statute for dispute-resolution. In *A.P. Power Committee & Others v, M/s Lanco Kondapalli Power Ltd & Others*, (2016) 3 SCC 468, the Supreme Court held as under:

> "*29…. Since no separate limitation has been prescribed for exercise of power under Section 86(1)f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time barred claims, there is no conflict between the provisions of the Electricity Act and Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation on account of provisions in Section 175 of the Electricity Act or even otherwise the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike Labour laws and Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent under lying reasons requiring adherence to a contrary view.*"

43. That the Limitation Act, 1963 applies to the adjudicatory power of the Regulatory Commissions has been reiterated in *CLP India Private Limited v. Gujarat Urja Vikas Nigam Limited*, (2020) 5 SCC 185 and followed consistently by this tribunal in catena of judgments including Judgement dated 25.10.2018 in Appeal No. 185 of 2015 in the matter of *Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission (RERC) and Ors*. and Judgement dated 24.04.2018 in Appeal No. 75 of 2017 in the

matter of *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission (MERC) and Ors*.

44. Pointing out that the Petition No 1002 of 2010 was filed by Essar on 29.01.2010 for reliefs on claims for the period prior to 30.01.2007, it is the plea of the appellant that reliance on Section 14(2) of the Limitation Act, 1963 is inappropriate because it cannot be said that Essar had been prosecuting with due diligence another civil proceeding.

45. Section 14 of the Limitation Act, 1963 reads as under:

> *"14. Exclusion of time of proceeding bona fide in court without jurisdiction –*
>
> *1. In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *2. In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a court of first instance or of appeal or revision against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*
>
> [Emphasis Supplied]

46. It is well settled that there are two conditions provided under Section 14, viz. that the other proceeding should have been

prosecuted *with due diligence* and *in good faith*. The person claiming the application of Section 14 is required to establish to the satisfaction of the concerned Court or Tribunal that the other proceedings were pursued by it in a bona fide manner and good faith. In this context reference may be made to rulings in *Rabindra Nath Samuel Dawson v. Sivkasi & Ors* (1973) 3 SCC 381, *Surendra Nath Bhuyan v. Official Liquidator, Puri Bank Ltd*, AIR 1961 Orissa 57 and *M.P. Steel Corporation vs. Commissioner of Central Excise* (2015) 7 SCC 58.

47. In *Rabindra Nath Samuel Dawson* (supra), it was observed that:

> *"… benefit of the section are not available to a plaintiff who persisted in his earlier suit and appeal in spite of the repeated objection of the party."*
>
> *…*
>
> *… the objection as to the maintainability of the suit was taken at the very initial stage but that was re-agitated and GUVNL invited a decision of the District munsif. Even at the stage of revision against that order in the High Court he took the risk of proceeding with the suit. This is therefore not a case of prosecuting the previous proceedings bonafide. But on the other hand, he deliberately did so may be for obvious reason that if he had to withdraw the suit he would have to give notice under section 80 of C.P.C to the Government, wait for the expiry of the period of notice of two months and thereafter file a fresh suit"*

48. In *M.P. Steel Corporation vs. Commissioner of Central Excise* (supra), the previous judgments on the issue were noted and it was observed that Section 14 of the Limitation Act is to be interpreted liberally, the relevant part of the order reading thus:

> *42. Section 14 has been interpreted by this Court extremely liberally inasmuch as it is a provision which furthers the cause of justice. Thus, in Union of India v.*

West Coast Paper Mills Ltd (2004) 3 SCC *458, this Court held:*

14...In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be 'defect of jurisdiction or other cause of a like nature' within the meaning of Section 14 of the Limitation *Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression 'other cause of like nature' came up for the consideration of this Court in Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi (1975) 4* SCC *628 and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.*

49. It is the submission of the appellant that Essar has not made any attempt whatsoever to show that the proceedings fulfil the above requirements.

50. The appellant argued that Essar had initiated on 14.11.2005 the arbitration proceedings for adjudication of disputes under the Arbitration and Conciliation Act, 1996 which were contested initially before the Hon'ble High Court of Gujarat and thereafter before the Hon'ble Supreme Court wherein it was eventually held on

13.03.2008 that the adjudication of dispute between GUVNL and Essar should be under Section 86(1)(f) of the Electricity Act, 2003 and not by way of reference under the Arbitration and Conciliation Act, 1996. Per the appellant, the proceedings referred to by Essar are the time between 14.11.2005 when it had sent the notice of arbitration or 26.01.2006 when it filed the proceedings in the High Court of Gujarat and 13.03.2008 when the Hon'ble Supreme Court decided the case. It is submitted that the facts and circumstances of the case establish that the proceedings initiated by Essar with the issue of notice for arbitration dated 14.11.2005 and filing of the Petition under Section 11 of the Arbitration and Conciliation Act, 1996 before the High Court of Gujarat was a counter blast to GUVNL pursuing its claim before the State Commission, the design being to delay and/or deflect the petition filed by GUVNL, there being nothing *bona fide*.

51. The learned counsel for the appellant dilated on the above argument by submitting that the cause of action for claiming the amount by Essar from GUVNL was in February 2003 and on 19.01.2005. At the relevant time, the parties were in discussions and the matter was before the Committee appointed by the Government of Gujarat. The State Government finally decided on 27.07.2005 that the disputes and differences raised by the respective parties should be settled through adjudicatory process of the GERC under the Electricity Act, 2003 and resultantly GUVNL filed its claim before the State Commission on 14.09.2005 in Petition No. 873 of 2005 immediately whereafter Essar by letter dated 14.11.2005 sought reference of the disputes to arbitration under the Arbitration clause contained in the PPA. The

proceedings initiated in that nature by Essar culminated in the Order dated 13.03.2008 passed by Supreme Court rejecting the contention of Essar about arbitrability.

52. It is pointed out that when GERC began the proceedings on the petition filed by GUVNL, Essar had the opportunity to raise its counter claim but failed to avail of it before the State Commission. Instead, it again sought to prevent the adjudication of the claim by the State Commission by seeking reference of the dispute to arbitration under Section 158 of the Electricity Act, 2003 which was repelled. Essar, it is argued, did not file the petition raising its claim even after the above request of Essar for reference to arbitration was rejected by the State Commission by Order dated 20.11.2008 passed in Petition No 873 of 2005, having awaited decision on the said case (Petition No. 873 of 2005) which was rendered on 18.02.2009, the claims allowed by GERC by impugned order having been presented only on 29.01.2010.

53. It is argued that though Essar had opportunity to raise counter claims but it deliberately chose not to do so while the claims of the appellant were being adjudicated by the State Commission and since Essar was pursuing the proceedings before the High Court and Supreme Court in defence in regard to the claims of GUVNL and not with any intention to agitate its claim against GUVNL, such proceedings cannot be claimed as a proceeding followed in pursuance of its claim, much less *bona fide* proceeding in good faith to get its claims adjudicated as envisaged in Section 14 of the Limitation Act, 1963.

54. It was argued that the entire claim of Essar is time barred for the reason none of the issues under subject matter of appeal were part of the Arbitration Petition being Petition No. 8 of 2005 initiated by Essar which was restricted to FERC (foreign exchange rate variation), as also concluded by GERC (in para 7.6) they having been raised for the first time in the Petition No. 1002 of 2010 and, therefore, there cannot be any consideration of the application of Section 14(2) of the Limitation Act, 1963 in relation to such issues. The appellant contends that the GERC has mechanically proceeded on the aspect of Section 14(2) without considering the basic conditions.

55. The factual narrative shows that upon disputes arising under the PPA between Essar and the appellant, the attempts to settle amicably, including with the intervention of the State Government, having failed, Essar had initiated steps, on 14.11.2005, for reference to arbitration, taking the matter to the Gujarat High Court under Section 11 (5) and (6) of the Arbitration and Conciliation Act, 1996. The Gujarat High Court, by its judgment dated 15.06.2006, allowed the said application of Essar and appointed a sole arbitrator which order was eventually set aside on appeal by Special Leave before the Supreme Court of India by judgment dated 13.03.2008. It is the said judgment which settled the law that such disputes as at hand between licensees (like GUVNL) and generating companies (like Essar) could only be resolved by the regulatory commission and that Section 86 (1) (f) of the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. Since the matter was already pending

before the GERC, the Hon'ble Supreme Court directed the GERC to dispose of the same as expeditiously as possible.

56. It is settled legal position that the words "sufficient cause" for condonation of delay must be viewed liberally to sub- serve the ends of justice [*M.P. Steel Corporation vs. Commissioner of Central Excise* (supra)]. Upon careful scrutiny we conclude that the finding of the GERC on the issue of limitation is just, proper and reasonable. The contention of the appellant that the claims of Essar are barred by limitation is completely devoid of any merit. The fact that the High Court had agreed with the contentions of Essar strengthens the argument that Essar was under a *bona fide* belief that the arbitration agreement could be given effect to and disputes could be arbitrated.

57. The second respondent is right in pointing out that the subject claims (depreciation; Foreign Exchange Variation; Interest on UTI-Non-Convertible Debentures; Bill Discounting Charges; Interest on Working Capital; Delayed Payment Charges; and Rebate) brought for adjudication before GERC leading to impugned order were expressly discussed in the arbitration notice dated 14.11.2005 read with letter dated 06.08.2005, the submission to the contrary by the appellant being factually incorrect.

58. In view of the above, we find that the decision of GERC that the claims of the Essar prior to 29.09.2004 only are time barred in terms of the Limitation Act is correct, the objections raised by the appellant to the contrary for claims entertained by application of Section 14 being misconceived.

Depreciation

59. The issue before the State Commission was whether Essar should be allowed depreciation at the rate of Rs. 4084.85 lacs (Rs. 40.85 crores) per annum as mentioned in the Supplementary Agreement dated 18.12.2013 or only Rs 2902 lacs as contended by GUVNL stating that the amount of Rs 4084.85 lacs per annum contained in the Supplementary Agreement was by inadvertence and by mistake. It is argued that the crucial factor here is the project capital cost apportioned to 300 MW contracted capacity applicable to GUVNL i.e. whether it should be Rs. 1016 crores or Rs. 945 crores which was later increased to Rs.957.82 Crores due to exchange rate difference. The depreciation is related to the capital cost represented by Gross Value of the Capital Assets and the project capital cost allocated to the supply of 300 MW to GUVNL was Rs 945 crores only adjusted for FERV component to Rs 957.78 crores as confirmed by GERC in (Para 11.2) of the impugned Order. It is argued that since all the tariff elements for payment by GUVNL to Essar for 300 MW contracted capacity, viz. Return on Equity, O & M Expenses, Interest on Working Capital, Incentive have been claimed and paid by GUVNL on the above project cost of Rs 945 crores only at all times subject only to the adjustment of FERV component, there is no reason for the State Commission to have determined the depreciation in a manner other than recognizing Rs 945 crores.

60. The appellant contends that fundamental mistake made in the impugned order is non-consideration of the depreciation already

accounted for and paid as a part of the tariff during generation and supply of electricity in the Open Cycle Operation, it being wrong impression that GUVNL is disputing the computation of depreciation in the Open Cycle Operation.

61. The depreciation amount to be computed in aggregate over the years should be to cover 90% of the allocated capital cost (excluding land cost) qua 300 MW capacity contracted under the PPA with GUVNL. Per the appellant, the said amount of capital cost to be considered is Rs. 726.42 crores and the depreciation amount based thereon for the balance period from 01.07.2003 would work out to Rs. 29.01 crores per annum and not Rs. 40.85 crores per annum. By mistake the amount of Rs. 40.85 crores was recorded in the Supplementary Agreement. If Rs. 40.85 crores per annum is considered and taken together with a depreciation already allowed in the open cycle operation of an amount of Rs. 61.41 crores, the aggregate amount qua depreciation would work out to Rs. 894.745 crores which would be 115.24% of aforesaid depreciable capital cost contrary to the basic principles on which the depreciation has to be computed.

62. The appellant submitted that the contention of Essar that depreciation was agreed to be paid on the proportion of 300:215 of the actual capital cost and not on the allocated capital cost of Rs. 945 crores (to be adjusted with FERV at Rs 57.78 crores) is wrong since it cannot be that various other tariff elements such as Return on Equity, etc will be accounted for and serviced at the allocated project capital cost as per the PPA entered into but depreciation would alone be allowed at a much higher capital cost.

63. Upon careful scrutiny, we find that the arguments of appellant are an attempt to wriggle out of contractual obligations so as to deny to Essar its claim under the head of depreciation founded properly in the PPA read with Supplementary Agreement which was executed after detailed negotiations between the parties and approval of the State Government.

64. The Electricity (Supply) Act, 1948 provided under Section 43A as under:

> *"The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette... "*

65. Depreciation is one of the heads of capacity charge payable to Essar, calculated in terms of Article 7.1.1 (c) of Schedule VII of the Original PPA, the said clause reading thus:

> ***"7.1.1 Annual Fixed Charges: Computation and payment.***
> ***……***
> *(c)* ***Depreciation: -***
>
> *Depreciation will mean the depreciation as notified by the Government of India from time to time and provided under the Electricity (Supply) Act, I 948 and shall be first computed on the assets of the Generating Station and thereafter apportioned for the purposes of the determining the Annual Fixed Charges as a proportion of the Allocated Capacity over the Nominal Installed Capacity.* "

66. The material on record shows that the parties had held detailed discussions on the subject of calculation of the amount of

depreciation in accordance with the provisions of the Electricity (Supply) Act, 1948, and the appellant by its letter dated 10.09.1997 had agreed that Depreciation shall be computed on the basis of Project Cost arrived at by subtracting the cost of land, working capital margin and cost of leased assets and then apportioned to the allocated capacity in terms of the PPA, Essar having submitted by its letter dated 06.10.1997 its calculation of Depreciation to the tune of Rs. 73.64 crores per annum. The appellant accordingly paid Depreciation amount of Rs. 73.64. crores per annum from October 1997 to June 2003, the total amount thus paid being Rs. 424.14 crores towards Depreciation. It was pursuant to the directions of GERC that the appellant and the Government of Gujarat had entered into discussions with Essar, seeking a review of the PPA and a reduction of Annual Fixed Charges, the State Government having constituted the First Negotiating Committee to discuss with the stake holders and suggest modifications in the Original PPA to reduce the power purchase cost. The prolonged discussions involving both parties and the State Government resulted in agreement, actuated by considerations inclusive of the interests of consumers and uninterrupted generation of electricity, whereupon certain terms of the Original PPA were revised by execution of the Supplementary Agreement on 18.12.2003 reducing the Depreciation from Rs. 73.64 crores per annum to Rs. 40.8485 crores per annum (payable in equal monthly instalments) from 01.07.2003 up to 01.07.2013, the modified clause of Supplementary Agreement reading thus:

"7.1.1. Annual Fixed Charges: Computation and payment.

(c) Depreciation:-

Depreciation will mean the depreciation as notified by the Government of India from time to time and provided under the Electricity (Supply) Act, 1948 and shall be first computed on the assets of the Generating Station and thereafter apportioned for the purposes of the determining the Annual Fixed Charges as a proportion of the Allocated Capacity over the Nominal Installed Capacity. Depreciation for the period 1st July 2003 to 1st July 2013 shall be paid at the rate of Rs.4084.85 lakhs per annum."

67. The above was expressly confirmed by GEB (the predecessor of the Appellant) by its letter dated 19.12.2003, reading thus:

"The draft of Supplementary Agreement submitted by you, along with your letter dated 8th November 2003 is approved by the competent authorities. The same is separately signed and delivered.

With the issuance of this letter, all the outstanding issues between GEB and EPoL in relation to the Power Purchase Agreement dated 30-05-1996 stand fully and finally resolved."

68. It cannot be ignored that while agreeing to a lower Depreciation, Essar had also conferred other substantial monetary and commercial benefits on GUVNL by the Supplementary Agreement, some such benefits gained by the appellant being inclusive of reduction in the percentage of return on equity from 16% to 13%, increase in the level of generation of electricity to be achieved from 68.49% to 70% for the purpose of payment of Fixed Charges, Delayed Payment Charges to be computed from the 61st day (as opposed to the earlier agreed period of 31st day) from the date of notice, and increase of the period for payment of Depreciation by four years resulting in reduction of monthly instalment amount of Depreciation.

69. The appellant paid the reduced Depreciation @ Rs. 40.85 Crores from 01.07.2003 to 31.08.2004 to Essar in terms of Supplementary Agreement. However, by letter dated 20.08.2004 it again sought reopening the issue of Depreciation which, we agree, was impermissible since any re-negotiation of the contract duly signed could happen only by mutual agreement. By its letter dated 08.10.2004, the appellant informed Essar that instead of Rs. 40.85 crores as mutually agreed upon under the Supplementary Agreement, it was liable to pay depreciation of only Rs. 29.02 crores per annum also stating that it would therefore pay Rs. 2.42 crores per month from September 2004 on the plea that it had also paid during the open cycle mode of operation (1996 to 1997) before the plant was commissioned on the combined cycle mode. The second respondent protested against unilateral attempt to amend the PPA pointing out, by letter dated 15.10.2004 that Rs 40.8485 Crores per annum rate of depreciation was part of the amended PPA which had been executed after negotiations and agreement between the parties and the State Government. The letter dated 15.10.2004 of Essar also mentioned that the depreciation payments had commenced only after commissioning of the combined cycle operation of the power plant. The payments during open cycle operation were made on parameters for combined cycle mode without compensating for the actual fuel-cost which statedly was substantially higher, all such considerations having been factored in to form the basis of the Supplementary Agreement.

70. We agree with the second respondent that the appellant having acted upon the Supplementary Agreement for almost one year

without any objections was estopped and could not have altered the contractual terms unilaterally in the manner sought to be done. It was not open for the GUVNL to decide on its own that there was an error in calculation of the amount of depreciation payable by it (GUVNL) to Essar particularly when the subject had already been settled by way of the Supplementary Agreement, a product of detailed negotiations.

71. It is trite law that the sanctity of the contract is paramount and its terms are binding. In *CITI Bank N.A. v. Standard Chartered Bank*, (2004) 1 SCC 12, the Supreme Court ruled thus:

> *"47. Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novatio of the contract. Further, it is neither Citi Bank's nor CMF's case nor even SCB's case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novatio does not arise for consideration. ..."*

72. In *DDA v. Joint Action Committee Allottee of SFS Flats,* (2008) 2 SCC 672, the Supreme Court observed as under:

> *"62. It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject- matter of a public notice. Apart*

from the fact that the parties rightly or wrongly proceeded on the basis that the demand by way of fifth instalment was a part of the original Scheme, DDA in its counter- affidavit either before the High Court or before us did not raise anycontra plea. …

66. The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allottee. Having not done so, it, relying on or on the basis of the purported office orders which are not backed by any statute, new terms of contract could (sic not be) thrust upon the other party to the contract. The said purported policy is, therefore, not beyond the pale of judicial review. In fact, being in the realm of contract, it cannot be stated to be a policy decision as such.

… *When a contract has been worked out, a fresh liability cannot be thrust upon a contracting party."*

73. The law on contracts as noted above leaves no scope for argument that the unilateral attempt of the appellant was within its rights. The second respondent thus rightly challenged the aforesaid action of GUVNL by filing Petition no. 1002 of 2010 before the GERC seeking declaration that GUVNL is liable to make a payment of Rs. 98.03 crores towards outstanding depreciation, as on 31.12.2012, the claimed amount being based on the figure of Rs 40.8485 crores per annum as agreed upon in the Supplementary Agreement dated 18.12.2003. The said claim was upheld by GERC holding by the impugned order thus:

"The above amendment in the PPA indicates that the petitioner and the respondent agreed to revise the depreciation

amount payable by the respondent as Rs. 4084.85 lacs per annum for the period 1st July, 2003 to 1st July 2013. There is no document on record specifying that how the above amount was agreed between the parties and derived by them. Once both the petitioner and the respondent based on the negotiation came to the conclusion and agreed for the depreciation amount of Rs. 4084.85 lacs per annum, it is the duty of the parties to adhere to the same. If any amendment or modification is desired by the parties it has to be carried out through the agreement or by way of raising the dispute and decided by the appropriate authority. In the precent case the respondent had unilaterally reduced the depreciation amount from 40. 85 cores per annum to 29.02 crores. The above action of the Respondent is arbitrary and also in contravention to the amendment made in PPA dated 18.12.2003."

(Emphasis supplied)

74. It is clear from the material on record that as per the terms of the approval of financing plan, depreciation was to be computed on allocated project cost reduced by cost of land and working capital margin. Since the project cost could be arrived at only after commissioning of the steam turbine or in other words combined cycle plant i.e. on 01.10.1997, there is no question of any payments against depreciation during the operation in open cycle mode. Furthermore, GEB's letter dated 10.09.1997 read with the letter dated 06.10.1997 of Essar leaves no room for doubt that depreciation was to be computed on actual project cost whereas other tariff parameters were agreed on a negotiated project cost. The letter dated 10.09.1997 of GEB reflects the Negotiated Project Cost as Rs.945 Crores. However, the subsequent letter of Essar dated 06.10.1997 depicting the breakup of the depreciation amount payable clearly indicates the total cost of the Project as Rs.1745 Crores and the Depreciated Project Cost as Rs.1588 Crores. By the letter of 06.10.1997, Essar had specifically depicted the Project Cost and Depreciated Cost as such and had not

agreed to or consented to Negotiated Project Cost of Rs.945 Crores. Both the parties have thereafter acted pursuant to this letter and accordingly the depreciation for the allocated capacity to the appellant was arrived at Rs.73.63 Crores and it had been making the payments as per this calculation from October 1997 to June 2005, at Rs.73.63 Crores per annum. Subsequently, this quantum was further agreed to be reduced to Rs.40.85 Crores on basis of understading before the negotiation committee and a supplementary Agreement was executed, recording in sub-clause 7.1.1 of Schedule VII that "*depreciation for the period 1st July 2003 to 1st July 2013 shall be paid at the rate of Rs.4084.85 lakhs per annum*".

75. The appellant has relied on letter dated 22.09.2004 of Essar to argue that the understanding under the Supplementary PPA was modified with consent of Essar. We cannot accept this in view of the letter dated 15.10.2004 whereby Essar categorically stated that "*at the time of renegotiation of the PPA, the Depreciation amount was re-set at Rs.4084.85 lakhs per annum during the period 01.07.2003 to 01.07.2013 aggregating Rs. 408.485 Crores*" and that "*(t)his amount of Rs 408.485 Crores was arrived at by deducting from the total eligible amount of Depreciation to be paid by GUVNL during the tenor of the PPA i.e. Rs. 832.66 Crores being 90% of Rs. 925.18 Crores being the proportion of Capital Cost on which Depreciation is to be computed based on the proportion of capacity allocated to GUVNL".* This letter dated 15.10.2004 specifically refers to depreciation being paid at 90% of Rs. 925.18 Crores i.e., Depreciated Project Cost allocated to the appellant vide letter dated 06.10.1997.

76. We are satisfied that the decision of the State Commission is based on the express provisions of the PPA. Neither party to a contract can be allowed to take a plea on some imaginary and unfounded claim that the numbers in the agreement would not be followed in future as the amount agreed to be paid was due to a mistaken calculation. Therefore, the submission of the appellant that Depreciation amounts of Rs. 61.41 Cr. which it purportedly paid to Essar during the "open cycle" mode in the year 1996-1997 is baseless and is only an after-thought intended to deprive Essar of its legitimate dues. The amount of Depreciation was finalized vide letter dated 06.10.1997 and payment on basis of availability started only after commercial operation of the combined cycle generating station. There can be no question of any payment qua Depreciation during the open cycle mode operation (i.e. July 1996 to September 1997). The decision of GERC is based on the settled principle of law that a contract cannot be unilaterally modified by a party and, therefore, must be upheld.

77. The monthly payable depreciation based on pro-rata monthly normative depreciation @ Rs. 40.85 Cr. per annum adjusted for cumulative monthly PLF as provided by Essar from July, 2003 to March, 2013 works out to Rs. 98,16,75,302 which was wrongly withheld by the appellant and, therefore, must be immediately paid along with Delayed Payment Charges.

78. We decide the issue accordingly.

Foreign Exchange Rate Variation / Sinking Fund

79. The second respondent (Essar) admittedly had raised foreign currency loan by way of external commercial borrowings with the condition that the loan shall be repaid by making bullet payment at the end of the seventh year. The PPA by Article 1 and Schedule VII provided for approval of financing plan by GUVNL. By letters dated 12.03.1997, 18.03.1997, 10.09.1997 and 06.10.1997 exchanged between the parties the Financing Plan was approved. The said correspondence envisaged creation of a Sinking Fund by Essar which would also earn interest in foreign currency so as to reduce the foreign currency risk as the bullet repayment would involve higher burden of foreign exchange outflow both towards interest and repayment. The obligation of GUVNL in regard to Foreign Exchange Variation was as per the provisions of the PPA read with the approved Financing Plan provided in Clauses 7.1.1 (a) and 7.1.1 (g) of Schedule VII of the PPA.

80. Particular reference is made to the following part of letter dated 06.10.1997 of Essar:

> "*We confirm that the Sinking Fund Account will commence from March 1998 and shall be funded at the end of every six months in the US Dollars to the extent of 1/13th of the ECB amount. We shall, thus, save GEB from exchange fluctuation on the portion of ECB loan that is funded in the Sinking Account*".

81. Concededly, Essar did not create the sinking fund. It is the grievance of the appellant that the State Commission has allowed Essar to benefit from its own wrong and deviating from the

Financing Plan agreed to between the parties, having mixed up issues of creation of sinking fund by Essar and the delay in making payment of monthly bills by GUVNL. It is argued by the appellant that Essar has wrongly claimed that it (GUVN)L had delayed payments of monthly bills and therefore Essar did not create the sinking fund. It is submitted at the same time that there was no delay in payment of the monthly bills by GUVNL, this stand having been noted in the impugned order thus:

"v. The reason for default in payment by the Respondent claimed by the petitioner is without any basis which seems from the following tables:

Year	*Amount of Bills processed (Rs. Crores)*	*Outstanding at the end of the year (Rs Crores)*	*No. of days outstanding*
2000-01	*366.00*	*17.00*	*17*
2001-02	*465.16*	*35.08*	*27*
2002-03	*505.97*	*100.43*	*72*
2003-04	*424.52*	*149.40*	*128*
2004-05 (upto 30th Nov 2004)	*282.84*	*32.58*	*28*

vi. Further, the 60 days time lag in the above table has to be ignored on account of working capital available with the Petitioner and no delayed payment surcharge being payable for such period.

82. The appellant argued that Essar has not submitted any evidence or proof about GUVNL not making payments against the tariff invoices

83. At the same time, it is also argued that the obligation of GUVNL to make timely payments is not linked to the creation of the sinking

fund the obligation towards the Sinking Fund being a pre-condition for approval of the Financing Plan. The appellant also contends that the submission of Essar that the sinking fund was to be funded by it (GUVNL) every six months is unfounded, there being not even a whisper in the letters dated 10.09.1997 exchanged between the parties for such Supplementary Invoices to be raised on creation of the sinking fund. Per the appellant, the intention of the creation of the sinking fund was to reduce the burden on GUVNL and the same cannot be achieved by requiring GUVNL to fund such creation by additional outlay.

84. It is also submitted by the appellant that Essar has wrongly alleged that it had never raised any Supplementary Invoice to fund the sinking fund because GUVNL had not made payment against the tariff invoices. The argument is that the failure to raise invoices at the appropriate time clearly demonstrates that there was no such understanding between the parties.

85. Placing reliance on the letter dated 06.10.1997 of Essar (referred to earlier), assuring to the appellant that "*Sinking Fund Account will commence from March 1998 and shall be funded at the end of every six months in the* US$ *to the extent of 1/13th of the ECB amount*", the intent being to "*save GEB from exchange fluctuation on the portion of ECB loan*", it is argued that the fact that Essar had failed to even create the fund, not that it had created the fund but could not make timely payments every six months due to any default of GUVNL, demonstrates bad faith on its part.

86. It is the plea of the appellant that it had duly fulfilled its obligation towards payment of foreign currency variation on interest amount

paid against the monthly invoices. If the sinking fund had been created by Essar, as was the pre-condition for acceptance of Financing Plan by GUVNL, the same would have earned interest in foreign currency as confirmed by Essar in its letter dated 18.3.1997. The cumulative deposits in the sinking fund account including the interest would have contributed towards reduction in lump sum repayment liability in foreign currency. It is submitted that the delays in payments by the appellant or its predecessor cannot be mixed up with the discharge of the obligations assumed by Essar including in particular the creation of Sinking Fund since the PPA provides for payment of Delayed Payment Surcharge for the period of delay in the payment of the bills by GUVNL.

87. We note that under the PPA, the appellant was obliged to make payment towards the Foreign Exchange Rate Variation ("FERV") as and when the foreign currency loans were repaid, the relevant provision of the PPA being as under:

> *"5. 7 SUPPLEMENTARYINVOICES FOR FOREIGN EXCHANGE VARIATION:*
>
> *The Board shall also pay to the Company, the extra Rupee liability towards interest payments and loan repayments arising cm of foreign exchange rate variation over the Base Foreign Exchange Rate which have not been fully compensated under the invoice amount computed as per Schedule VII of this Agreement. Foreign exchange variation for Return on Foreign Equity (ROFE) shall also be borne by the Board to the extent of the variation in the exchange rate over the Base Foreign Exchange Rate. The Company shall raise a Supplementary Invoice on the Board as and when such amounts of exchange variation are determined, giving details thereof If the amount payable to the Company is determined to be less on account of foreign exchange variation, than the amount paid by the Board*

at the Base Exchange Rate, such difference shall be re-paid to the Board within14 days from the date of the determination."

88. While approving the financing plan, the appellant had suggested creation of the sinking fund account towards GUVNL's liability of FERV. The sinking fund was to be funded by the appellant every six months to the extent of 13th of FERV of the US$ denominated loan. The funding of the sinking fund to the extent of FERV was to be done through supplementary invoices. Pertinently, the second respondent (Essar), by its letter dated 06.10.1997, had expressly assured GEB that it would be saved from exchange rate fluctuation but qualified this by saying it would be to the extent of its contribution in the Sinking Fund ("… *We shall thus save GEB from Exchange Fluctuation on the portion of ECB Loan that is funded in Sinking Fund account"*).

89. Indisputably, Essar had taken foreign debt by way of external commercial borrowing in US$ 138 Million out of which the share for the GUVNL was US$ 72.74 Million availed with its prior approval. The entire US$ denominated loan amount was repaid by Essar on 07.07.2004 at the exchange rate of Rs.45.9295 per US$ as against the base foreign exchange rate of Rs.35.17 per US$. This renders GUVNL liable to pay to Essar a sum of Rs.78.27 crore towards FERV.

90. It is clear from the material on record that tariff invoices were not paid as per their respective due dates. It is the explanation of the second respondent that no supplementary invoice to fund the FERV component of sinking fund could ever be raised. The appellant is stated to have paid only Rs.39.10 crores on the grounds that if the sinking fund had been created, its liability could

not be Rs.78.27 Crores. By the impugned order, GERC has rejected the submissions of GUVNL holding that the creation of sinking fund cannot be seen independent of the other obligations of the appellant and there cannot be a notional computation of sinking fund. The following part of the impugned order needs to be quoted:

> *"13.6 While the financing plan approved by the respondents mentions about creation of sinking funds to avoid foreign currency risk, it is incumbent on the respondent to pay the dues of the petitioner in time so that deposits can be made in the sinking funds. The delay in payment of the bills/invoices of the petitioner is evident from the table provided at para 8.1.2. The creation of sinking funds cannot be seen independent of the other obligations of the respondent under the PPA. Hence, the contention of the respondent cannot be accepted. There cannot be any notional computation of the sinking funds and interest thereon as contended by the respondent. Article 7.1.1 (g) clearly stipulates that the respondent shall pay to the petitioner the foreign exchanges variation on due date as a bullet payment. Hence, the deduction of Rs. 39.10 crore by the respondent from the actual foreign exchange variation of Rs. 78.27 crore is wrong and required to be refunded to the petitioner."*

91. We endorse the view canvassed by Essar that creation of sinking fund was contingent on GUVNL making payments towards the same and there cannot be reduction in FERV liability without GUVNL having contributed towards the corpus of the sinking fund. The alleged notional computation of interest on the corpus never contributed for is imaginary and obviously could not have been basis for reducing the actual FERV liability arising in terms of the provisions of the PPA.

92. The appellant has made bald statements that invoices were paid on time and there was no delay in payments. The material on

record shows that even at the time of discussions before the first negotiation committee it had agreed to pay 40% of the Delayed Payment Charges. The Sinking fund was to be funded by the appellant and its such liability was over and above the tariff invoices, the second respondent having agreed to reduce the FERV liability only to the extent of actual *"contribution to Sinking Fund".* The entitlement of Essar for delayed payment surcharge cannot be a defence to the appellant for defaults on its part. There can be no artificial reduction of FERV without any contribution having ever being made towards it.

93. The challenge to the impugned decision of GERC is thus found devoid of substance and is consequently rejected.

Interest on Non-Convertible Debentures

94. The second respondent Essar had issued Non-Convertible Debentures ("NCDs") to Unit Trust of India ("UTI") as a part of the Financing Plan, as envisaged in Clause 7.1.1 (g) of Schedule VII of the PPA in terms of which the servicing of the interest on NCDs was to be allowed in the tariff if the same are consistent with the Financing Plan. it is stated that Essar failed to make the repayment of the principal amount in time resulting in the payment of interest. The State Commission has allowed the claim of Essar for interest on the debentures on the basis that GUVNL had delayed the monthly bill payments for which reason it (Essar) had to make adjustments in its repayment schedule which was beyond its control.

95. The relevant part of the impugned order reads thus:

> "*15.4 It is undisputed between the parties that the Respondent had paid an interest of Rs. 3.82 crores on UTI-NCD Debenture for extended period of one year which was recovered by the Respondent unilaterally with interest on it amounting to 1.58 crores based on the auditor remark.*
>
> *15.5 We note that the petitioner had claimed the interest on UTI-NCD as a part of fixed charges as per the provision of clause 7.1.1(a) of schedule VII of the PPA. As it is observed in earlier para the respondent had delayed the monthly bills payment of the petitioner, the petitioner had to make adjustment in its repayment schedule which were beyond its control. The very fact that the respondent recognised additional interest of Rs. 3.82 Crores and paid to the petitioner is an evidence of having agreed to the extension of the UTI-NCD. As such, the action of the respondent to recover interest paid on UTI-NCD is illegal and contrary to the terms of the PPA.*
>
> *15.6 Based on the above observations, we decide the above issue in favour of the petitioner with a direction that the petitioner and the respondent shall evaluate the amounts based on the principle decided in the above paragraph.*"

96. The appellant refutes the allegation that there was delay in payment of the bills by it (GUVNL) referring to its submissions to this effect before GERC which, it is argued, failed to deal with the said contention.

97. At the same time, it is argued that the State Commission and Essar had erroneously mixed up the issues of interest on UTI NCDs and the issue of delay in making payments by GUVNL, the argument being that the obligation of GUVNL to make timely payments is not linked to the repayment of UTI NCDs, the delay in payment of invoices by GUVNL being compensated fully by the Delayed Payment Charge ("DPC")/interest, such interest covering

the cost of arrangement of funds by Essar from outside sources for the period of delay in payment. It is argued that on payment of such interest or DPC, it is as if Essar had received the payments in time, it being impermissible for Essar to claim both DPC as well as claim that it could not repay UTI – NCDs since GUVNL cannot be charged interest twice for the same delay.

98. The appellant also points out that contrary to the above position now taken, Essar had earlier intimated to GUVNL by the letter dated 03.08.2005 that the non- payment was due to non-fulfilment of various conditions stipulated by the Lenders and, therefore, they had to source finance through short term basis.

99. We note that the second respondent had placed NCDs with UTI as per the approved financing plan, in terms of which the repayment was scheduled in year 2002. However, as noted in context of other issues there were consistent defaults in payment of tariff invoices by the appellant. Further, as pointed out by Essar firm supply during open cycle mode was treated as "infirm power" resulting in reduced revenues. Resultantly, the UTI NCDs could not be redeemed as per the original schedule and an extension of one year was sought and agreed upon by UTI, it having recovered interest on the outstanding NCDs for the additional year, the interest thus paid being recovered by Essar through tariff invoices. Indisputably, GUVNL paid the tariff invoices containing demand for interest on the UTI NCDs but, later on 19.01.2005, long after the expiry of the period prescribed by PPA for raising of dispute respecting an invoice, it questioned the liability to pay interest for the extended term of the UTI NCDs and unilaterally deducted Rs.

5.4 Crore this inclusive of Rs.3.82 crore interest on UTI NCDs and Rs.1.58 crore further interest on such amount.

100. We agree that the payment of tariff invoices based on declared availability commenced only after the commercial operation of the combined cycle generating station and payments during open cycle operation did not account for the higher heat rate. Consequently, the assumptions of financing plan which included payment of tariff invoices as per the PPA were never realized. Therefore, the extension of term of UTI-NCDs is attributable to defaults on the part of the appellant. This naturally leads to the conclusion that Essar cannot be held liable to pay the interest for the extension term of NCDs.

101. The State Commission, by the impugned order, has held (para 15.5, quoted earlier) the unilateral recovery by the appellant to be illegal, the extension of the term of UTI NCDs being within its knowledge and being a direct consequence of default on its part in making timely payment of the tariff invoices.

102. With above observations, we reject the challenge by the appeal at hand to the conclusion of GERC on the captioned subject.

Bill Discounting Charges

103. On the issues of Bill Discounting Charges, the State Commission has held that Essar had availed Bill Discounting facility only at the request of the appellant (GUVNL) and all applicable charges

having become payable by GUVNL, the key observations on this subject in the impugned order being as under:

> *"17.4 The Respondent contented that the bill discounting charges should be 1% lower than the rate of interest applicable on cash credit limit as well as the same was to be done from the nationalised bank and not from private or co-operative banks. We note that as stated above there is no mention about the bill discounting facility in the PPA. However, the said facility was availed by the petitioner on the request of the Respondent and therefore if any restriction about the bill discounting charges are concerned the same was decided by the parties when such arrangement agreed was made by them. The respondent has disputed the same later which is not valid once the bill discounting facility is available to the petitioner and is availed by both the parties."*

104. In terms of the contractual arrangement binding the parties, the due date for payment of the bills (without claiming any rebate and without any obligation to pay Delayed Payment Surcharge) is the 60th day from the date the bill. If the payment is made in advance i.e., within 7 days, the appellant (GUVNL) is entitled to 2.50% rebate and if it is within 30 days, 1% rebate. The surcharge is applicable only if the payment is delayed beyond 60 days.

105. The appellant argues that the Discounting of the Bill raised by Essar on GUVNL by the Bank and payment of Bill Discounting Charges need to be considered as per the above option and obligation of GUVNL to pay the bills under the PPA.

106. It was argued that the appellant (GUVNL) was to pay Bill Discounting Charges not exceeding a specified rate of 1% lower than the rate of interest applicable on cash credit limit at the relevant time or actual whichever is less. Essar was to arrange the

Bill Discounting in a manner that the Bill Discounting Charges does not exceed 1% lower than the interest applicable on cash credit limit. This condition was important as Bill Discounting was to be done in a prudent manner and from the Nationalized Bank and not from Private or Cooperative Banks where interest charges are exorbitant.

107. It is also the submission of the appellant that the Bill Discounting Charges were to be calculated from the date of discounting of bills which result in the payment of actual interest by the concerned Bank and not from the date of acceptance of the bill. GUVNL cannot be called upon to reimburse any amount to Essar in the absence of Essar incurring any expenditure on account of interest.

108. It is submitted by the appellant that the details available show that Essar was not discounting bills immediately but after a considerable lapse of time and, thus, not acting consistent with the proposal of getting payment at the earliest. On numerous occasions, the bills were discounted after 62 days to 131 days contrary to the very purpose for which the bill discounting was to be availed viz. to recover the payment before due date. In the circumstances above, the entire claim on account of Bill Discounting is without any basis.

109. It is submitted by the appellant that Essar's claim of Rs. 33,21,463/- is on the basis that the Gujarat Electricity Board had retired discounting the bills after maturity without making payment of interest for the over-due period is wrong, it being the position taken that there was no delay in making payment, the claim

relating to Bill Discounting Charges and not interest amount for delay in payment.

110. The appellant claims to have accommodated Essar through Bill Discounting Mode of payment by accepting the Bills of Exchange of Rs. 37 crores in the month of July 2004 as the latter (Essar) had requested, by letter dated 02.07.2004, to enable them to honor repayment of foreign currency loan, this amounting to advance release of the Bond Fund when Essar had not made arrangement for the same, without levying Bill Discounting Charges, reference for confirmation being made to the fact that no claim for such Bill Discounting in the amount of Rs 33,21,463 was ever raised by Essar at the relevant time.

111. It is the grievance of the appellant that GERC has mechanically proceeded only on the facts mentioned in Essar's submission dated 06.05.2013 wherein it had claimed that an amount of Rs. 157,46,99,066/- was outstanding as on 30th June, 2004 towards invoices raised by them for electricity supplied during the period from January 2004 to June 2004 - Rs. 64,08,81,820/- against invoices for the period from January 2004 to March 2004 with Rs. 93,38,17,246/- against invoices for the period from April 2004 to June 2004, the objection of GUVNL being that in absence of invoices-wise break-up of all the outstanding dues the claim couldn't be verified, confirmed or accepted. Submitting that the invoice is raised in the following month for the energy supplied during the month, it is argued that there is no consistency in the claim of Essar since on one hand the outstanding is claimed "*for the supply of electricity during* the period from January 2004 to

June 2004" while on other hand it refers to "*for invoices raised for the period from* January'04 to June'04".

112. The appellant questions the correctness of the calculations of Essar by submitting that that bills for the months of January to March 2004 were all paid before 30.6.2004 except an amount of Rs. 38 lacs which was paid on 12th July 2004. The bills for April and May were raised before 30.6.2004 but were not due for payment. The bill for April was raised on 7.5.2004 and hence the due date for payment would be after 60 days i.e. 7.7.2004. Similarly bill for May was due for payment only in August. Hence the amount that was outstanding and due for payment on 30.6.2004 was only Rs. 38 lacs.

113. It is also argued that in case of Bill Discounting of the value Rs. 37 crores for which the Bill Discounting Charges were not paid to Essar, the Bills of Exchange were drawn against their Invoice No. GEB/2004-05/1 dated 04.05.2004 for the period from 01.04.2004 to 04.05.2004 which was submitted by Gujarat Electricity Board on 7th May, 2004. As per the provisions of PPA, the payment against this bill made up to 7th July, 2004, does not attract DPC and since the payment was made on 5th July, 2004 the same is well within the provisions of PPA.

114. In nutshell, the submission is that there was no delay in releasing payment to Essar by GUVNL, Essar having not given any details to substantiate the claim for Bill Discounting Charges, the State Commission having mechanically allowed the claims of Essar contrary to the material available.

115. It is vivid that the appellant was not able to make payment of the Tariff Invoices as per the due dates (7th day after presentation thereof) and accordingly it was agreed between the parties that Essar using its own credit will receive payment from banks by means of discounting monthly bills. This procedure was followed by Essar. The dispute between the parties before GERC was limited to the extent of the interest which GUVNL is liable to pay for such discounting on the ground that bills were not presented promptly for discounting and the facility of discounting was not obtained from a nationalized bank. While processing such invoices, GUVNL made certain deductions on the grounds that interest rate charged by its banks are lower than the actual interest paid by Essar to the discounting bank. GUVNL has essentially contended that it would have availed loans at lower rates from the banks.

116. The submission of the appellant is flawed and rightly rejected by GERC. It is Essar which availed bill discounting facility using its own credit with prior consent of the appellant. The argument that GUVNL would have obtained cheaper loans is conjectural and immaterial and therefore cannot be a ground to deny interest actually paid by Essar. Since the bills could be presented for discounting only after the same was approved by the appellant, the delay if any in presenting the bills to the bank for discounting is on its account only. Since the bill discounting facility was to be availed on the basis of its credit, there cannot be any condition that the same should have been obtained from a particular bank or a nationalized bank.

117. We reject the challenge to the decision of State Commission on this issue with above observations.

Rebate and Delayed Payment Surcharge

118. The two captioned subjects may be taken up together as they have a bearing on each other.

119. There are two aspects of Rebate viz. (i) the application of the principle of *First-in-First-Out* ("FIFO") in regard to the adjustment for payment of Invoices and (ii) the claim of GUVNL that the issue of Rebate for the period prior to the Supplementary Agreement dated 18.12.2003 was duly settled with Essar. The State Commission has dealt with the first issue in Paragraph 19.1 to 19.2 and the second issue in Paragraphs 19.3 to 19.4 of the impugned order.

120. The applicability of FIFO on the invoices raised was upheld by the State Commission as under:

> *"19.2 ... Moreover, it will also be helpful to the Respondent GUVNL to avoid further delay payment charges payable under the provision of the PPA. If the Respondent is permitted to adjust the payment made by him against the last invoice raised by the Petitioner, in that case the earlier pending invoice will become due but not paid in time. In due course of time, such earlier bills may become time barred under the provision of limitation act which is not an intent of the parties. We therefore decide that the payment made by the Respondents shall be first adjusted against the pending invoice and if the Respondent is eligible to receive the rebate base on the such payment, it will be entitled for the same. Otherwise the claim of the respondent after the due date of bill invoices for rebate is not valid and legal. "*

"19.4 ....From the above, it is evident that issue of rebate was not referred to the negotiation committee constituted for resolution of the dispute between the parties. Therefore, the contention of the respondent that the claim of the petitioner was referred to the negotiation committee and the committee decided the issue of rebate claim by the respondent against the invoices raised by the petitioner, is not correct and valid. "

121. On the subject of Delayed payment Charge ("DPC"), the State Commission has held thus:

"The dispute between the parties with regard to DPC is governed by the power purchase agreement dated 13th May,1996 and Supplementary Agreement dated 2003 signed between the parties. If any amendment or modification or change in the agreed terms of the PPA/Supplementary Agreement is to be made, it requires to follow the procedure for agreement between the parties which is governed by the provisions of the Indian Contract Act, 1876. The said Act provides that an agreement is arrived between the parties only when the promisee promises certain facts which are accepted by the promissories and agreed to act upon it. Then only it can be said that an agreement is arrived at between the parties. The negotiation Committee appointed by the Government of Gujarat is a mediator/conciliator to resolve some of the issue between the parties which include the issue of negotiation of DPC charges. EPOL had not agreed with the proposals submitted by GUVNL and there is no agreeable solution arrived between the parties as reflected from the meetings dated 13th May, 2005. Therefore, the contention of GUVNL that there was negotiation between the parties and Second negotiation committee and that the issue of DPC was resolved between the parties as per the recommendation of the above Committee is incorrect and illegal and same is not valid. "

122. The expression "Due date' is defined in Article 5.3.1 of the PPA as under:

"5.3.1 Due Date:
All the invoices mentioned under Article 5.2(i), (ii) and (iii) above shall become due for payment on the seventh (7th) Day (Due Date) of presentation thereof The Board shall make payments

on or before such Due Date. The amount of Supplementary Invoices of Article 5.7 and Schedule VII shall be payable on the 14th (Fourteenth) day of the presentation thereof"

123. The subject of Rebate is governed by Articles 5.3.2 and 5.3.3 of the PPA, which reads as under:

"5.3.2 Payment
"The payment of Variable Charges in terms of Article 5.2 (i) shall be payable in each month within the Due Date.

The payment for Fixed Charges in terms 9f Article 5.2 (ii) in each month shall be equivalent to Ill2th of the Annual Fixed Charges and shall be adjusted at the end of the Accounting Year in the event, the Level of Generation achieved by the Company during the Accounting Year is below 6000 Hrs/KW of the Allocated Capacity. For the first and last year of the Term the above 6000 Hrs./KW/AY shall be pro-rata reduced on 365 days basis in a year.
The payment of Incentive Payment in terms of Article 5.2 (iii) shall be payable from the month during which the Level of Generation exceeds the 6000 Hrs./KW of the Allocated Capacity during any Accounting Year. For the first and last year of the Term the above 6000 Hrs./KW/AY shall be pro rata reduced on 365 days basis in a year.

All payments received by the Company shall be appropriated towards settlement of amounts due and payable on the Invoices in the order in which they have been raised, unless earlier Invoice (s) is disputed by the Board and remains unresolved for 30 (thirty) days.

5.3.3 Rebate
The Company shall allow the following rebates on Invoices including Supplementary Invoice payable by Board.

i) On payment made, in whole or in part within the due date, directly or through LC, a rebate of 2.5% shall be allowed on the extent of payment made;

ii) On payment made, in whole or in part within the due date, directly or through LC within 23 days from the Due Date, a rebate of 1% (One per cent) shall be allowed on the extent of payment made.

[Emphasis Supplied]

124. Thus, the PPA allows Rebate to the appellant GUVNL in the event of timely payment of invoice. It is the contention of the appellant that it has claimed the rebate on bills duly paid and to the extent the amount was due and payable, in terms of the provisions of the PPA.

125. It needs to be also noted here that under Article 5.3.4 of the PPA the parties had agreed on Delayed Payment Charges ("DPC") as under:

> *"5.3.4 Delayed Payment Charges:*
> *If payment in full is not remitted on or before the close of business on Due Date, delayed payment charge on the unpaid amount due for each day overdue will be imposed by the Company at the rate of 2% over the average interest rate charged by Board's banks on working capital loans during the preceding 12 months, from the 31st day of day of the last day of the period to which the bill pertains."*

126. The aforesaid clause on DPC was amended by the Supplementary Agreement dated 18.12.2003 to the benefit of the appellant (GUVNL), it now stipulating that DPC shall be leviable not from the 31st day but from the 61st day of presentation of the bill. By virtue of the aforesaid amendment, Essar had granted to GUVNL an additional 30 days to make its payments against the invoices raised, without attracting any DPC.

127. Clearly, Rebate is admissible on Invoices raised only if GUVNL makes the payment thereagainst within the specified period, it being @2.5% if payment is made within Due Date (i.e. 7th day from date of Invoice) and @1% if payment is made within 23 days from the Due Date. However, if the payment were made belatedly DPC

would be levied at the rate of 2% over the average interest rate changed by the banks of the appellant on working capital loans during the preceding 12 months, this liability kicking in if payment were made under original PPA after 31 days of the Invoice but under Supplementary Agreement if payment were made after 61 days of the Invoice.

128. It is argued by the appellant that FIFO method would apply to a case where the Invoices are not disputed but some part of the Invoices remains unpaid. If, subsequently, say after the other Invoices have been raised, the payment is made in regard to such other Invoices by GUVNL, by application of FIFO principle, Essar would be entitled to adjust the outstanding admitted amount under the earlier undisputed Invoices notwithstanding that GUVNL had paid the amount in regard to the subsequent Invoices.

129. The appellant submits that it has been denied Rebate on the actual amount paid towards undisputed invoices, contrary to Article 5.3.3 of the PPA. Its case is that the resolution of the claims and counter claims as on 19.12.2003 by Supplementary Agreement, and side letter issued alongside, had settled all claims relating to rebate for the period 1999–2000 and not as an amendment to any basic provision of the PPA. It is argued that the claim of wrongful adjustment of rebate was raised by Essar for the first time in the petition of 1002 of 2010 filed before the State Commission on 29.01.2010 as an afterthought.

130. It is the contention of the appellant that the State Commission has proceeded on the wrong basis that the issue of rebate was not referred to the negotiating committee on basis of the letter dated

10.09.1997, pointing out that there was no occasion for the letter of 10.9.1997 to refer such issue to the negotiating committee in 2002-03, the letter dated 10.09.1997 being in relation to financing plans and not on the subject of bill payment, rebate etc.

131. The appellant submits that Rebate agreed to be refunded in the side letter has been fully refunded by GUVNL and there is no further outstanding in this regard.

132. It has been argued by the appellant that the State Commission has erred in directing GUVNL to pay the Delayed Payment Surcharge on the aspects decided in favor of Essar, having failed to appreciate that GUVNL had withheld the amounts on a *bona fide* understanding of the terms of PPA and it cannot be penalized by having to pay delayed payment surcharge.

133. The second respondent, however, has shown from material on record that in the payments made by the appellant against the invoices raised during the period May 2005 till March 2013, the appellant deducted Rebate @ 1% and 2.5% from all the invoices presented by Essar, contrary to the PPA, in as much as even while it was claiming and deducting Rebate, there were outstanding invoices which had been duly raised and had remained unpaid.

134. We find that Essar was within its rights, particularly under Article 5.3.2 of the PPA (quoted above), to have adjusted the payments received against the previous outstanding invoices and consequently the payment made by GUVNL can't be said to have been made during the period which enabled rebate in terms of the

PPA. The second respondent having rightly adjusted monies received by it against the previous outstanding invoice the appellant cannot claim to have made payment within Due Date against a particular invoice. The second respondent rightly used the FIFO method for accounting the payments received from GUVNL towards the outstanding dues. Hence, the unilateral deduction or adjustment made by GUVNL contending disputed amounts is outside the provisions of and in direct breach of the PPA.

135. The claim of the appellant that previous invoices were disputed is an afterthought and has been raised for the first time before this tribunal. Even otherwise, the appellant did not deny that the procedure prescribed in (Article 5.4 of) the PPA for disputing invoices was not followed.

136. Pursuant to the discussions in the First Negotiation Committee, Essar had agreed to waive the DPC amount by 40% and GUVNL had agreed to admit the liability toward the remaining 60%, the latter confirming this by its letter dated 19.12.2003 having agreed to pay an amount of Rs. 289.40 crores. Indisputably, GUVNL also acted upon this new understanding and made a payment of Rs. 26 crores (approx.) towards DPC, on 30.09.2004, in accordance with Supplementary Agreement read with side letter dated 19.12.2003.

137. In *T.N. Generation and Distbn. Corpn. Ltd. v. PPN Power Gen. Co. Pvt. Ltd.* (2014) 11 SCC 53, the Supreme Court dealing with a dispute involving a similar provision for payment of delayed

payment surcharge between a generator and distribution license had held as under:

> *"With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10. 6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra & Ors (2002 (1) SCC 367). In this judgment it has been held as follows:*
>
> > *" … … … The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd. All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab speaking through Tek Chand, J in CIT v. Dr Sham Lal Narula thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money.*
> >
> > *. . . In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use· or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable.* "

138. Similar observations were made in *Indian Council of Enviro-Legal Action v. Union of India & Ors* (2011) 8 SCC 161, the relevant part reading thus:

> *"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above-or to simply levelise a convenient approach is calculating interest. But here interest has to be calculated on compound basis- and not simple for the latter leaves much uncalled for benefits in the hands of the wrongdoer.*
> *179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out. 180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws.* "

139. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates, should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. Upon careful scrutiny of the contentions, we hold that the appellant proceeded to indulge in reversal of DPC amounting to Rs. 26.73 crores (approx.) by its letter dated 19.01.2005 unilaterally and in a manner not permissible under the contract or the law. This cannot be upheld. It (the appellant) instead is liable to account for DPC on all the principal amount outstanding from 29.09.2004 till the date of payment calculated at

the rate of 2% over the average interest rate charged by Board's banks on working capital loans during the preceding 12 months.

140. We thus conclude that the challenge to the impugned decision on captioned issues is unmerited. The same is, therefore, repelled.

Interest on Working Capital

141. The second respondent has contended that it is entitled to recover Interest on Working Capital as per Clause 7.1.1 (f) in Schedule VII of the PPA, the appellant having unilaterally deducted, on 19.01.2005, an amount of Rs. 10.48 crore inclusive of *Excess payment towards O&M* (Rs.2.81 Crore), *Excess payment towards maintenance spares* (Rs.4.26 Crore), *Excess payment towards two months receivables* (Rs.0.43 Crore), and *Interest on preceding heads* (Rs.2.99 Crore).

142. It is a grievance of the appellant that the State Commission has not discussed or analyzed the claims and counter-claims of the parties in regard to the computation of Interest on Working Capital, it (GERC) having only adopted the reasoning given in its Order dated 14.11.2013 passed in Petition No. 1053 of 2010 related to CLP Limited overlooking the differences in the PPAs in the two cases, this demonstrating non-application of mind.

143. As mentioned earlier, the State Commission vide Corrigendum Order dated 21.11.2014 had deleted the findings in para 22 of the impugned order on deduction of 1/5th spares agreeing with GUVNL

on methodology of computation of one year requirement of maintenance spares and two months' average billing.

144. The Commission, however, has held that operational and maintenance (O&M) Expenses (Cash) for one month under the head 'Interest on Working Capital' is to be derived based on Article 7.1.1 (b). It is the argument of the appellant that GERC has failed to appreciate that O&M expenses (cash) means O&M expenses actually spent in cash and not the O&M Expenses as per Article 7.1.1(b). The argument is that if O&M Expenses as per Clause 7.1.1(b) was to be considered, there was no need to mention 'cash' in the components of Interest on Working Capital.

145. It is pointed out by the appellant that on the subject of maintenance spares, the PPA provides for actual maintenance spares but not exceeding one year's requirement, less $1/5^{th}$ of initial spares. The State Commission has upheld the same and stated that actual expenditure on maintenance spares was to be submitted by Essar. It is argued that Essar had not submitted any documentation for verification of actual O&M expenses and cost of maintenance spares despite several requests.

146. The appellant claims that it had made payments on the basis of Essar's Annual Report. During the course of proceedings before the State Commission, Essar had submitted the CA Certificate. It is submitted that the recovery based on annual reports for maintenance spares was about Rs. 4.25 crores whereas as per CA certificate the recoverable amount works out to only 0.25 crores. The argument is that the Annual reports are more authentic audited statements than a separate certificate issued by a

chartered accountant, the appellant not ready to accept the figures certified by the CA. It refutes the computation of Essar in terms of the Impugned Order and reiterates that as per the Impugned Order, the amount works out to only of Rs. 8.13 crores.

147. The appellant also argues that Essar has wrongly claimed Interest on Working Capital on Depreciation, the amount of Rs 1.32 crores claimed being not admissible. It submits that the delay in the payment of the Depreciation amount to be actually worked out as outstanding is compensated only by payment of Interest or Delayed Payment Surcharge.

148. We note that the claims of Essar respecting deductions were contested before GERC. The claimant (Essar) has relied on certificate by its CA to verify the actual expenses incurred. In absence of any specific discrepancy, we do not find merit in the contention that the CA certificate cannot be given credibility. It is on that basis the Commission has held that the O&M expense incurred and cost of maintenance spares consumed are supported by the evidence of actual expenditure and therefore the unilateral recovery by the GUVNL is illegal. It has found that GUVNL is required to pay amount wrongfully deducted towards O&M expenses, Interest on Working Capital on maintenance spares along with interest recovered by GUVNL, Essar being entitled to claim amount deducted towards Interest on Working Capital on two months receivable and interest thereon, GUVNL being required to pay amount towards Interest on Working Capital on depreciation amount as well.

149. We find no reason to displace the finding returned by the Commission that Essar had raised monthly invoices inclusive of demand of interest on working capital for the period from 01.04.1998 to 31.03.2004, the appellant having unilaterally deducted the amount of Rs. 10.48 Crore on 19.01.2005, such action being also time barred besides not being in accord with the bill dispute provision prescribed under the PPA. In our considered view, the State Commission has rightly rejected the contention of the appellant and directed payment in terms of the PPA. The contentions of the appellant are, therefore, rejected.

THE RESULT

150. In view of the foregoing conclusions, the challenge to the impugned order by the appeal at hand must fail. The appellant will be obliged in law to pay the amounts in terms of the principles that have been decided.

151. As noted earlier, the Commission had called upon the parties to "*evaluate the amount receivable*" by the second respondent Essar (petitioner before the Commission) from the appellant GUVNL (respondent before the Commission) "*as per the principles decided by the Commission*" and "*inform the Commission within one month's time from the receipt of the Order*". Ideally, the Commission should have quantified the amount payable in terms of the principles decided rather than leaving it to another round of proceedings. Be that as it may, it appears some calculations were submitted before GERC in terms of the said directions. It is clear from the submissions made before us that the parties are not *ad idem* on the amount payable by the appellant to the second

respondent under this dispensation. In order that the exercise is complete, we direct that the State Commission shall now pass the necessary orders on this score, after hearing both parties, expeditiously and at an early date, not later than two months from the date of this judgment. Needless to add the amount already paid in terms of interlocutory order will be adjusted. The Commission shall also ensure by taking appropriate measures that the claims are duly satisfied in a time-bound manner.

152. The appeal is disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 07TH DAY OF APRIL, 2022.

(Sandesh Kumar Sharma) **Technical Member**	**(Justice R.K. Gauba)** **Officiating Chairperson**