COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 304 OF 2016
APL No. 171 OF 2017
APL No. 139 OF 2017
APL No. 140 OF 2017
APL No. 96 OF 2017
APL No. 159 OF 2017

Dated: 28th August, 2023

Present : **Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson**
Hon`ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

APL No. 304 OF 2016

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003
.... Appellant(s)

Versus

1. **Central Electricity Regulatory Commission**
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 .... Respondent No.1

2. **Uttar Pradesh Power Corporation Ltd.**
(UPPCL) Shakti Bhawan, 14, Ashok
Marg, Lucknow-226001, Uttar Pradesh .... Respondent No.2

3. **Jaipur Vidyut Vitaran Nigam Ltd.**
(JVVNL) Vidyut Bhawan, Janpath,
Jaipur- 302005 .... Respondent No.3

4.	**Ajmer Vidyut Vitran Nigam Limited (AVVNL) Vidyut Bhawan, Panchsheel Nagar, Makarwali Road, Ajmer-305 004**	**….**	**Respondent No.4**
5.	**Jodhpur Vidyut Vitaran Nigam Ltd. (JdVVNL) New Power House, Industrial Area, Jodhpur-342003**	**….**	**Respondent No.5**
6.	**Tata Power Delhi Distribution Ltd. (TPDDL) Grid Substation, Hudson Road, Kingsway Camp, Delhi-110009**	**….**	**Respondent No.6**
7.	**BSES Rajdhani Power Ltd. (BRPL) BSES Bhawan, Nehru Place, New Delhi-110019**	**….**	**Respondent No.7**
8.	**BSES Yamuna Power Ltd. (BYPL) Shakti Kiran Building, Karkardooma, Delhi-110092**	**….**	**Respondent No.8**
9.	**Haryana Power Purchase Centre. (HPPC) Shakti Bhawan, Sector-VI, Panchkula, Haryana-134109**	**….**	**Respondent No.9**
10.	**Punjab State Power Corporation Ltd, (PSPCL) The Mall, Patiala-147001**	**….**	**Respondent No.10**
11.	**Himachal Pradesh State Electricity Board Ltd. (HPSEBL) Kumar Housing Complex Building-II, VidyutBhawan, Shimla- 171004**	**….**	**Respondent No.11**
12.	**Power Development Department, Govt, of Jammu & Kashmir, Secretariat, Srinagar-190 009**	**….**	**Respondent No.12**
13.	**Power Department (Chandigarh) Union Territory of Chandigarh, Addl. Office Building, Sector-9 D, Chandigarh-160 009**	**….**	**Respondent No.13**

14. Uttarakhand Power Corporation Ltd. (UPCL) UrjaBhawan, Kanwali Road, Dehradun-248001 **…. Respondent No.14**

Counsel on record for the Appellant(s) : Shri Venkatesh
Varun Singh
Pratyush Singh For App1

Counsel on record for the Respondent(s) : Manu Seshadri For Res1
Pradeep Misra For Res2
Raj Bahadur Sharma For Res7

APL No. 171 OF 2017

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003

…. Appellant(s)

Versus

1. Central Electricity Regulatory Commission
Through its Secretary
3rd& 4th Floor, Chanderlok Building,
3 6, Janpath, New Delhi- 110001 **…. Respondent No.1**

2. Uttar Pradesh Power Corporation Ltd. (UPPCL)
Through its Chairman
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001, Uttar Pradesh **…. Respondent No.2**

3. Jaipur Vidyut Vitaran Nigam Ltd.
Through its Chairman
(JVVNL) Vidyut Bhawan, Janpath, **…. Respondent No.3**
Jaipur- 302005

4. Ajmer Vidyut Vitran Nigam Limited (AVVNL)
Through its Chairman
Old Power House HathiBhata,

Jaipur Road, Ajmer-305 004 …. Respondent No.4

5. **Jodhpur Vidyut Vitaran Nigam Ltd. (JdVVNL)**
   Through its Chairman
   New Power House,
   Industrial Area, Jodhpur-342003 …. Respondent No.5

6. **Tata Power Delhi Distribution Ltd. (TPDDL)**
   Through its Chairman
   33 KV Grid Substation, Hudson Road,
   Kingsway Camp, Delhi-110009 …. Respondent No.6

7. **BSES Rajdhani Power Ltd. (BRPL)**
   Through its Chairman
   BSES Bhawan, Nehru Place,
   New Delhi-110019 …. Respondent No.7

8. **BSES Yamuna Power Ltd. (BYPL)**
   Through its Chairman
   Shakti Kiran Building, Karkardooma, …. Respondent No.8
   Delhi-110092

9. **Haryana Power Purchase Centre. (HPPC)**
   Through its Chief Engineer
   Shakti Bhawan, Sector-VI, Panchkula,
   Haryana-134109 …. Respondent No.9

10. **Punjab State Power Corporation Ltd, (PSPCL)**
    Chairman-cum-Managing Director
    The Mall, Patiala-147001 …. Respondent No.10

11. **Himachal Pradesh State Electricity Board Ltd. (HPSEBL)**
    Chairman-cum-Managing Director
    Kumar Housing Complex Building-II,
    VidyutBhawan, Shimla- 171004 …. Respondent No.11

12. **Power Development Department,**
    Govt. of Jammu & Kashmir,

Secretariat, Srinagar-190 009 …. Respondent No.12

**13. Power Department (Chandigarh)
Union Territory of Chandigarh,
Through its Chief Engineer
Addl. Office Building, Sector-9 D,
Chandigarh-160 009 …. Respondent No.13**

**14. Uttarakhand Power Corporation Ltd.
(UPCL)
Through its Chief Engineer
UrjaBhawan, Kanwali Road,
Dehradun-248001 …. Respondent No.14**

Counsel on record for the Appellant(s)	:	Shri Venkatesh Varun Singh Pratyush Singh For App1
Counsel on record for the Respondent(s)	:	For Res1 Pradeep Misra For Res2 Ranjana Roy Gawai For Res6 Raj Bahadur Sharma For Res7

APL No. 139 OF 2017

**NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003**

…. Appellant(s)

Versus

**1. Madhya Pradesh Power Management Company Limited
Through its Managing Director
Shakti Bhawan, Vidyut Nagar,
Jabalpur – 482008 …. Respondent No.1**

**2. Maharashtra State Electricity Distribution Company Ltd.
Through its Managing Director
Pradashgad, Bandra (East),**

Mumbai – 400051 …. Respondent No.2

3. Gujarat Urja Vikas Nigam Ltd.
Through its Managing Director
Sardar Patel Vidyut Bhawan,
Race Course Road, Vadodra-390 007 …. Respondent No.3

4. Chattisgarh State Power Distribution Company Limited,
Through its Managing Director
P.O. Sundar Nagar, Danganiya,
Raipur – 492913 …. Respondent No.4

5. Electricity Department, Government of Goa.
Through its Secretary
Government of Goa, Vidyut Bhawan,
Panaji, Goa – 403001 …. Respondent No.5

6. Electricity Department,
Through its Secretary
Administration of Daman & Dui – 396210 …. Respondent No.6

7. Electricity Department,
Through its Secretary
Administration of Dadra and Nagar Haveli,
Silvassa-396230 …. Respondent No.7

8. Central Electricity Regulatory Commission
Through its Secretary
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 …. Respondent No.8

Counsel on record for the Appellant(s)	:	Adarsh Tripathi Vikram Singh Baid Ajitesh Garg For App1
Counsel on record for the Respondent(s)	:	Ravi Sharma For Res1 Sethu Ramalingam For Res8

APL No. 140 OF 2017

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003

…. Appellant(s)

Versus

1. **Madhya Pradesh Power Management Company Limited**
   Through its Managing Director
   Shakti Bhawan, Vidyut Nagar,
   Jabalpur – 482008 …. Respondent No.1

2. **Maharashtra State Electricity Distribution Company Ltd.**
   Through its Managing Director
   Pradashgad, Bandra (East),
   Mumbai – 400051 …. Respondent No.2

3. **Gujarat Urja Vikas Nigam Ltd.**
   Through its Managing Director
   Sardar Patel Vidyut Bhawan,
   Race Course Road, Vadodra-390 007 …. Respondent No.3

4. **Chattisgarh State Power Distribution Company Limited,**
   Through its Managing Director
   P.O. Sundar Nagar, Danganiya,
   Raipur – 492913 …. Respondent No.4

5. **Electricity Department,**
   Government of Goa.
   Through its Secretary
   Government of Goa, Vidyut Bhawan,

Panaji, Goa – 403001 .... **Respondent No.5**

6. **Electricity Department,**
   Through its Secretary
   Administration of Daman & Dui – 396210 .... **Respondent No.6**

7. **Electricity Department,**
   Through its Secretary
   Administration of Dadra and Nagar Haveli,
   Silvassa-396230 .... **Respondent No.7**

8. **Central Electricity Regulatory Commission**
   Through its Secretary
   3rd& 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi- 110001 .... **Respondent No.8**

Counsel on record for the Appellant(s) : Adarsh Tripathi
Vikram Singh Baid
Ajitesh Garg For App1

Counsel on record for the Respondent(s) : Ravi Sharma For Res1
Anna Malhotra For Res8

APL No. 96 OF 2017

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003

.... **Appellant(s)**

Versus

1. **AP Eastern Power Distribution Company Limited**
   Through its Managing Director
   Corporate Office, P&T Colony,
   Seethammadhara,
   Visakhapatnam –530 013 - (AP) .... **Respondent No.1**

2. **AP Southern Power Distribution Company Limited**

Through its Managing Director
Back Side Srinivasa Kalyana,
Mandapam Tiruchhanur Road,
Kesavayana Gunta,
Tirupathi – 517 503 (AP)

…. Respondent No.2

3. Telangana State Northern Power Distribution Company Limited
(formerly Andhra Pradesh Northern Power Distribution Company Ltd.)
Through its Managing Director
H. No. 2-5-31/2 Vidyut Bhavan,
Nakkalagutta, Hanamkonda,
Warangal – 506 001

…. Respondent No.3

4. Telangana State Southern Power Distribution Company Limited
(formerly Andhra Pradesh Central Power Distribution Company Ltd.)
Through its Managing Director
Mint Compound, Corporate Office
Hyderabad – 500 063.

…. Respondent No.4

5. Bangalore Electricity Supply Company Limited
Through its Managing Director
Krishna Rajendra Circle,
Bangalore – 560 001.

…. Respondent No.5

6. Mangalore Electricity Supply Company Ltd.
Through its Managing Director,
Paradigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore – 575 001.

…. Respondent No.6

7. Chamundeshwari Electricity Supply Corporation Ltd.
Through its Managing Director,
CESC, Corporate office, No. 29,
Ground floor, Kaveri Grameena bank
road, Vijayanagar 2nd stage,
Mysore - 570017.

…. Respondent No.7

8. **Gulbarga Electricity Supply Company Ltd.**
Through its Managing Director
Main road, Gulbarga -585 102
Karnataka.

…. Respondent No.8

9. **Hubli Electricity Supply Company Ltd.**
Through its Managing Director,
Corporate office,
P.B. Road, Navanagar, Hubli – 580 025.

…. Respondent No.9

10. **Kerala State Electricity Board Ltd.**
Through its Managing Director
Vaidyuthi Bhavanam,
Pattom Thiruvananthapuram – 695 004.

…. Respondent No.10

11. **Tamil Nadu Generation & Distribution Corporation Ltd.**
Through its Managing Director
7th Floor, NPKRR Maligai,
144, Anna Salai, Chennai – 600 002.

…. Respondent No.11

12. **Electricity Department Govt. of Puducherry**
Through its Superintending Engineer-I
137, NSC Bose Salai,
Puducherry – 605 001 **…. Respondent No.12**

13. **Electricity Department Government of Goa**
Through its Chief Engineer (Electrical)
Vidyut Bhavan, 3rd Floor, Panaji,
GOA – 403 001 **…. Respondent No.13**

14. **Central Electricity Regulatory Commission**
Through its Secretary,
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

…. Respondent No.14

Counsel on record for the Appellant(s)	:	Adarsh Tripathi Vikram Singh Baid Ajitesh Garg For App1
Counsel on record for the Respondent(s)	:	For Res1 S. Vallinayagam For Res11 Anna Malhotra For Res14 Rakesh Kumar Sharma For Res3 Rakesh Kumar Sharma For Res4

APL No. 159 OF 2017

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003

…. Appellant(s)

Versus

1. **West Bengal State Electricity Distribution Company Limited**
Through its Managing Director
Vidyut Bhawan, Block-DJ,
Sector-II, Salt Lake City
Kolkata – 700 091 **…. Respondent No.1**

2. **Bihar State Power holding Company Limited**
Through its Managing Director
Vidyut Bhawan, Bailey Road
Patna – 800 001 **…. Respondent No.2**

3. **Jharkhand State Electricity Board,**
Through its Managing Director
Engineering Building,
HEC, Dhurwa, Ranchi – 834004 **…. Respondent No.3**

4. **GRIDCO Limited**
Through its Managing Director
24, Janpath, Bhubaneswar – 751007 **…. Respondent No.4**

5. **Haryana Power Purchase Centre(HPPC)**
Through its Managing Director

Shakti Bhawan, Sector-6,
Panchukla, Haryana - 134109 …. Respondent No.5

6. Power Department
Through its Secretary
Govt. of Sikkim, Kazi Road,
Gangtok, Sikkim-737101 …. Respondent No.6

7. Tamil Nadu Generation and
Distribution Company Limited
Through its Managing Director
NPKRP Maaligail, 144, Anna Salai,
Chennai – 600002 …. Respondent No.7

8. Punjab State Power Corporation
Limited,
Through its Managing Director
The Mall, Patiala -147001 …. Respondent No.8

9. Uttar Pradesh Power Corporation
Limited
Through its Managing Director
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226001 …. Respondent No.9

10. Power Development Department (J&K)
Through its Secretary
Govt. of J&K Secretariat,
Srinagar-190 009 …. Respondent No.10

11. Assam Power Distribution Company
Limited
Through its Managing Director
Bijulee Bhawan, Paltan Bazar,
Guwahati - 782001 …. Respondent No.11

12. BSES Rajdhani Power Limited
Through its Managing Director
BSES Bhawan, Nehru Place
New Delhi-110019 …. Respondent No.12

13. BSES Yamuna Power Limited
Through its Managing Director

Shakti Kiran Bldg., Karkardooma,
Delhi-110092 …. Respondent No.13

14. **Tata Power Delhi Distribution Company Limited**
Through its Managing Director
33 KV Sub Station Bldg.
Hudson Lane, Kingsway Camp
New Delhi-110009 …. Respondent No.14

15. **Jaipur Vidyut Vitran Nigam Ltd**
Through its Managing Director
400 kV GSS Building (Ground Floor),
Ajmer Road,
Heerapura, Jaipur-302024 …. Respondent No.15

16. **Ajmer Vidyut Vitran Nigam Ltd**
Through its Managing Director
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur-302024 …. Respondent No.16

17. **Jodhpur Vidyut Vitran Nigam Ltd**
Through its Managing Director
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur-302024 …. Respondent No.17

18. **Central Electricity Regulatory Commission**
Through its Secretary
3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001 …. Respondent No.18

Counsel on record for the Appellant(s) : Adarsh Tripathi
Vikram Singh Baid
Ajitesh Garg For App1

Counsel on record for the Respondent(s) : For Res1
Raj Bahadur Sharma For Res12
Raj Bahadur Sharma
Mohit Mudgal For Res13
Raj Bahadur Sharma For Res2
Raj Kumar Mehta For Res4
S. Vallinayagam For Res7
Pradeep Misra For Res9

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The appeals, which form part of the present batch, were filed by the Appellant- M/s NTPC Ltd. They are (i) Appeal No. 304 of 2016 challenging the Order of the CERC in Petition No. 291/GT/2014 dated 23.08.2016, with respect to the Appellant's Rihand Super Thermal Power Station Stage-1; (ii) Appeal No. 171 of 2017 challenging the order of the CERC in Petition No. 319/GT/2014 dated 22.03.2017, with respect to its Feroze Gandhi Unchahar TPS, Stage -1; (iii) Appeal No. 96 of 2017 challenging the Order of the CERC in Petition No. 292/GT/2014 dated 24.01.2017, with respect to its Ramagundam Super Thermal Power Station Stage I & II; (iv) Appeal No. 139 of 2017 challenging the Order of the CERC in Petition No. 338/GT/2014 dated 24.02.2017, with respect to its Vindhyachal Super Thermal Power Plant Stage-I; (v) Appeal No. 140 of 2017 challenging the Order of the CERC in Petition No. 323/GT/2014 dated 24.02.2017, with respect to its Korba Thermal Power Station Stage I & II; and (vi) Appeal No. 159 of 2017 challenging the Order of the CERC in Petition No. 316/GT/2014 dated 10.03.2017, with respect to its Farakka Super Thermal Power Station Stage I & II.

Appeal No. 304 of 2016 has been filed by M/s. NTPC Ltd (Formerly National Thermal Power Corporation Ltd), a generating company owned and controlled by the Central Government, against the Order passed by the Central Electricity Regulatory Commission dated 23.08.2016, rejecting the petition filed by them against the Uttar Pradesh Power Corp. Ltd ("UPPCL" for short) and others, under Section 79(1)(a) of the Electricity Act, 2003. In the petition filed by them before the CERC, the

Appellant had sought approval of the tariff of Rihand Super Thermal Power Station, Stage-I (2 x 500 MW) for the period 2014-19 in accordance with the CERC Tariff Regulations, 2014. Rihand STPS, Stage-I, one of the generating stations owned by the Appellant, has a total capacity of 1000 MW comprising two units of 500 MW each. The COD of Unit-I was 01.01.1990, and Unit II was 01.01.1991. By the Order, impugned in this Appeal, the CERC disallowed the following expenditure incurred by the Appellant i.e: (i) Ash Slurry Pump House; (ii) 1st raising of Mithini Ash Dyke Lagoon-I; (iii) 2nd raising of Central Ash Dyke Lagoon-I; (iv) 2nd raising of Central Ash Dyke Lagoon-2; (v) 1st raising of Mithini Ash Dyke Lagoon-2; (vi) 3rd raising of Central Ash Dyke Lagoon-2; (vii) Modification of Electro Static Precipitator, Stage-I, and (viii) Fire Detection & Protection System, Stage-I. The Additional Capital Expenditure incurred by NTPC was disallowed by the CERC holding that the Appellant had already been compensated by way of the Special Allowance prescribed under Regulation 16 of the CERC Tariff Regulations, 2014.

Appeal No. 171 of 2017 is filed by M/s. NTPC Ltd against the order of the CERC dated 22.03.2017. The Appellant had filed the petition before the CERC, against the Uttar Pradesh Power Corp. Ltd. ("UPPCL" for short) and others, seeking approval of the tariff of Feroze Gandhi Unchahar Thermal Power Station, Stage- I (420 MW) for the period from1.4.2014 to 31.3.2019 in accordance with the CERC Tariff Regulations, 2014. Unchahar TPS, Stage-I, one of the generating stations owned by the Appellant, has a total capacity of 420 MW and comprises of two units of 210 MW each. The generating station was taken over by the Appellant from the erstwhile UPRUVNL on 13.02.1992. Unit I of Unchahar TPS, Stage-I achieved its COD on 21.11.1988, and Unit II on 22.03.1989. By the impugned Order, the CERC disallowed the following expenditure incurred by the Appellant ie (i) Inert gas system for CCR (central control room) and CER (Central Equipment Room); (ii) Online Monitoring for CO_2 in Flue Gas; (iii) Fire Fighting system for Stacker, Reclaimer I and II in CHP and Main Plant; and (iv) Modification of ESPs. The CERC disallowed the Special Capital Expenditure, claimed by the Appellant as having been incurred on account of a 'Change in Law', holding that they had already been compensated by way of the Special Allowance under Regulation 16 of the CERC Tariff Regulations, 2014.

Appeal No. 159 of 2017 is filed by M/s. NTPC Ltd against the order passed by the CERC dated 10.03.2017. The said order was passed in a petition filed by the Appellant, against the West Bengal State Electricity Distribution Company Limited ("WBSEDCL" for short), seeking approval of the tariff of Farakka Super Thermal Power Station, Stage-I & II (1600 MW) for the period 2014-19 in accordance with the CERC Tariff Regulations, 2014. The Farakka Super Thermal Power Station, Stage I and II, with a total capacity of 1600 MW, comprises of three units of 200 MW each and two units of 500 MW each. The electricity generated therefrom is supplied to Respondent Nos. 1 to 17 herein. By the Order, impugned in this Appeal, the CERC disallowed the following expenditure incurred by the Appellant ie (i) 4th Raising of Nishindra Ash Dyke I & II; (ii) Starter dyke of Nishindra Lagoon-III; (iii) Inert Gas Fire Extinguishing System; (iv) Dry Ash Extraction System; (v) Renovation of Electro Static Precipitator (ESP); and (vi) Replacement of Wooden and Cast Iron Sleepers of Merry Go Round [MGR]. The CERC disallowed the Additional Capital Expenditure incurred by the appellant, which they claimed was on account of a 'Change in Law', holding that they had already been compensated by way of the Special Allowance prescribed under Regulation 16 of the Tariff Regulations, 2014. The question which mainly arises for consideration in this Appeal is whether the Additional Capital Expenditure incurred by the Appellant in view of the 'Change in Law' that had occurred in the recent past, and the expenditure incurred towards the works relating to raising of the Ash Dyke could be claimed under Regulation 14, or whether it could only be compensated under Regulation 16 of the CERC Tariff Regulations, 2014.

Appeal No. 96 of 2017 has been filed by M/s. NTPC Ltd against the Order passed by the CERC dated 24.01.2017, rejecting the petition filed by them against the AP Eastern Power Distribution Company Ltd ("APEPDCL" for short) and others, seeking approval of the tariff of Ramagundam Super Thermal Power Station Stage-I & II (3X200 MW +3X500MW), for the period 2014-19 in accordance with the CERC Tariff Regulations,2014. The Ramagundam Super Thermal Power Station, Stage I & II, with a total capacity of 2100 MW, comprises 6 units, three units of 200 MW each and three units of 500 MW each. The electricity generated from the Ramagundam STPS Stage I-II is supplied to Respondents Nos. 1 to 13 herein. By the Orders, impugned in these Appeals, the CERC disallowed the following expenditure incurred by the Appellant i.e. (i) Ash Dyke/ash pond related works, (ii) N2 Dyke strengthening, (iii) Earth covers for Ash Dyke, (iv) Halon replacement, (v) DAES Online CO2, (vi) SOX, (vii) NOX Analyzer, (viii) Mulsifyre System for transformers and cable galleries, (ix) MVW system for CHP, (x) Railway Wagons, and (xi) Online Effluent Analyzer. The CERC disallowed the Additional Capital Expenditure, claimed by the Appellant under Clauses (ii), (iii), (iv) and (x) of Regulation 14(3), mainly on the ground that they had already been compensated by way of the Special Allowance under Regulation 16 of the CERC Tariff Regulations, 2014.

Appeal No. 139 of 2017 has been filed by M/s. NTPC Ltd aggrieved by the Order passed by the CERC dated 24.02.2017 rejecting their petition. In the petition filed by them against the Madhya Pradesh Power

Management Company Limited ("MPPMCL" for short) and others, the Appellant sought approval of the tariff of Vindhyachal Super Thermal Power Station, Stage-I (1260 MW) for the period 2014-19 in accordance with the CERC Tariff Regulations,2014. The Vindhyachal Stage I, with a total capacity of 1260 MW, comprises of 6 units of 210 MW each. The electricity generated from the Vindhyachal Stage-I is supplied to Respondents No. 1 to 7 herein. By the Order, impugned in this Appeal, the CERC disallowed the following expenditure incurred by the Appellant i.e. (i) Near Zero Discharge of Water, (ii) Continuous Emission Monitoring System, (iii) Replacement of Halon System, (iv) installation of CCTV Surveillance System, and (v) Augmentation of existing fire fighting system. The CERC disallowed the Capital Expenditure, claimed by the Appellant as having been incurred on account of a 'Change in Law', holding that the appellant had already been compensated by way of the Special Allowance under Regulation 16 of the Tariff Regulations, 2014.

Appeal No. 140 of 2017 has been filed by M/s. NTPC Ltd against the Order passed by the CERC dated 24.02.2017, rejecting their petition. In their petition filed against the Madhya Pradesh Power Management Company Limited ("MPPMCL" for short) and others, the Appellant sought approval of the tariff of the Korba Station, Stage I and II for the period 2014-19 in accordance with the CERC Tariff Regulations,2014. The Korba Super Thermal Power Station, Stage I & II, with a capacity of 2100 MW, consists of 3 units of 200 MW each and 3 units of 500 MW each. The electricity generated from the Korba Station is supplied to Respondents No. 1 to 7 herein. By the Order, impugned in this Appeal, the CERC disallowed the following expenditure incurred by the Appellant i.e. (i) ESP modification works, (ii) Halon Replacement, and (iii) Ash Dyke Related works. The CERC disallowed the Special Capital Expenditure, claimed by the Appellant as having been incurred on account of a ‘Change in Law’, holding that the appellant had already been compensated by way of the Special Allowance under Regulation 16 of the Tariff Regulations, 2014.

II. PLEADINGS:

As the issues, which arise for consideration in these batch of appeals, are largely common, we see no reason to burden this judgement with the pleadings in all the six Appeals. It would, in our view, suffice if the pleadings in Appeal No. 304 of 2016 are alone noted.

In Appeal No. 304 of 2016, the CERC determined the tariff of Rihand Super Thermal Power Station Stage-I (2x500 MW) in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as the ‘2014 Regulations’). The appellant alleges that the CERC erred in disallowing the additional capitalization claimed by them in respect of the following: (i) Ash Slurry Pump House; (ii) 1st raising of Mithini Ash Dyke Lagoon-I; (iii) 2nd raising of Central Ash Dyke Lagoon-I; (iv) 2nd raising of Central Ash Dyke Lagoon-2; (v) 1st raising of Mithini Ash Dyke Lagoon-2; (vi) 3rd raising of Central Ash Dyke Lagoon-2; (vii) Modification of Electro Static Precipitator, Stage-I; and (viii) Fire Detection & Protection System, Stage-I. The case of both the appellant and the respondent, with respect to these claims, are summarized below.

A. CASE OF THE APPELLANT:

The Appellant, a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003 (herein referred to as “*the Act*”), has power stations/projects at different regions and places in the country. Rihand STPS, Stage-I, one of the generating stations owned by the

Appellant, has a total capacity of 1000 MW comprising two units of 500 MW each; and, while the COD of Unit I was 01.01.1990, the COD of Unit II was 01.01.1991. The tariff, for sale of Electricity by the Appellant, is regulated by the CERC. The present Appeal is filed challenging the legality and validity of the Order passed by the CERC, in Petition No.291/GT/2014 dated 23.08.2016, in relation to the Rihand Super Thermal Power Station Stage-1.

In the Impugned Order, the CERC, after interpreting certain provisions of the 2014 Regulations, disallowed the Additional Capital Expenditure to be incurred by the Appellant on the Rihand STPS, Stage-I, holding that the said expenditure is covered under the Special Allowance for coal based/lignite fired Thermal Generating Stations as provided under Regulation 16 of the 2014 Regulations.

According to the Appellant, the CERC failed to appreciate that the Projected Additional Capital Expenditure sought was on the ground of 'Change in Law' events, as contemplated under Regulation 14 of the 2014 Regulations, that had occurred in the recent past, and works related to the raising of Ash Dyke; such capitalization had nothing to do with R&M works required for extending the life of the plant beyond 25 years as contemplated under the Special Allowance determined under the 2014 Tariff Regulations; and the Impugned Order is in contravention of the Tariff Policy and the various notifications issued by the Government of India promoting generation from power plants which have attained the age of 25 years.

In this Appeal, the disallowance of the following items of Additional Capitalization is being questioned: -(a) ***Ash Related Works: -*** (i) Works related to Ash Slurry Pump House; (ii) 1st raising of Mithini Ash Dyke Lagoon-I; (iii) 2nd raising of Central Ash Dyke Lagoon – I; (iv) 2nd raising of Central Ash Dyke Lagoon- 2; (v) 1st raising of Mithini Ash Dyke Lagoon 2;

and (vi) 3rd raising of Central Ash Dyke Lagoon 2; (b) ***Change in Law related works***:- (i) Fire Detection & Protection System, St-1 (in CHP Area);and (ii) Modification of Electro Static Precipitator, Stage- 1

With respect to Ash slurry house, the CERC, in the Impugned Order dated 23.08.2016, observed that the appellant had claimed a projected additional capital expenditure of ₹72.00 lakh in 2014-15 towards installation of Ash slurry pump contending that the work related to augmentation of Ash slurry pump house in order to pump bottom ash slurry and fly ash slurry from the common ash slurry sump to the central and Mathini Ash Dyke area for continuous disposal of ash slurry in order to ensure no overflow of Ash slurry from the sump; the respondents had contended that no details had been submitted of the proposed life extension for the projected additional capital expenditure at the end/after the useful life of the plant, the said work was not a deferred work relating to ash or ash handling system, and should be disallowed.

The CERC had then referred to Regulation 27(7) of 2014 Tariff Regulations, and observed that the appellant had claimed projected additional capital expenditure during the fag end of completion of useful life of 25 years, and had not provided any justification or proposal for life extension of the project; in terms of Regulation 15 of the 2014 Tariff Regulations, they had the liberty to approach the Commission with a comprehensive scheme of R&M for extension of life of the generating station; however, the appellant had opted for "Special Allowance" from the year 2015-16 in order to meet the requirement of expenses including R&M beyond the useful life of the generating station; in this background, they were not inclined to allow the projected additional capital expenditure of ₹72.00 lakh claimed in 2014-15; and the appellant should meet the expenses from the "Special Allowance" permitted to the generating station for 2014-2015.

With regards Ash dyke raising, the appellant, in the petition filed before the CERC, claimed a projected capital expenditure of ₹980.00 lakhs for the1st raising of Mathini Ash Dyke Lagoon-I, ₹560.00 lakhs for the 2nd raising of Central Ash Dyke Lagoon-I in 2015-16, ₹560.00 lakhs for the 2nd raising of Central Ash Dyke Lagoon-2 and Rs.1000.00 lakhs for the 1st raising of Mathini Ash Dyke Lagoon-2 in 2017-18, and ₹600.00 lakhs for the 3rd raising of Central Ash Dyke Lagoon-2 in 2018-19; in justification, they submitted that these works had already been approved by the CERC vide order in Petition No. 176/GT/2013 dated 15.5.2014; the work was required to be executed for optimum utilization of land for land disposal, conservation of forest/cultivating land, and compliance with the directions of statuary bodies; by order in Petition No. 176/GT/2013 dated 15.5.2014, the CERC had approved the projected additional capital expenditure of ₹789.91 lakhs in 2012-13 for the 1st raising of Mathini Ash Dyke Lagoon-I, and in Petition No. 317/GT/2014 no additional capital expenditure was incurred/claimed for the same; on the other hand, the respondents had submitted that, though the plant was completing its useful life in 2015-16, details of the proposed life extension of the generating station, for the capital expenditure at the end/after of the useful life, had not been submitted; the appellant had claimed "Special Allowance" from 2014-15 onwards in terms of the 2014 Tariff Regulations; and,, hence, they were not entitled for the projected additional capital expenditure.

The Appellant submits that, on this issue, the CERC had opined that the generating station would be completing its useful life of 25 years during the year 2015-16; the expenditure for Ash Dyke works were to facilitate operation of the plant after the useful life of 25 years, and for the extended period of operation; the appellant was at liberty to approach the CERC with a comprehensive scheme of R&M for extension of life of the generating station; the appellant had opted for the "Special Allowance" in order to meet the requirement of expenses including R&M beyond the useful life of the generating station; and, in this background, they were not inclined to allow the projected additional capital expenditure against the Ash Dyke work.

On the issue of Modification of ESP of Stage-I as a Change in law, it is stated that the appellant had claimed a total projected additional capital expenditure of ₹5840.00 lakhs in 2015-16 and ₹5840.00 lakh in 2016-17, towards modification of ESP of Stage-I, to achieve the emission level of 100 mg/Nm3 specified by the Uttar Pradesh Pollution Control Board, vide letter dated 17.2.2011 under Regulation 14(3)(ii) of the 2014 Tariff Regulations; in its previous order in Petition No. 261/2009 dated 7.6.2012, a sum of ₹13,000 lakhs was approved by the CERC for the same; the appellant did not claim any expenditure towards ESP in Petition 176/GT/2013 and, considering the timelines in the contract and the requirement of shutdowns, capitalization of the expenditure would stretch beyond 2013-14 and would continue till the year 2015-16; the respondent had contended that neither details regarding the proposed life extension for the expenditure at the end of /after the useful life of the plant, nor documentary evidence relating to "change in law" had been submitted; the appellant had claimed Special allowance from 2015-16 onwards in term of the 2014 Tariff Regulations; hence, they were not entitled for the projected additional capital expenditure; in response, the appellant had submitted that the modification of ESP Stage-1 was not in the nature of R&M as provided under the 2014 Tariff Regulations, and the work was event based to be undertaken to fulfil statutory requirements.

The appellant states that, on this issue, the CERC opined that the projected additional capital expenditure claimed for modification of ESP, after expiry of useful life of 25 years of the generating station, was in the nature of R&M; the appellant had opted for Special Allowance for meeting expenditure including R&M, beyond the useful life of the generating station during the period 2014-19; since they were allowed Special Allowance in terms of Regulation 16 of the 2014 Tariff Regulations for the period 2014-19, to meet expenditure including R&M beyond the useful life of the generating station, the projected additional capital expenditure of ₹11,680.00 lakhs (₹5840.00 lakhs in 2015-16 and ₹5840.00 lakhs in 2016-17) was being disallowed; and the appellant may meet the expenditure from the Special Allowance allowed to the generating station.

The appellant states that, with regards fire detection & protection system in Stage- I, they had claimed projected additional capital expenditure of ₹400.00 lakh in 2014-15 towards the modification of Fire detection & Protection system in Stage- I, under Regulation 14(3)(ii) & 14(3)(iii) of the 2014 Tariff Regulations; they had submitted that, in terms of the Central Electricity Authority (Technical Standards for construction of Electrical Plants and Electric Lines) Regulation, 2010, major works such as (i) Installation of Medium Velocity Water Spray system for coal conveyers, crusher house, cable galleries, stacker reclaimer of CHP; (ii) Installation of analogue addressable type fire detection and alarm system; (iii) Installation of fire hydrants, were essentially required to prevent fire break out; augmentation of fire protection system of Stacker Reclaimer area, and conveyers, was essentially required to prevent any catastrophic damage in case fire breaks out in CHP, as existence of coal in CHP area makes it vulnerable to fire hazard, and mobile fire protection equipment may not be able to control the spread of fire; and they had claimed capitalisation of augmentation of Fire protection system under Regulation 14(3)(iii) of the 2014 Tariff Regulations; the Respondent had stated that details of the proposed life extension, for the expenditure at the end/after of the useful life, had not been submitted by the appellant; Regulation

12(5) of the Central Electricity Authority Regulations, 2010 provided the technical standards for construction of electrical plants; and, as the generating station was already a constructed plant, the said regulation was not applicable in this case.

The Appellant submits that the CERC had opined that the projected additional capital expenditure claimed towards augmentation of Fire fighting system, in CHP, Cable galleries, Conveyers etc, were based on the CEA Regulations, 2010; the appellant had not established that augmentation of the fire fighting system was due to any change in law; a proper and well equipped fire fighting system was required in any thermal power generating station, even prior to the notification of the CEA Regulation 2010 prescribing safety standards; hence, it could not be contended that the change in law was on account of the CEA Regulations 2010; even otherwise, the appellant had not indicated how safety standards, under the CEA Regulations, was a change in law which prompted the expenditure under this head; the appellant had not established existence of any change in law which justified the expenditure towards augmentation of fire fighting systems; they were not inclined to allow the projected additional capital expenditure of ₹400.00 lakhs claimed under this head for 2015-16; and this expenditure may be met from the Special Allowance granted to the generating station.

The Appellant submits that, in effect, no projected additional capital expenditure had been allowed for the period 2014-19 in respect of the aforesaid claims; the impugned Order does not interpret the true import of Regulation 14(3) of the 2014 Tariff Regulations; it incorrectly assumes that Regulation 14(3) and Regulation 16 of the 2014 Tariff Regulations are not mutually exclusive; and it ignores that the Appellant had, in the instant case, already submitted that the Additional Capital Expenditure, projected to be incurred during the fag end of the Station, would not extend the life of the Station, as life extension of the Station depended on extension of the life of all plant equipment simultaneously, or at least BTG works.

The Appellant submits that Regulation 14(3) of the 2014 Tariff Regulations operates independent of Regulation 16, and it would suffice to demonstrate that Capital Expenditure is being increased not for the purpose of R&M ie for increasing the life of the project; the Appellant had specifically stated that the subject expenditure was necessitated either due to a change in law or compliance of any existing law, or improvement of safety of plant or other capital expenditure which had either been previously allowed, or such expenditure was not related to R&M for life extension of the Plant; and these claims were summarily rejected since the Appellant was claiming Special Allowance under Regulation 16.

According to the appellant, the interpretation placed by the CERC on the Regulations was erroneous; If the aim of the 2014 Tariff Regulations was to combine Additional Capitalisation under Regulation 14, with the special allowance given under Regulation 16, then a proviso would have been inserted either in Regulation 14(3) or Regulation 16, making them subject to each other; in its Regulations, the CERC has carved out various exceptions when it felt that a dispensation ought not lead to duplicity; for example – the 2nd Proviso to Regulation 14(3) states that all expenditure, other than those mentioned under Regulation 14(3)(i) to (iv) in case of coal/ lignite based station, shall be met out of compensation allowance; the 3rd Proviso to Regulation 14(3) provides that if an expense is claimed under R&M then the same cannot be claimed as Additional Capitalization; this is consistent with the case of the Appellant as the Additional Capitalization sought is over and above the Special Allowance or R&M, and hence needs to be compensated additionally; the conclusion of the CERC that, since the Appellant was availing Special Allowance, it was not entitled to Additional Capitalization under Regulation 14(3), is contrary to its Regulations itself; this issue, though raised by the Appellant in Appeal No. 61 of 2015, was dismissed by this Tribunal in its Judgment dated 29.04.2016 against which the Appellant has preferred a Civil Appeal before the Supreme Court; the grounds urged in the present appeal were not considered by this Tribunal in the earlier Judgment as Additional Capital Expenditure, claimed therein, was for a period in which the same was not capitalized; this Tribunal, while passing the Judgment, simply observed that expenditure on ESP can be claimed under Regulation 10 of CERC 2009 Regulations; and the finding of the CERC is also contrary to the Judgment of the Supreme Court, in **LIC v. D.J. Bahadur, (1981) 1 SCC 315,** wherein the legal maxim generalia specialibus non derogant was applied.

The appellant states that the finding of the CERC that the Additional Capital Expenditure in relation to Modification of ESP of Stage -1, which is an admitted 'Change in Law or compliance of existing law' event, does not fall within Regulation 14(3) but can be compensated in terms of Regulation 16 of the 2014 Tariff Regulations is erroneous; the capital expenditure on account of Electro Static Precipitators, claimed by Appellant under Regulation 14(3)(ii), i.e. under the head `Change in Law or compliance of existing law', is admissible, as such expenditure had become necessary on account of statutory requirements; as the claim is admissible under the specific Regulation i.e Regulation 14(3)(ii) of the 2014 Tariff Regulations, it cannot be said to form part of the Special Allowance under Regulation 16, especially when an exception to Regulation 14(3)(ii) has been carved out in the proviso; the Regulation relating to Special Allowance is as an alternative for determination of the capital expenditure to be allowed on Renovation and Modernization for the purpose of extension of life beyond the useful life of the generating station or unit thereof; it is independent of Regulation 14(3)(ii) which relates to Change in Law or compliance of existing law; Regulation 14 (3)(ii) does not restrict application of Change in law either during the useful life of the generating station or after Renovation and Modernization; accordingly, if anything needs to be incurred by way of capital expenditure on account of the changed directions of law at any time, the same is admissible towards additional capitalization under this specific Regulation; and Regulation 14(3)(ii) applies to the entire period after the cutoff date, including during and after Renovation and Modernization of the plant/unit for extending the useful life as it is applicable for the works undertaken and claimed due to fulfillment of the statutory requirement.

The Appellant states that the capital expenditure, on Electro Static Precipitators, was allowed by the CERC in the order in Petition No 261/2009 dated 7.6.2012 for the 2009-14 period; based on this order dated 7.6.2012, i.e. only after regulatory certainty on the claim of Electro Static Precipitators being allowed in tariff, the Appellant went ahead and initiated the process of ESP modification; the CERC cannot therefore, at a later stage, reconsider issues already decided in their own previous order, as this would create uncertainty in servicing capital expenditure incurred on the basis of the prior approval and regulatory certainty; and the Tariff Policy, as amended in 2016, also warrants that expenditure incurred due to "Change in Law" events must be passed on to the beneficiaries.

The appellant states that the Additional Capital Expenditure, in relation to Fire Detection & Protection system in Stage -1, is a 'Change in Law or compliance of existing law' event; it is also required for Safety & Security of the Station; the CERC erred in holding that it does not fall within Regulation 14(3), but can be compensated in terms of Regulation 16 of the 2014 Tariff Regulations; the appellant conducted an internal fire safety audit and decided that, in order to improve the overall safety of the plant, it would comply with existing provisions of the Central Electricity Authority (Technical Standards for Construction of Electric Plants and Electric Lines) Regulations 2010 as the guiding document, the only available statutory document specific to power plants in this regard; augmentation of fire protection system, of the Stacker Reclaimer area and conveyers, is essentially required to prevent any catastrophic damage in case fire breaks out in the Coal Handling Plant (CHP), as existence of coal in CHP area makes it vulnerable to fire hazard, and mobile fire protection equipment may not be able to control the spread of fire; considering the safety of the Plant & Equipment, and as O&M of personnel was the utmost priority, it was decided to align the firefighting system of the Appellant's plants as per the CEA Regulations; the CERC rejected this claim on the ground that sufficient reasons had not been provided for such augmentation, and it should be met from the Special Allowance; the works relating to Fire Detection and Protection System was carried out in line with Regulation 12(5) of the 2010 CEA Regulations which required thermal generating stations to be equipped with comprehensive/ automatic fire detection, alarm and fire protection system; in rejecting this claim, the CERC concluded that the 2010 CEA Regulations cannot be said to be a Change-in-law; and the CERC failed to consider the other part of Regulation 14(3)(ii), i.e. compliance of any existing law, which, in the present case, is the 2010 CEA Regulations.

The Appellant states that the works, relating to Modification of ESPs, were being carried out to comply with the emission norms of 100 mg/Nm3 as per the statutory direction of the Uttar Pradesh Pollution Control Board (UPPCB); these works were undertaken based on the directions and notifications of the respective statutory bodies, which could not have been envisaged before hand; such expenses are, therefore, not covered under the normative Special Allowance under Regulation 16 of the 2014 Tariff Regulations; the Ministry of Environment, Forest and Climate change, vide Gazette notification dated 7.12.2015, amended various norms for Thermal Power Plants; to comply with them, several works were required to be carried out incurring substantial expenditure; the Tariff Regulations do not envisage such unforeseen expenses being incurred under Special Allowance as these expenditure would not be known before hand; Regulation 14(3)(ii) does not restrict application of Change in law only up to the useful life of the generating stations; it is applicable, even after its useful life, till the units are in service; if any expenditure needs to be incurred by way of capital expenditure, in compliance with the directions of statutory bodies at any point of time, they should be admissible as additional capitalization under Regulation 14(3) of the 2014 Tariff Regulations; the National Perspective Plan, notified by the Central Electricity Authority dealing with renovation, modernization and life extension of thermal power stations (valid up to 2016-17), provides that the cost of Life Extension & Upgradation works (LE&U) shall not exceed 50% of the EPC cost of a new generating unit of indigenous origin (BHEL); if the LE&U works are limited to BTG, the cost ceiling shall be restricted to 50% of the new BTG unit only; accordingly, the Special allowance granted in lieu of Renovation & Modernization, namely an amount of Rs 7.5 lakhs/ MW/ year, is not sufficient to meet the expenditure required for the Boiler Turbine Generator (BTG); by way of illustration, in the case of the recently commissioned Rihand Generating Station (2x500 MW) of NTPC, the Boiler Turbine Generator (BTG) cost works out to approximately Rs 2.4 to 2.7 Crores/ MW, and 50% thereof amounts to Rs 1.20 to Rs 1.35 Cr./ MW; the aforesaid Plan envisages allowance of Rs 1.20 to 1.35 Cr./ MW towards Renovation & Modernization of Boiler Turbine Generator (BTG) works alone; and, even assuming Renovation &

Modernization of Boiler Turbine Generator (BTG) results in a life extension of 10 years, the meagre special allowance of Rs 1 Cr./ MW (considering Rs 7.5 Lakh/ MW/ year for 10 years with the escalation of 6.35%) does not even compensate for the Rs 1.20 Cr to 1.35 Cr./MW required for the BTG works alone.

The appellant states that, in the Impugned Order, the CERC failed to deal with the issue as to how execution of works, like Ash Dyke or Ash Handling System, on account of a change in Law or compliance of any existing law, can be linked to the special allowance granted to a generating station; for example if a Station, which is granted a Special Allowance of Rs 100 Cr (for a 5 year period), is required to incur expenditure of even Rs 100 Crores during the same control period in compliance with a notified Statute, it will not be in a position to carry out any of the R&M works, ash related works or comply with any other unforeseen changes in law events; in terms of the 2014 Tariff Regulations, the R&M for a station can be claimed either on actual basis as per Regulation 15, or in lieu thereof special allowance can be claimed at Rs.7.50 lakhs/MW/year under Regulation 16; in case, actual R&M expenditure is claimed under Regulation 15, then any change in law which is unforeseen and occurs in view of any statutory notification should be separately allowed as per the Regulations as the same has to be serviced in tariff, which is also in line with the Tariff Policy; if a generator chooses to avail Special Allowance under Regulation 16, which is in lieu of Regulation 15, the same analogy is applicable and, any unforeseen expenditure on account of change in law, should be serviced in tariff; therefore the special allowance, as claimed by the appellant under Regulation 16, is merely a substitute for the cost allowed under Regulation 15, and has no correlation with future unforeseen expenditure;

Regulation 14 is not subject to either Regulation 15 or Regulation 16 as both are independent and mutually exclusive; while Regulation 15 or 16 are in the alternative, the expenditure incurred towards events under Regulation 14, like change in law, safety and security and ash related expenditure etc, are in addition to the expenditure allowed under Regulations 15 or 16, as they cannot be foreseen before hand; and, from the aforesaid illustration, it is evident that the available Special Allowance, even if accumulated over 10 years, is insufficient to carry out even the R&M works of Boiler, Turbine & Generator, and there is no way that the generator can absorb these unforeseen future expenses and the expenditure on ash related works which are recurring and continuous in nature.

The appellant states that the CERC erred in holding that the Additional Capital Expenditure, incurred in relation to Ash Dyke Raising/ Ash slurry pump house, does not fall within Regulation 14(3) but can be compensated only under Regulation 16 of the 2014 Tariff Regulations; the expenditure for 1st raising of Mithini Ash Dyke, Lagoon-I had been specifically allowed by the CERC, by its order in Petition No. 176/GT/2013 dated 15.05.2014, with respect to Rihand STPS, Stage-I; it defies reason that the same expenditure should be disallowed for a subsequent control period; the National Electricity Policy requires regulatory certainty to be maintained in the electricity sector; once additional capitalization has been allowed for a specific period, it cannot be disallowed for a subsequent period; for the same tariff component, the CERC cannot apply two opposite provisions without assigning cogent reasons; and the CERC failed to consider the submission of Appellant that the Additional Capital Expenditure, projected to be incurred during the fag end of the Station, would not extend the life of the Station, as life extension of the Station depends on extension of the life of all equipment of the plant simultaneously, or at least BTG works, which is not the case herein.

The appellant submits that, by disallowing Additional Capital Expenditure claimed by the Appellant in relation to various Change in Law events, the CERC has brought about a situation where the Appellant will be eventually forced to shut down the plant, which is not in the larger interest of the consumers, and is also against the mandate of the Tariff Policy and the GoI Notifications; as per Government of India Notification dated 16th July 2015, the appellant's coal based Power Stations, that complete 25 years, should be used for bundling with solar capacity being established by the Appellant as part of the Government of India's ('***GoI***') plans for enhancing renewable energy generation in the country; the Notification also prescribes that the PPA for Solar Capacity, to be bundled with the Appellant's Coal based power stations completing 25 years, will be for the next 25 years, and would be reviewed after 15 years depending upon the condition of the coal based power stations; the GoI Policy also envisages that Coal based power Stations, completing 25 years, can have a further useful life of at least 15 years; and the said notification has been issued to give thrust to power plants which have attained the life of 25 years, for the reason that the tariff of such plants is highly competitive vis-à-vis plants presently supplying to beneficiaries.

The appellant submits that the Government of India, vide its Notification dated 17th July 2015, has already allocated 85% (1700 MW) of power from Singrauli STPS of the Appellant, which has completed 25 years, for bundling with Solar power of 3000 MW capacity; these notifications make it clear that the Act and the Policy mandate that their debt free power plant is given impetus to continue supplying power to all beneficiaries as the cost of generation from these power plants are much lower compared to other generating projects; the Appellant's power plant has already completed 25 years; as it is a fully depreciated plant, the cost of power supplied therefrom stands reduced; the Fixed charges and Energy charges of power supplied from the Appellant's power plant is Rs. 0.84/Kwh and Rs. 1.6/Kwh respectively, which is amongst the cheapest power available in the country; these power plants, with very low tariff and completely depreciated assets, should be allowed to operate in an efficient manner to be able to continue generating power for the overall benefit of the consumers; the 2016 Tariff Policy also prescribes that the benefit of reduced tariff of power plants, whose assets have been fully depreciated, should remain available to consumers; even if the entire Additional Capitalization is allowed, as sought by the Appellant, the capacity charge would only increase by Rs. 0.04 Per Unit, which still makes the cost of power generation from the Appellant's Power Plant highly competitive vis-à-vis other plants operating and supplying to the same beneficiaries; as opposed thereto, the replacement cost of 1000 MW Station is approx Rs.5500 Cr, and its Fixed Charges today would be approx Rs 2.00/Kwh; the beneficiary should get the advantage of the depreciated assets; therefore, the Appellant's power plant, being a depreciated asset with very low tariff, should not be forced to shut down; the additional capitalization, sought by the Appellant with respect to various change in law events, should be allowed for the plant to continue generating power so that the beneficiaries and consumers can take advantage of the depreciated assets and reduced tariff; and coal based power plants, that complete useful life of 25 years, should not be shut down, and must be put to optimum utilization for the benefit of the consumers/ beneficiaries.

The Appellant states that the various additional Capital Expenditure incurred by it squarely falls within Regulation 14(3) i.e. Additional

Capitalization, and not Regulation 16 which essentially deals with Special Allowance for Coal fired Thermal Generating Stations; with respect to Ash Slurry Pump House and Ash Dyke Raising, they had submitted that the CERC had after prudence check, vide its Order in Petition No. 176/GT/2013 dated 15.05.2014, allowed similar capitalization of expenditure for Rihand St-I in respect of raising of Central Ash Dyke and raising of Mithini Ash Dyke as per Regulation 9(2)(iii) of Tariff Regulations, 2009; the expenditure incurred for ash related works is essential for compliance with the statutory requirement of ensuring that the ash dyke area is not flooded; capitalization on account of raising of Ash Dyke is admissible under the 2014 Tariff Regulations; raising of Ash Dyke, instead of creating an Ash Dyke of full capacity at once, is a gradual development of the asset; development of the compete Ash Dyke in stages, through raising, is to the benefit of beneficiaries; these ash related works are required for smooth and efficient operation of the plant even after the useful life of the station, and have no impact individually on the overall life of the Station; the special Allowance under Regulation 16 of the Tariff Regulations, 2014 is for Renovation and Modernization, and not for capital expenditure necessitated for other reasons falling under Regulation 14, such as Change in Law, Ash related schemes; and, therefore, Special Allowances under Regulation 16 and Add cap carried out under Regulation 14 can co-exist.

On Modification of ESP Stage-I, the appellant states that works, such as Modification of Electro-Static Precipitators (ESPs), are undertaken to comply with the statutory directions of the Uttar Pradesh State Pollution Control Board’s letter dated 17.02.2011 which stipulates the need to achieve the emission level to 100 mg/Nm3; these works are event based, and cannot be envisaged before hand; and the capital expenditure, to meet the requirement under change in law, is admissible irrespective of the life of the plant.

On Fire Detection & Protection System St-1, the appellant submits that, during the fire safety audit, the Central Electricity Authority (Technical Standards for Construction of Electric Plants and Electric Lines) Regulations 2010, the only available statutory document specific to power plants, was followed as the guiding document; safety of the Plant & Equipment and O&M of personnel, being of the utmost priority, it was decided to align fire-fighting system of NTPC plants as per the CEA Regulations; augmentation of fire protection system of Stacker Reclaimer area and conveyers is essential to prevent catastrophic damage in case fire breaks out in the CHP; existence of coal in the CHP area makes it vulnerable to fire hazard, and mobile fire protection equipment may not be able to control the spread of fire.

The appellant states that the expenditure of 1st raising of Maithini Ash dyke, Lagoon-I had been previously approved by the CERC in its order in Petition No. 176/GT/2013 dated 15.05.2014 in respect of Rihand STPS, Stage-I; the expenditure in relation to flooding of surrounding areas, due to overflowing of ash from Ash Dyke, is in violation of the statutory orders of the Ministry of Environment & Forest, and necessitates compliance; for optimum utilization of land for ash disposal & conservation of forest/cultivating land, raising of Ash Dyke is carried out gradually instead of creating it at once; front loading of tariff is avoided thereby; the said capital expenditure is required to be incurred for smooth operation of the plant, and does not individually impact the overall life of the plant; the special Allowance under Regulation 16 does not envisage capital expenditure necessitated under Regulation 14; works carried out for compliance with statutory requirement is not in the nature of R&M for which special allowance is granted in the Tariff Regulations; change in

Law has to be complied with, irrespective of the life of the project; therefore, the capital expenditure to meet the requirement of change in Law would be admissible irrespective of the life of the plant; the special allowance allowed by the CERC, in lieu of R&M, is insufficient to meet the expenditure required for R&M of BTG works alone; and the obligation to record reasons, and pass a speaking order, has been emphasized by the Supreme Court in **S.N Mukherjee vs. Union of India (1990) 4 SCC 594,** and this Tribunal in **M/s Jayshree Chemicals Limited vs. OERC & Anr (**Judgment in Appeal No. 190 of 2005 dated 04.04.2006).

B. CASE OF THE RESPONDENT:

The Respondent submits that the Appellant had claimed additional capital expenditure of Rs. 72 lakhs for works related to augmentation of 'Ash Slurry Pump House', during 2014-15, under Regulation 14(3)(iv) of the 2014 Tariff Regulations; the claim under this regulation can be made only if it is 'Deferred works related to ash pond or ash handling system in the original scope of work'; as the proposed work was for augmentation of 'Ash Slurry Pump House', it did not fall under Regulation 14(3)(iv); the CERC therefore examined the issue for the purposes of R&M as the claim was made during the fag end of the 'useful life' of the generating station; it was noted that the Appellant had not filed details of the proposal for R&M under Regulation 15 of the 2014 Tariff regulations, and they had exercised the option to claim 'Special Allowance' under Regulation 16 of the 2014 Tariff regulations; thus, the claim was not permissible under R&M works; the Appellant has not stated why they waited for 24 years to complete the deferred work, in case the work proposed was contained in the original scope of the project or why the deferred works for execution were not detailed in the petition as per the proviso to Regulation 14(1) of the Tariff Regulations, 2014; a similar proviso is also contained in

Regulation 9(1) of the 2009 Tariff Regulations; the claim of the Appellant is without any basis; the Appellant has claimed and was allowed Rs. 1000 lakhs during 2014-15 as ‘Compensation Allowance’ under Regulation 17 of the 2014 Tariff Regulations to meet expenses on new assets of a capital nature which are not admissible under Regulation 14 of the 2014 Tariff Regulations; and the claim is liable to be rejected.

It is submitted, on behalf of the Respondent, that the Appellant has claimed additional capital expenditure on ‘Ash Dyke Works’, during FY 2015-16, 2017-18 and 2018-19, under Regulation 14(3)(iv) of the 2014 Tariff Regulations, in respect of the following: (i) 1st raising of Mithini Ash Dyke Lagoon-I; (ii) 2nd raising of Central Ash Dyke Lagoon-I; (iii) 2nd raising of Central Ash Dyke Lagoon-2; (iv) 1st raising of Mithini Ash Dyke Lagoon-2; and (v) 3rd raising of Central Ash Dyke Lagoon-2; the Appellant contends that the ‘Special Allowance’, under Regulation 16 of the 2014 Tariff Regulations, is norm based, and they are also entitled for additional capitalization under the ‘Deferred works relating to ash pond or ash handling system’ as provided in Regulation 14(3)(iv) of the 2014 Tariff Regulations; the ‘Special Allowance’ is provided only for Coal based /Lignite fired thermal generating stations on completion of their ‘Useful Life’ of 25 years as they undergo Renovation & Modernization (R&M) under Regulation 15 of the 2014 Tariff Regulations, in accordance with the procedure prescribed therein; all capital expenses are taken care in R&M for the purpose of extension of life beyond the originally recognized useful life for the purpose of tariff; the generating company is also allowed option either to avail R&M or opt for ‘Special Allowance’ as compensation for meeting the requirement of expenses, including R&M beyond the useful life of the generating station; a generating company, on exercising the option to avail ‘Special Allowance’, is not entitled for any further claim for expenses including R&M; their contention that they can avail ‘Special

Allowance' and additional capitalization under Regulation 14(3)(iv) of the 2014 Tariff Regulations, 2014 is a claim for double benefit; the provision for 'Special Allowance' was introduced, for the first time, in Regulation 10 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the '2009 Regulations') for the tariff period 2009-14; this provision was further carried over to the tariff period 2014-19 under Regulation 16 of the 2014 Tariff Regulations; during the tariff period 2009-14, the appellant had contended, before this Tribunal, that they are entitled for additional capitalization under 'Deferred works relating to ash pond or ash handling system' as provided in Regulation 9(2)(iii) of the 2009 Tariff Regulations, and for 'Special Allowance' under Regulation 10 of the 2009 Tariff Regulations, as the Singrauli STPS was also completing 25 years of useful life during the tariff period; and this Tribunal examined the issue, interpreted the relevant regulations, and dismissed the contention by its judgment in Appeal Nos. 129 of 2012 and batch. According to the Respondents, as the issue raised in the present Appeal is covered by the afore-said judgment, the Appellant's contention is liable to be rejected.

It is submitted, on behalf of the Respondent, that the Appellant had projected Additional Capital expenditure, amounting to Rs.5840 lakhs during 2015-16 and Rs.5840 lakhs during 2016-17, towards modification of ESP of stage-I under 'Change in Law or compliance of any existing law', as provided in Regulation 14(3)(ii) of the 2014 Tariff Regulations; Additional Capitalization was claimed after expiry of the useful life of 25 years of the generating station; on completion of the useful life of 25 years, the Appellant's generating plant is only entitled for Renovation & Modernization (R&M) under Regulation 16 of the 2014 Tariff Regulations; the Appellant has not sought capitalization under R&M works as per Regulation 15 of the 2014 Tariff Regulations, but had opted for 'Special

Allowance' in respect of Rihand STPS, Stage-I; in a similar manner during the tariff period 2009-14, the Appellant had, in Appeal No. 232 of 2012 in respect of Singrauli STPS, sought Renovation and Retrofitting of ESP amounting Rs. 10,000 lakhs under 'Change in Law' as provided in Regulation 9(2)(ii) of the 2009 Tariff Regulations; the CERC had rejected this claim, as they had claimed 'Special Allowance' under Regulation 10 of the 2009 Tariff Regulations, as Singrauli STPS of the Appellant had completed 25 years of useful life during the tariff period; and this Tribunal examined the issue, interpreted the relevant regulations and rejected the contention by its judgment in Appeal Nos. 129 of 2012 and batch dated 12th May, 2015. According to the Respondent, the issue raised in the present Appeal is covered by the above judgment; and the contention of the Appellant on the issue is therefore liable to be rejected.

It is submitted, on behalf of the Respondent, that the Appellant had projected Additional Capital expenditure of Rs.400 lakhs during 2015-16 towards augmentation of Fire Fighting System under 'Change in Law or compliance of any existing law' under Regulation 14(3)(ii) & 14(3)(iii) of the 2014 Tariff Regulations; projecting the said expense, under two clauses of the 2014 Tariff Regulations, would show that the Appellant is, itself, not certain under which clause the projected expenses can be claimed; augmentation of Fire Fighting System is proposed and projected as Additional Capitalization, under higher security and safety of the plant on the advice/directions of appropriate Government Agencies or statutory authorities responsible for national security/internal security as provided in Regulation 14(3)(iii) of the 2014 Tariff Regulations; the projected additional expenditure is not permissible as the Appellant is already claiming 'Special allowance' on completion of its useful life of 25 years; this issue is also covered by the above referred judgment of this Tribunal; and the Appellant's claim is liable to be rejected.

It is submitted, on behalf of the Respondents, that the contention of the Appellant that Regulation 14(3)(ii) does not restrict application of 'Change in Law' only up to the useful life, is misconceived; it is clear from Regulation 16 of the 2014 Tariff Regulations that 'Special Allowance' is a compensation for meeting the requirement of expenses including R&M; no further expenses are permissible under Regulation 14(3) to thermal power stations; this issue has also been considered by this Tribunal in its judgment in Appeal Nos. 129 of 2012 and batch dated 12th May, 2015; the 2014 Tariff Regulations contain provisions which are generally in pari materia with the provisions of the 2009 Tariff Regulations as regards 'Special Allowance', 'Compensatory Allowance' and Additional capitalization; and the contention of the Appellant is without basis and is liable to be rejected.

It is submitted, on behalf of the Respondents, that the Appellant has been allowed 'Special Allowance' amounting to Rs. 31,086.52 lakhs, under Regulation 16 of the 2014 Tariff Regulations, to meet expenses including R&M during the tariff period 2014-19; the 'Special Allowance' is norm based; by claiming 'Special Allowance', and also additional capitalization, the Appellant is seeking double benefit which is impermissible; the 'Special Allowance', under Regulation 16 of the 2014 Tariff Regulations, is available only in respect of coal based / Lignite fired thermal power stations, and is not extended to other type of generating stations; the 'Compensation Allowance', mentioned in Regulation 17 of the 2014 Regulations, is also available only in respect of coal based / Lignite fired thermal power stations; and the Appeal as filed is devoid of merits, and is liable to be dismissed.

C. REJOINDER:

It is submitted, on behalf of the appellant, that the expenditure on ash related work is essential to comply with the statutory requirement of the ash dyke area not flooding, and is permissible under the 2014 Tariff Regulations; instead of creating Ash Dyke of full capacity at once, raising of Ash Dyke is a gradual development of the asset; development of the complete Ash Dyke in stages is beneficial; ash related works are required for smooth and efficient operation of the plant, even after the useful life of the station, and individually have no impact on the overall life of the station; if, as contended by the Respondent, the aim of the 2014 Regulations is to combine Additional Capital expenditure under Regulation 14 with the Special Allowance under Regulation 16, then a proviso would have been inserted either in Regulation 14(3) or Regulation 16 making them subject to each other; the Regulations themselves carve out various exceptions wherever it felt that a dispensation ought not lead to duplicity; for example – Regulation 14 (3) read with the 2nd Proviso states that all other expenditure, other than those mentioned under Regulations 14(3)(i) to (iv) in case of coal/ lignite based stations, shall be met out of compensation allowance; similarly, as mentioned in sub clause (1) of the Regulation 17, the compensation allowance, under Regulation 17 of the 2014 Regulations, is given to meet expenditure on new assets which are specifically not given under Regulation 14; the Appellant had clearly mentioned that the Additional Capitalization was over and above the Special Allowance or R&M, and hence needs to be compensated additionally; the Additional Capital Expenditure, projected to be incurred during the fag end of the Station, will not extend the life of the Station, as the life extension of the Station depends on extension of life of all plant equipment simultaneously or at least BTG works, which is not the case; the order of this Tribunal, in Appeal No.129 of 2012 dated 12.05.2015, is distinguishable on facts; three circumstances are listed where additional capitalization can be granted, out of which one is when there is deferred work relating to ash pond or ash handling system; and deferred capitalization of ash related work is directly applicable in the present case.

On the contention of the Respondent that modification of ESP Stage-1 can be claimed as special allowance under Regulation 16, and not under Regulation 14(3)(ii), and this claim was rejected by this Tribunal in Appeal No. 232 of 2012, it is submitted, on behalf of the appellant, that the Ministry of Environment, Forest and Climate change, vide Gazette notification dated 7.12.2015, has amended various norms for Thermal Power Plant for which several works are required to be carried out with substantial expenses; while framing Tariff Regulations, the CERC has not envisaged such unforeseen expenses under Special Allowance; the claim is admissible under Regulation 14(3)(ii) of the 2014 Tariff Regulations, and cannot therefore be said to form part of the Special Allowance under Regulation 16, especially when an exception for Regulation 14(3)(ii) has been carved out in the proviso; Regulation 14(3)(ii) does not restrict application of Change in law either during the useful life of the generating stations or after Renovation and Modernization; accordingly, if anything needs to be incurred by way of capital expenditure on account of the changed directions of law at any time, the same is admissible towards additional capitalization under Regulation 14(3)(ii) which applies to the entire period after the cut-off date, including during and after Renovation and Modernization of the plant/unit as it is applicable for works undertaken and claimed due to fulfilment of statutory requirements; the projected capitalization on Electro Static Precipitators was allowed by the CERC, in its order in Petition No 261/2009 dated 7.6.2012, for the 2009-14 period; it is after the regulatory certainty, of the claim of Electro Static Precipitators having been allowed in the tariff by the CERC, that the Appellant went ahead and initiated the process of ESP modification; therefore, CERC cannot, at a later stage, reconsider issues already decided in their previous order as it creates regulatory uncertainty; the order of this Tribunal, in Appeal No. 232 of 2012, is distinguishable on facts and law; and the additional capitalization, sought in the present proceedings, is under Regulation 14(3)(ii) of the 2014 Regulations, and is independent of the Special Allowance provided under Regulation 16 of the 2014 Regulations.

With regards the claim that fire detection and protection system in Stage I falls under Regulation 14(3)(ii) & (iii) of the 2014 Regulations, it is submitted on behalf of the appellant that the CERC erred in failing to consider the other part of the Regulation 14(3)(ii), i.e. “compliance of any existing law”, which, in the present case, was the CEA Regulations; works related to Fire Detection and Protection System was carried out in line with the mandate of Regulation 12(5) of the 2010 CEA Regulations which requires thermal generating stations to be equipped with comprehensive/automatic fire detection, alarm and fire protection system; the works carried out by them, in augmentation of firefighting system, are in line with the mandate of the CEA Regulations, and these systems were not in existence earlier as per the internal safety audit; the previous position was altered vide notification of the 2010 CEA Regulations; Regulation 12(5)(f)(iii) of the 2010 CEA Regulations mandated every thermal power plant to be equipped with comprehensive/automatic fire detection, alarm and fire protection system; the 2010 CEA Regulations are in the nature of delegated legislation, and must be compulsorily complied with; and since installation of fire detection and protection system was mandated by the 2010 CEA Regulations, with regards higher security and safety of the plant, the Appellant had claimed the expenditure under Regulation 14(3)(ii) as well as 14(3)(iii).

It is submitted, on behalf of the appellant, that, if the aim of the 2014 Regulations was to combine Additional Capital Expenditure under

Regulation 14 with the Special Allowance under Regulation 16, then a proviso would have been inserted either in Regulation 14(3) or Regulation 16 making them subject to each other; Regulation 14(3) of the 2014 Tariff Regulations operates in a field independent of Regulation 16, as long as the Appellant can demonstrate that the Capital Expenditure is being claimed not for the purpose of R&M or for increasing the life of the project; the Appellant had pointed out that the expenditure had been necessitated either out of change in law or compliance of any existing law, or for improvement of safety of plant or other capital expenditure which had been either previously allowed or such expenditure which were not related to R&M for life extension of the Plant; mindful of the difference between capitalization on account of change in law/compliance of existing law, and Special Allowance given to a Thermal Power Plant, the 2014 Tariff Regulations has considered it as two separate subject matter, and has made separate provisions for it; Regulation 14(3) provides for Additional Capitalization on account of Change in Law, compliance of existing law, expenses qua security and safety of the plant, and deferred work relating to ash pond or ash handling system incurred by the generator after the cut-off date; Regulation 16, on the other hand, provides for Special Allowance to a Thermal Power Plant for the purpose of Renovation and Modernization beyond the useful life of the plant; both these Regulations are independent of, and do not interfere, with each other; the legal maxim, generalia specialibus non derogant, is squarely applicable; each enactment must be construed in that respect according to its own subject-matter and its own terms; Regulation 14(3) does not specifically state that the capital expenditure under the said Regulation is provided only till the useful life of the plant i.e., 25 years; it merely states that the 'capital expenditure incurred by the generator, after the cut-off date, may be admitted by the commission, subject to prudence check; it is clear that there is no restriction imposed qua applicability of Regulation 14(3) beyond the useful life of the plant; when a proviso has been consciously inserted to exclude applicability of any other provision of the Regulations, and as the expenditure is squarely covered under Regulation 14(3), it must be implied that such expenditure to be incurred by the generator, qua Additional capitalization as envisaged under Regulation 14(3)(i) to (iv), will neither fall under Special Allowance nor under Compensation Allowance; the 2nd proviso is in the nature of an express prohibition; it is well settled principle of interpretation that what is expressed makes, and what is implied is excluded '***Expressum Facit Cessare Tacitum';*** when a statute prescribes a particular way of doing something, it is implied that such is the only way that something can be done; positive words, specifying the way in which something may be done, may have the negative effect of preventing that thing being done in any other way; therefore, in such a situation when capital expenditure on account of Change in Law, compliance of existing law, security and safety of plant and deferred work relating to ash pond or ash handling system have been specifically provided under Regulation 14(3), it must be implied that neither Compensation Allowance nor Special Allowance cover such expenditure; the Appellant's power plant has already completed 25 years; it is therefore a depreciated plant reducing the cost of power supplied therefrom; the Fixed charges and Energy charges of power supplied from the Appellant's power plant is Rs. 0.84/Kwh and Rs. 1.3/Kwh respectively, which is amongst the cheapest power available in the country; such a power plant, with a very low tariff and depreciated assets, must be allowed to operate in an efficient manner to be able to continue generating power for the overall benefit of consumers; the Tariff Policy, 2016 also prescribes that the benefit of reduced tariff of power plants, whose assets have been fully depreciated, should remain available to consumers; even if the entire

Additional Capitalization is allowed, as sought by Appellant, the Capacity charge would only increase by Rs. 0.04 Per Unit which still makes the cost of power generation from the Appellant's Power Plant highly competitive vis-à-vis other plants operating and supplying to the same beneficiaries; if the change in law claims are disallowed, it would then force the Appellant's power plant to shut down; such a construction should be avoided and a purposive or harmonious interpretation of the 2014 Tariff Regulations with the provisions of the Electricity Act, 2003, should be adopted; the order of this Tribunal, in Appeal No.129 of 2012 dated 12.05.2015, are distinguishable, from the present case, on facts; and several contentions, urged in the present case, were not addressed in the aforesaid appeal.

The appellant submits that the contention of the Respondents that the special allowance of Rs.31,086 Lakhs, under Regulation 16, would take care of Additional capitalisation, and the appellant cannot be allowed double benefit in the garb of additional capitalisation under Regulation 14(3), is not tenable; the additional capital expenditure, to be incurred by the Appellant on account of Change in Law, security and safety of the plant and deferred work relating to ash pond or ash handling system, are independent of the Special Allowance given to the Appellant under Regulation 16; the 2014 Tariff Regulations provide that R&M for a station can be claimed either on actual basis as per Regulation 15 or as Special Allowance at Rs.7.50 lakh/MW/year under Regulation 16; in case, actual R&M expenditure is claimed under Regulation 15, then any change in law which is unforeseen, and occurs by virtue of any statutory notification by any Govt. Instrumentality, is separately allowable as per the Regulations, as it has to be serviced in the tariff which is also in line with the Tariff Policy; if the generator chooses to avail Special Allowance under Regulation 16, which is in lieu of Regulation 15, the same analogy is applicable and any unforeseen expenditure, on account of change in law, has to be serviced in tariff; therefore, the Special Allowance as claimed by the appellant under Regulation 16 is just a substitute for the cost allowed under Regulation 15 with no correlation with future unforeseen expenditure; Regulation 14 is not subject to either Regulation 15 or Regulation 16, as both are independent and mutually exclusive; hence, the events under Regulation 14, like change in law, safety and security and ash related expenditure etc, are in addition to the expenditure allowed under Regulation 15 or 16 as they cannot be comprehended before hand; and similarly compensation allowance, under Regulation 17 of the 2014 Regulations, is an allowance given to meet the expenditure on new assets which are specifically not given under Regulation 14, as mentioned under sub clause (1) of Regulation 17.

While generally denying the contents of the Reply, filed by the Respondents para-wise, the appellant denies that disallowance of additional capitalization for ash slurry pump house, raising of ash dykes, modification of Electro Static Precipitator Stage-I and Fire Detection & Protection System Stage-I is justified, and contends that the CERC wrongly disallowed the said additional capitalization based on a misconceived application of the 2014 Tariff Regulations, ignoring the relevant facts placed on record by the Appellant; and these regulations show that the special allowance and compensation allowance have no bearing on additional capitalization under Regulation 14 of the 2014 Tariff Regulations.

(i). APPEAL WISE DETAILS OF CLAIMS AND THE RELEVANT REGULATIONS:

(a).CLAIMS IN APPEAL NO. 304 OF 2016:-

In Appeal No.304 of 2016, the appellant's claims are as follows: (1) Fire Detection & Protection System St-1 (CHP Area) under Regulation 14(3)(iii) towards "Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security"; (2) modification of Electrostatic Precipitator Stage -1 under Regulation 14(3)(ii) towards "Change in Law or compliance of any existing law"; (3) Work related to Ash Slurry Pump House under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; (4) 1st Raising of Mithini Ash Dyke Lagoon –I under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; (5) 2nd Raising of Central Ash Dyke Lagoon -1under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; (6) 2nd Raising of Central Ash Dyke Lagoon -2 under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; (7) 1st Raising of Mithini Ash Dyke Lagoon -2 under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; and (8) 3rd Raising of Central Ash Dyke Lagoon -2 under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work".

(b). CLAIMS IN APPEAL NO. 171 0F 2017:-

In Appeal No. 171 0F 2017, the appellant's claims are as follows: (**1)** Inert gas System for Central Control Room and Control Equipment Room under Regulation 14(3)(ii) towards "Change in Law or compliance of any existing law"; (**2)** Online Monitoring System for Co2 in Flue Gas under Regulation 14(3)(ii) towards “Change in Law or compliance of any existing law”; (**3)** Fire Fighting System for Stacker, Reclaimer I and II in CHP and Main Plant under Regulation 14(3)(iii) towards “Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security”; and (**4)** Modification of ESPs under Regulation 14(3)(iii) towards “Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security”.

(c). CLAIMS IN APPEAL NO. 96 OF 2017:-

In Appeal No. 96 of 2017, the appellant’s claims are as follows**: (1)** Ash Dyke/ash related works (Rs 18.47 crores), N2 Dyke Strengthening Works (Rs 6.50 crores), and Earth Cover for Ash Dyke (Rs 6 Cr.) under Regulation 14 (3) (iv) towards “Deferred works relating to Ash Pond and Ash Handling System in the original scope of work”; **(2)** Dry Ash Extraction System (DAES) (Rs 17.95 Cr.) under Regulation 14(3)(ii) towards “Change in Law or compliance of any existing law”; **(3)** CO2, Sox, NOX Analyzer (Rs 1.67 crores), and Online Effluent Analyzer (Rs 0.40 Cr.), under Regulation 14(3)(ii) towards “Change in Law or compliance of any existing law”; **(4)** Halon Replacement (Rs 13.57 Cr.) under Regulation 14 (3)(ii) towards “Change in Law or compliance of any existing law”; **(5)** Mulsifier System for transformers and cable galleries (Rs 6 Cr.) under Regulation 14(3)(ii) & (iii) towards “Change in Law or compliance of any existing law” and “Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security”; **(6)** Medium Velocity Water (MVW) spray system for various coal conveyers of the Coal Handling Plant (Rs. 6.90 Cr.) under Regulation 14(3)(ii) & (iii) towards "Change in Law or compliance of any existing law" and "Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security"; and (7) Railway Wagons (Rs. 2.25 Cr.) under Regulation 14(3)(X) towards **"**Any capital expenditure found justified after prudence check necessitated on account of modifications required or done in fuel receiving system arising due to non-materialisation of coal supply corresponding to full coal linkage in respect of thermal generating station as a result of circumstances not within the control of the generation station".

(d). CLAIMS IN APPEAL NO. 139 OF 2017:-

In Appeal No. 139 of 2017, the appellant's claims are as follows: **(1)** Near Zero Discharge of Water (Rs. 10 Cr.) towards "Change in Law or compliance of any existing law" under Regulation 14(3)(ii); **(2)** Continuous Emission Monitoring (CEMS) System (Rs. 1.10 Cr.) towards "Change in Law or compliance of any existing law" under Regulation 14(3)(ii); **(3)** Replacement of Halon system (Rs. 7 Cr.) towards "Change in Law or compliance of any existing law" under Regulation 14(3)(ii); **(4)** CCTV Surveillance (Rs. 13 Cr.) towards "Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security" under Regulation 14(3)(iii); and **(5)** Augmentation of existing fire-fighting system (Rs. 8.5 Cr.) towards "Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate

Government Agencies or statutory authorities responsible for national security/internal security" under Regulation 14(3)(iii).

(e). CLAIMS IN APPEAL NO. 140 OF 2017:-

In Appeal No. 140 of 2017, the appellant's claims are as follows: **(1)** Modification of Electrostatic Precipitator (ESP) (Rs. 268 Cr.) towards "Change in Law or compliance of any existing law" under Regulation 14 (3)(ii); **(2)** Ash Dyke Related Works (Rs. 893.92 Crores) under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; and **(3)** Replacement of halon system (Rs. 7.9 Cr.) under Regulation 14(3)(ii) towards "Change in Law or compliance of any existing law".

(f). CLAIMS IN APPEAL NO. 159 OF 2017:-

In Appeal No. 159 of 2017, the appellant's claims are as follows: **(1)** 4th Raising of Nishindra Ash dyke I & II (Rs. 10.58 Cr under Regulation 14 (3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; **(2)** Starter dyke of Nishindra Lagoon – III (Rs. 44.47 Cr.) under Regulation 14(3)(iv) towards "Deferred works relating to Ash Pond and Ash Handling System in the original scope of work"; **(3)** Inert gas fire extinguishing system (Rs. 7.27 Cr.) under Regulation 14(3)(ii) towards "Change in Law or compliance of any existing law"; **(4)** Dry Ash Extraction System (Rs 97.19 Cr.) under Regulation 14 (3)(ii) towards "Change in Law or compliance of any existing law"; **(5)** Modification of Electro Static Precipitator (ESP) (Rs 97.54 Cr) under Regulation 14(3)(ii) towards "Change in Law or compliance of any existing law"; and **(6)** Replacement of wooden and cast iron sleepers of MGR (Rs 49.41 Cr.) under Regulation 14(3)(ii) & (iii) towards "Change in Law or compliance of any existing law" and "Any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security".

III. IMPUGNED ORDER: ITS CONTENTS:

Petition No. 291/GT/2014 was filed, by the appellant before the CERC, seeking approval of tariff of Rihand Super Thermal Power Station Stage-I (2x500 MW) for the period from1.4.2014 to 31.3.2019 in accordance with the provisions of the 2014 Regulations.

In its Order dated 23.08.2016, (which is under challenge in Appeal No. 304 of 2016), the CERC observed that Clause 3 of Regulation 9 of the 2014 Tariff Regulations provides that the Capital cost of an existing project shall include the following: (a) the capital cost admitted by the Commission prior to 1.4.2014 duly trued up by excluding liability, if any, as on 1.4.2014; (b) additional capitalization and de-capitalization for the respective year of tariff as determined inaccordance with Regulation 14; and (c) expenditure on account of renovation and modernisation as admitted by the Commission in accordance with Regulation 15. On the issue of Actual/ Projected Additional Capital Expenditure during 2014-19, the CERC took note of Regulation 14(3) of the 2014 Tariff Regulations, its ten clauses, and its three provisos, and then noted the break-up of the projected additional capital expenditure claimed by the appellant during 2014-19.

The CERC then proceeded to discuss the projected additional capital expenditure claimed by the appellant. With regards the projected additional capital expenditure towards installation of Ash slurry pump house, the CERC referred to Regulation 27(7) of the

2014 Regulations, and observed that the appellant had claimed projected additional capital expenditure during the fag end of the completion of useful life of 25 years, and had not provided any justification or proposal for life extension of the project; in terms of Regulation 16 of the 2014 Regulations, the appellant had the liberty to approach the Commission with a comprehensive scheme of R&M for extension of lifeof the generating station; however, the appellant had opted for "Special Allowance" from the year 2015-16 in order to meet the requirement of expenses including R&M beyond the useful life of the generating station; in this background, they were not inclined to allow the projected additional capital expenditure claimed in 2014-15; and the appellant should meet the expenses from the "Special Allowance" permitted to the generating station for 2014-2015.

With regards Ash dyke raising, the CERC observed that the appellant had claimed a projected capital expenditure of ₹980.00 lakh for 1^{st} raising of Mathini Ash Dyke Lagoon-I and ₹560.00 lakh for 2^{nd} raising of Central Ash Dyke Lagoon-I in 2015- 16,₹560.00 lakh for 2^{nd} raising of Central Ash Dyke Lagoon-2 and 1000.00 lakh for 1^{st} raising of Mathini Ash Dyke Lagoon-2 in 2017-18and ₹600.00 lakh for 3^{rd} raising of Central Ash Dyke Lagoon-2 in 2018-19; in justification, the appellant had submitted that these works had already been approved by the Commission vide order dated 15.5.2014 in Petition No. 176/GT/2013, the work was required to be executed in order to have optimum utilization of land for land disposal, conservation of forest/cultivating land, and compliance with the directions of Statuary bodies, and, in the order dated 15.5.2014 in Petition No. 176/GT/2013, the Commission had approved the projected additional capital expenditure of ₹789.91 lakh, in 2012- 13 for 1^{st} raising of

Mathini Ash Dyke Lagoon-I, and no additional capital expenditure was incurred/claimed by them for the same. The appellant had accordingly requested that the Commission may approve the expenditure claimed.

The CERC then opined that the generating station would be completing its useful life of 25 years during the year 2015-16; the expenditure for Ash Dyke works were for facilitating operation of the plant after the useful life of 25 years, and for the extended period of operation; the appellant was at liberty to approach the Commission with a comprehensive scheme of R&M for extension of life of the generating station; however, the appellant had opted for "Special Allowance‟ in order to meet the requirement of expenses including R&M beyond the useful life of the generating station; and, in this background, they were not inclined to allow the projected additional capital expenditure against the Ash Dyke work.

With regards their claim for Change in law in relation to modification of ESP of Stage-I, the CERC observed that the appellant had claimed a total projected additional capital expenditure of ₹5840.00 lakh in 2015-16, and ₹5840.00 lakh in 2016-17, towards modification of ESP of Stage-I, in order to achieve the emission level of 100 mg/Nm3, specified by the Uttar Pradesh Pollution Control Board vide letter dated 17.2.2011 under Regulation 14(3)(ii) of the 2014 Regulations; in the previous order dated 7.6.2012, in Petition No. 261/2009, the amount of ₹13000 lakhs was approved for the same; the appellant had submitted that it had not claimed any expenditure towards the ESP in Petition 176/GT/2013 and, considering the timelines in the contract and the requirement of shutdowns, capitalization of the expenditure would stretch beyond 2013-14, and would continue till the year 2015-16.

The CERC then observed that the projected additional capital expenditure claimed for modification of ESP, after expiry of useful life of 25 years of the generating station, was in the nature of R&M; the appellant had opted for Special Allowance for meeting the requirement of expenses including R&M beyond the useful life of the generating station during the period 2014-19; since the petitioner is allowed Special Allowance in terms of Regulation 16 of the 2014 Tariff Regulations for the period 2014-19 for meeting the requirement of expenses including R&M beyond the useful life of the generating station, the projected additional capital expenditure of ₹11680.00 lakh (₹5840.00 lakh in 2015-16 and ₹5840.00 lakh in 2016-17) was disallowed; and the appellant may meet the expenses from the Special Allowance allowed to the generating station.

With respect to Fire detection & protection system in Stage- I, the CERC noted that the appellant had claimed projected additional capital expenditure of ₹400.00 lakh in 2014-15 towards modification of Fire detection & Protection system in Stage- I, under Regulation 14(3)(ii) & 14(3)(iii) of the 2014 Regulations; they had submitted that, as per the guidelines of the Central Electricity Authority (Technical Standards for construction of Electrical Plants and Electric Lines) Regulation, 2010, the major works such as (i) Installation of Medium Velocity Water Spray system for coal conveyers, crusher house, cable galleries, stacker reclaimer of CHP; (ii) Installation of analogue addressable type fire detection and alarm system; (iii) Installation of fire hydrants were identified and were essentially required to prevent fire break out; augmentation of fire protection system of Stacker

Reclaimer area and conveyers was essentially required to prevent any catastrophic damage in case fire breaks out in CHP as existence of coal in CHP area makes it vulnerable to fire hazard, and mobile fire protection equipment may not be able to control the spread of fire; and the appellant had therefore prayed that the Commission may allow the capitalisation claim on account of augmentation of Fire protection system under Regulation 14(3)(iii) of the 2014 Tariff Regulations.

The CERC then observed that the projected additional capital expenditure, claimed towards augmentation of Fire-fighting system in CHP, Cable galleries, Conveyers etc, were based on the CEA Regulations, 2010; the appellant had not established that augmentation of a fire-fighting system was due to any change in law; a proper and well equipped fire-fighting system was required in any thermal power generating station even prior to the notification of the CEA Regulation 2010, prescribing safety standards; hence, it could not be contended that the change in law was on account of the CEA Regulation 2010; even otherwise, the appellant had not indicated as to how the safety standards under CEA Regulations was covered under the provisions of change in law which prompted the expenditure under this head; the appellant had not established the existence of any change in law justifying the expenditure towards augmentation of fire-fighting system; they were not inclined to allow the projected additional capital expenditure of ₹400.00 lakh claimed under this head for 2015-16; and the expenditure under this head may be met from the Special Allowance granted to the generating station. In conclusion, the CERC held that no projected additional capital expenditure had been allowed for the period 2014-19 in respect of the claims made by the appellant.

IV. RIVAL SUBMISSIONS:

Elaborate submissions, both Oral and Written, were put forth on behalf of the Appellants and the Respondents in this batch of appeals. At our request, learned Counsel, appearing for the parties in the present batch of appeals, readily agreed to submit a common gist of written submissions, one on behalf of the Appellants, and the other on behalf of all the Respondents. It is convenient to examine the rival submissions, urged by the Learned Counsel on either side, under different heads.

V. PRINCIPLES GOVERNING TARIFF DETERMINATION:

It is contended, on behalf of the Respondents, that the tariff, for the generating stations of the Appellant, is determined on cost plus basis which means that all expenses of the Appellant should be borne by the beneficiaries; the Regulation making Power, and the Terms and Conditions for determination of Tariff, is referrable to Section 178 (1) & (2)(s) of the Electricity Act, 2003, and this power is to be exercised as per Section 61 of Electricity Act, 2003; in specifying the Terms and Conditions for determination of Tariff, the CERC shall also be guided by factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investment; Section 61(d) of the Electricity Act, 2003 requires that the tariff should be cheapest at the end of the consumer, and the generator should also get a reasonable return; Section 61 does not provide for recovery of the entire cost incurred by the Generator; it only provides for recovery of the cost of electricity in a reasonable manner; the discretion to quantify the cost to be recovered vests with the CERC; the Generator is not entitled to claim the entire cost as of right; and the Regulations should be interpreted in a harmonious manner giving effect to all the Regulations, and should not be read in isolation.

Section 61 of the Electricity Act relates to tariff regulations and, thereunder, the Appropriate Commission shall, subject to the provisions of the Electricity Act, specify the terms and conditions for the determination of tariff and, in doing so, to be guided by (a) to (i) thereunder. Clause (b) requires it to ensure that generation, transmission, distribution and supply of electricity are conducted on a commercial basis. Clause (c) requires it bear in mind factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investment, while making Regulations. Clause (d) requires it to safeguard consumers' interest and, at the same time, ensure recovery of the cost of electricity in a reasonable manner. Clause (e) requires it to bear in mind principles regarding efficiency in performance. Clause (h) relates to multi year tariff principles, and Clause (g) requires it to be guided by the requirement that the tariff progressively reflects the cost of supply of electricity, and also that cross-subsidies are reduced.

While it is true that the tariff for a generating station is determined on a cost plus basis by the CERC, the discretion, statutorily conferred on it in this regard, must be exercised by it for just and valid reasons, and in accordance with law. Regulation 61(g) requires the Regulations made by the Appropriate Commission to ensure that the tariff progressively reflects cost of supply of the electricity. Section 178 of the Electricity Act relates to the powers of the CERC to make regulations. Section 178 (1) enables the CERC, by notification, to make regulations consistent with the Electricity Act and the rules generally to carry out the provisions of the Act. While the regulations which the CERC is empowered to make under Regulation 178 (1) must be consistent with the Act and the rules made thereunder, the CERC is obligated, while making Regulations, to also be guided by the clauses (a) to (i) of Section 61.

Section 178(2)(s) of the Electricity Act enables the Regulations to provide for the terms and conditions of determination of tariff under Section 61. Both the 2009 and 2014 Tariff Regulations, made by the CERC, are referable to Section 178 (1) and Section 178(2)(s) read with Section 61 of the Electricity Act.

While it is also true that a generator cannot claim payment of the entire cost as of right, and any such expenditure is subject to prudence check, the CERC is nonetheless required to adhere to the Regulations framed by it in determining the tariff of a generating company. Since the Regulations so made are also required to be adhered to by this Tribunal, while exercising its appellate jurisdiction, the scope of enquiry in the present appellate proceedings, must necessarily be confined to the interpretation of the relevant provisions of the 2014 Regulations, for the orders passed by the CERC, in these batch of Appeals, arise thereunder.

VI.PURPOSIVE/HARMONIOUS CONSTRUCTION:

It is contended, on behalf of the Respondents, that, in these appeals, Additional Capitalization has been claimed under Regulation 14(3) of the 2014 Regulations; if special allowance is opted on a normative basis, under Regulation 16, the generating plant will not be entitled to claim additional capitalization for renovation and modernization under Regulation 15 of the 2014 Regulations; the Appellant had opted for special allowance, and thus cannot apply for Additional Capitalization under Regulation 15 for renovation and modernization; and the Appellant is also entitled for compensation allowance, under Regulation 17, after completing ten years of operation.

It is further submitted, on behalf of the respondents, that, applying the well settled principles of Purposive and Harmonious construction to the provisions of Regulation 14, 16, 17 & 27, the following position emerges: (i) under Regulation 14(3), Capital Expenditure, in respect of existing Generating Station which has not completed its useful life under the heads enumerated thereunder, after the cut-off date, can be allowed; (ii) under Regulation 15, the Generating Company can seek approval for meeting expenditure on Renovation & Modernization (R&M) for the purpose of extension of life of the Plant beyond the originally recognized useful life for the purposes of Tariff determination of the Generating Station or Unit thereof; (iii) under Regulation 16, instead of availing Renovation & Modernization expenses for the purpose of extension of life of the plant, the generating company may opt to avail a special allowance as compensation for meeting the expenditure, including on Renovation & Modernization, beyond the useful life of the Generating Station or Unit thereof; (iv) in such an event, review of capital cost should not be allowed, and the applicable operational norms should not be relaxed, but the special allowance should be included in the Annual Fixed Cost; (v) under Regulation 17, a separate compensation allowance is admissible in case of an existing generating station to meet the expenditure on new assets of a capital nature which are not admissible under Regulation 14; in such an event also, revision of the capital cost shall not be allowed on account of compensation allowance, but compensation allowance shall be allowed to be recovered separately; (vi) under Regulation 27(7), the generating company shall submit details of the proposed capital expenditure during the fag end of the project (five years before the useful life) along with justification and proposed life extension; and (vii) based on prudence check of such submissions, the CERC approves depreciation on capital expenditure during the fag end of the project.

Learned Counsel for the Respondents would submit that Generators, which have opted for Special & Compensation Allowances in the place of O&M, R&M Expenditure of a Capital Nature, for extension of life of Plant or beyond the Useful Life of the Plant, are not eligible to claim R&M, O&M or Additional Capital Expenditure as mentioned in Regulation 14(3); a Generator, which has availed Special Allowance for meeting expenditure of R&M beyond Useful Life or at the fag end, shall not be eligible for revision of the Capital Cost, and the applicable operational norms shall not be relaxed; however, the Special Allowance shall be included in the Annual Fixed Cost; after the Useful Life of Plant, grant of Special Allowances will be at the discretion of the CERC; if in the previous Tariff Years, the Generator has availed the Special Allowance, then, in the succeeding Tariff years, they will not have the option of choosing between Regulation 15 and Regulation 16, but they would be given Special Allowances based upon the Escalation Cost Index as mentioned in Regulation 16(2); Generators are mandated to maintain separate account for Expenditure incurred or utilized from the Special Allowance; the CERC may call for details at any time; the 2014 Regulations should be interpreted in a such a manner that effect is given to all of its provisions, and none of them are rendered redundant or otiose; and none of the Regulations should be read in isolation.

Reliance is placed, on behalf of the Respondents, on the judgment of the Supreme Court, in **Kailash Chandra & Anr. Versus Mukundi Lal & Ors. - (2002) 2 SCC 678,** to contend that all related provisions should be read together for the purposes of proper and harmonious construction; and an isolated consideration of a provision leads to the risk of some other interrelated provision becoming otiose or devoid of meaning.

In support of their submission that the 2014 CERC Tariff Regulations must be given a purposive interpretation, and on a purposive interpretation of Regulations 9(2)(f), Regulation 14(3) with exceptions, Regulation 15, Regulation 16, Regulation 17, Regulation 27(7) read with Regulation 29 of the CERC Tariff Regulations, 2014, the Appellant is not entitled to claim Capital Expenditure under Regulation 14(3), as they have already claimed special allowance & compensation allowance in lieu thereof, reliance is placed, on behalf of the Respondents, on that part of the Judgment, in **Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1**, (Order in Civil Appeal No. 3123 of 2020 dated 05.05.2021) ("**the Maratha Reservation Case**").

(i). JUDGEMENTS RELIED ON BEHALF OF THE RESPONDENTS:

In **Kailash Chandra v. Mukundi Lal, (2002) 2 SCC 678,** the Supreme Court observed that a provision in the statute should not be read in isolation, but with other related provisions in the Act itself, more particularly, when the subject-matter dealt with in different sections or parts of the same statute is the same or similar in nature; all related provisions should be read together for the purposes of proper and harmonious construction; as held in **R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335,** no part of a statute and no word of a statute can be construed in isolation; statutes should be construed so that every word has a place and everything is in its place; and, as held in **M. Pentiah v. Muddala Veeramallappa: AIR 1961 SC 1107** and **Canada Sugar Refining Co. v. R :1898 AC 735, e**very clause of a statute should be construed with reference to the context and the other clauses of the Act so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. Reliance is placed in the said judgement on **Gammon India Ltd. v. Union of India: (1974) 1 SCC 596**; **Mysore SRTC v. Mirja Khasim Ali Beg: (1977) 2 SCC 457**; **CIT v. National Taj Traders: (1980) 1 SCC 370**; and **Sultana Begum v. Prem Chand Jain: (1997) 1 SCC 373.**

In **Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1**, the Supreme Court, (in the portion of the judgement relied on behalf of the Respondents), observed that, in the light of contemporary issues, the purposive method has gained importance over the literal approach; Constitutional Courts must not shy away from performing their foremost duty to achieve constitutional functionalism by adopting a pragmatic approach; it is the exposition of judicial sensibility, to the functionalism of the Constitution, which is called constitutional pragmatism; in **Abhiram Singh vs. C.C. Commachen (Dead) By Legal Representatives and others, (2017) 2 SCC 629,** the Supreme Court had noticed the conflict between a literal interpretation or purposive interpretation, and had held that interpretation has to consider not only the context of the law but the context in which the law is enacted; paragraph 38 of **Bennion on Statutory Interpretation** was extracted therein, which said that: "general judicial adoption of the term "purposive construction" was recent, but the concept was not new"; and, approving the purposive construction, the Supreme Court had also held that a pragmatic view was required to be taken and the law interpreted purposefully.

(ii). REGULATIONS SHOULD BE READ AS A WHOLE:

A statute or Rules or Regulations should be read as a whole and in its context. In understanding the meaning of a provision, Rule or Regulation, the Court must take into consideration not only the other provisions of the statute, Rules or Regulations, but also the existing state of the law, and the mischief which the Court can, by those and other legitimate means, discern that the statute, Rules or Regulations intended to remedy. (***Delhi Airtech Services (P) Ltd. v. State of U.P., (2011) 9 SCC 354: Attorney General*** **v.** ***HRHPrince Ernest Augustus of Hanover*** **[1957] 1 All ER 49**). A holistic approach is required to be made for the purpose of interpretation of the provisions of the 2014 Regulations which stipulate a detailed and comprehensive procedure for tariff determination.(***Nellur Thimma Reddy v. Special Deputy Collector,***

(Land Acquisition) Telugu Ganga Project, Nellore at Rajampet, Cuddapah District, 2002 SCC OnLine AP 1105; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

The key to the opening of every law is the reason and spirit of the law. It is the animus imponentis, the intention of the lawmaker, expressed in the law itself, taken as a whole. To arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context. (***Delhi Airtech Services(P) Ltd**.***; ***HRH Prince Ernest Augustus of Hanover*****). The words in a Statute cannot be read in isolation, their colour and content are derived from their context and every word in a statute is to be examined in its context. (***Delhi Airtech Services (P) Ltd.***; ***Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193;*****D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

An enactment must be construed as a whole, each portion throwing light if need be on the rest. The sound interpretation and meaning of the statute, on a view of the enacting clause, and the proviso, taken and construed together, should prevail. (***Tahsildar Singh***; ***J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers, (1996) 6 SCC 665:RamkishanshrikishanJhaver***; **Maxwell's Interpretation of Statutes, 10 Edn; D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

(iii). LITERAL CONSTRUCTION:

What has not been referred to by the Counsel for the Respondent, is the other part of **Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1**, wherein the Supreme Court observed that, in examining provisions of the Constitution, courts should adopt the primary rule, and give effect to the plain meaning of the expressions; this rule can be departed, only when there are ambiguities; in **Kuldip Nayar v. Union of**

India [Kuldip Nayar v. Union of India, (2006) 7 SCC 1; and **G. Narayanaswami v. G. Pannerselvam, (1972) 3 SCC 717,** it was opined that the rule of “plain meaning” or “literal” interpretation, which remains “the primary rule”, should be kept in mind; the rule of “literal construction” is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results; the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself (**Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907 : 1958 SCR 360**); if the language or the meaning of the statute is plain, there is no need for construction as legislative intention is revealed by the apparent meaning (**Adams Express Co. v. Commonwealth of Kentucky : 238 US 190 (1915))**; legislative intent must be primarily ascertained from the language used in statute itself (**United States v. Goldenberg: 168 US 95 (1897));** if the words of a provision are capable of more than one meaning, then one can choose between these meanings, but beyond that the court must not go (**Jones v. Director of Public Prosecutions, 1962 AC 635 : (1962) 2 WLR 575 (HL));** the elementary principle of interpreting the Constitution or a statute is to look into the words used in the statute and, when the language is clear, the intention of the legislature is to be gathered from the language used; aid to interpretation is resorted to only when there is some ambiguity in words or expression used in the statute (**State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501);** the plainest duty of the court is to give effect to the natural meaning of the words used in the provision, if the words of the statute are clear and unambiguous (**R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183**); the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise between the subject of the enactment and the object which the legislature has intended to achieve; however, the object-oriented approach cannot be carried to the extent of doing violence to the plain language used by rewriting the section, or structure words in the place of the actual words used by the legislature (**CIT v. N.C. Budharaja & Co., 1994 Supp (1) SCC 280;** the logical corollary, that flows from the judicial pronouncements, is that the primary rule of construction is the literal construction; if there is no ambiguity in the provision, which is being construed, there is no need to look beyond; legislative intent, which is crucial for understanding the object and purpose of a provision, should be gathered from the language; and, while the purpose can be gathered from external sources, any meaning inconsistent with the explicit or implicit language cannot be given.

Where the language of an enactment is plain and clear upon its face, and is susceptible to only one meaning, then, ordinarily, that meaning should be given by the Court. In such a case the task of interpretation can hardly be said to arise. (***Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193***). The duty of the Court is to give effect to the intention of the legislature, and that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. (***Banarsi Debi v. ITO, (1964) 7 SCR 539; ATTORNEY-GENERAL v. CARLTON BANK., [1899] 2 Q.B. 158).*** The primary rule of construction is that the intention of the Legislation must be found in the words used by the Legislature itself. (***Unique Butyle Tube Industries Pvt. Ltd.*** **v.*****Uttar Pradesh Financial Corporation******; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

The legislature is deemed to intend and mean what it says. Statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances, (***Chertsey Urban District Council*** **v.** ***Mixnam's Properties Ltd.*****), and must be construed according to the rules of grammar. When the language is plain and unambiguous, and admits of only one meaning, no question of construction of a Statute arises, for the Act speaks for itself. The meaning must be collected from the expressed intention of the legislature. (***State of U.P. v. Dr. Vijay Anand Maharaj, (1963) 1 SCR 1*)**. In construing a statutory provision, the first and foremost rule of construction is the literal construction. All that the court has to see, at the very outset, is what does that provision say. If the provision is unambiguous and if, from that provision, the legislative intent is clear, the Court need not call into aid other rules of construction of Statutes (***Raghunath Rai Bareja* v. *Punjab National Bank (2007) 2 SCC 230*; *Hiralal Ratanlal*v. *STO****)**, nor would it be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. (***Kanai Lal Sur v. Paramnidhi Sadhukhan, 1958 SCR 360***), as it is well recognised that the language used speaks the mind and reveals the intention of the framers. (***C.I.T.* v. *T.V. Sundaram Iyengar (P) Ltd.*****; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

The language employed in a Statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake and to have intended to say what it has said. Assuming there is a defect in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result. (***Raghunath Rai Bareja v. Punjab National Bank (2007) 2 SCC 230*; *Ombalika Das v. Hulisa Shaw, (2002) 4 SCC 539*; *CIT* v. *Sodra Devi****; *Prakash Nath Khanna v. CIT, (2004) 9 SCC 686*; *Delhi Financial Corpn. v. Rajiv Anand, (2004) 11 SCC 625*)**. It would be impermissible to call in aid any external aid of construction to find out the hidden meaning. (***D.D. Joshi v. Union of India, (1983) 2 SCC 235***; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

It is no doubt true that a fortress out not to be made of the dictionary as a Statute always has some purpose or object to accomplish, whose discovery is the surest guide to its meaning. (***Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193***). While it is permissible to look into the object of the Legislation (***Inder Sain v. State of Punjab, (1973) 2 SCC 372***), if the provision is unambiguous and if, from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. (***Hiralal Rattanlal*****; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

A provision is not ambiguous merely because it contains a word which, in different contexts, is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is ambiguous only if it contains a word or phrase which, in that particular context, is capable of having more than one meaning. (***kirkness (inspector of taxes) appellant; and john hudson & co. Ld. Respondent., [1955] 2 WLR 1135).*** It is only when the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, would Courts prefer to adopt the latter construction.(**D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

‘ The golden rule’ of construction is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. (***Suthendran*v SUTHENDRAN APPELLANT AND IMMIGRATION APPEAL TRIBUNAL RESPONDENTS, [1976] 3 WLR 725; *Farrell*; *R.*v. *Inhabitants of Banbury*****). It is only when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective, the language may be modified sufficiently to avoid such disadvantage, though no further. (**SUTHENDRAN APPELLANT AND IMMIGRATION APPEAL TRIBUNAL RESPONDENTS, [1976] 3 WLR 725; *Becke* v. *Smith***; *R.* v. *Inhabitants of Banbury***; *Tzu-Tsai Cheng* v. *Governor of Pentonville Prison***; *Applin* v. *Race Relations Board*; *Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722*; Justice G.P. Singh Principles of Statutory Interpretation (8 Edn., 2001**; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

An ordinary meaning, or a grammatical meaning, does not imply that the Judge attributes the meaning to the words of a statute independent of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used. By enabling citizens to rely on ordinary meanings, unless notice is given to the contrary, the legislature (or Rule or Regulation making authority) contributes to legal certainty and predictability for citizens, and to greater transparency in its own decisions. (**Cross in Statutory Interpretation (3 Edn., 1995); *Harbhajan Singh***; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

(iv). WHEN CAN THE RULE OF LITERAL CONSTRUCTION BE DEPARTED FROM:

A departure from the golden rule is permissible if it can be shown that the legal context in which the words are used, or the object of the statute in which they occur, require a different meaning. (**Justice G.P. Singh Principles of Statutory Interpretation(8thEdn., 2001); *Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722***). If reading statutory words in its primary and natural sense, would lead to some repugnance or inconsistency with the rest of the instrument, the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency. (***Grey* v. *Pearson***; *Kehar Singh***

***v. State (Delhi Admn.), (1988) 3 SCC 609)*; *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat, (2004) 6 SCC 672*)**.

The need for interpretation arises only when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature. (***ITC Ltd. v. CCE, (2004) 7 SCC 591.*** As the statute is an edict of the legislature, the language employed therein is the determinative factor of legislative intent. (***Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230*; *Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659***; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

It is only where the words, according to their literal meaning, produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, the Court would be justified in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear. (***Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193*; D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

We are in complete agreement with the submission, urged by the Learned Counsel for the Respondents, that the 2014 Regulations should be interpreted in a such a manner that effect is given to all of them, none of the Regulations should be read in isolation, and none of them are rendered redundant or otiose. Consequently, not only should Regulation 14(3) be read along with Regulation 15(1), 16(1),17 and 27(7), these provisions must, in turn, also be read with the other provisions of the 2014 Regulations. As shall be detailed later in this Order, when so read, it would become clear that the 2014 Regulations do not bar additional capital expenditure, under Clauses (ii), (iii) and (iv) of Regulation 14(3), being incurred even beyond the useful life of the generating plant, and during its extended life.

We must however, at this stage itself, express our reservation regarding the submission, urged on behalf of the Respondents, that the 2014 Tariff Regulations must be given a purposive interpretation to hold that the Appellant would not be entitled to claim Capital Expenditure under Regulation 14(3), as they have already claimed special allowance under Regulation 16(1), and compensation allowance under Regulation 17, in lieu thereof. As detailed hereinabove, where the language of a Regulation is plain and clear upon its face, and is susceptible to only one meaning, then that meaning alone should be given by the Court; it is only when the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Regulations whilst the other construction is likely to assist achievement of the said policy, would Courts prefer to adopt the latter construction; and it is only if reading the words in its literal sense, would lead to some repugnance or inconsistency with the rest of the Regulations, can the literal interpretation test yield to other canons though less proper, including purposive construction, that too only to the limited extent of avoiding that absurdity and inconsistency. As no such need arises in construing the relevant provisions of the 2014 Regulations, application of the literal interpretation rule would suffice, and resort to a purposive construction is wholly unnecessary.

VII. INTER-PLAY BETWEEN REGULATIONS 14 TO 17 OF THE 2014 TARIFF REGULATIONS:

(a). RIVAL SUBMISSIONS UNDER THIS HEAD:

It is contended, on behalf of the appellant, that the CERC disallowed the expenditure, proposed to be incurred by the Appellant, holding that it was availing Special Allowance, without even considered whether grant of Special Allowance disentitled the appellant from claiming Additional Capital Expenditure under Regulation 14(3); by its very definition under Regulation 3(2), Additional Capitalisation is relatable only to Regulation 14; Regulation 3(9) defines Change in Law, a restitutionary concept which through five different scenarios (*a to e*) provides for relief to an affected party; the expansive definition of Change in law assumes significance in the cost plus regime, as the Generating Company/Transmission Licensee, if it is adversely affected by even a change in interpretation (*by an Indian Government Instrumentality*), would be entitled for relief under change in law; Regulation 7(3) is a clear indicator that any existing Generating Station can seek determination of Tariff including Additional Capitalisation irrespective of whether such Generating Station has completed its useful life or not; Regulation 9 (3), which relates to Capital Cost of existing projects, is also not linked with the useful life of the project; and clause (b) thereof empowers the existing generating station to seek inclusion of Additional Capitalisation in terms of Regulation 14.

It is further contended, on behalf of the appellant, that Regulation 14(3), which applies to an Existing Generating Station, is not linked to its useful life; considering the long life of a Thermal Power Plant, it envisages 10 scenarios where Additional Capitalisation can be permitted; critically, events such as '*Liability to meet an Arbitration Award, Change in Law and/or Compliance of law, Expense necessitated out of higher security and safety, Ash Dyke works'* are all expenditure beyond the control of the Generating Company and are, therefore, permitted to be recovered as Additional Capital Expenditure; these categories of expenses are recoverable at all points in time by a generating Company, as these expenditure are necessitated for reasons beyond its control, and must be allowed separately; the requirement of the 3rd proviso to Regulation 14(3) is satisfied in the present case as the appellant has, admittedly, not claimed Additional Capital expenditure under R&M; Regulation 14(3) does not bar a claim for additional capital expenditure by a Generating Company claiming Special Allowance under Regulation16; if the intention of the 2014 Regulations was to exclude plants, availing Special Allowance under Regulation 16, from availing additional capital expenditure under Regulation 14(3), it would have either provided that Regulation 14 (3) would apply only to Existing Generating Station operating within its useful life or inserted words into the 3rd Proviso to Regulation 14(3) to include 'generating companies availing Special Allowance'; and Regulation 14 (3) extends to all 'Existing Generating Stations' which, by its very definition, includes all generating stations irrespective of their useful life.

It is also contended, on behalf of the appellant, that, as per Regulation 15(4), once the R&M package is approved, it shall then form part of determination of Tariff under Regulation 7; the 3rd Proviso to Regulation 14(3) should be harmoniously read with Regulation 15; it is only when a generating Station, while carrying out R&M works, claims a particular expense should it be considered as part of the overall package; it is only then should it be precluded from claiming the said expense as additional capital expenditure in view of the 3rd Proviso to Regulation 14 (3); as Special Allowance is an alternative to Regulation 15, the intent of Regulation 16 is only to ensure extension of useful life; it is the specific case of the appellant that the Special Allowance granted to them is limited to the works related to R&M after useful life i.e. 25 years; the expenditure, in question, is in relation to Change in Law *[Regulation 14 (3) (ii)],* Compliance of law *[Regulation 14 (3) (ii)]*, Higher safety and security *[Regulation 14 (3) (iii)]* or deferred works related to ash handling system in the original scope of work [*Regulation 14 (3) (iv)];* the said expenditure has nothing to do with extension of 'Useful Life', and is required to be incurred by the appellant to continue generation of power; the said expenditure cannot be equated with Special Allowance; the claimed expenditure must be allowed separately to the appellant, as additional capitalization, under Regulation 14(3); it is clear that (a) Regulation 14 (3) nowhere prescribes that it shall not be applicable to a Generating Company claiming Special Allowance under Regulation 16; (b) in the impugned Orders, the CERC has not held that, once Special Allowance is claimed, the Generating Company is barred from claiming the expenditure incurred under Regulation 14(3); (c) CERC has itself held that, in cases where Special Allowance is availed by the appellant, Additional Capital Expenditure, proposed to be incurred under Regulation 14(3), would be permissible; (d) both Regulations 15 and 16 are applicable for extension of useful life of the Project, and are distinct from Regulation 14(3) of the 2014 Tariff Regulations which permits Additional Capital Expenditure in certain limited scenarios; (e) Regulation 14 (3) applies to all Existing Projects (as defined under Regulation 3(22) of the 2014 Tariff Regulations); the definition of Existing Project is also not restricted by its useful life, and only means a Project which has been declared under commercial operation on a date prior to 01.04.2014; (f) the only exception to Regulation 14(3) is prescribed in the 3rd Proviso of the said Regulation i.e., expenditure which are already claimed by the Generating Company as R&M under Regulation 15; (g) it is not in dispute that the appellant has not availed Regulation 15 (R&M Package), and the expenditure in question does not also form part of extension of useful life; hence, the Proviso to Regulation 14(3) is not applicable in the present case; and in the Impugned Orders, the CERC has not held that, in view of Regulation 16 (*Special Allowance* being granted to them), the appellant cannot claim the expenditure incurred under Regulation 14 (3).

According to the appellant, the contention of the Respondents, with respect to the Ad-Cap incurred after completion of the useful life of the

TPP, is self-defeating; the appellant will only get the benefit of higher capital cost as and when Ad-Cap of the Asset as claimed is approved by the CERC, and the same is capitalised after being put to use; hence if the appellant, instead of the 23rd year of operation, incurs Ad-Cap in the 26th year, the beneficiaries are only liable to pay the higher cost from the 26th year i.e., when the asset is capitalised; the beneficiaries will stand to gain if the expenditure is deferred by the appellant; the Add-Cap proposed by the Generating Company is not operationalised within the planned control period due to the time required, from concept to commissioning, once the Add Cap is envisaged, such as tendering and award of work on competitive basis, engineering and execution challenges in an operating power plant; while carrying out massive Add Caps, the appellant has to continue its operations and meet various annual targets including station availability set by the CERC to recover its Fixed Cost; hence, physical augmentation of the Thermal Power Plant is meticulously planned and carried out by the appellant; it is for this reason that Ad-Cap may spill over to the next control period; and the beneficiaries are liable to pay for higher capital cost only when the Asset is created and operationalised.

On the other hand, Learned Counsel for the Respondents submit that the following principles must be kept in mind while interpretating Regulations 14 to 17 and 27 of the 2014 Regulations: (i) Regulation 14 to 17 and 27 form an Integrated scheme; (ii) though there is some overlapping, the underlying object of the Scheme, as contained in the Regulations, is that, after the useful life of the Generating Station has come to an end or the Generating Station is at the fag end of its useful life (5 years before the end of useful life), no Additional Capitalization should be allowed without a proposal with justification for life extension of the plant; (iii) these Regulations must be interpreted in such a manner that effect is given to all the Regulations, and none of the Regulations become redundant or otiose; (iv) none of the Regulations should be read in isolation; (v) there cannot be any justification for extensive Additional Capitalization after the useful life or at the fag of the life of the plant, which would result in revision of the Fixed Cost; (vi) the term “existing Generating Station” in Regulation 14 (3), as against “new or existing Generating Station” in Regulation 14 (1), gives an indication of the object of Regulation 14 (3) namely that it applies during the useful life of the plant; (vii) the expression “existing Generating Station” in Regulation 14, has been used in contrast to the words “beyond the useful life of the Generating Station” in Regulation 16; (viii) the difference in the language of Regulation 14 and 16 shows the intention behind the two Regulations, namely that the two Regulations operate in different situations; and (ix) in view of the nature of Regulatory jurisdiction, some flexibility must be read into the Regulations to enable the CERC to deal with different situations, since Regulations cannot anticipate or provide for all situations.

It is submitted, on behalf of the Respondents, that the Scheme, contained in the 2014 Regulations, is that, once the useful life of the plant has come to an end or if the plant is at the verge of completion of its useful life (5 years before the end of useful life), no Additional Capitalization should be allowed without proper justification as to why such capitalization is actually required; no justification exists for extensive Additional Capitalization after the useful life, or towards the fag of the life of the plant, which would result in revision of the Fixed Cost; all Expenses, that a Generator incurs beyond the Useful Life, are to be met with either the Special Allowance provided under Regulation 16 or for Renovation and Modernisation under Regulation 15 which provides for: (i) Extension of life beyond the Useful Life of a Generating Station; (ii) Revision of Tariff for the extended life, duly specified in years by the Regulatory CERC for the Generations Station; this Regulation provides for Revision of Tariff only for the period of extended life, and not till the Generating Station is in existence; Regulation 16 of Tariff Regulation 2014-2019 does not provide for (i) Extension of life of the Generating Station, (ii) Revision of Capital Cost (iii) Relaxation of operating norms; in the instant case, the Generator opted for Special Allowance to meet its expenses after the Useful Life of its Generation Station; the Tariff continues to be the same as revised in the last five years of the 25 years' Useful Life; in addition, the Generating Station gets the Special Allowance to meet its other requirements; and the Appellant is not entitled to claim Revision of Tariff, under Additional Capitalisation, without extension of useful life of the Plant.

(b). ANALYSIS AND CONCLUSION:

The dispute, in these appeals, relate mainly to whether or not the Appellant is entitled to claim additional capitalization under Regulation 14(3) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations 2014 ("the 2014 Regulations" for short) which were in force for a period of five years from 01.04.2014 to 31.03.2019, since they had claimed Special allowance under Regulation 16 of the 2014 Regulations.

It is useful to note, at the very outset, the relevant provisions of the 2014 Tariff Regulations. Regulation 2 thereof relates to the scope and extent of application of the 2014 Regulations, and Regulation 2(1) stipulates that these Regulations shall apply in all cases where the tariff for a generating station is required to be determined by the CERC under Section 62 read with Section 79 of the Electricity Act.

Regulation 14 relates to additional capitalization and de-capitalization, and contains four sub-sections. While the first three sub-sections relate to capital expenditure, sub-section (4) of Regulation 14 relates to de-capitalization of all generating companies with which we are not concerned in the present batch of appeals. Regulation 3(2) defines Additional Capitalisation to mean the capital expenditure incurred, after the date of commercial operation of the project, and admitted by the Commission after prudence check, in accordance with the provisions of Regulation 14 of the 2014 Regulations. For capital expenditure to qualify for Additional Capitalisation, it must (i) be a capital expenditure, (ii) have been incurred after the commercial operation date, and (iii) it must fall within the scope of Regulation 14. As all the claims of the appellant, in this batch of appeals, relate to the additional capital expenditure to be incurred, or proposed to be incurred, during the period after the commercial operation date, the CERC was required to exercise its discretion, to admit this capital expenditure, after prudence check, in accordance with the provisions of Regulation 14.

Regulation 14(1) relates to capital expenditure, in respect of new projects or an existing project, incurred or projected to be incurred within the original scope of the work, after the date of commercial operation and up to the cut-off date. The words ‘existing project’, ‘new project’, ‘date of commercial operation’, and ‘cut-off date’ are all defined expressions under the 2014 Regulations. Regulation 3(22) defines ‘existing project’ to mean a project which has been declared under commercial operation on a date prior to 01.04.2014. Regulation 3(40) defines ‘new project’ to mean a project which has achieved COD or is anticipated to be achieving COD on or after 01.04.2014. Regulation 3(14) defines ‘date of commercial operation’ (COD) to have the same meaning as in Regulation 4 of the 2014 Regulations. Regulation 3 (13) defines ‘cut-off date’ to mean the 31st March of the year closing after two years of the year of commercial operation of the whole or part of the project, and in case the whole or part of the project is declared under commercial operation in the last quarter of a year, the cut-off date shall be the 31st March of the year closing after three years of the year of commercial operation.

It is not in dispute that most of the generating stations of the Appellant, with which we are concerned in the present batch of appeals, have completed 25 years of its useful life and, since all of them must have declared commercial operation long prior to 01.04.2014, they are all ‘existing projects’, and none of them are new projects which achieved COD after 01.04.2014. The fact, however, remains that it is only the capital expenditure incurred or proposed to be incurred even by existing projects up to the cut-off date, ie within two/three years after the date of commercial operations, to which alone Regulation 14(1) applies. In the present case, the additional capital expenditure of the subject generating plants relate to a period long after the ‘cut off date’, and Regulation 14(1) has therefore no application.

Regulation 14(2) applies to capital expenditure incurred or projected to be incurred in respect of new projects within the original scope of work after the cut-off date. Regulation 3(43) defines “original project cost” to mean the capital expenditure incurred by the generating company within the original scope of the project upto the cut-off date. As none of the subject generating stations are “new projects”, (ie projects which achieved COD or were anticipated to achieve COD on or after 01.04.2014), Regulation 14(2) also has no application in the present batch of appeals.

The claims of the Appellant in this batch of six appeals, as can be seen from the table below, are confined to clauses (ii), (iii), (iv) and (x) of Regulation 14(3) of the 2014 Regulations.

Table of claims and the relevant Regulations

S. No.	**R. 14(3)(ii)**	**R. 14(3)(iii)**	**R. 14(3)(iv)**	**R. 14(3)(x)**

1	Modification of Electrostatic Precipitator (ESP) Stage -1	Fire Detection & Protection System St-1 (CHP Area)	Work related to Ash Slurry Pump House	Railway Wagons
2	Inert gas System for Central Control Room and Control Equipment Room.	Fire Fighting System for Stacker, Reclaimer I and II in CHP and Main Plant	1st Raising of Mithini Ash Dyke Lagoon –I	
3	Online Monitoring System for Co2 in Flue Gas.	CCTV Surveillance	1st Raising of Mithini Ash Dyke Lagoon -2	
4	Dry Ash Extraction System (DAES)	Augmentation of existing fire-fighting system	2nd Raising of Central Ash Dyke Lagoon -2	
5	Mulsifier System for transformers and cable galleries	Mulsifier System for transformers and cable galleries	2nd Raising of Central Ash Dyke Lagoon -1	
6	Installation of Medium Velocity Water (MVW) spray system for various coal conveyers of the Coal Handling Plant	Installation of Medium Velocity Water (MVW) spray system for various coal conveyers of the Coal Handling Plant	3rd Raising of Central Ash Dyke Lagoon -2	
7	Replacement of wooden and cast iron sleepers of MGR	Replacement of wooden and cast iron sleepers of MGR	Ash Dyke/ash related works (Rs 18.47 crores); N2 Dyke Strengthening Works (Rs 6.50 crores); and	
8	Online CO2, Sox, NOX Analyzer;			

	and Online Effluent Analyzer		Earth Cover for Ash Dyke	
9	Replacement of Halon System		4th Raising of Nishindra Ash dyke I & II	
10	Near Zero Discharge of Water		Starter dyke of Nishindra Lagoon – III	
11	Ash Dyke Related Works		Ash Dyke Related Works	
12	Continuous Emission Monitoring (CEMS) System			
13	Inert gas fire extinguishing system			

Regulation 14(3) of the 2014 Regulations, which also has three provisos, applies to existing generating stations which, as noted hereinabove, means projects which have been declared to be under commercial operation on a date prior to 1.4.2014. All the generating units of the Appellant, which are the subject matter of these appeals, were declared to have been under commercial operation long prior to 01.04.2014. Since most of these generating plants are more than 25 years old, and the additional capital expenditure, which the Appellant claims they are entitled to incur under this head, is also after the cut-off date, these claims would, consequently, fall within the scope and ambit of Regulation 14(3).

As the claims of the Appellant, in this batch of Appeals, fall under clauses (ii), (iii), (iv) and (x) of Regulation 14(3), it is unnecessary to refer to any of the other clauses thereof. Clause (ii) of Regulation 14(3) relates to "change in law or compliance of any existing law", Clause (iii) of Regulation 14(3) relates to "any expenses to be incurred on account of need for higher security and safety of the plant as advised or directed by appropriate Government agencies of statutory authorities responsible for national security/internal security. Clause (iv) relates to “deferred works relating to ash pond or ash handling system in the original scope of work”, and Clause (x) relates to “any capital expenditure found justified after prudence check necessitated on account of modifications required or done in fuel receiving system arising due to non-materialization of coal supply corresponding to full coal linkage in respect of thermal generating station as a result of circumstances, not within the control of the generating station.

The word ‘change in law’, used in Clause (ii) of Regulation 14(3), is again a defined expression. Regulation 3(9) defines ‘change in law’ to mean occurrence of any of the following events: (a) enactment, bring into effect or promulgation of any new Indian law; or (b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or (c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or (d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or license available or obtained for the project; or (e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station regulated under these Regulations.

The aforesaid definition of “change in law” is extremely wide and as long as the claims, relating to capital expenditure in respect of all their generating units, fall within the ambit of a “change in law” under Regulation 3(9), the Appellant, subject to compliance with the other conditions which shall be detailed hereinafter, would be entitled to the benefit of additional capitalisation under Regulation 14(3)(ii) of the 2014 Regulations.

Clause (ii) of Regulation 14(3) is not confined only to a “change in law”, but also brings within its ambit “compliance of any existing law” ie cases where such capital expenditure is required to be incurred, or is proposed to be incurred, to comply with any law in force on the date the claim is made. ‘Law’, in this context, would not only include plenary legislation but would also bring within its fold subordinate legislation such as rules, regulations or even orders/ notifications which have the force of law, provided, of course, that it is in order to comply with such an existing law, that the claim for incurring, or having incurred, additional capital expenditure is made.

Clause (i) to (x) of Regulation 14(3) must be read to be in the alternative, and each one of them must be understood as relating to aspects different from the others and as not to overlap, for the CERC, while making these statutory Regulations, cannot be said to have indulged in a repetitive or meaningless exercise of providing for the same aspect in more than one clause. Therefore, claims made in Clause (iii) or (iv) or (x) must relate to matters other than those which fall within the ambit of Clause (ii) of Regulation 14(3). For it to fall within Clause (iii) of Regulation 14(3), the capital expenditure should have been incurred on account of the need for higher security and safety of the plant. Such a need, for higher security and safety of the plant, must have arisen as a result of the advice or directions given by (1) the appropriate Government agencies or (2) statutory authorities, responsible for national security/ internal security. To invoke Clause (iii) of Regulation 14(3), the Appellant would be required to satisfy the CERC that such capital expenditure had been incurred, or was proposed to be incurred, to fulfil the need for higher security and safety of the plant, and that such a need had arisen as a result of the advice rendered or the directions issued by the agencies/statutory authorities responsible for national security/ internal security. Failure to fulfil the aforesaid requirements would disentitle the Appellant from claiming additional capital expenditure under Clause (iii) of Regulation 14(3).

Clause (iv) of Regulation 14(3) is confined to ash pond or ash handling system. From a reading of Regulation 3(43), it does appear that the original scope of the project/work would be the capital expenditure envisaged to be incurred by the generating company up to the cut-off date ie from the inception upto two/three years of its commissioning. Such works, to fall within the ambit of Clause (iv), must not only fall within the scope of the work envisaged at the time the plant was established/commissioned, but must also not have been executed i.e. execution of such works, which fell within the original scope of the work, should have been deferred for its execution to a later date. In order to satisfy the requirement of Clause (iv) of Regulation 14(3), the works should (1) relate to ash pond or ash handling system, (2) fall within the original scope of the work, and (3) its execution must have been deferred to a later date, and the claimant must establish that it is intended to be executed within the control period.

(c). PROVISO: ITS EFFECT:

As noted herein above, Regulation 14(3) of the 2014 Regulations contains three provisos. It is necessary therefore to note, in brief, the purpose which a proviso serves, and the function it discharges. A proviso may serve four different purposes (1) qualifying or excepting certain provisions from the main enactment; (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable; (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision. (***S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591***).

As a proviso has several functions, the court, while interpreting a statutory provision, is required to carefully scrutinize and find out the real object of the proviso appended to that provision. A provision and the proviso thereto must be construed as a whole. (***S. Sundaram Pillai* v. *V.R. Pattabiraman; Craies: Statute Law 7th Edn.*).** A proviso must be construed harmoniously with the main enactment (***Abdul Jabar Butt v. State of J&K, (1957) SCR 51*; *CIT v. Indo-Mercantile Bank Ltd., 1959 Supp (2) SCR 256.*; *Ram Narain Sons Ltd. v. Asstt. CST, (1955) 2 SCR 483*; State of Punjab v. Kailash Nath, (1989) 1 SCC 321**), and be considered in relation to the principal matter to which it stands as a proviso. A proviso cannot be torn apart from the main Section nor can it be used to nullify or set at naught the real object of the main Section. (***S. Sundaram Pillai* v. *V.R. Pattabiraman; Craies: Statute Law 7th Edn.*).**

(d). THE MAIN PROVISION AND ITS PROVISO SHOULD BE READ HARMONIOUSLY:

A proviso must be considered in relation to the principal matter to which it stands as a proviso, and should be construed harmoniously with the main enactment. (***Abdul Jabar Butt v. State of J&K, (1957) SCR 51)***. The golden rule is to read the whole Section, inclusive of the proviso, in such a manner that they mutually throw light on each other, and result in a harmonious construction. (***Dwarka Prasad v. Dwarka Das Saraf, (1976) 1 SCC 128*; *S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1***

SCC 591;* D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).** As a general rule, it is proper to construe the main provision and the proviso together without making either of them redundant or otiose.(J.K. Industries Ltd.***). A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. (***Tahsildar Singh*****;** ***Maxwell's Interpretation of Statutes*****, 10 Edn., at p. 162**; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

Though there are ten clauses under Regulation 14(3) of the 2014 Regulations, the second proviso to Regulation 14(3) stipulates that any capital expenditure, other than that of the nature specified in Clause (i) to (iv), in the case of coals/lignite based stations, shall be met from out of compensation allowance. As the Appellant is a coal based station, it is not entitled to claim the capital expenditure, under Clause (x) of Regulation 14(3), as the claim under this head can only be met from out of compensation allowance, which falls within the ambit of Regulation 17 of the 2014 Regulations. As shall be detailed hereinafter, compensation allowance, under Regulation 17, is not available to a thermal generation station beyond its useful life of 25 years. Consequently such a claim can no longer be made by the appellant either under Regulation 14(3)(x) or under Regulation 17.

Regulation 14(3) stipulates that the capital expenditure, incurred or projected to be incurred by the appellant, under Clauses (ii), (iii), and (iv) thereunder, may be admitted by the CERC. Use of the word ‘may’ shows that the Commission has the discretion either to admit or not to admit such capital expenditure for determination of the Appellant’s tariff. It goes without saying that the discretion conferred on the CERC, either to admit or refuse to admit such capital expenditure for determination of tariff, must be exercised for just and valid reasons to be recorded in the tariff order.

Regulation 14(3) also requires such capital expenditure, before it is admitted, to be subject to prudence check by the CERC. Regulation 3(48) defines "prudence check" to mean scrutiny of the reasonableness of capital expenditure incurred or proposed to be incurred, as may be considered appropriate by the Commission for determination of tariff, and while carrying out the prudence check, the Commission shall look into whether the generating company has been careful in its judgment and decision for executing the project or has been careful and vigilant in executing the project. Regulation 10 relates to prudence check of capital expenditure. Regulation 10(1) stipulates that the following principles shall be adopted for prudence check of the capital cost of existing projects which, in the case of a thermal generating station, may be carried out taking into consideration the bench mark norms specified/to be specified by the Commission from time to time.

It is only on fulfilment of the aforesaid requirements, would the appellant be entitled to have the additional capital expenditure, which it claims falls within clauses (ii), (iii) and (iv) of Regulation 14(3), admitted by the CERC. Let us now examine the effect which the first and the third provisos have on Regulation 14(3) of the 2014 Regulations.

(e). ORDINARILY A PROVISO CARVES OUT AN EXCEPTION TO THE MAIN PROVISION:

Before examining the scope and ambit of the first and the third provisos to Regulation 14(3), it is necessary to ascertain the nature of these two provisos. A proviso, to a particular provision of a statute, only embraces the field which is covered by the said provision. It carves out an exception to the provision to which it has been enacted as a proviso, and to no other. (***CIT v. Indo-Mercantile Bank Ltd., 1959 Supp (2) SCR 256***; ***A.N. Sehgal v. Raje Ram Sheoran 1992 Supp (1) SCC***

304; ***TribhovandasHaribhai Tamboli v. Gujarat Revenue Tribunal, (1991) 3 SCC 442***; ***Kerala State Housing Board v. Ramapriya Hotels (P) Ltd., (1994) 5 SCC 672***; ***BinaniBinani Industries Ltd. v. CCT, (2007) 15 SCC 435, Madras and Southern Mahratta Railway Co., Ltd. v. Bezwada Municipality, 1944 SCC OnLine PC 7***; ***Nagar Palika Nigam v. Krishi Upaj Mandi Samiti, (2008) 12 SCC 364; Ram Narain Sons Ltd. v. Asstt. CST, (1955) 2 SCR 483***).

The ordinary and proper function of a proviso, coming after a general enactment, is to limit that general enactment in certain instances. (***Jennings*** **v.** ***Kelly; Binani Industries Ltd. v. CCT, (2007) 15 SCC 435***). As a general rule, in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. (***J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers, (1996) 6 SCC 665).*** It would not be a reasonable construction of any statute to say that a proviso, which in terms purports to create an exception, should be held to be otiose. (***Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories, (1965) 1 SCR 737***). A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. (***Tahsildar Singh v. State of U.P., 1959 Supp (2) SCR 875).***

A qualifying or an excepting proviso only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso, and to no other. (***The Commissioner of Income-tax, Mysore Travanecore-Cochin and Coorg, Bangalore*** **v.** ***The Indo Mercantile Bank Ltd.******; ***Ram Narain Sons Ltd. v. Asstt. CST, (1955) 2 SCR 483).*** The effect of an excepting or qualifying proviso is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which, but for the proviso, would be within it. Such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect. (***Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, (1962) 2 SCR 159 : Kedarnath Jute Mfg. Co. Ltd. v. CTO, (1965) 2 SCR 626*****; Craies on Statute Law, 5 Edn., pp. 201-202**). Such a proviso is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. (***LOCAL GOVERNMENT BOARD APPELLANTS; AND SOUTH STONEHAM UNION RESPONDENTS., [1909] A.C. 57*****;** ***S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591***). The natural presumption is that, but for the proviso, the enacting part of the Section would have included the subject-matter of the proviso. (***Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, (1962) 2 SCR 159*****;** ***S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591*****;** ***Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai, (1966) 1 SCR 367: Madras and Southern MahrataRailway Co. Ltd.*** **v.** ***Bezwada Municipality*******;** ***Indo Mercantile Bank Ltd**.*****; Craies in his book Statute Law (7 Edn.**). Such a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded. (***STO, Circle-I**, Jabalpur*** **v.** ***HanumanPrasad********;** ***S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591*****; D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382)**

A proviso is normally used to remove special cases from the general enactment, and provide for them specially. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision a portion which, but for the proviso, would be a part of the main provision. (***S. Sundaram Pillai*** **v.** ***V.R. Pattabiraman; Craies: Statute Law 7th Edn.*****).** The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment. (***Madras and Southern Mahratta Railway Co., Ltd. v. Bezwada Municipality, 1944 SCC OnLine PC 7; Holani Auto Links (P) Ltd. v. State of M.P., (2008) 13 SCC 185; CIT v. Indo-Mercantile Bank Ltd., 1959 Supp (2) SCR 256***; ***A.N. Sehgal v. Raje Ram Sheoran, 1992 Supp (1) SCC 304*****)**. A proviso is a qualification of the preceding provision, and is not to be interpreted as stating a general rule. (***Haryana State Coop. Land Development Bank Ltd. v. Banks Employees Union, (2004) 1 SCC 574***; ***Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha, (1962) 2 SCR 159***; ***Calcutta Tramways Co. Ltd.*** **v.** ***Corpn. of Calcutt; A.N. Sehgal v. Raje Ram Sheoran 1992 Supp (1) SCC 304***; ***TribhovandasHaribhai Tamboli v. Gujarat Revenue Tribunal, (1991) 3 SCC 442 and Kerala State Housing Board v. Ramapriya Hotels (P) Ltd., (1994) 5 SCC 672).***

The Appellant's claim for additional capital expenditure under Regulation 14(3) (x), would, in the light of the second proviso to Regulation 14(3), be required to be claimed as compensation allowance under Regulation 17, and not under Regulation 14(3). The second proviso to Regulation 14(3), which stipulates that any capital expenditure, other than those specified in Clause (i) to (iv) shall be met from out of compensation allowance (ie under Regulation 17), is also in the nature of a qualifying proviso, the effect of which is to qualify the generality of Regulation 14(3) by providing an exception and taking out from it, clauses (v) to (x) which, but for the second proviso, would have continued to be a part of Regulation 14(3), and would have been treated as additional capital expenditure in terms of the said Regulation.

As a qualifying proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it, and what the legislature or rule or regulation making authority desires should be excluded, both the first and the third provisos to Regulation 14(3) also fall within this category. The first proviso to Regulation 14(3) stipulates that, any expenditure on acquiring the minor items or the assets including tools and tackles, furniture, air-conditioners, voltage stabilizers, refrigerators, coolers, computers, fans, washing machines, heat convectors, mattresses, carpets etc. brought after the cut-off date shall not be considered for additional capitalization for determination of tariff with effect from 01.04.2014. As the first proviso uses the word 'including', it is not just the items specifically referred to in the first proviso, but other minor items of a like nature which are not entitled to be considered for additional capitalization, for the purpose of determination of tariff, during the control period governed by this 2014 Regulations.

While the expenditure incurred, on acquiring minor items or assets, may have otherwise qualified for additional capital expenditure, if it fell within any one of the clauses of Regulation 14(3), the first proviso carves out an exception and excludes such items from being considered towards additional capital expenditure, under the said Regulation, on or after 01.04.2014.

In terms of the third proviso to Regulation 14(3), if any expenditure has been claimed under Renovation and Modernization (R&M), repairs and maintenance under O&M expenses, and Compensation Allowance, the same expenditure cannot be claimed under this Regulation (ie Regulation 14(3)). Renovation & Modernisation (R&M) falls under Regulation 15, Compensation Allowance falls under Regulation 17, and Operation & Maintenance expenses falls under Regulation 29. Regulation 3(42) defines "Operation & Maintenance expenses" to mean the expenditure incurred for Operation and Maintenance of the project or part thereof, and includes the expenditure on manpower, repairs, maintenance, spares, consumables, insurance and overheads, but excludes fuel expenses and water charges.

The exception carved out by the third proviso is that, even if the capital expenditure falls within any one of the clauses of Regulation 14(3), if such capital expenditure has been claimed as expenditure under Regulations 15 or 17 or as repairs & maintenance under Regulation 29, it cannot again be claimed as additional capital expenditure under Regulation 14(3). The effect of the third proviso is that, even for items falling under any one of the clauses of Regulation 14(3), a claim with respect to such capital expenditure can be made either under Regulation 14(3) or Regulations 15, 17 or 29, but not in more than one of them.

The third proviso neither bars a claim for additional capital expenditure under Regulation 14(3), nor does it obligate a thermal generation station to take recourse only to Regulations 15, 17 and 29 and not to Regulation 14(3). All that the third proviso disables is for a claim to be made for the same capital expenditure twice. Once such capital expenditure is claimed as R & M under Regulation 15, or as compensation under Regulation 17 or as repairs & maintenance under Regulation 29, the very same capital expenditure cannot again be claimed under Regulation 14(3).

By the use of the word "claimed", the third proviso also makes it clear that the generating company is barred from claiming additional capital expenditure under any one of the clauses of Regulation 14(3), only if it has actually claimed such capital expenditure under Regulations 15 or 17 or 29. The effect of the third proviso is that, if an item of capital expenditure falls within the ambit of both Regulation 14(3) and say Regulation 15, the generating company may opt to avail it under Regulation 14(3) instead of under Regulation 15. The underlying object of the third proviso is also to clarify that the generating company cannot make the same claim under two different heads, and it is well settled that where the meaning of a Section, Rule or Regulation is unclear, a proviso may be used as a guide to its interpretation. (***Sarathi in Interpretation of Statutes***; ***S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591***; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLine Hyd 382).**

(f).PROVISIONS OF ONE REGULATION CANNOT BE USED TO DEFEAT ANOTHER:

Regulation 15(1) requires the generating station to make an application before the Commission, seeking approval to meet the expenditure on R&M, "*for the purpose of extension of life beyond the originally recognized useful life"* for the purpose of tariff of the generation station. Regulation 3(67)(a) defines 'useful life', in relation to a coal/lignite based thermal generating station unit, to mean 25 years. Consequently, the expenditure on R&M can be incurred by a generating station only for the purpose of extending its life beyond its useful life of 25 years. Use of the words "*for the purpose of extension of life beyond the originally recognized useful life",* in Regulation 15(1), makes it clear that approval to meet the expenditure on R&M can only be sought for a period beyond the useful life of the plant ie after 25 years, and it is established that such expenditure is sought to be incurred only for the purpose of extension of the life of the plant. That expenditure on R&M is available under Regulation 15(1), only after 25 years of the useful life of a plant, does not mean that additional capital expenditure, under Regulation 14(3), is unavailable after the plant has completed its useful life of 25 years, for it is well settled that the provisions of one section of a statute (Regulation 15(1) in the present case) cannot be used to defeat those of another (Regulation 14(3) in the present case), unless it is impossible to effect reconciliation between them. (**Raj Krushna Bose v. Binod Kanungo: AIR 1954 SC 202; Sultana Begum: (1997) 1 SCC 373; Mohd. Sher Khan v. Raja Seth Swami Dayal : AIR 1922 PC 17; Kailash Chandra v. Mukundi Lal, (2002) 2 SCC 678**). We find no such impossibility.

(g). DIFFERENT WORDS USED IN TWO DIFFERENT PROVISIONS CARRY DIFFERENT MEANINGS:

When two different words (or sentences) are used in two different provisions of the same statute, one has to construe these different words as carrying different meanings. (***Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd., (2003) 4 SCC 305).*** Different use of words, in two provisions of a statute, is for a purpose. If the field of the two provisions were to be the same, the same words would have been used. (***B.R. Enterprises v. State of U.P., (1999) 9 SCC 700***. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. (***Member, Board of Revenue v. Arthur Paul Benthall, (1955) 2 SCR 842***). When the legislature has taken care of using different phrases in different sections, normally different meaning is required to be assigned to the language used by the legislature. If different words of different import are used in two different provisions of the same statute, there is a presumption that they are not used in the same sense.(***Arthur Paul Benthall (1955) 2 SCR 842***; ***Oriental Insurance Co. Ltd. v. Hansraj bhai V. Kodala, (2001) 5 SCC 175***). If the legislative intention was not to distinguish, there would have been no necessity of expressing the position differently. When the situation has been differently expressed, the legislature must be taken to have intended to express a different intention. (***CIT v. East West Import and Export (P) Ltd., (1989) 1 SCC 760).***

Section 15(1) uses the words "*for the purpose of extension of life beyond the originally recognized useful life",* which are different from the words *"in respect of existing generating station incurred…………after the cut off date"* used in Regulation 14(3). As two sentences of different import are used in the 2014 Regulations, in two consecutive provisions (ie Regulation 14(3) and 15(1)), it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. While it may not be permissible for the appellant to claim R&M under Regulation 15(1) other than for the purpose of extension of life beyond the useful life of its generating plant, that does not mean that additional capital expenditure, which is not sought as R&M solely for the purpose of life extension, cannot be claimed under Regulation 14(3) beyond the useful life of 25 years of the plant.

It is not in dispute that most of the generating stations of the appellant, which are the subject matter of these appeals, have completed their useful life of 25 years, and are eligible to meet the expenditure on R&M, for extension of its life, by making an application to the CERC under Regulation 15. It is un-necessary for us to take note of the other clauses of Regulation 15, as it is not in dispute that the Appellant has made no application before the Commission in terms of Regulation 15(1) and has, instead, claimed Special Allowance under Regulation 16.

Regulations 15 and 16 are in the alternative. Regulation 16 relates to Special Allowance for coal based/lignite fired thermal generating stations. Regulation 16(1) provides that a generation company, instead of availing R&M, may opt to avail a 'Special Allowance' in accordance with the norms specified in Regulation 16 as compensation for meeting the requirement of expenses including R&M beyond the useful life of the generating station. The option, given to the generating company under Regulation 16(1), is to avail Special Allowance under Regulation 16, instead of making an application under Regulation 15 for incurring expenditure towards R&M. This Special Allowance, under Regulation 16(1), is the compensation for meeting the requirement of expenses, including R&M, beyond the useful life of the generating station or for a unit thereof. The word 'including', used in Regulation 16(1) indicates that the Special Allowance is made available not only to meet the R&M expenditure, but something more.

The question which necessitates examination is whether, by the use of the word 'including' in Regulation 16(1), the 2014 Regulations intended to exclude not only the claim for expenditure towards R&M, but also additional capital expenditure under Regulation 14(3). It is useful, in this context, to take note of Regulation 17 which relates to Compensation Allowance. The Compensation Allowance, under Regulation 17, can only be claimed during the useful life of the plant, and not beyond. As both R & M expenditure under Regulation 15 and Special allowance under Regulation 16 can only be claimed beyond the useful life of the plant, by which time the compensation allowance under Regulation 17 is no longer available, it does appear that Regulation 16(1), by the use of the word "including" therein, intended that the Special allowance was not only in lieu of Regulation 15 but was also intended to cover the expenditure which could hitherto be claimed under Regulation 17.

It is true that Regulation 17(1) provides that Compensation Allowance shall be admissible to meet expenses on new assets of a capital nature which are not admissible under Regulation 14 of the Regulations. All that Regulation 17 prohibits is for the capital expenditure, claimed under Regulation 14, to again be claimed under Regulation 17 and nothing more.

In our opinion, the other expenditure (ie apart from R&M) required to be met from the Special Allowance, under Regulation 16, would not include the additional capital expenditure under Regulation 14 (3). A reading of Clause (i) of Regulation 14(3) would make this amply clear. Clause (i) of Regulation 14(3) relates to liabilities to meet award of arbitration or for compliance of the order or decree of a court of law. The amount which the generating company may be required to incur, to comply with (1) an arbitration award or (2) order or decree of a competent court, would not be precisely known either before an arbitration award, or an order or decree by a competent court, is passed. It does not, therefore, stand to reason that even the expenditure which may have to be incurred under Regulation 14(3)(i) during the extended life of a generation station, the quantum of which is not even certain till an award/decree is passed, was meant to be covered by the normative sum specified as Special allowance under Regulation 16. The Special Allowance, as is evident from Regulation 16(2), is given at a normative value of Rs.7.5 lakh/MW/year for 2014-15 and thereafter escalates at Rs.6.35 each year during the tariff period 2014-19, from the Financial Year after completion of the useful life of the unit.

The option given to a generating company is to choose Special Allowance under Regulation 16, instead of availing R&M which falls within the ambit of Regulation 15. The 2014 Regulations do not stipulate that the Special allowance under Regulation 16 is an alternative to the additional capital expenditure under Regulation 14(3). Even otherwise, the third proviso excludes any expenditure already claimed under R&M from again being claimed under Regulation 14(3), and as Regulation 16 can be opted instead of Regulation 15, it can, at best, mean that the capital expenditure, incurred or to be incurred from the Special Allowance under Regulation 16, cannot again be claimed under Regulation 14(3), and nothing more.

Clause (3) of Regulation 16 requires the expenditure, incurred or utilized on the Special Allowance, to be maintained separately by the generating stations, and details of such expenditure to be made available to the CERC as and when directed to furnish details of such expenditure. Since any claim for additional capital expenditure under Regulation 14(3) is subject to prudence check, it is always open to the CERC to call for details and ascertain whether the expenditure, which the Appellant has incurred from the Special Allowance under Regulation 16, is again sought to be claimed under Regulation 14(3), and, if the same expenditure is sought to be claimed both under Regulation 14(3) and Regulation 16, to then disallow the claim for such additional capital expenditure under Regulation 14(3).

Regulation 14(3) and 15 are mutually exclusive. While the Special Allowance under Regulation 16 is an alternative to a claim for R&M expenditure under Regulation 15, it does not cover the additional capital expenditure falling within the ambit of Regulation 14, for, if it did, there would not have been any need for the 2014 Regulations to contain separate provisions for additional capital expenditure, R&M and for Special Allowance, and it would have sufficed to specify that additional capital expenditure (which is governed by Regulation 14(3)) would also be covered under Regulation 16 or to expressly stipulate that Regulation 16 is an alternative both to Regulations 14(3) and 15(1).

(h).ADDITION OF WORDS TO A STATUTORY PROVISION IS IMPERMISSIBLE:

For the submission, urged on behalf of the Respondents, to be accepted, we may have to add in Regulation 16 (1) the words "*and additional capitalization*" after the words "*instead of availing R&M*" and before the words "*may opt to avail a 'special allowance'* " so that the relevant part of Regulation 16(1) reads " *instead of availing R&M and additional capitalization, may opt to avail a special allowance"*. Such a course is impermissible, for it is well settled that a provision must be construed according to the natural meaning of the language used; and the Court, in interpreting a Statute or a statutory Regulation, must proceed without seeking to add words which are not to be found in the Statute or the Regulation. (***Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO, (2007) 5 SCC 447; Union of India v. Mohindra Supply Co., (1962) 3 SCR 497*****; Bank of England.* v. *Vagliano Bros*****; *CIT v. Anjum M.H. Ghaswala, (2002) 1 SCC 633; J. Srinivasa Rao* v. *Govt. of A.P.******; **D. Mahesh Kumar v. State of Telangana: 2016 SCC OnLineHyd 382).**

(i). WORDS IN A STATUTORY REGULATION CANNOT BE BRUSHED ASIDE AS INAPPOSITE SURPLUSSAGE:

The only other way, for the submission of the learned Counsel for the Respondent to be accepted, is to delete the word "Existing" in Regulation 14(3). This is also impermissible, since it is not a sound principle of construction to brush aside words in a statute or Regulation, as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the Statute. (***Aswini Kumar Ghose v. Arabinda Bose, (1952) 2 SCC 237).***

An efficient generating station may have no need to incur capital expenditure towards Renovation & Modernisation. It may therefore choose not to claim such capital expenditure under Regulation 15, and instead claim Special Allowance under Regulation 16, though the special allowance under Regulation 16 is provided at a normative figure, and the claim for R&M expenditure under Regulation 15 is based on actuals. While Regulation 15(1) is attracted only after a thermal generating station has completed its useful life of 25 years, and is seeking extension of its useful life, Regulation 14(3) does not prescribe any such restriction, and is applicable both before the generating station has completed its useful life and even thereafter during its extended life. The very fact that Regulation 15(1) makes it clear that it is available only after the useful life of the plant and for the purpose of extension of useful life, and Regulation 14(3) does not expressly stipulate that it would not be available after the useful life of the plant of 25 years, would show that the additional capital expenditure under Regulation 14(3) can be claimed both before and after the useful life of the plant, however, "after the cut-off date" stipulated in Regulation 14(3) which is 2 or 3 years after the date of commercial operation. The very fact that the third proviso only disables expenditure claimed under R&M, repairs and maintenance under O&M expenses, and compensation allowance from again being claimed under Regulation 14(3) shows that, as long as the generating company has not claimed 'expenditure' under Regulations 15 or 17 or 29, it is entitled to claim additional capital expenditure under Regulation 14(3).

As noted hereinabove, the second proviso to Regulation 14(3) requires capital expenditure, other than those specified in clauses (i) to (iv) of Regulation 14(3), in the case of coal based generating stations, to be met out of the compensation allowance. Regulation 17(1) and (2), which relate to compensation allowance, make it clear that the said allowance is available only during the useful life of a generating station, ie for 25 years, and not thereafter during its extended life. If, as is contended on behalf of the Respondents, the additional capital expenditure, to be incurred under Regulation 14(3), was intended to be confined only till the useful life of the generation unit, Regulation 14(3) would also have restricted, as has Regulation 17, its application only to the useful life of the generation plant, and not beyond.

Likewise, if the intention of the 2014 Regulations was to confine Regulation 14(3) only to the useful life of the coal based generating station, and not to make it available during its extended life, the 3rd proviso thereunder would not have stipulated that the expenditure claimed under renovation and maintenance, cannot be claimed under Regulation 14(3). It is in recognition of the fact, that additional capital expenditure under Regulation 14(3) is available even during the extended life of a generating company, that the 3rd proviso to Regulation 14(3) bars a generating company from claiming capital expenditure both under Regulation 15(1) and under Regulation 14(3). If Regulation 14(3) was not available to a generating company during its extended life, there was no need to specifically provide that it would not be available in case R&M had been claimed, for R&M can only be claimed under Regulation 15(1) for extension of the useful life of a generating company, and not during its useful life.

While Learned Counsel for the appellant may not have been amiss in their submission that the CERC, in the impugned Orders, does not appear to have specifically held that the claim for additional capitalization under Regulation 14(3) is barred on Special Allowance being claimed under Regulation 16(1), the fact remains that the appellant was directed to meet the capital expenditure, they sought to incur under Regulation 14(3), from the Special Allowance granted to them under Regulation 16(1). The CERC has, implicitly, held that the claim for additional capital expenditure cannot be claimed, once Special Allowance under Regulation 16(1) has been opted for.

It was necessary for us, therefore, to analyse the relevant provisions of the 2014 Regulations, in examining this question. The contentions, under this head, are answered holding that, while additional capital expenditure under Regulation 14(3), (subject to fulfilment of the other conditions stipulated therein), can be claimed even on receipt of Special Allowance under Regulation 16(1), the generating station is not entitled to claim the same capital expenditure both under Regulation 14(3) and 16(1), as that would result in the Appellant unjustly enriching itself at the cost of consumers, whose interests the CERC is obligated to protect in terms of Regulation 61(d) of the Electricity Act.

VIII. SHOULD THE GENERALIA SPECIALIBUS NON -DEROGANT TEST BE APPLIED:

It is contended, on behalf of the appellant, that, in **NTPC Ltd. vs. CERC & Ors., (Judgment in Appeal No. 125 of 2017 dated 09.05.2019)**, this Tribunal considered the inter-play between Regulation 14(3) and Regulation 17 (*Compensation Allowance*). and held that general provisions must yield to special provisions; a similar view was taken in **NTPC vs CERC & Ors. (Order in Appeal No. 93 of 2017 dated 29.01.2020);** Regulation 16 and 17, in their application, are similar in nature as they both provide for an allowance which is to be recovered separately without revision of capital cost; in the present case also, specific Additional Capital Expenditure was claimed by the appellant, which fell under the Regulation 14 (3); and in terms of the law laid down by this Tribunal, if the said specific expenditure is claimed under the Special provision [*Regulation 14 (3)*] then the general provisions such as Compensation Allowance/ Special Allowance [*Regulation 16/17*] must yield to it.

In **NTPC Limited Versus Central Electricity Regulatory Commission (Order in APPEAL NO. 125 of 2017 dated 09th May, 2019),** this Tribunal observed:-

"…….31. It is well settled if special provision is available one should not take recourse to general provision. General provisions must yield to

special provisions in such situation. Therefore, it is clear from the impugned order that the very process in assessing the claims was not properly appreciated by the Commission. If at all Commission needed some more information, they ought to have asked the Appellant for such information instead of opining that there is incomplete information. It is not in dispute in so far as other plants of the Appellant, similar claim as safety measures was allowed by the very same Central Commission. Therefore, there is no doubt that if additional capital expenditure after cut-off date is spent towards higher security and safety of the plant in terms of Regulation as recommended by appropriate Government Agency or Statutory Authority, it shall fall under Regulation 14(3)(iii). In that view of the matter, and for the reasons mentioned above, we are of the opinion that the Respondent Commission proceeded on wrong assumption and denied the claim of the Appellant under Regulation 14(3)(iii) of 2014 Regulations………..”

The maxim *generalia specialibus non derogant*, means that a general later law does not abrogate an earlier special one by mere implication. In other words, where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by the earlier Legislation, it should not be held that the earlier special legislation is indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act. (***Maxwel on the Interpretation of Statutes*****, Eleventh Edition, page 168**). This principle has also been applied to resolve any conflict between general and special provisions in the same legislative instrument, and it has been held that in case of conflict, between a special provision and a general provision, the special provision prevails over the general provision, and the general provision applies to such cases which are not covered by the special provision. **(Kureti Venkateswarlu, President v. State of Andhra Pradesh, 1970 SCC OnLine AP 33).**

Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language or there be something which shows that the attention of the legislature had been turned to the special Act, and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the Special one. (***Maxwel on the Interpretation of Statutes*****, Eleventh Edition, page 168**).

A claim for additional capital expenditure, under Regulation 14(3), can be made by a generating company only if such a claim falls specifically within any one of Clauses (i) to (x) thereunder. Further, in view of its second proviso, such a claim should fall specifically within clauses (i) to (iv) of Regulation 14(3), as any claim under clauses (v) to (x) is required to be met from out of the compensation allowance available, under Regulation 17, during the useful life of the generating station. As compensation under Regulation 17 ceases to be available, during the extended life of the concerned Generating station, it is only with respect to claims, which specifically fall under clauses (i) to (iv) of Regulation 14(3), would the appellant, subject to prudence check etc, be entitled to incur such additional capital expenditure during its extended life.

Unlike Regulation 14(3) which is available only for specific categories, Regulation 15 can be availed for capital expenditure required for renovation and modernization of the plant for extension of its useful life, subject of course to fulfilment of the conditions stipulated therein.

While the only restriction on the nature of capital expenditure, which may be permitted to be incurred under Regulation 15, is that it should relate to renovation and modernization of the plant necessary for extension of its life, Regulation 14(3) is more specific and spells out the heads under which alone additional capital expenditure is available to be claimed. As the special allowance under Regulation 16 is in the alternative to a claim under Regulation 15, it is possible to contend that Regulation 14(3) is a special provision, while Regulation 15 and 16 are general.

It is unnecessary for us, however, to delve further into this issue, as we are satisfied that, even otherwise, additional capital expenditure under Regulation 14(3) can be claimed as the said Regulation operates in areas distinct from Regulations 15 and 16; and as long as no claim has been made under Regulation 15 towards renovation and modernization, and the same additional capital expenditure is not sought to be incurred both under Regulation 14(3) and 16(1), (which, if permitted, would result in the generating station receiving the benefit of tariff for the same expenditure twice, and thereby unjustly enriching itself), there is no bar for a generating station to claim additional capital expenditure, under Regulation 14(3), even during its extended life.

IX. ABSENCE OF PRUDENCE CHECK WHEN SPECIAL ALLOWANCE UNDER REGULATION 16(1) IS AVAILED:

It is submitted, on behalf of the respondents, that the CERC discharges a wide range of functions, including determination of Tariff for generating companies; in carrying out such determination, the CERC is required to undertake a prudence check for all expenditure claimed by the generating company; "Prudence Check" is a defined expression under the 2014 Tariff Regulations; expenditure on Capitalization is allowed by the CERC only after detailed scrutiny while exercising Tariff Prudence Check during truing up, while approving Capital Cost, while approving Capital Expenditure, while allowing Additional Capitalization, and while allowing Renovation and Modernization Expenditure; however, no prudence check is carried out by the CERC, in the event the generating company claims Special Allowance, and the same is granted as per Regulation 16 in toto; therefore, the generating company which has, in its wisdom and on its own accord, availed of the Special Allowance and thereby avoided scrutiny of the CERC for Renovation and Modernization activities in the present case, cannot now be allowed to claim expenses under the head of Additional Capitalization under Regulation 14 (3).

Regulation 14(3) of the 2014 Regulations stipulates that the additional capital expenditure, which an existing generating station is permitted to incur, is subject to prudence check by the CERC. Likewise under Regulation 15(2), any claim for renovation and modernisation expenditure is required to be approved by the CERC only after due consideration of the reasonableness of the cost estimates etc. Even details of the capital expenditure, incurred from the Special Allowance under Regulation 16(1), is, in terms of Regulation 16(3), required to be maintained separately by the generating station, and furnished to the CERC as and when it is directed to do so. The 2014 Tariff Regulations are statutory in character, and have the force of law. The CERC is, therefore, legally obligated to carry out prudence check/verification of claims for capital expenditure/R&M expenditure/expenditure incurred from the Special Allowance. Failure, if any, by the CERC to discharge these statutory obligations, does not mean that a generating station should be denied its entitlement for additional capitalisation under Regulation 14(3) of the 2014 Tariff Regulations. Suffice it to direct that the CERC shall henceforth, regularly, verify whether the capital expenditure claimed under Regulations 14(3), 15 or 16 have, in fact, been incurred for the purposes for which they are permitted under the 2014 Tariff Regulations.

X. IS SPECIAL ALLOWANCE UNDER REGULATION 16 IN LIEU OF COMPENSATION ALLOWANCE UNDER REGULATION 17?

It is submitted, on behalf of the Respondents, that, at the fag end of the Useful Life of the Generating Station, i.e. between 21 – 25 years, the Compensation Allowance under Regulation 17 is only Rs. 1 lakh/MW/year; however, immediately on completion of useful life, the Special Allowance under Regulation 16 suddenly balloons straight away to more than 7.5 times i.e. Rs. 7.5 lakh/MW/year for the year 2014-15, and thereafter escalates @ 6.35% every year during the Tariff Period 2014-15 to 2018-19**;** this drastic increase itself manifests the intention of the CERC, while providing for Special Allowance, that all expenses that are to be incurred by the Thermal Generator, while claiming Special Allowance, have to be accounted from the Special Allowance itself for the purpose of determination of Tariff; in addition Regulation 17, which is applicable up to the Useful Life i.e., 25 years, puts a specific restriction on Revision of Capital Cost; and this Regulation also does not provide for any Expense on New Assets, which is not admissible under Regulation 14 beyond 25 years of the life of the Generating Station.

It is contended, on behalf of the appellant, that the word “included”, used in Regulation 16, essentially means that the Generating Company is getting Special Allowance to meet the expenditure in lieu of R&M, as well as minor assets for which compensation allowance was allowed up to the useful life as per Regulation 17; however, after the useful life, such expenditures also needs to be met with the special allowance only; these minor assets are those assets which do not qualify under Regulation 14, and have no bearing on the continued efficiency of a Thermal Power

Plant, i.e. they are non-R&M type of expenditure, but at the same time are necessary for continued operations; and examples for the same are IT Equipment, stationaries, Township assets, Miscellaneous Bought Out Assets (i.e. MBOAs such as table, chair, furniture, etc.).

The compensation allowance, under Regulation 17(1), is available for a thermal generating station to meet the expenses of new assets of a capital nature which are not available under Regulation 14 of the 2014 Tariff Regulations. Besides, the compensation allowance is available only after 10 years of the useful life of the generating station, and until it completes 25 years of its useful life. Unlike Regulation 17, which is explicitly made unavailable in cases where capital expenditure is admissible under Regulation 14(3), and is also unavailable after 25 years of the useful life of a generating station, the capital expenditure incurred on renovation and modernisation under Regulation 15(1) is available to a generating company only for the purpose of extension of its life beyond the originally recognised useful life. The capital expenditure under Regulation 15(1) can only be incurred after 25 years of the useful life of a generating station, that too only for the purposes of its life extension. The special allowance under Regulation 16 can be opted by a thermal generating station instead of availing R&M under Regulation 15(1). It is clear, therefore, that the Special Allowance under Regulation 16(1) is an alternative to Regulation 15(1), which means that the Special Allowance under Regulation 16(1) can only be incurred after a thermal generating station completes its useful life of 25 years, and during its extended life.

It is true that, by the use of the words *"including renovation and modernisation beyond the useful life of the generating station"*, Regulation 16(1) contemplates not just the R&M expenditure but something more which, as noted hereinabove, is, possibly, also in lieu of Regulation 17, since compensation, in terms of Regulation 17, is not available after a thermal generating station completes its useful life of 25 years. It does appear that the Special Allowance under Regulation 16(1) is intended to cover both renovation and modernisation expenditure under Regulation 15(1), and compensation allowance which was hitherto extended under Regulation 17(1).

Learned Counsel for the Respondents may, therefore, not be justified in their submission that there has been a tremendous hike in Regulation 16 as compared to the compensation allowable under Regulation 17. While both Regulations 16 and 17 are extended on a normative basis, the Special Allowance under Regulation 16 is, possibly, meant to cater not just to the erstwhile compensation allowance under Regulation 17(1), but also to meet the renovation and modernisation expenditure which is otherwise available under Regulation 15(1).

XI. UNJUST ENRICHMENT:

It is submitted, on behalf of the Respondents, that the CERC has allowed the appellant's claim under Regulation 16- Special Allowance, as that would save end consumers from additional burden in the form of ROE and Depreciation component; after living its useful life, a plant is entitled to recover expenses only in the form of O&M expenses & interest on working capital; any other expense can only be allowed under Special Allowance, as that would save end consumers from unnecessary burden of ROE & Depreciation; it would avoid unjust enrichment to the plants, as they are already benefiting from very high ROE granted on an investment which has already provided adequate returns during the useful life of the plant; the appellant had opted for Special Allowance & Compensation Allowance for incurring Expenditure of a capital nature; they cannot, therefore, also claim expenditure of a capital nature under Regulations 14(3) as it will amount to unjust enrichment, and double the burden on the poor end consumers for the same kind of expenditure, once through Special & Compensation Allowance and now through Additional Captial Expenditures under Regulations 14(3).

Black's Law Dictionary, 8th Edition, defines "unjust enrichment" to mean the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected; a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense; area of law dealing with unjustifiable benefits of this kind. **P. Ramanatha Aiyar's, The Major Law Lexicon, 4th Edition, Volume 6,** defines "unjust enrichment" as the circumstances which give rise to the obligation of restitution, ie the receiving and retention of property, money, or benefit which, in justice and equity, belong to another. The doctrine of "unjust enrichment" is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the *doctrine of restitution*. **(Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs, (2005) 3 SCC 738)**

Unjust enrichment has been defined as a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience". Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience". Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. **(Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161; Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943 AC 32 : (1942) 2 All ER 122 (HL); Nelson v. Larholt [(1948) 1 KB 339 : (1947) 2 All ER 751).**

As noted hereinabove, unjust enrichment would arise only when a person seeks to retain a benefit to which he is not entitled to, or if it is contrary to justice or against equity. It is only if either the 2014 Regulations are so interpreted as not to permit a thermal generating station from claiming additional capitalisation under Regulation 14(3), or it is established that the concerned generating station has claimed the benefit of the same capital expenditure twice under different heads, can it then be said that such a generating station has unjustly enriched itself. As noted hereinabove, the CERC is obligated to ensure that the very same capital expenditure, which the Appellant seeks to incur under Regulation 14(3), is not claimed by them under Regulation 16(1) also. While the special allowance under Regulation 16(1) is no doubt extended to a thermal generating station on a normative basis, Regulation 16(3) requires a generating station to maintain a detailed account of even such expenditure. With a view to ensure that the expenditure incurred under Regulation 16(1) is not again claimed under Regulation 14(3), the CERC should, regularly, verify details of the expenditure which a thermal generating station has incurred under Regulation 16(1) also.

XII. REGULATION 27 OF 2014 REGULATIONS:

It is contended, on behalf of the appellant, that reliance placed by the Respondents, on Regulation 27(7), to contend that old power plants, or those who have lived their useful life cannot claim Additional Capitalisation, is misplaced; Regulation 27 of the 2014 Tariff Regulations deals with Depreciation and, ex-facie, has no bearing on Ad-Cap claimed under Regulation 14; Regulation 27 (7) was introduced by the CERC in order to balance the interest of both the generating companies as well as the beneficiaries, and to avoid Tariff Shock during the fag end of the Thermal Power Plant; the CERC, *vide* its Order dated 07.06.2012 in Petition No. 261 of 2009 (*Rihand-I*) at Para 41, has allowed ESP works of Rs 130 Cr in the 23rd year, and has considered 20 years for depreciation of the same to avoid tariff shock and to balance the interest of both the appellant and the beneficiaries; Regulation 27(7) enables generating companies, when assets are created at the fag end of the useful life, to claim depreciation beyond the useful life; and Regulation 27(7) has no co-relation with the Additional capitalisation under Regulation 14.

It is submitted, on behalf of the Respondents, that the Tariff Determination Process envisages that Capital / Additional Capital incurred by a Generating Station is recovered from the date of Commercial Operation up to its 25th year, which is its Useful Life as per the Regulations; Regulation 27 specifies the period of recovery from COD to Useful Life; Regulation 27 specifically provides for the spread of Depreciation to be limited within the Useful Life of 25 years; further, any Depreciation disallowed on account of lower availability of the Generating Station or Generating Unit or Transmission System, as the case may be, shall not be allowed to be recovered at a later stage during the Useful Life and the extended life; the application for incurring expenditure of a capital nature, for extension of the life of the Plant or beyond the useful life of the

Plant, must be made before 5 years of the fag end along with other details such as DPR, Cost Benefit Analysis etc; Generators will not be allowed to incur Additional Capital Expenditure at the fag end, and to incur such Additional Capital Expenditure, the Generators need to get special approval along with DPR, Cost Analysis etc; and, for incurring such heavy expenditure at the fag end, concurrence of the Beneficiaries is required as it will tantamount to extension of the useful life of the Plant.

It is further contended, on behalf of the Respondents, that Regulation 27(7) requires the generating company to submit details of the proposed capital expenditure during the fag of project (5 years before the useful life), along with justification and proposed life extension; based on prudence check of such submissions, the CERC approves depreciation on capital expenditure during the fag end of the project; and a claim for Additional Capitalization must be made five years before the end of the recognized useful life, otherwise the expenditure should be met from special allowance as well as compensation allowance.

(a). DOES REGULATION 27(7) BAR CAPITAL EXPENDITURE BEING INCURRED DURING THE EXTENDED LIFE OF A GENERATING COMPANY:

Regulation 6 relates to tariff determination and, under sub-regulation (1) thereof, the tariff, in respect of the generating station, may be determined for the whole of the generating station or a stage or a generating unit or block thereof. Regulation 6(2) provides that, for the purpose of determining tariff, the capital cost of the project may be broken into stages, blocks, units forming part of the project if required. Regulation 20 relates to the components of a tariff. Regulation 20(1) stipulates that the tariff, for the supply of electricity from a thermal generating station, shall comprise of two parts namely capacity charge (for recovery of annual fixed costs consisting of the components as specified in Regulation 20(1) of the Regulations), and energy charge (for recovery of primary and secondary fuel cost and limestone wherever applicable). Regulation 21 relates to capacity charge. Thereunder capacity charges shall be derived on the basis of Annual Fixed Cost, and the Annual Fixed Cost of a generating station shall consist of the following: (a) Return on equity; (b) Interest on loan capital; (c) Depreciation; (d) Interest on working capital; and (e) Operation and maintenance expenses. Under the proviso thereto, if special allowance, in lieu of R&M, were opted in accordance with Regulation 16 and/or separate compensation allowance in accordance with Regulation 17, wherever applicable, shall be recovered separately and shall not be considered for computation of working capital.

The proviso to Regulation 20(1) makes it clear that where a generating company claims special allowance under Regulation 16 (which is in lieu of Regulation 15, and can therefore be claimed only during the extended life of a generating company) or Regulation 17 (compensation allowance which is available only during the useful life of the generating company), both these allowances would not be considered in the computation of tariff under Regulation 21 for the purpose of interest on working capital.

Regulation 9 relates to capital cost. Regulation 9(1) stipulates that the capital cost, as determined by the Commission after prudence check, shall form the basis of the determination of tariff for existing and new projects. Regulation 9(3) stipulates that the capital cost of an existing project shall include the following: (a) the capital cost admitted by the Commission prior to 01.04.2014 duly trued up by excluding liability, if any, as on 01.04.2014; (b) additional capitalization for the respective year of tariff as determined in accordance with Regulation 14; and (c) expenditure on account of renovation and modernisation as admitted by the Commission in accordance with Regulation 15.

Any claim for additional capitalisation under Regulation 14(3), if admitted by the Commission after prudence check, would be included in the capital cost of the generating company in the determination of its tariff. As a consequent of its inclusion in the capital cost, such additional capitalisation is also subject to determination of capacity charges under Regulation 21. The mode of computation of capacity charges is stipulated in Regulation 30 and, under Regulation 30 (1), the fixed cost of a thermal generating station shall be computed on an annual basis based on norms specified under the 2014 Regulations, and recovered on a monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share/allocation in the capacity of the generating station.

As noted hereinabove, among the components of the annual fixed cost of a generating station is "Depreciation" which is governed by Regulation 27. Regulation 27(1) stipulates that depreciation shall be computed from the date of commercial operation of a generating station or unit thereof. In case of the tariff of all units of the generating station, for which a single tariff needs to be determined, the depreciation shall be computed from the effective date of commercial operation of the generating station taking it into consideration the depreciation of individual units. Under the proviso thereto, the effective date of commercial operation shall be worked out by considering the actual date of commercial operation, and installed capacity of all units of the generating station, for which a single tariff needs to be determined. Regulation 27(2) stipulates that the value base, for the purpose of depreciation, shall be the capital cost of the assets admitted by the Commission and, in the case of multiple units of a generating station, the weighted average life for the generating station shall be applied, and depreciation shall be charged from the first year of commercial operation. Regulation 27(3) stipulates that the salvage value of the assets shall be considered as 10%, and depreciation shall be allowed up to the maximum of 90% of the capital cost of the assets. Regulation 27(5) requires depreciation to be calculated annually based on the straight line method, and at the rates specified in Appendix II to the 2014 Regulations, for the assets of a generating station. Under the proviso thereto, the remaining depreciable value as on 31st March of the year closing, after a period of 12 years from the effective date of commercial operation of the station, shall be spread over the balance useful life of the assets.

Regulation 27(7) stipulates that the generating company shall submit details of the proposed capital expenditure during the fag end of the project (5 years before the useful life) along with justification and proposed life extension, and the Commission, based on prudence check of such submissions, shall approve depreciation on capital expenditure during the fag end of the project.

A reading of the aforesaid clauses of Regulation 27 makes it amply clear that they relate mainly to depreciation during the useful life of the asset ie the first 25 years of the life of a thermal generating station. No specific mode, for computation of depreciation of a thermal generating station during its extended life, has been prescribed. The stipulation in Regulation 27(7), for the generating company to submit details of the proposed capital expenditure during the fag end of the project (within 5 years before the useful life ie before the 20th year of the generating station) along with justification and proposed life extension, is only to enable computation of depreciation for the proposed capital expenditure to be incurred during the remaining 5 years of the useful life of the generating company. It is only if information regarding proposed life extension is furnished, would the CERC be able to determine the period over which depreciation, on the proposed capital expenditure to be incurred during the remaining 5 years of useful life, should be spread over. In other words, the period over which such depreciation can be spread over, would be the remaining five years of useful life plus the extended life determined by the CERC.

While Regulation 27(7) no doubt requires information, regarding the proposed life extension, to be submitted by the 20th year of the useful life of the generating company, it does not provide for computation of depreciation on the additional capital expenditure proposed to be incurred during the extended life of the project, and is confined to computation of depreciation on the capital expenditure incurred (or proposed to be incurred) during the fag end of the project ie in the last five years of its useful life.

The reason for the 2014 Regulations not containing a specific provision in this regard is evident. Firstly, computation of depreciation, during the extended life of a project, would depend upon the period for which the useful life of the generating company is extended. The period of extension, of the useful life of a generating company, is required to be determined by the Commission on a case to case basis. Secondly, the CERC, after prudence check, is required to approve the quantum of additional capital expenditure to be permitted to be incurred under Regulation 14(3), during the extended life of the project, for it is only on the amount so approved can depreciation be computed. Bearing these aspects in mind, the CERC has to decide, on a case to case basis, the extent to which depreciation should be provided, during this extended life of the generating company, on the additional capital expenditure under Regualtion14(3) and renovation and modernisation expenditure under Regulation 15 of the 2014 Regulations.

This can be better explained by way of an illustration. For instance, if the CERC determines that the extended life of a thermal generating company should be say 5 years. It would then be required to exercise its discretion to determine whether the additional capital expenditure, proposed to be incurred under Regulation 14(3), and renovation and modernisation expenditure to be incurred under Regulation 15, should be permitted to be recovered by the generating company, in its entirety, during the extended life of 5 years or whether it should only be permitted to be recovered in part with a view to avoid tariff shock to the consumers since Section 61 (d) of the Electricity Act not only requires the CERC to ensure a reasonable return to the generating company, it also obligates it to protect consumers interest.

Since issues regarding the period for which the life of a thermal generating company should be extended, the additional capital expenditure/renovation and modernisation expenditure which should be allowed to be incurred, and the extent of depreciation to be permitted thereon, are all matters for determination by the CERC, on a case to case basis, the 2014 Tariff Regulations does not contain a specific provision in this regard.

The mere fact that Regulation 27(7) requires the generating company to submit details of the proposed life extension does not mean that no additional capital expenditure can be permitted to be claimed during the extended life of the project in case the generating company fails to provide details, of the extension of its useful life, before the end of the 20th year of its useful life. The details of the proposed capital expenditure and its justification, which a generating company is required to submit under Regulation 27(7), relates only to the fag end of the project ie for the last 5 years of its useful life.

(b). USE OF THE CONJUNCTION "AND" : ITS EFFECT:

In *Stroud's Judicial Dictionary*, 3rd Edn. it is stated at p. 135 that the word "and" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together. (**M. Satyanarayana v. State of Karnataka(1986) 2 SCC 512; A.K. Gopalan v. The State of Madras 1950 SCC 228 ; Ishwar Singh Bindra v. The State of U.P. (1969) 1 SCR 219; Commissioner Central Excise and Customs v. Dujodwala Resins and Terpenes Ltd., 2019 SCC OnLine Utt 577).**

Use of the conjunction *"and"* in Regulation 27(7), between the words *"the generating company shall submit details of the proposed capital expenditure during the fag end of the project (5 years before the useful life) along with justification"* on the one hand, and *"proposed life extension"* on the other, makes it clear that the generating company is required to submit details of the capital expenditure and its justification, for the period which falls during the fag end of the project ie the last 5 years of its useful life. While the generating company is, no doubt, also required to submit details of the proposed life extension, Regulation 27(7) does not require details of the additional capital expenditure, to be incurred during the proposed life extension period, to be provided. This is also clear from the 2nd limb of Regulation 27(7) which only requires the CERC to approve depreciation on the capital expenditure to be incurred during the fag end of the project, and not during the proposed life extension. The submission, urged on behalf of the Respondents, that, in the light of Regulation 27(7), no capital expenditure can be incurred under Regulation 14(3), during the extended life of the project, does not therefore merit acceptance.

XIII. CEA GUIDELINES ON RENOVATION AND MODERNISATION: ITS RELEVANCE:

It is submitted, on behalf of the Respondents, that the CEA Guidelines on Renovation and Modernization, published in October 2009, make it clear that the need for carrying out Renovation and Modernization, stems from complying with environmental norms, and safety requirements**;** most of the heads for which Additional Capitalization has been disallowed, in the present batch of Appeals, relate to compliance of law (Environmental Norms) and safety of the Plant; as these guidelines were in place, much prior to their having elected for Special Allowance in lieu of R & M, the Appellant ought to have considered these guidelines while exercising their option for Special Allowance; and the Appellant cannot now feign ignorance, and try and seek benefit from its own wrong.

The submissions, urged on behalf of the Respondents under this head, do not merit acceptance. It is unnecessary for us to examine the purport of the CEA guidelines on renovation and modernisation, since we have already held that, notwithstanding Special Allowance under Regulation 16(1) having been claimed, a thermal generating station is also entitled to incur additional capitalisation under Regulation 14(3), provided, of course, the claim clearly falls under one or more of the clauses thereunder. As Regulations 14(3) and 16(1) are not in the alternative, and a claim for Special Allowance under Regulation 16(1) does not bar a claim for additional capitalisation under Regulation 14(3), the submission urged on behalf of the Respondents that the Appellant should have considered the CEA guidelines, before claiming Special Allowances under Regulation 16(1), is not tenable.

XIV. STATEMENT OF OBJECTS AND REASONS/EXPLANATORY MEMORANDUM: ITS RELEVANCE AS AN AID TO INTERPRETATION:

Reliance is placed, on behalf of the Respondents, on the Statement of Objects and Reasons to the CERC (Terms and Conditions of Tariff)

Regulations, 2009, and to the Explanatory Memorandum to the Draft Terms and Conditions of Tariff for 2014 – 2019 published on 6th December 2013, to submit that the option of availing a Special Allowance, in lieu of Renovation and Modernization, was available to be exercised by the Thermal Generator after undertaking due diligence of its Plant conditions; the Generator is entitled to a Special Allowance if it so opts, and is required to maintain records of how that Special Allowance is being used; and this Special Allowance will include all R & M Activities that are required to be carried out from time to time.

(a). STATEMENT OF OBJECTS AND REASONS:

The Statement of Objects and Reasons is not admissible for construing a Section in an enactment, far less can it control the actual words used. (***Central Bank of India* v. *Workmen*: AIR 1960 SC 12; Deptt. of Forests v. J.K. Johnson, (2011) 10 SCC 794).** Statement of objects and reasons for introducing a Bill in the Legislature is not admissible as an aid to the construction of the statute as enacted; far less can it control the meaning of the actual words used in the Act. It can only be referred to for the limited purpose of ascertaining the circumstances which actuated the sponsor of the Bill to introduce it and the purpose for doing so. **(A.C. Sharma v. Delhi Admn., (1973) 1 SCC 726).** Where the provisions of the statute or its wordings are ambiguous, the first attempt should be to find meaning, through internal aids, in the statute itself. Failing this, it is open to the court to find meaning, and resolve the ambiguity, by turning to external aids, which include the Statements of Objects and Reasons, as well as parliamentary reports, or debates in Parliament. **(Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1)**

Statements of Objects and Reasons of a Statute may furnish valuable historical material in ascertaining the reasons which induced the

Legislature to enact a Statute, but in interpreting the Statute they must be ignored. **(*The Gujarat University, Ahmedabad* v. *Krishna Ranganath Mudholkar*: AIR 1963 SC 703).** The Statement of Objects and Reasons of a statute may be looked into as an extrinsic aid to find out the legislative intent only when the meaning of the statute by its ordinary language is obscure or ambiguous. But if the words used in a statute are clear and unambiguous then the statute itself declares the intention of the Legislature and in such a case it would not be permissible for a Court to interpret the statute by examining the Statement of Objects and Reasons for the statute in question. **(*S.S. Bola* v. *B.D. Sardana*: (1997) 8 Supreme Court Cases 522).**

Reference to the Statement of Objects and Reasons is for understanding the enactment and the purpose is to ascertain the conditions prevailing at the time the Bill was introduced and the objects sought to be achieved by the proposed amendment. The Statement of Objects and Reasons is not ordinarily used to determine the true meaning of the substantive provisions of the statute. As an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill, ordinarily must be avoided. **(Deptt. of Forests v. J.K. Johnson, (2011) 10 SCC 794).**

(b). REPORTS PRECEDING AN ENACTMENT/EXPLANATORY MEMORANDUM:

Reports and recommendations made by the Parliamentary Committees/Commissions that precede enactment of a statute are not decisive, and a Court is free to arrive at a different conclusion based on its own findings and other evidence produced by the parties. (***State of Mysore* v. *R.V. Bidap*, (1974) 3 SCC 337; *R.S. Nayak* v. *A.R. Antulay*, (1984) 2 SCC 183; *Kalpana Mehta* v. *Union of India*, (2018) 7 SCC 1).**

An explanatory memorandum is usually 'not an accurate guide of the final Act'. (**Francis Bennion's Statutory Interpretation, 1984 edn. at p. 529**; **Shashikant Laxman Kale v. Union of India, (1990) 4 SCC 366).** A phrase used, to describe some provisions in the Bill, in the explanatory memorandum can neither be determinative of, nor can it camouflage the true object of the legislation. (**Shashikant Laxman Kale v. Union of India, (1990) 4 SCC 366).**

(c). NO EXTERNAL AID PERMISSIBLE WHERE STATUTORY LANGUAGE IS CLEAR:

The interpretation and the intent should be gathered from the entirety of the statute and, when the language of the Section is clear and categorical, no external aid is permissible in interpretation of the same. **(State of Maharashtra v. Marwanjee F. Desai, (2002) 2 SCC 318).** When the language of the statutory provision is plain and clear no external aid is required, and the legislative intention has to be gathered from the language employed. (**Deptt. of Forests v. J.K. Johnson, (2011) 10 SCC 794).**

As observed earlier, the golden rule of interpretation of Statutes is to read the words of a statutory provision as they mean ie its literal interpretation. It is only where the words of a statutory regulation are ambiguous, or are capable of more than one meaning, would resort to any other canon of construction be justified. Even in such a situation, the court/tribunal should first resort to internal aids such as a purposive or a harmonious construction of the provisions of the Regulations itself. It is only where internal aids for interpretation of Statutes do not also suffice, can resort be then had to external aids of construction of statutory provisions. While the statement of objects and reasons, and the explanatory memorandum, have been held, in some judgements, not even to fall within the permissible external aids, and as not being capable of being relied upon in the interpretation of statutes, even if we were to proceed on the premise that they constitute external aids, resort to such external aids is unnecessary, as the provisions of the 2014 Regulations, on a literal interpretation thereof, make it clear that a thermal generating station is entitled to claim additional capital expenditure under Regulation 14(3), notwithstanding its having claimed and received Special Allowance under Regulation 16(1), provided it has not claimed the benefit of the same capital expenditure twice ie both under Regulations 14(3) and 16(1).

XV. ARE THE 2009 AND 2014 TARIFF REGULATIONS COMPARABLE:

It is submitted, on behalf of the Respondents, that the CERC (Terms and Conditions of Tariff) Regulation, 2014 (the "2014 Regulations" for short) are in pari materia with the CERC (Terms and Conditions of Tariff) Regulation, 2009 (the "2009 Regulations" for short); in these Appeals, the Appellant has claimed Additional Capitalization; and, in Para 122 of Appeal No. 95 of 2015 dated 15.05.2018, this Tribunal has held that, if the benefit of efficiency improvement does not go to the beneficiaries, the expenditure cannot be capitalized for the purpose of tariff; and most of the claims of additional capital expenditure, raised by the appellant in these batch of appeals, are covered by the earlier Orders of this Tribunal.

It is useful, therefore, to note the judgements relied on behalf of the Respondents in this regard.

(i). CO2 MONITORING SYSTEM:

On the appellant's claim for additional capitalization projected to be incurred for online CO2 Monitoring System, this Tribunal, in its Order in

NTPC Ltd. vs CERC & Ors. (**Appeal no. 44 of 2012 dated 27-01-2014),** observed that they had, in their affidavit filed before the Central Commission, claimed capitalization of expenditure projected to be incurred on CO2 Monitoring System. as a consequence of change in law provided in Regulation 9(2) of the 2009 Tariff Regulations; in the said affidavit dated 8.4.2010 the appellant had given the following justification for expenditure on online CO2 Monitoring System:

> *"As regards expenditure of Rs. 30 lakhs towards online CO2 monitoring system, it is submitted that in order to monitor the combustion quality of fossil fuel in the boiler, this system needs to be installed and is in procurement stage. It will help in optimizing the coal combustion and cutting the CO2 gas emission which is a green house gas. India being a signatory of Kyoto protocol is committed to reduce the emission of green house gases. Therefore, this expenditure has become necessary."*

The Central Commission has given the following findings on the claim of NTPC for CO2 Monitoring System as under:

> *"49. The Petitioner's claim for expenditure of Rs. 30.00 lacs under this head towards on-line CO2 monitoring system in terms of the Environmental consent order of the Ministry of Environment & Forests. Government of India, has been examined in view of the clarification submitted vide affidavit dated 08.04.2010 (as quoted in Paragraph 40 above) and no reference of this work/asset has been found in the said environmental consent order referred to by the Petitioner. Hence, the expenditure of Rs. 30.00 lacs is not allowed for capitalization under this head."*

This Tribunal then held that the Central Commission had rejected the claim for online CO2 Monitoring System as there was no reference of this work/assets in the Environmental consent order referred to by NTPC; the Central Commission had considered the affidavit dated 8.4.2010 filed by NTPC, as also the environmental clearance of the Ministry of Environment & Forests dated 5.2.2009; the claim of NTPC was not covered under any of the provisions of Regulation 9 for additional capitalization; and, therefore, there was no infirmity in the findings of the Central Commission in this regard in the impugned order.

(ii). ELECTRO-STATIC PRECIPITATORS:

The issue which arose for consideration before this Tribunal, in **NTPC vs. CERC & Ors.** (Order in **Appeal No. 61 of 2015 dated 29.04.2016),** was whether the CERC had erred in disallowing additional capital expenditure on Electro-Static Precipitators (ESP) under Regulation 9(2)(ii) of Tariff Regulations, 2009 under the head `Change in Law; the CERC had disallowed the claim on the ground that the same would be covered by the Special Allowance allowed for Renovation and Modernization; the capital expenditure on account of Electro Static Precipitators was claimed by NTPC under Regulaion 9 (2) (ii), and the same was admissible by reason of the fact that such expenditure had become necessary on account of statutory requirements; and such expenditure is admissible independent of the expenses admissible under other provisions of the Tariff Regulation, 2009.

This Tribunal held that the Appellant had not claimed the additional expenditure on ESP in the FY 2013-14; in its Affidavit dated 08.03.2013 the appellant had submitted that the ESP package was awarded to M/s. Hitachi on 01.03.2013 and the erection would continue till the Year 2015-16; the useful life of 25 years of the first unit would expire in the year 2015, and the other unit would expire in the year 2016; and, thus, the Appellant cold have claimed the expenditure on ESP under Regulation, 10 of the 2009 Tariff Regulation, i.e. under Renovation and Modernization of the Thermal Plants. No reasons have been assigned in the said Order as to why this expenditure could not be claimed under Regulation 9 of the 2009 Regulations.

(iii). CAPITAL EXPENDITURE INCURRED ON RAISING OF ASH DYKE:

On the issue of disallowance of capital expenditure incurred on raising of Ash Dyke, this Tribunal, in **NTPC Ltd. vs West Bengal State Electricity Distribution Company Limited and ors.** (Order in **APPEAL NO. 46 OF 2015 Dated: 04th July, 2016),** held that the CERC had disallowed the capital expenditure incurred on raising of Ash Dyke, amounting to Rs. 498.28 lakhs, as against Rs. 966.71 lakhs, on the ground that the said part of the expenditure relating to stage-I of the Farakka Station was covered by Special Allowance provided under Regulation 10(4) of the Tariff Regulations, 2009; the contention of the Appellant was that they had claimed the special allowance in respect of Unit-I & Unit-II of Farakka Station from the date of completion of 25 years of service as provided under Regulation 10(4) of the Tariff Regulations, 2009, which was admitted by the Central Commission, vide its order dated 14.6.2012; hence, it was not now open to the CERC to disallow the said claim of capital expenditure incurred on raising of Ash Dyke; after the useful life of the generating station, the Appellant had opted for special allowance under Regulation 10(4) of Tariff Regulations, 2009, and had been allowed special allowance; admittedly, the useful life of two units of Stage-I had expired during the tariff period, hence, the CERC had rightly disallowed capitalization during 2010-11 having observed that the same could be met from special allowance; the CERC had adopted the view that, since the useful life of Unit-I & II has expired during 2012-13 and 2013-14 respectively during the tariff period, this expenditure could be met from special allowance, which had already been opted and allowed to the Appellant; there was no merit in the contention of the Appellant that the Renovation and Modernization of Unit-I & II were in the range of Rs. 1.20 to 1.35 crores/MW for boiler turbine generator and the special allowance was not sufficient for this purpose; the Central Commission had allowed the special allowance on the basis of details furnished by the Appellant at the time of framing of Regulations; once the norms were fixed for any work in the Regulation, subsequently, actuals cannot be claimed as the entire tariff of Appellant is determined on the basis of normative values; and this issue should be decided against the Appellant.

(iv). INSTALLATION OF INLET AIR COOLING SYSTEM:

In its Order, in **NTPC Ltd. vs Uttar Pradesh Power Corporation Ltd & ors.** (**APPEAL NO. 95 OF 2015 dated 15.05.2018),** this Tribunal held that the impugned Order showed that there was no justification for installation of inlet air cooling system; the order also showed that the Appellant had refused to pass on the benefits of efficiency improvements to the beneficiaries; it was the specific case of the Appellant that passing the benefit to the beneficiaries was not a condition envisaged in Regulation 9(2)(vi) of the Tariff Regulations, 2009; such a contention, if accepted, would allow double benefit to the Appellant; the judgment of this Tribunal dated 08.05.2014, passed in Appeal No. 173 of 2013, was squarely applicable to this case too; the reasoning given was in accordance with the provisions of Regulation 9(2) as the powers under Regulation 9(2) were discretionary powers vested in the Commission; the CERC in its wisdom/discretion, while allowing the additional capitalization, may order that the benefits of the additional capitalization to be passed on to the beneficiaries; in the event of denial by the Appellant, the additional capitalization can be refused at the discretion of the Commission; such approach is based on equity and justice which is also applied in the instant issue by assigning valid and cogent reasons; and they did not find any error or legal infirmity in the Impugned Order.

(v). ISSUE RELATING TO ADDITONAL CAPITALIZATION UNDER 'CHANGE IN LAW'

On the issue relating to additional capitalization under "change in law", this Tribunal, in **NTPC Ltd vs CERC and ors. (Appeal No. 129 of 2012 dated 12.05.2015),** noted that capitalization under Regulation 9(2)(ii) of the Tariff Regulations, 2009 was claimed by the appellant on the aspects of Energy Management Systems, Carbon Dioxide (CO2) Monitoring System, Obsolete Control Systems, ESP Field and Rapper Controllers, Solar Heating and Renovation and Retrofitting of ESP, Ambient Air Quality Monitoring System (AAQMS) Package, Energy Management System Wagon Tippler Package, Opacity Monitoring Equipment and Bio Methanation Plant, Construction of New Canteen Building due to installation of Dry Ash Extraction System, MVW Spray for Augmentation of Fire-fighting, Expenditure on Energy Conservation, Fuel Gas Analyzer, online Power Measurement System, Insert Gas Fire Extinguishing System & Chlorine Leak Detection System by giving details and necessity of each of these facilities which were mandatorily required in different power projects of the appellant-NTPC, but the CERC had disallowed the expenditure on Energy Management Systems on the basis that the benefit of the reduction in auxiliary power consumption was not passed on to the beneficiaries during the period 2009-14, and so the said expenditure should be borne by the NTPC; the Energy Management System had been installed, as per guidelines of the Bureau of Energy Efficiency, to monitor and to optimize auxiliary power consumption; the

Regulations of Central Electricity Authority also made it mandatory for installation of meters, enhanced energy efficiency in energy intensive core sectors was also the policy of the Government of India; and hence the disallowance on this basis was wrong.

This Tribunal observed that the additional capital expenditure, on the above said assets as claimed by the appellant under the said situations, were not covered under the definition of Change in law because the expenditure on the said assets could be claimed by the appellant NTPC only under the change in Law clause when the events are to be dealt with as a result of enactment, promulgation, amendment, modification or repeal of any law or change in the interpretation of any law by a competent court, Tribunal or Indian Governmental Instrumentality or Change in Law by a competent statutory authority in any consent, approval or license available or obtained for the project; the appellant had failed to demonstrate that such events leading to replacement of the said system or addition of the said assets had occurred; the CERC had rightly observed that such expenses were being claimed by NTPC in FY 2013-14 without providing any explanation for the delayed capitalization of the expenditure, and such claim was being made under 'change in law' by the appellant without demonstrating the need for such expenditure under the provisions of any statute; further, under Tariff Regulations, 2009 auxiliary power consumption is determined on the basis of normative value, and any reduction in auxiliary power consumption will benefit the appellant alone; merely because the Bureau of Energy Efficiency had issued guidelines to monitor auxiliary power consumption and the Regulations of the CEA required installation of meters, would not bring it under 'Change in Law'; thus the capitalization in respect of this asset cannot be made for the purpose of tariff; no Regulation of the Tariff Regulations can be read in isolation but the cumulative effect of the whole Regulations, scheme and purpose of the Regulations have to be considered; and the CERC has rightly disallowed the said claims of NTPC after analyzing the cumulative effect of various Regulations of Tariff Regulations, 2009 without leaving any ambiguity.

(vi). ADDITIONAL CAPITALIZATION UNDER REGULATION 9(2)(iii) OF THE TARIFF REGULATIONS, 2009:

In its Order, in **NTPC Ltd vs CERC and ors. (Appeal No. 129 of 2012 dated 12.05.2015),** this Tribunal noted that the appellant had claimed capitalization under Regulation 9(2)(iii) of the Tariff Regulations, 2009 before the CERC during 2009-10, on the ground that the work relating to Ash Pond and Ash Handling System was to augment the dry fly ash extraction and evacuation, stating that the ash pond or ash handling system formed part of the original scope of the work and the execution was started before the cut off date, but the work could be completed and capitalised after the cut off date due to reasons beyond the control of NTPC; even under Tariff Regulations, 2009, the capital expenditure, in the nature of deferred works relating to ash pond or ash handling system forming part of the original scope of works, are to be allowed after the cut-off date subject to prudence check by the Central Commission; and the CERC had wrongly disallowed all the capital expenditure, relating to ash pond and ash handling system, on the ground that the expenditure incurred or projected to be incurred was required to be met from the Special allowance admissible to the generating station towards R&M during life extension of the units/generating station.

This Tribunal expressed its inability to accept the contentions of the appellant that the work relating to ash pond or ash handling system was to augment the dry fly ash extraction and evacuation which formed part of the original scope of work, the execution of which was started before the cut off date, but the work could be completed and capitalized only after the cut off date due to the reasons beyond the control of the appellant; for exercising power under Regulation 9(2)(iii) of the Tariff Regulations, 2009 the capital expenditure incurred or projected to be incurred on deferred works relating to ash pond or ash handling system must relate to the original scope of the work after the cut off date, and only then can the CERC, in its discretion, admit the same subject to prudence check; the CERC had disallowed the said expenditure relating to ash pond or ash handling system on the ground that the said expenditure incurred or projected to be incurred was required to be met from the special allowance admissible to the generating station towards renovation and modernization during life extension of the units/generating station; they were not inclined to accept this contention of the appellant that the CERC had wrongly held that, where the generating station consists of two stages, namely, Stage-I and Stage-II and the ash pond or ash handling system is a common facility for both the stages, Stage-I (600 MW) had completed useful life of 25 years during May, 2010 and accordingly, the Stage-I units were entitled for Special allowance under Regulation 10(4) of the Tariff Regulations, 2009, in lieu of renovation & modernization; the CERC had rightly held that the said capital expenditure was not permissible under Regulation 9(2)(iii) of Tariff Regulations, 2009; the contention of the appellant, that the capital expenditure for ash pond or ash handling system ought not to be disallowed on the ground that they were covered by the special allowance under Regulation 10(4) of the Tariff Regulations, 2009 for reasons that these expenditure of renovation & modernization were not part of the generating station/unit but were independent of the same, was liable to be rejected; as also the contention of the appellant that special allowance towards continuous and progressive maintenance did not include expenditure required for installation of new assets such as ash pond and the associated works.

This Tribunal further held that, as per Regulation 9(2)(iii) of the Tariff Regulations, 2009, no additional capitalization could be granted except the three conditions mentioned therein, and any new work could not be capitalized; the three conditions mentioned in the said provision were firstly, the liability to meet the award of arbitration or for compliance of the order or decree of a Court, secondly change in law and thirdly deferred works relating to ash pond or ash handling system in the original scope of the work; they were upholding the view of the CERC that the expenditure incurred by the appellant on ash pond or ash handling system could be met by the special allowance under Regulation 10(4) of the Tariff Regulations, 2009; if the appellant finds that the special allowance is inadequate, in that case, the appellant is free to challenge the said Regulation in the competent Court or Writ Court, but during the existence of the said Regulation 9(2)(iii) of Tariff Regulations, 2009, the said claim relating to ash pond or ash handling system cannot be allowed under deferred works in the original scope of works.

This Tribunal also held that under Regulation 10 of Tariff Regulations, 2009, dealing with Renovation & Modernization, an option was granted to the generating company either to claim expenditure incurred on renovation & modernization or to opt alternatively for special allowance under Regulation 10(4) of the Tariff Regulations, 2009 to meet the expenditure including on renovation & modernization; once the appellant has exercised its option to claim special allowance, it cannot then be allowed to claim the capital expenditure incurred or projected to be incurred on deferred works relating to ash pond or ash handling system in the original scope of work under Regulation 9(2)(iii) of the Tariff Regulations, 2009; there was no provision for renovation and modernization before completion of the useful life of the generating station in the Tariff Regulations, 2009; and expenses, if any, of such nature could be met from the compensation allowance under Regulation 19 (e) of the Tariff Regulations, 2009.

The Order of this Tribunal, in **NTPC Ltd. vs CERC & Ors.** (**Appeal No. 44 of 2012 dated 27-01-2014),** related to a claim towards additional capital expenditure on online CO2 Monitoring System, and it was held that the said claim was not covered under any of the provisions of Regulation 9 of the 2009 Regulations for additional capitalization.

The Order of this Tribunal, in **NTPC vs. CERC & Ors.** (**Appeal No. 61 of 2015 dated 29.04.2016),** related to a claim for additional capital expenditure on Electro Static Precipitators (ESP) under Regulation 9(2)(ii) of Tariff Regulations, 2009 under the head `Change in Law; and it was held that the Appellant could have claimed this expenditure under Regulation 10 of the 2009 Tariff Regulations i.e. under Renovation and Modernization of Thermal Plants.

The Order of this Tribunal, in **NTPC Ltd. vs West Bengal State Electricity Distribution Company Limited and ors.** (**APPEAL NO. 46 OF 2015 Dated: 04th July, 2016),** related to the capital expenditure incurred on raising of Ash Dyke, and it was held that the Appellant had opted for special allowance under Regulation 10(4) of Tariff Regulations, 2009, and had been allowed special allowance, after the useful life of the generating station; and this expenditure could be met from the special allowance.

The Order of this Tribunal, in **NTPC Ltd. vs Uttar Pradesh Power Corporation Ltd & ors.** (**APPEAL NO. 95 OF 2015 dated 15.05.2018),** related to installation of inlet air cooling system. This Tribunal held that its earlier judgement in Appeal No. 173 of 2013 dated 08.05.2014 was squarely applicable to this case, and the reasoning given therein was in accordance with the provisions of Regulation 9(2) of the 2009 Regulations.

The Order of this Tribunal, in **NTPC Ltd vs CERC and ors. (Appeal No. 129 of 2012 dated 12.05.2015),** related to claims on Energy Management Systems, Carbon Di Oxide (CO2) Monitoring System, Obsolete Control Systems, ESP Field and Rapper Controllers, Solar Heating and Renovation and Retrofitting of ESP, Ambient Air Quality Monitoring System (AAQMS) Package, Energy Management System Wagon Tippler Package, Opacity Monitoring Equipment and Bio Methanation Plant, Construction of New Canteen Building due to Installation of Dry Ash Extraction System, MVW Spray for Augmentation of Fire-fighting, Expenditure on Energy Conservation, Fuel Gas Analyzer, online Power Measurement System, Insert Gas Fire Extinguishing System & Chlorine Leak Detection System under Regulation 9(2)(ii) of the Tariff Regulations, 2009. This Tribunal held that the additional capital expenditure, on the above said assets, were not covered under the definition of Change in law

The Order of this Tribunal, in **NTPC Ltd vs CERC and ors. (Appeal No. 129 of 2012 dated 12.05.2015),** related to works of Ash Pond and Ash Handling System to augment the dry fly ash extraction and evacuation. This Tribunal was of the view that the CERC had rightly held that the said capital expenditure was not permissible under Regulation 9(2)(iii) of Tariff Regulations, 2009; and the said expenditure could be met by the special allowance under Regulation 10(4) of the Tariff Regulations, 2009.

All the aforesaid judgements under this head dealt with the scope and purport of Regulation 9 of the 2009 Regulations. To understand why the judgements under the 2009 Regulations may have no application, while interpreting the relevant provisions of the 2014 Regulations, it is useful to take note of the relevant provisions of the 2009 Regulations. The CERC Terms and Conditions of Tariff Regulation, 2009 ("the 2009 Regulations" for short) came into force on 01.04.2009 and remained in force, for a period of 5 years from its commencement, up to 31.03.2014.

Regulation 9 of the 2009 Regulation related to additional capitalisation. Regulation 9(2) related to capital expenditure incurred or projected to be incurred, on the counts mentioned thereunder, after the cut of date. The CERC, in its discretion, could admit such capital expenditure subject to prudence check. Clauses (i) to (ix) thereunder were matters with respect to which capital expenditure, incurred after the cut-off date, could be admitted by the CERC. Regulation 9(2) of the 2009 Regulation contained only one proviso. The said proviso stipulated that, in respect of sub-clauses (iv) and (v), any expenditure on acquiring minor items or assets like tools and tackles, furniture, air-conditioners, voltage stabilizers, refrigerators, coolers, fans, washing machines, heat convectors, mattresses, carpets etc, bought after the cut-off date, shall not be considered for additional capitalization for determination of tariff with effect from 01.04.2009.

Unlike Regulation 9(2) of the 2009 Regulations, Regulation 14(3) of the 2014 Regulations additionally uses the words "*in respect of existing generation station*" and "*or projected to be incurred*", making it clear that the additional capital expenditure incurred or proposed to be incurred is with respect to an existing generation station. Similarly, Regulation 14(3)(ii) of the 2014 Regulations contains the additional words "*or compliance of any existing law*" which was not provided for in Regulation 9(2)(ii) of the 2009 Regulations. While Regulation 9(2)(iii) of the 2009 Regulations is in pari-materia with Regulation 14(3)(iv) of the 2014 Regulations, the latter Regulations contains a new sub-clause (iii) which relates to "*Any expenses to be incurred on account of need for higher* *security and safety of the plant as advised or directed by appropriate Government Agencies or statutory authorities responsible for national security/internal security*".

The proviso to Regulation 9(2) of the 2009 Regulation is similar to the first proviso to Regulation 14(3) of the 2014 Regulations. Unlike Regulation 9(2) of the 2009 Regulations which had only one proviso, Regulation 14(3) of the 2014 Regulations has three. As noted hereinabove, a conjoint reading of the additional new provisos to Regulation 14(3) shows that additional capital expenditure, under Regulation 14(3) of the 2014 Regulations, can be claimed even during the extended life of a thermal generating company. Since there were no provisos, similar to that of the additional provisos to Regulation 14(3) of the 2014 Regulations, in Regulation 9(2) of 2009 Regulations, reliance placed on the judgement of this Tribunal, in **NTPC Ltd vs CERC & others (Order in Appeal No.129 of 2012 & batch dated 12.05.2015)**, wherein the scope and ambit of Regulation 9(2) of the 2009 Regulations was considered, is of no avail.

Regulation 10(1) of the 2009 Regulations related to Renovation & Modernisation, and is similar to Regulation 15 of the 2014 Regulations. The first proviso to Regulation 10(1) of the 2009 Regulations, though not identical, is similar to Regulation 16 of the 2014 Regulations. Regulation 10 of the 2009 Regulation is now largely covered by Regulations 15 and 16 of the 2014 Regulations.

As there has been a material change from the 2009 Regulations in the 2014 Regulations, the aforesaid judgements may have no application in the changed context where the 2014 Regulations are alone applicable during the tariff period 2014-2019. No reliance can, therefore, be placed on judgements interpreting the 2009 Regulations, while construing the provisions under the 2014 Regulations.

XVI. CONTRARY VIEWS EXPRESSED IN TWO JUDGEMENTS OF THIS TRIBUNAL: SHOULD A REFERENCE BE MADE TO A LARGER BENCH?

It is contended, on behalf of the appellant, that the principal issue in the present batch of Appeals is the applicability of Regulation 14 *viz-a-viz* Regulation 16 of the 2014 Tariff Regulations; the Impugned Orders seek to deny the appellant its legitimate claims (Claimed under Regulation 14 (3)) solely on the ground that they are entitled to Special Allowance (Regulation 16); this issue is squarely covered by the Judgment of this Tribunal in ***'NTPC Limited v. CERC & Ors.'(***Order in Appeal No. 25 of 2017 & batch dated 01.12.2022) wherein it was held that there was no correlation between Regulations 14 and 16 of the 2014 Tariff Regulations, and denying the legitimate claim of the appellant on this score was unjust and unreasonable; Regulation 14 of the 2014 Tariff Regulations provides for Additional Capitalization beyond the original scope of work, if the said expenditure falls within the scope of Regulation 14(3); and the issues in the present Appeals now stand covered by the Judgement of this Tribunal in ***'NTPC Limited v. CERC & Ors.'(***Order in Appeal No. 25 of 2017 & batch dated 01.12.2022).

It is further contended, on behalf of the appellant, that the judgement in Appeal No. 129 of 2012 was in relation to the 2009 Tariff Regulations; insertion of 3 provisos in Regulation 14(3) has made the 2014 Tariff Regulations distinct from the 2009 Tariff Regulations; by inserting the 3rd Proviso (*which is the exception to the rule*), the CERC has clearly specified that only if an expense is claimed under R&M, is it barred under Regulation 14 (3); the proviso clearly indicates that the 'only exception' to 14(3) is a 'Claim of R&M'; Regulation 14(3) is materially distinct from

Regulation 9(2) of the 2009 Tariff Regulations; and the subject Judgment is not applicable to the present dispute. Reliance is placed by the learned Counsel, on **‘*Haryana Financial Corporation & Anr. v. Jagdamba Oil Mills & Anr’*. (2002) 3 SCC 496,** to contend that Courts should not rely on Judgments without taking into consideration the facts and circumstances of the case to be adjudicated, and a change in the facts of two cases would require the matter to be considered afresh.

It is submitted, on behalf of the Respondents, that, in its Order in Appeal No. 129 of 2012 dated 12.05.2015, this Tribunal has elaborately discussed and settled the legal position in detail on the inter-play between Regulation 14(3) proviso 3, Regulation 15 and Regulation 16 read with Regulations 17, 29(7) and the proviso to Regulation 29 of the CERC Tariff Regulations, 2014 which are similar to the CERC Tariff Regulations, 2009; in the said Order, this Tribunal held that, if Generators have opted for Special and Compensation Allowance in the place of O&M, R&M Expenditure of Capital Nature, for extension of the life of the Plant or beyond the useful life of the plant, generators shall not be eligible to claim R&M, O&M or Additional Capital Expenditure as mentioned in Regulations 14(3); subsequently, by another Order in Appeal No. 25 of 2017 dated 01.12.2022, this Tribunal has taken a contrary view, ignoring the law laid down by this Tribunal in its earlier Order in Appeal No. 129 of 2012 dated 12.05.2022, and without doubting the correctness of said Order; a co-ordinate Bench cannot ignore or hold as per-incuriam the law laid down by another co-ordinate bench; and, instead, they should have referred the matter for hearing before a larger bench.

Reliance is placed in this regard, on the Order of this Tribunal, in Appeal No. 188 of 2022 dated 23.02.2023, to submit that, in case of doubt, all that the Bench of a co-equal quorum can do is to place the matter for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration; and as, in the present Case, there are two Judgments of co-ordinate strength, i.e. Order in Appeal No. 129 of 2012 dated 12.05.2015, and Order in Appeal No. 25 of 2017 dated 01.12.2022, taking two contrary views, this Tribunal may not accept the views / law laid down in one Judgment while ignoring the law laid down in the other Judgment of co-equal strength of the same Tribunal; and the questions of law, arising for consideration herein, be referred to a larger bench for its decision.

(i). WHEN SHOULD A REFERENCE BE MADE TO A LARGER BENCH:

The statement of law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. (**Union of India v. Raghubir Singh, (1989) 2 SCC 754; North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7**). A Division Bench must ordinarily respect another Divisional Bench of co - ordinate jurisdiction but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail. **(CIT V. M/s. B.R. Constructions, Hyderabad, 1992 SCC OnLine AP 121 (FB)).** When a Bench of co-equal strength expresses an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, the matter ought to be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law, the correctness of which is doubted. (**Union of India v. Raghubir Singh (Dead) By Lrs (1989) 2 SCC 754; Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673; North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7).**

The earlier judgment may seem to be not correct, yet it binds the later Bench of co-ordinate jurisdiction. The easy course of saying that the earlier decision was rendered *per incuriam* is not permissible, and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that the earlier decision is not correct on merits. [**State of Bihar v. Kalika Kuer: (2003) 5 SCC 448**). When a bench of co-ordinate jurisdiction disagrees with another bench of coordinate jurisdiction, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety, forms the basis of judicial procedure and it must be respected at all costs. [**Vijay Laxmi Sadho (Dr) v. Jagdish: (2001) 2 SCC 247)**.

In examining whether or not the subsequent bench of this Tribunal had declared the order passed by the earlier bench per incuriam, it must be borne in mind that a conclusion, without reference to the relevant provision of law, is weaker than even casual observations. (**Synthetics and Chemicals Ltd: (1991) 4 SCC 139**). The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority'. (***Young* v. *Bristol Aeroplane Co. Ltd:* (1944) 2 ALL ER 293)**. The Latin expression "**per incuriam**" means through inadvertence. A decision can be said generally to be given per incuriam when the Court has acted in ignorance of a binding precedent (***Punjab Land Development and Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court, ChandigarhI:* (1990) 3 SCC 682).**

"*Per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that, in such cases, some part of the decision or some step in the reasoning on which it is based, is found, on that account, to be demonstrably wrong. (***Morelle*** **v.** ***Wakeling*****: (1955) 1 ALL ER 708;** ***State of Orissa*** **v.** ***Titaghur Paper Mills Co. Ltd.*****: (1985) Supp SCC 280;** ***A.R. Antulay*** **v.** ***R.S. Nayak*****: (1988) 2 SCC 602**). If a decision has been given *per incuriam* the Court can ignore it. A decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. (***Municipal Corporation of Delhi*** **v.** ***Gurnam Kaur*****: (1989) 1 SCC 101).** A precedent ceases to be a binding precedent when it is rendered per incuriam. **(B.R. Constructions: (1993) 1 APLJ 63)**.

While it is true that a subsequent Division Bench cannot ignore an earlier judgment on the ground that it was rendered *per incuriam* **(Kanwar Amrinder Singh v. High Court of Uttarakhand, 2018 SCC OnLine Utt 1026),** and the only course open for it, in such cases, is to make a reference to a larger bench, the fact remains that the subsequent Order of this Tribunal, in Appeal No.25 of 2017 dated 01.12.2022, not only took note of the earlier Order in Appeal No.129 of 2012 dated 12.05.2015, but did not also hold that the earlier Order was a decision given in ignorance or forgetfulness of some inconsistent statutory provision or of a binding authority, or that the earlier decision was given per incuriam. The earlier decision was distinguished on the ground that it was given on a construction of the then prevailing 2009 Tariff Regulations, while the enquiry before the subsequent Division Bench related to the interpretation of the 2014 Tariff Regulations.

(ii). THE TWO JUDGEMENTS OF THIS TRIBUNAL SAID TO BE IN CONFLICT WITH EACH OTHER:

Let us now consider whether the subsequent Bench of this Tribunal was justified in taking such a view.

In ***'NTPC Limited v. CERC & Ors.'(***Order in Appeal No. 25 of 2017 & batch dated 01.12.2022), this Tribunal observed:-

"72. It cannot be disputed that the Special allowance is a pre-emptive right of the Appellant to be obligatorily allowed for any of its generating unit which has been under commercial operation for over 25 years, whereas Regulation 14 is a provision for seeking expenditure which may be incurred by any 'existing generating station' during the course of its operation, therefore, any co-relation sought to be established by the Central Commission between Regulation 16 and Regulation 14 to deny legitimate expenditure to the Appellant is unjust and unreasonable.
73. On the contrary, the arguments of Respondents were relied upon the Judgement dated 12.05.2015 passed by this Tribunal in Appeal No. 129 of 2012, wherein similar issues were adjudicated, we note here that the said Judgment does not apply to the merits and the facts of the case as in the said Appeal, the Appellant had challenged various Orders passed by the Central Commission disallowing the Additional Capital Expenditure incurred by the Appellant on the premise that the Appellant was availing Special Allowance as per the Regulation 10(4) of the Tariff Regulations, 2009."

It is clear, from the afore-extracted portion, that the Judgement of this Tribunal in ***'NTPC Ltd vs CERC & Ors',*** (Order in Appeal No. 129 of 2012 dated 12.05.2015), was considered by this Tribunal, in ***'NTPC Limited v. CERC & Ors.'*** **(**Order in Appeal No. 25 of 2017 & batch dated 01.12.2022), and was distinguished holding that it did not apply to cases pertaining to the 2014 Tariff Regulations, which are the Regulations under consideration in the present batch of Appeals also. The correctness of the earlier judgement was neither doubted by this Tribunal, in its Judgement in Appeal No. 25 of 2017 & batch dated 01.12.2022, nor was it said to have been rendered per incuriam. On the other hand, the earlier judgement, rendered in the context of the 2009 Regulations, was held inapplicable in the changed context of the 2014 Regulations.

In considering the question whether this Tribunal, while passing the judgement in ***'NTPC Limited v. CERC & Ors.' (***Order in Appeal No. 25 of 2017 & batch dated 01.12.2022), was justified in holding that its earlier judgement, in Appeal No.129 of 2012 dated 12.05.2015, was inapplicable in the changed circumstances, it is necessary to, firstly, take note of the contents of the earlier judgement.

The appeal, in **NTPC Ltd vs CERC & Others (Appeal No. 129 of 2012 dated 12.05.2015),** was filed by the appellant (NTPC Limited) against the order passed by the CERC dated 07.05.2012 determining the tariff applicable for generation and supply of electricity relating to Ramagundam Super Thermal Power Station, Stage III (500 MW), for the period from 01.04.2009 to 31.03.2014, in terms of the CERC (Terms & Conditions of Tariff), Regulations 2009 (hereinafter referred to as the '2009Tariff Regulations'). By the said order, the CERC disallowed the claims of the appellant-NTPC regarding additional capital expenditure on the works i.e. Township Building and Ash-Silo 2, execution initiated before the cut off date as pre-defined in Regulation 3(11) of the 2009 Tariff Regulations, but could be completed and capitalised subsequently; additional capital expenditure for the period 01.04.2009 to 31.03.2014 involving activities which formed part of the original scope of the work including expenditure on BHEL Main Plant Turnkey work and construction of railway siding and locos. and additional capital expenditure to be incurred from time to time towards replacement/refurbishment of old assets, which capital expenditure is necessary for the efficient and effective operation of the generating stations.

Relying on its earlier Order in **NTPC vs. Central Electricity Regulatory Commission &Ors., (judgment in Appeal No. 44 of 2012 dated 27.1.2014),** this Tribunal, in its Order in **NTPC Ltd vs CERC & Others (Appeal No. 129 of 2012 dated 12.05.2015),** observed that the additional capital expenditure claimed by the appellant was under "Change in Law" as provided under Regulations 9(2) and 19(e) of the 2009 Tariff Regulations; the appellant had contended that these two Regulations were independent; the capital expenditure was allowable under the last proviso to Regulation 7 of the Tariff Regulations, 2009; the balance works were covered under the original scope of the work, and the CERC had not considered the entire amount as per Regulation 18 read with Regulation 19 of the 2009 Tariff Regulations for deriving permissible interest on working capital; and the CERC had erred in holding that no additional capitalization was to be allowed except those covered under Regulation 9 of the 2009 Tariff Regulations without considering the implications of the last proviso to Regulation 7 read with Regulation 3(8) of the 2009 Tariff Regulations, in the case of an existing generating station.

This Tribunal further held that expenditure on the said assets could be claimed by the appellant NTPC only under the Change in Law clause, when the events were to be dealt with as a result of enactment, promulgation, amendment, modification or repeal of any law or change in the interpretation of any law by a competent court, Tribunal or Indian Governmental Instrumentality, or a Change in Law by a competent statutory authority, in any consent, approval or license available or obtained for the project; the appellant had failed to demonstrate that such events, leading to replacement of the said system or addition of the said assets, had occurred; the CERC had rightly observed that such expenses were being claimed by NTPC in FY 2013-14 without providing any explanation for the delayed capitalization of expenditure, and such claim was being made under 'change in law' by the appellant without demonstrating the need for such expenditure under the provisions of any statute; under the 2009 Tariff Regulations, auxiliary power consumption was determined on the basis of normative value, and any reduction in auxiliary power consumption would benefit the appellant alone; merely because the Bureau of Energy Efficiency had issued guidelines to monitor auxiliary power consumption, and the Regulations of the CEA required meters to be installed, would not bring it under 'Change in Law'; no Regulation of the Tariff Regulations could be read in isolation; and the cumulative effect of the whole Regulations, scheme and purpose of the Regulations, should be considered.

This Tribunal expressed its inability to accept the contentions of the appellant that the work relating to ash pond or ash handling system was to augment dry fly ash extraction and evacuation which formed part of the original scope of the work, the execution of which was started before the cut off date, but the work could be completed and capitalized only after the cut off date due to reasons beyond their control; for exercising power under Regulation 9(2)(iii) of the 2009 Tariff Regulations, the capital expenditure incurred or projected to be incurred on deferred works relating to ash pond or ash handling system must relate to the original scope of the work after the cut off date, and only then the CERC may, in its discretion, admit the same, subject to prudence check; the said expenditure relating to ash pond or ash handling system was disallowed on the ground that it was required to be met from the special allowance admissible to generating stations towards renovation and modernization during life extension of the units/generating station; they were rejecting this contention of the appellant, that the capital expenditure for ash pond or ash handling system ought not to be disallowed on the ground that they are covered by the special allowance under Regulation 10(4) of the 2009 Tariff Regulations, for the reason that the expenditure of renovation & modernization were not part of the generating station/unit but were independent of the same; they could not also accept the contention that special allowance, towards continuous and progressive maintenance, did not include expenditure required for installation of new assets such as ash pond and associated works; as per Regulation 9(2)(iii) of the 2009 Tariff Regulations, no additional capitalization can be granted except under the three conditions mentioned therein, and any new work cannot be capitalized; the three conditions mentioned in the said provision were firstly the liability to meet the award of arbitration or for compliance of the order or decree of a Court, secondly change in law and thirdly deferred works relating to ash pond or ash handling system in the original scope of work; the CERC had rightly held that the expenditure, incurred by the appellant on ash pond or ash handling system, could be met by special allowance under Regulation 10(4) of the 2009 Tariff Regulations; under Regulation 10 of the 2009 Tariff Regulations, dealing with Renovation & Modernization, an option was granted to the generating company either to claim expenditure incurred on renovation & modernization or to opt alternatively for special allowance under Regulation 10(4) of the 2009 Tariff Regulations, to meet the expenditure including on renovation & modernization; once the appellant had exercised its option to claim special allowance, it could not then be allowed to claim capital expenditure incurred or projected to be incurred on deferred works relating to ash pond or ash handling system in the original scope of work under Regulation 9(2)(iii) of the 2009 Tariff Regulations; there was no provision for renovation and modernization before completion of the useful life of the generating station in the 2009 Tariff Regulations; and expenses, if any, of such nature could be met from the compensation allowance under Regulation 19(e) of the 2009 Tariff Regulations.

This Tribunal also opined that Regulation 9(2)(vii) of the 2009 Tariff Regulations, showed that the capital expenditure, incurred or projected to be incurred, may be admitted by the CERC, in its discretion subject to prudence check, if the capital expenditure was found justified after prudence check necessitated on account of modifications required or done in fuel receipt system arising due to non-materialization of fuel coal linkage as a result of circumstances not within the control of the generating station.

In **NTPC vs. Central Electricity Regulatory Commission &Ors., (judgment in Appeal No. 44 of 2012 dated 27.1.2014),** this Tribunal, while interpreting the 2009 Tariff Regulations, observed that Regulation 9 was a substantive Regulation for additional capitalization both for the existing projects and also for new projects; regarding capital cost, Regulation 7 covered both existing as well as new power projects; Regulation 7(1) stipulated that the capital cost of a project would include expenditure incurred or projected to be incurred up to the COD, capitalized initial spares subject to the specified ceiling and additional capital expenditure determined under Regulation 9; this would apply to existing projects which achieved COD before 1.4.2009, and new projects which attained COD on or after 1.4.2009; Regulation 7(2) also applied to both existing and new projects; the 1st and 2nd proviso to Regulation 7(2) dealt with prudence check of capital cost; the 7th proviso dealt with the ceiling of determination of tariff on the basis of provision in power purchase agreement or transmission service agreement; the last proviso only indicated that, in case of existing projects, the capital cost admitted by the CERC prior to 1.4.2009, duly trued up by excluding un-discharged liabilities, and the additional capital expenditure projected to be incurred for the respective year of the tariff period 2009-14, as may be admitted by the Commission, shall form the basis for determination of tariff; the last proviso did not say that any additional capital expenditure, incurred or projected to be incurred by the generating company in the existing power stations for successful and efficient plant operation, could be permitted;

the capital cost, as defined in Regulation 7(1), did not include additional capital expenditure for existing projects as determined under the last proviso to Regulation 7 (2); the definition of capital cost only included capital cost up to the COD as admitted by the CERC, capitalized initial spares and additional capital expenditure determined under Regulation 9; and, thus, additional capitalization, even in case of an existing power station, could be considered by the CERC only as per the provisions of Regulation 9.

This Tribunal found no merit in the contention that additional capitalization had to be allowed for existing power stations as per the last proviso to Regulation 7(2), and Regulation 9 regarding additional capitalization only pertained to new power projects and did not deal with existing projects except to the limited extent provided in Regulation 9(2). This Tribunal was of the view that additional capitalization, in the case of existing power projects whose cut-off date was achieved after 1.4.2009, and new power projects within the original scope of the work, had to be admitted by the CERC subject to prudence check under Regulation 9(1); similarly capital expenditure, after the cut-off date for both existing power stations and new projects, had to be decided by the CERC according to Regulation 9(2); there was nothing in Regulations 7 & 9 which indicated that Regulation 9 was generally applicable only to new projects; and the last proviso to Regulation 7(2) would be applicable to existing projects for deciding additional capitalization.

This Tribunal expressed its inability to accept the contention that Regulation 9 did not specify that, besides Regulation 9(1) and (2), no other additional capitalization shall be admissible or that, even in terms of Regulation 5 and 6, there was no limitation of additional capitalization being limited only to Regulation 9 and not covering any other aspect, as Regulation 9 was a substantive provision for additional capitalization;

Regulation 7(1) clearly indicated that the capital cost would include the capital expenditure incurred or projected to be incurred up to the CoD, capitalized initial spares subject to the specified ceiling and additional capital expenditure determined under Regulation 9; there was no other component of additional capitalization, other than that provided for in Regulation 9, which had to be included in the capital cost as per Regulation 7(1); the explanation given in the Statement of Reasons for the 2009 Tariff Regulations, and the Statement of Reasons for amendment dated 21.6.2011, clearly indicated that the CERC had not agreed to provide for additional capital expenditure on new works not within the original scope and expenditure on minor assets, but instead provided for compensation allowance under Regulation 19(e); Regulation 5 and 6 provided for an application to be made by the generating company for determination of tariff, including the claim for additional capital expenditure and truing up of capital expenditure including the additional capital expenditure up to 31.3.2014 in the next tariff period; these Regulations did not provide for how additional capitalization would be allowed; and how additional capitalization had to be admitted by the CERC was specified only under Regulation 9.

This Tribunal also held that sub-clause (a) of Regulation 19 specified the normative O&M expenses for coal based generating stations given in terms of Rs. lakh/MW; the norms for O&M expenses were not based on a percentage of the capital cost; sub-clause (b) of Regulation 19 provided for O&M expenses allowed for certain old thermal power projects of NTPC and DVC; the compensation allowance, provided in Regulation 19(e), was to meet the expenses on new assets of a capital nature; and, therefore, there was no merit in the contention of NTPC for inclusion of compensation allowance in normative O&M expenses for computing the working capital requirement.

In its judgment, in **NTPC Limited Vs. Central Electricity Regulatory Commission & Ors (Appeal No. 188 of 2013 dated 11th April 2014),** this Tribunal affirmed the view expressed by it in its earlier judgment in **NTPC vs. Central Electricity Regulatory Commission & Ors** (Appeal No. 44 of 2012 dated 27.01.2014), regarding additional capitalization.

Since several provisions of the 2014 Regulations, including Regulation 14(3) and its provisos, have undergone a substantial change from the earlier 2009 Regulations, the judgement of this Tribunal, in **NTPC Ltd vs CERC & others (Order in Appeal No.129 of 2012 & batch dated 12.05.2015),** which is based on the interpretation placed on the provisions of the 2009 Regulations, would not constitute a precedent binding on the subsequent Bench which had, in passing the judgement in **NTPC Ltd vs Chairperson CERC & others (Order in Appeal No. 25 of 2017 dated 01.12.2022)**, interpreted the 2014 Regulations.

(iii). JUDGEMENT RELIED ON BEHALF OF THE APPELLANT:

In **'*Haryana Financial Corporation & Anr. v. Jagdamba Oil Mills & Anr*'. (2002) 3 SCC 496,** the Supreme Court observed:-

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define*. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton'z. (at p. 761) Lord MacDermot observed : (All ER p. 14C-D)*

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

….

***21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper…………*."**

[Emphasis Supplied]

(iv). A JUDGMENT IS ONLY AN AUTHORITY FOR WHAT IT DECIDES:

A decision of a court (or Tribunal) is only an authority for what it decides and not what can logically be deduced therefrom. It cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. (**Quinn v. Leathern, [1901] AC 495; State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647; Delhi Administration (NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; Dr. Nalini Mahajan v. Director of Income-tax (Investigation), [2002] 257 ITR 123 Delhi) and Bhavnagar University v. Palitana Sugar Mill P. Ltd., (2003) 2 SCC 111; B.F. Ditia v. Appropriate Authority, Income-Tax Department, 2008 SCC OnLine AP 904).** A word here or a word there should not be made the basis for inferring inconsistency or conflict of opinion. Law does not develop in a casual manner. It develops by conscious, considered steps. **(SKCC Bank Limited v. N Seetharama Raju, 1990 SCC OnLine AP 32).**

Observations of Courts are neither to be read as Euclid's theorems nor as provisions of a statute, and that too taken out of their context.

(**Amar Nath Om Prakash v. State of Punjab(1985) 1 SCC 345; CCE v. Alnoori Tobacco Products: (2004) 6 SCC 186; London Graving Dock Co. Ltd. v. Horton; 1951 AC 737; Home Office v. Dorset Yacht Co. (1970) 2 ALL.ER 294; Shepherd Homes Ltd. v. Sandham: 1971 (1) WLR 1062; British Railways Board v. Herrington 1972 (2) WLR 537**). What is of the essence in a decision is its ratio and not every observation found therein. It is the rule deducible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. (**Union of India v. Dhanwanti Devi: (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas: (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay: (2005) 6 SCC 404; Girnar Traders v. State of Maharashtra(2007) 7 SCC 555; ADM,Jabalpur v. Shivakant Shukla: (1976) 2 SCC 521; Quinn v. Leathem: 1901 AC 495 : (1900-03) All ER Rep. 1 (HL); State of Orissa v. Sudhansu Sekhar Misra: (AIR 1968 SC 647; T. Sharath v. Govt. of A.P., 2013 SCC OnLine AP 324).**

It is not everything said by a Judge, while giving judgment, that constitutes a precedent. The only thing in a Judge's decision which is binding is the principle upon which the case is decided. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (**Union of India v. Dhanwanti Devi (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra AIR 1968 SC 647; Quinn v. Leathem (1901) AC 495; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447).** A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case, or is put in issue, would constitute a precedent. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. (**Union of India v. Dhanwanti Devi (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas (2006) 1 SCC 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra AIR 1968 SC 647; Quinn v. Leathem (1901) AC 495; Rachakonda Nagaiah v. Govt. of A.P., 2012 SCC OnLine AP 447).**

Every judgment must be read as applicable to the particular facts proved, or assume to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The case cannot be quoted for a preposition that may seem to follow logically from it. (**State of Orissa v. Sudhansu Sekhar Misra [AIR 1968 SC 647] : Quinn v. Loathem (1901) A.C. 495; Parshuram v. State of Uttarakhand, 2019 SCC OnLine Utt 1866).** What is binding is the ratio of the decision, and not any finding of fact. It is the principle found upon a reading of a judgment as a whole, in the light of the questions before the Court, that forms the ratio and not any particular word or sentence. (**Director of Settlements, A.P. v. M.R. Apparao (2002) 4 SCC 638)**.

An order of a court (or Tribunal) must be construed having regard to its text and context and, for this purpose, the judgment should be read in its entirety. The factual matrix, the issues involved and the context in which the observations were made are relevant. Observations in a judgment should not be read in isolation or out of context. A judgment should not be read as a statute. **(Goan Real Estate & Construction Ltd.**

v. Union of India, (2010) 5 SCC 388). No reliance should be placed on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations must be read in the context in which they appear to have been stated. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. (**Hindustan Petroleum Corpn. Ltd. v. Dolly Das: (1999) 4 SCC 450; Bharat Petroleum Corporation Ltd v. N.R. Vairamani: (2004) 8 SCC 579; T. Sharath v. Govt. of A.P., 2013 SCC OnLine AP 324).**

As noted hereinabove, observations in a judgment should not be read in isolation or out of context. The factual matrix, the issues involved and the context in which the observations, in the Order in Appeal No.129 of 2012 & batch dated 12.05.2015, were made are relevant in deciding whether this Tribunal had, in its subsequent Order in Appeal No. 25 of 2017 dated 01.12.2022, taken a different view on the same set of facts, ignoring a binding precedent. Both the 2009 and the 2014 Tariff Regulations are statutory in character and have the force of law. The changes brought about in the 2014 Tariff Regulations, from the earlier 2009 Tariff Regulations, has resulted in a significant change in the law governing the field. The judgement rendered in the context of an earlier law, would not constitute a precedent binding on a later co-ordinate bench which is called upon to examine the claims made in terms of the subsequent law, both of which are not in pari-materia.

As the aforesaid two judgements were based on an interpretation of two different sets of Regulations, which were not identical to each other, this Tribunal cannot be said to have taken two different views in two different judgments, necessitating the matter having to be referred to a larger bench.

XVII. ORDERS OF THE CERC PERMITTING ADDITIONAL CAPITALISATION UNDER REGULATION 14(3), OR UNDER REGULATIONS SIMILAR THERETO: ITS RELEVANCE:

It is contended, on behalf of the appellant, that the contention of the Respondents that, since no capital cost can be revised as per Regulation 16, Regulation 14(3) cannot be invoked, is untenable; and even the CERC has permitted Additional Capital Expenditure for Projects opting for Special Allowance. Reference is made in this regard to (a) Order dated 20.07.2018 in Petition No. 98/MP/2017 filed by the appellant seeking in-principle approval of the projected cost to be incurred to meet Revised Emission Norms as per MoEF&CC Notification dated 07.12.2015 under Regulation 14(3)(ii) of the 2014 Tariff Regulations; (b) Order of the CERC dated 30.06.2017 in 23/RP/2016; (c) in its recent True Up/ Determination Tariff Orders, issued for the various Thermal Power Plants of the appellant, the CERC allowed Additional Capital Expenditure for the FY 2014-19 and FY 2019-24, despite the said TPPs availing Special Allowance, and the said Orders of the CERC are (i) Order Dated 28.11.2022 passed in Petition No. 191/GT/2020 for Singrauli Super Thermal Power Station***;*** (ii) Order dated 11.01.2022 passed in Petition No. 297/GT/2020 for Vindhyachal Super Thermal Power Station, Stage-I; and, as the CERC has itself allowed the claims of Additional Capital Expenditure of the Generators, despite their availing Special Allowance, a similar benefit must be extended in these appeals also.

It is submitted, on behalf of the Respondents, that the CERC has subsequently incorporated an additional Regulation, under the heading Additional Capitalization on account of revised emission standards, under Regulation 29 of the Tariff Regulation, 2019; Additional Capitalization, under Regulation 29 is entirely different from Additional Capitalization under Regulation 26 of Tariff Regulations, 2019; and the CERC has consistently not permitted Special Allowance under Regulation 26 of Tariff Regulations, 2019.

While reliance is placed, on behalf of the Appellant, on the subsequent orders of the CERC to contend that a different view has been taken therein, and the claim for additional capitalization under Regulation 14(3) or under provisions similar thereto have been admitted for determination of tariff, the contention urged on behalf of the Respondents is that the circumstances under which it was passed, including on account of the revised emission standards, are completely different; such Orders have no application to the facts and circumstances of the present batch of appeals; and, therefore, these orders passed by the CERC cannot be relied upon.

The orders of the CERC, relied upon on behalf of the appellant, can, at best, be examined in appellate proceedings to ascertain whether the CERC has been consistent in passing orders involving similar issues, and nothing more. Since this Tribunal exercises appellate jurisdiction over orders passed by the CERC, and as the possibility of these orders of the CERC being subjected to challenge by way of appeals cannot be ruled out, it would be wholly inappropriate for us to express any opinion on the observations made, and the conclusions arrived at, by the CERC in the Orders which do not form part of these batch of appeals.

In the light of our analysis of the various provisions of the 2014 Regulations, and the conclusions we have arrived at as a result, it is unnecessary for us, in the present batch of appeals, even to examine whether or not the other orders of the CERC, when compared to the orders impugned in the present appeals, show a lack of consistency. Suffice it to make it clear that we have not expressed any opinion on the merits of the orders of the CERC referred to and relied upon on behalf of the Appellant under this head.

XVIII. USEFUL LIFE OF APPELLANT'S GENERATION PLANTS HAVE NOT BEEN EXTENDED BY THE CERC:

It is submitted, on behalf of the Respondents, that the scheme of Tariff Determination provides for complete recovery of the Fixed Charges of a Generator from COD up to its useful life i.e., 25 years or during the extended life in the event of the Generator opting for R&M under Regulation 15; a combined reading, of the relevant definitions and Regulation 27, clearly indicate that the useful life of an existing Generation Station is 25 years; Capital Cost recovery and Depreciation is spread over 25 years, [3(67) (a)]; there is no provision of revision of Tariff beyond 25 years in the Tariff Regulations, except under Regulation 15, which provides for extension of the useful life of a Generating Station beyond 25 years; Regulation 3(24) of the 2014 Tariff Regulation provides for extended life; the mere fact that a Generation Station exists beyond 25 years, without extension of life, does not entitle it to any Revision of Tariff under Regulation 14(3); in the present case, the Generating Station has been declared under commercial operation on a date prior to 01.04.2014, and is an existing Generating Station. [Regulation 3 (46) & 3 (22)]; the useful life of the existing Generating Station is 25 years. [3(67)(a)]; the existing Generating Station has completed its useful life of 25 years; the CERC, in the exercise of its regulatory power, can extend the useful life of the said Generating Station beyond 25 years on a case-to-case basis. [Second Proviso to 3(67)]; the existing Generating Station did not apply for extension of useful life; the useful life of the existing Generating Station was not extended; and the existing Generating Station has no extended life. [3(24)].

As noted hereinabove, Regulation 3(67)(a) of the 2014 Regulations defines “useful life”, in relation to a unit of a coal/lignite based thermal generating station, to mean 25 years. Regulation 3(24) defines “extended life” to mean the life of a generation station or a unit thereof beyond the period of useful life, as may be determined by the Commission on a case to case basis. In the light of the afore-said definitions, the useful life of a generating station of 25 years can be extended, for a further period beyond 25 years, only by the CERC on a case to case basis. In short, the determination exercise, required to be undertaken by the CERC for extension of the useful life, must be thermal generation station specific. The CERC is required to consider, with respect to each individual generating station, whether its useful life should be extended beyond 25 years or not. Such an exercise would involve examination, among several other factors, the quality of the equipment in the said thermal generating station, the necessity for its useful life to be extended to meet consumers’ demand for cheap availability of power, the cost of power generated by these units etc. It is only after the CERC decides to extend the useful life of the generation station, would it then be required to determine the period for which life extension should be granted to the subject generating station, and then determine whether additional capitalization, claimed under Regulation 14(3), specifically falls within any one or more of the clauses thereunder. It is only if it is so satisfied, would the CERC then be required to determine the extent to which depreciation should be permitted on such capital expenditure, bearing in mind the requirements of Section 61(d) of the Electricity Act to protect the interests of consumers, and to avoid giving them a tariff shock.

XIX. CONCLUSION:

For the reasons afore-mentioned, we are satisfied that the CERC was not justified in denying the Appellant, the benefit of additional capitalization under Regulation 14(3), solely on the ground that they had opted for, and were extended the benefit of, Special Allowance under Regulation 16(1). The Appellant would be entitled to claim additional capitalization under Regulation 14(3), notwithstanding their having claimed and received Special Allowance under Regulation 16(1), provided they have not claimed the benefit of both Regulations 14(3) and 16(1) for the same items of capital expenditure.

The orders under appeal are, accordingly, set aside. The Appellant's entitlement to be extended additional capitalization, under clauses (ii), (iii) and (iv) of Regulation 14(3) of the 2014 Regulations, shall be examined by the CERC afresh, after determining whether the useful life of the Appellant's generating stations should be extended and, if so, the period for which such extension should be granted. The matter is remanded to the CERC for its consideration afresh in the light of our opinion in this batch of appeals.

The appeals are, accordingly, disposed of.

Pronounced in the open court on this the **28th day of August, 2023**.

(Sandesh Kumar Sharma) **Technical Member**	**(Justice Ramesh Ranganathan)** **Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~
tpd/mk