IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

EXECUTION PETITION NO. 11 OF 2023

Dated: 2nd July, 2024

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

In the matter of:

M/s Clearsky Solar Private Limited
Through its Director,
8-2-268/2/B/3, Road No. 2,
Banjara Hills, Hyderabad – 500 034. … Petitioner(s)

VERSUS

1. **Karnataka Electricity Regulatory Commission**
Through its Secretary,
No. 16, Millers Tank Bed Area,
Vasanth nagar, Bengaluru – 560 052. ... Respondent No.1

2. **Gulbarga Electricity Supply Company Limited**
Through its Managing Director,
Station road,
Kalburagi – 585012. ... Respondent No.2

3. **Karnataka Renewable Energy Development Limited**
Through its Managing Director,
No. 39, "Shanthi Gruha"
Bharat Scouts & Guides Building
Palace Road, Bengaluru – 560001. ... Respondent No.3

4. **Karnataka Power Transmission Corporation Limited**
Through its Managing Director,
Corporate Office, Kaveri Bhavan,
K.G. Road, Bengaluru – 560 009. ... Respondent No.4

5. **State of Karnataka**
Through its Additional Chief Secretary,
Department of Energy
Room No. 236, 2nd Floor, Vikas Soudha, … Respondent No. 5

Bengaluru, PIN – 560001.

Counsel on record for the Petitioner	:	Hemant Sahai Shreshth Ramesh Sharma Nitish Gupta Molshree Bhatnagar Surbhi Sharma Nipun Sharma Nishant Talwar Parichita Chowdhury Nimesh jha Neel Kandan Rahate Deepak Thakur Rishabh Sehgal Manpreet Singh Aanchal Seth Shubham Singh Varnika Tyagi Kamya Sharma
Counsel on record for the Respondent(s)	:	Arunav Patnaik Bhabna Das for Res.2 Praveen G. Adagatti Sharanagouda Patil for Res.3 Prateek Chadha for Res.5

O R D E R

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The Petitioner has filed this Execution Petition seeking directions to the 2nd Respondent-GESCOM to comply with the final order passed by this Tribunal, in Appeal No. 160 of 2020 dated 02.08.2021, in its letter and spirit, by paying carrying cost on compounding basis on the delayed payment of differential tariff of Rs. 4.40 per unit which, they claim, was withheld by GESCOM for no fault of the part of the Petitioner, thereby compensating them for the time value of money. Among the directions issued by this

Tribunal, in Appeal No. 160 of 2020 dated 02.08.2021, (execution of which is sought in the present proceedings), was for the 2nd Respondent to pay the Appellant carrying cost/late payment surcharge on the differential amount of tariff in terms of Article 6.4 of the PPA.

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that a total sum of Rs. 15,18,88,719/- has been paid by the 2nd Respondent to the Petitioner; hence, the directions, in the Judgment of this Tribunal in Appeal No. 160 of 2020 dated 02.08.2021 (the "**Decree**'), stand fully complied; the 2nd Respondent had preferred Civil Appeal No. 5134 of 2021 against the decree, which was dismissed on 09.12.2022; it has, thereafter, been paying a tariff of Rs. 8.40/ unit from December, 2022; ddifferential tariff totalling to Rs. 11,51,78,122/-, from May, 2017 to November, 2022, has been paid on` 31.12.2022; after reconciliation of accounts, Rs. 3,51,50,597/- was paid towards LPS from June, 2017 to November, 2022 on 31.03.2023; liquidated damages of Rs. 12,00,000/- was refunded on 31.12.2022; and damages of Rs. 3,60,000/- was paid on 02.01.2024.

II. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Petitioner and Ms. Bhabna Das, Learned Counsel appearing on behalf of the 2nd Respondent. It is convenient to examine the rival submissions under different heads.

III. DUTY OF THE EXECUTING COURT:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the petitioner, would submit that it is the duty of the executing court to find out the true effect of the decree, and to find out the meaning of the words

employed in a decree; the true purpose of execution proceedings is to make sure that the decree holder enjoys the fruits of the decree; the reliefs sought in an execution petition must be the reliefs flowing directly from the declaration sought, keeping in mind the prolonged factum of litigation leading to the relief; and, while it is true that an executing court should not go behind the decree, that does not mean it has no duty to find out the true effect of the decree, Reliance is placed by the Learned Senior Counsel on **Bhavan Vaja v. Solanki Hanuji, (1973) 2 SCC 40; Deep Chand v. Mohan Lal, (2000) 6 SCC 259;** and **Western Electricity Supply Company Ltd. v. OCL Iron & Steel Ltd (Judgement of APTEL in E.P.No. 2 of 2013).**

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that the prayer in the EP is completely untenable as there is no direction in the decree for payment of carrying cost on compounding basis; it is settled law that this Tribunal, in execution proceedings, cannot go behind the decree, or vary or alter it in any manner; and the judgments in **Bhavan Vaja: (1973) 2 SCC 40** and **Deep Chand: (2000) 6 SCC 259** are of no assistance to the Petitioner as there is no ambiguity in the decree or in Article 6.4 of the PPA, which could be interpreted to award LPS on compounding interest basis to the Petitioner.

A. ANALYSIS:

Section 120 of the Electricity Act, 2003 (“the Act” for short) prescribes the procedure andpowers of the Appellate Tribunal. Sub-section (3) thereof stipulates that an order, made by the Appellate Tribunal under the Act, shall be executable by the Appellate Tribunal as a decree of the civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court. The power of execution, vested in this Tribunal, is not an implied power. As it has been expressly conferred, the said power is circumscribed

by, and is confined to, what has been stipulated in Section 120 (3) of the Act. **(M/s Spring Soura Kiran Vidyut Private Limited vs Southern Power Distribution Company of Andhra Pradesh & others (Order in Execution Petition No. 07 of 2021 & batch dated 24.02.2023).**

Though the word “Order” is not defined in the Act, it has been defined in the 2007 Rules made by the Central Government in the exercise of its powers under Section 176 (1) and Section 176(2)(q), (t), and (z) of the Act. Chapter XIV of the 2007 Rules relates to pronouncement of orders. Rule 91, which relates to Orders, stipulates that the final decision of the Tribunal, on an application/petition before it, shall be described as a Judgment. Rule 92 relates to the operative portion of the order, and provides that all orders or directions of the Bench shall be stated in clear and precise terms in the last paragraph of the order. **(M/s Spring Soura Kiran Vidyut Private Limited vs Southern Power Distribution Company of Andhra Pradesh & others (Order in Execution Petition No. 07 of 2021 & batch dated 24.02.2023).**

In view of Section 120(3) of the Electricity Act, an order of this Tribunal, for the limited purpose of its execution, must be treated as a decree of the Civil Court. As the power conferred on this Tribunal, to execute its orders, is that of a Civil Court, it is necessary to note the relevant provisions in the CPC applicable for execution of decrees. Section 2(2) of the Civil Procedure Code defines a “decree” to mean “the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the Suit”. In terms of the definition of a "decree", in Section 2(2) CPC, three essential conditions are necessary: (i) that the adjudication must have been made in a suit; (ii) that the suit must start with a plaint and culminate in a decree; and (iii) that the adjudication must be formal and final and must be given by a Civil Court. **(Diwan Bros. V. Central Bank of India: (1976) 3**

SCC 800; Madan Naik v. Hansubala Devi: AIR 1983 SC 676: 1983 3 SCC 15; **M/s Spring Soura Kiran Vidyut Private Limited vs Southern Power Distribution Company of Andhra Pradesh & others (Order in Execution Petition No. 07 of 2021 & batch dated 24.02.2023).**

Section 2 (9) CPC defines "judgment" to mean "the statement given by the Judge on the grounds of a decree or order. While Section 2(14) CPC, no doubt, defines "Orders" to mean "the formal expression of any decision of a Civil Court which is not a decree", the meaning of the word "Order" used in Section 120(3) would, in view of Rule 91 of the 2007 Rules, be the final decision of the Tribunal. On a conjoint reading of Section 120(3) of the Electricity Act and Section 2(2) CPC, the order of this Tribunal which is capable of execution is its operative portion, which alone can be said to be the formal expression of an adjudication in the appeal conclusively determining the rights of parties with regard to the dispute (matters in controversy) before it.

Section 47 CPC relates to the question to be determined by the Court executing the decree and, under sub- section (1) thereof, all questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by the Court executing the decree and not by a separate suit. The powers of the Court to enforce execution is stipulated in Section 51 CPC and is inapplicable to the present case, since the present dispute is confined to the question as to whether or not the relief sought by the petitioner, in these execution proceedings, forms part of the decree ie the operative portion of the order passed by this Tribunal in Appeal No. 160 of 2020 dated 02.08.2021.

The scheme of the Civil Procedure Code is that in one proceeding the court determines the liability of a party and the corresponding right of the

other party and incorporates them in the decree, and in another proceeding it executes the decree, i.e. at the instance of one party, it specifically enforces the liability against the other. There can be no execution or specific enforcement of a liability without a previous determination of the liability by a court which is incorporated in a formal document called a decree. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB): 1960 SCCONLINE All 89).**

Section 47 CPC is the only Section that deals with the jurisdiction of an executing court. It is confined to determining all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. Any question that does not relate to the execution, discharge or satisfaction of the decree is thus not within the jurisdiction of the executing court. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB): 1960 SCCONLINE All 89).** As an executing Court gets jurisdiction only to execute the order in accordance with the procedure laid down under Order 21 CPC (**RameshwarDass Gupta v. State of U.P. and Another: (1996) 5 SCC 728),** it can neither go behind the decree nor can it question its legality or correctness, save where the decree, sought to be executed, is a nullity for lack of inherent jurisdiction in the court passing it. **(Sunder Dass vs Ram Prakash : AIR 1977 SC 1201** :**1977 2 SCC 662; Jai Narain Ram Lundia vs Kedar Nath Khetan And Others : AIR 1956 SC 359:1956 SCR 62).**

The Petitioner may or may not have the right to ask the court which passed the decree to vary it, but they can certainly not ask the executing court to do so. The decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it. (**Jai Narain Ram Lundia vs Kedar Nath Khetan And Others:AIR 1956 SC 359:1956 SCR 62).** For instance, if the decree says

that on payment being made some definite and specific thing is to be given to the other side, the executing court cannot alter that and allow something else to be substituted for the thing ordered to be given. **(Fry on Specific Performance (6th Edn., Chapter IV, p. 546 onwards); Jai Narain Ram Lundia vs Kedar Nath Khetan And Others: AIR 1956 SC 359).**

A decree cannot be varied even by the court passing it, except on review or under Section152 CPC. (***Kotaghiri* v. *Vellanki* [I.L.R. 24 Mad. 1 (PC);Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All1(FB): 1960 SCCONLINE All 89).** A Court executing a decree can neither add to such a decree nor vary its terms. **(*Muhammad Sulaiman* v. *Jhukki Lal* [I.L.R. XI All. 228; Maharaj Kumar Mahmud Hasan Khan vs Moti LalBanker : AIR 1961 All 1(FB): 1960 SCCONLINE All 89).** The duty of an executing court is to execute the decree as it finds it. It has no jurisdiction to alter or vary it and to execute it as it would stand after the alteration or variance. (***Gobardhan's case:* A.I.R. 1932 All. 273 (F.B.)**; **Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker: AIR 1961 All 1(FB)).**

An executing court has jurisdiction only to execute the decree, i.e. it can enforce only the decretal liability. It has jurisdiction, conferred by Section 47 CPC, to decide all questions relating to execution, discharge and satisfaction of the decree, but it has no jurisdiction whatsoever over any other matter and cannot enforce any other liability. It is concerned only with enforcing the decretal liability and not any other. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker: AIR 1961 All 1(FB)).** If a decree-holder wants to enforce a liability other than the judgment-debtor's decretal liability, it would strictly not be a question of execution of the decree, and will not be within the jurisdiction of the executing court. **(Maharaj Kumar Mahmud Hasan Khan vs Moti Lal Banker : AIR 1961 All 1(FB)).**

The Executing Court cannot travel beyond the original *lis,* between the parties, to any subsequent cause of action. It is also not open to the Executing Court to add to a decree of which execution is sought, a direction or injunction that were neither prayed for nor formed part of the original *lis* between the parties; and the Executing Court cannot travel behind the decree to add or modify the directions contained therein. (**J&K Bank Ltd. v. Jagdish C. Gupta, (2004) 10 SCC 568; Gurdev Singh v. Narain Singh, (2007) 14 SCC 173).** The entire purpose of execution proceedings is to enforce the directions passed in the decree (**Firm Rajasthan Udyog & Ors. v. Hindustan Engineering and Industries Ltd. (2020) 6 SCC 660**). Findings, even though binding, cannot form the basis of a proceeding for execution. The purpose of execution proceedings is to enforce the verdict of the court. The executing court, while executing the decree, is only concerned with the execution part of it and nothing else. The court has to take the judgment at its face value. **(Meenakshi Saxena v. ECGC Ltd., (2018) 7 SCC 479).**

In **Gurdev Singh v. Narain Singh, (2007) 14 SCC 173,** the Supreme Court held that the executing court cannot go behind the decree; the decree did not clothe the decree-holder to pray for execution of the decree by way of removal of the trees; and the same could not have been directed by the executing court in the name of construing the spirit of the decree under execution.

Relying on **Gurdev Singh v. Narain Singh, (2007) 14 SCC 173**, the Supreme Court, in **Rajasthan Udyog v. Hindustan Engg. & Industries Ltd., (2020) 6 SCC 660**, held that the executing court could not go behind the decree; execution of an award could be only to the extent of what has been awarded/decreed, and not beyond; and going behind the decree, for doing complete justice, did not mean that the entire nature of the case could

be changed, and what was not awarded in favour of the respondent could be granted by the executing court. The law laid down by the Supreme Court, in the aforesaid judgements, make it amply clear that the Executing Court cannot go behind or beyond the decree.

The principles, which can be culled out from what has been referred to hereinabove, is that there can be no execution or specific enforcement of a liability without a previous determination of the liability by a court which is incorporated in a formal document called a decree. Any question, that does not relate to the execution of the decree, is not within the jurisdiction of the executing court. The executing court can neither go behind the decree nor can it question its legality or correctness. The decree must either be executed as it stands in one of the ways allowed by law or not at all, unless the Court which passed it alters or modifies it. A Court executing a decree can neither add to such a decree nor vary its terms. It is not within the jurisdiction of the executing court to enforce any liability, other than the judgment-debtor's decretal liability. The Executing Court cannot travel, beyond the original *lis* between the parties, to any subsequent cause of action. It is also not open to the Executing Court to add to a decree or to modify the directions contained therein or to grant a direction that was neither prayed for nor formed part of the original *lis* between the parties. The purpose of execution proceedings is to enforce the verdict of the court. The executing court, while executing the decree, is only concerned with the execution part of it and nothing else. The court has to take the judgment at its face value. The entire purpose of execution proceedings is to enforce the directions passed in the decree, and nothing more.

In **Bhavan Vaja & Ors V. Solanki Hanuji Khodaji Mansang & Anr: (1973) 2 SCC 40,** on which reliance is placed on behalf of the Petitioner, the Supreme Court held that, while an executing court cannot go behind the

decree under execution, that does not mean that it has no duty to find out the true effect of that decree; for construing a decree it can, and in appropriate cases it ought to, take into consideration the pleadings as well as the proceedings leading up to the decree; in order to find out the meaning of the words employed in a decree the Court, often, has to ascertain the circumstances under which those words came to be used; that is the plain duty of the execution Court; and, if the Court fails to discharge that duty, it has plainly failed to exercise the jurisdiction vested in it.

In **Deep Chand vs Mohan Lal : (2000) 6 SCC 259**, on which also reliance is placed on behalf of the petitioner, the Supreme Court held that the purpose of an execution proceeding is to enable the decree- holder to obtain the fruits of his decree; in cases where the language of the decree is capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree, and the other which prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted; execution of the decree should not be made futile on mere technicalities; this does not, however, mean that, where a decree is incapable of being executed under any provision of law, it should,in all cases, be executed notwithstanding such bar or prohibition; a rational approach is necessitated keeping in view the prolonged factum of litigation resulting in the passing of a decree in favour of a litigant; and the policy of law is to give a fair and liberal, and not a technical, construction, enabling the decree-holder to reap the fruits of his decree.

In **Western Electricity Supply Company Ltd. v. OCL Iron & Steel Ltd., (Judgement of APTEL in E.P.No. 2 of 2013 dated 02.12.2013),** this Tribunal held that (i) it is the duty of an Appellate Court to make the declaration and then the form in which that declaration is conceived and the words in which the order is framed which would amount to a direction to the

Court below to clothe that declaration in the proper form of a mandatory order and to give effect to the mandatory order so expressed; (ii) It is not necessary that the decree passed should specifically state that the judgement-debtor shall pay such and such amount regularly; it is enough, if the terms of the decree make it clear that it is intended that the judgement-debtor should pay; (iii) the relief must be a relief, flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent upon the right; it dos not mean "every kind of relief that may be prayed for", but only "a relief arising from the cause of action on which the plaintiff's suit is based; thus, the relief which is consequent upon the cause of action, can be enforced by the executing Court; (iv) the expression "further relief" would mean the relief which would complete the claim of the plaintiff and not lead to multiplicity of suits; the relief must flow necessarily from the relief of declaration and a relief appropriate to and necessarily consequent on the right of claim asserted; it is such relief as flows necessarily from the relief ancillary to the main relief, and not one in the alternative; (v) an Executing Court cannot go behind the decree, but if a fair interpretation of the judgement, order and decree passed by a Court having appropriate jurisdiction in that behalf, the relief sought for by the plaintiff appears to have been granted, there is no reason why the Executing Court shall deprive him from obtaining the fruits of the decree.

This Tribunal further observed that not only was the decree of this Tribunal not a bare declaration to execute but also the quantum with reference to the said decree can also be computed by executing courts; and, in other words, the direct and consequential relief flowing from the decree can be granted in the present execution proceedings.

In the light of the afore-said judgements of the Supreme Court, let us now take note of the pleadings in the appeal, as well as the order of this Tribunal

in Appeal No.160 of 2020 dated 02.08.2021, in construing the operative part of the judgement of this Tribunal ie the decree, and also ascertain whether the language of the decree is capable of two interpretations.

(i) O.P. No. 219 of 2017 BEFORE KERC:

The Petitioner herein had filed OP No.219 of 2017, under Section 86(1) (f) of the Electricity Act, 2003, before the Karnataka Electricity Regulatory Commission ("KERC" for short) seeking the following reliefs: (a) approve extension of the Scheduled Commissioning Date granted by Respondent; (b) direct the Respondent to pay the tariff of Rs.8.40 per unit as agreed under the Power Purchase Agreement dated 29th August, 2015 produced as Annexure P-1; (c) accord approval to the Supplemental Agreement dated 16th March 2017 at Annexure P- 35 without altering the tariff in the PPA dated 29th August 2015; and (d) pass such other order/s including an order as to costs, to meet the ends of justice.

By its Order in OP No.219 of 2017 dated 29.05.2020, the KERC set aside the extension of Schedule Commissioning Date granted by the 1st Respondent before it, and held that the execution petitioner is entitled to a tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, the varied tariff as applicable on the date of Commercial Operation of the petitioner's power project, as fixed by this Commission in the Tariff Order dated 12.04.2017 for the term of the Power Purchase Agreement, as per Article 5.1 of the PPA dated 29.08.2015; the petitioner was liable to pay the penalty of Rs.3,60,000/- as damages for non- fulfilment of the conditions precedent as per Article 2.2 of the PPA dated 29.08.2015, which it had already paid on 16.03.2017 vide Receipt No.16204; and the same shall be forfeited.

(ii) APPEAL No. 160 of 2020 BEFORE THIS TRIBUNAL:

Aggrieved by the Order passed by the KERC, in OP No.219 of 2017 dated 29.05.2020, the Petitioner herein filed Appeal No. 160 of 2020 before this Tribunal seeking the following reliefs- (a) allow the present Appeal and set-aside the Impugned Order dated 29.05.2020 in Petition No. 219 of 2017; (b) declare and hold that the appellant is entitled to a tariff of Rs. 8.40/kWh from the date of COD of its Project and direct the 2nd Respondent GESCOM to make payments accordingly (c) declare and hold that the timeline for achieving Scheduled Commercial Operation Date under the PPA stands revised to 27.05.2017 and approve the Supplementary PPA dated 16.03.2017; (d) declare and hold that the appellant has fulfilled the conditions precedent and achieved COD of its Project well within the prescribed timelines as provided under the PPA read with the Supplementary PPA dated 16.03.2017; (e) declare and hold that GESCOM has wrongfully realised Rs. 3,60,000 from the appellant as liquidated damages on account of non-fulfilment of Conditions Precedent and direct GESCOM to forthwith refund such amount.

In its Order, in Appeal No. 160 of 2020 dated 02.08.2021, this Tribunal held that, since there was no fault on the part of the Appellant to commission the project and they were ready in all respects, they were entitled to receive the amounts from the date of COD; therefore, Respondents were liable to pay late payment surcharge on the differential tariff so also amounts due towards tariff for the electricity supplied by the Appellant to the Respondent-GESCOM from the date of COD in terms of Article 6.4 of the PPA; since the Appellants were not responsible for any delay, they were entitled for tariff at Rs.8.40 per unit; and none of the contentions raised by the Respondent-GESCOM or Respondent-KPTCL were sustainable.

Accordingly, the Appeal was allowed setting aside the impugned order. The Appellant was held entitled for Rs. 8.40/kWh from the date of

commissioning the project. The Appellant was held entitled for differential tariff from the dateof COD and the same was directed to be paid by the Respondent Discom to the Appellant. The Appellant was also held entitled for carrying cost/late payment surcharge on the differential amount of tariff so also dues of energy charges if any, that were not paid from COD till it is paid, in terms of Article 6.4 of the PPA. The Appellant was held not liable to pay any damages so also liquidated damages, and the Respondent Discom was directed to pay the amounts, indicated in the Order, to the Appellant within four weeks from the date of receipt of the Order in Appeal.

(iii) RELIEF OF PAYMENT OF CARRYING COST AT COMPOUND INTEREST WAS NEITHER SOUGHT BY THE PETITIONER NOR WAS IT SPECIFICALLY GRANTED BY THIS TRIBUNAL:

It is evident, therefore, that both in the Petition filed before the KERC, and in the Appeal filed before this Tribunal against the Order passed by the KERC, the Petitioner did not specifically seek payment of carrying cost much less on compound interest basis. All that this Tribunal had directed, in the order execution of which is sought in the present proceedings, is that the Petitioner herein was entitled for carrying cost/late payment surcharge on the differential amount of tariff, as also dues of energy charges if any, that were not paid from COD till it is paid, in terms of Article 6.4 of the PPA. It is only if Article 6.4 specifically provides for payment of LPS/carrying cost on compound interest, would the Petitioner be entitled to seek payment of such amount in execution proceedings. Let us, therefore, examine what Article 6.4 of the PPA provides.

IV. ARTICLE 6.4 OF THE PPA: ITS SCOPE:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the

petitioner, would submit that the project got commissioned on 27.05.2017; however, the differential tariff was paid by GESCOM only on 13.12.2022; though there were categorical directions from this Tribunal to pay differential tariff, as well as other energy dues within four weeks from the date of the final order, GESCOM paid the differential tariff after 15 months, despite there being no stay by the Supreme Court; the differential tariff has been paid by GESCOM after 5 years; therefore, this Tribunal's direction for payment of carrying cost in terms of Article 6.4 of the PPA, to restitute the Petitioner for time value of money has not been complied with in its letter and spirit; Article 6.4 of the PPA is unambiguous as it uses the words 1% per month*;* the clause nowhere uses the words 'simple interest'; the usage of words '1% per month' implies that the interest on delayed payment will be compounded monthly; it could not have been the intention of this Tribunal, while granting carrying cost, that the same be paid on simple interest basis, despite GESCOM illegally withholding it for a period of 5 years; and it is well settled that the purpose of carrying cost is to compensate a party for the time value of money. Reliance is placed, by the Learned Senior Counsel, on **SLS Power Ltd. v. APERC (Order of APTEL in Apl. No 150 of 2011 dated 20.12.2022.**

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that the Petitioner has claimed that it is entitled to LPS on compound interest basis; the decree directs payment of LPS "*in terms of Article 6.4 of the PPA.*"; there is no stipulation in Article. 6.4 of the PPA requiring LPS to be paid on compounded basis; Article 6.4 provides for a "*rate of 1.0% per month on the bill amount … computed on a pro rata basis on the number of days of the delay*"; and this is nothing but simple interest of 1% p.m. or 12% p.a.

A. ANALYSIS:

In **SLS Power Limited v. Andhra Pradesh Electricity Regulatory Commission, 2012 SCC OnLine APTEL 209 (Order of APTEL in Apl. No 150/2011 dated 20.12.2012),** on which reliance is placed on behalf of the Petitioner, this Tribunal held that carrying cost is the compensation for time value of money or the monies denied at the appropriate time, and paid after a lapse of time; therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment; carrying cost is not a penal charge if the interest rate is fixed according to commercial principles; it is only a compensation for the money denied at the appropriate time; as the interest rate has been decided as 12% for determination of tariff, the same rate may be applied for calculation of interest/carrying cost; the interest will be due from the date the payment is due, and shall be compounded on quarterly basis; and the State Commission shall also set a time period within which the payment of arrears and interest will be paid to the developers by the distribution licensees.

While it is no doubt true, as held by this Tribunal in **SLS Power Limited,** that carrying cost is compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time, and the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission, there is no rigid formula applicable uniformly in all cases regarding the manner in which the developer should be granted restitution. The compensation to be paid to the developer, for the money denied to them at the appropriate stage, may depend on the terms of the PPA entered into between the parties or may be determined by the Court/Tribunal considering the facts of the case under adjudication.

In **SLS Power Limited,** this Tribunal had observed that, as the interest rate had been decided as 12% for determination of tariff, the same rate may be applied for calculation of interest/carrying cost; the interest would be due from the date the payment was due; and shall be compounded on quarterly basis.

Like in **SLS Power Limited,** this Tribunal, while passing its judgement in Appeal No.160 of 2020 dated 02.08.2021, could well have directed that the carrying cost/LPS should be compounded on quarterly or monthly basis and, if it had so directed, the Petitioner would have been justified in seeking payment of carrying cost compounded on monthly /quarterly basis. As this Tribunal, in its judgement in Appeal No.160 of 2020 dated 02.08.2021, had only directed payment of LPS "*in terms of Article 6.4 of the PPA*, it is only if the said Article in the PPA provides for payment of carrying cost compounded on monthly basis, would the Petitioner be entitled to seek such payment in the present execution proceedings.

Article 6.4 of the subject PPA relates to Late Payment Surcharge and reads thus: -

> *"In the event of payment of the monthly bill being made by GESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being "Late Payment Surcharge"), computed on a pro rata basis on the number of days of the delay in payment. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill"*

All that Article 6.4 of the subject PPA provides is for late payment surcharge to be paid to the developer for belated payment, of the monthly bill, beyond the due date. The said clause specifies that the late payment surcharge shall be payable at 1% per month on the bill amount, evidently

because the bills are required to be paid on a monthly basis. The said Article also provides for the manner in which such Late Payment Surcharge is to be computed ie on a pro-rata basis on the number of days by which the payment is delayed. For instance, if the delay in payment is 15 days, then LPS is required to be paid only for this period of 15 days at 1% per month. The mere fact that the said clause provides for payment of LPS at 1% per month, instead of stating 12% per annum, does not mean that the said provision should be construed as requiring LPS to be compounded monthly, as that would require this Tribunal, (that too in Execution Proceedings), to read non-existent words into a contractual provision, which is impermissible. As noted hereinabove, it is only because the monthly bill raised by the developer is to be paid within the stipulated period that Article 6.4 provides for payment of LPS at 1%, and nothing more. The fact that it also provides for payment on a pro-rata basis, for the actual period of delay, belies the Petitioner's claim of payment being required to be made on monthly compounding basis, for, if the delay is say of 15 days, the question of compounding on a monthly basis would not arise. Article 6.4 neither suffers from any ambiguity nor is it capable of more than one interpretation requiring it to be construed in favour of the petitioner.

In any event, these are not matters for examination in Execution proceedings. As Article 6.4 of the PPA does not explicitly provide for payment of LPS/Carrying Cost compounded on a monthly basis, and this Tribunal, in its judgement in Appeal No. 160 of 2020 dated 02.08.2021, has also not specifically directed that payment be made of LPS/Carrying Cost compounded on monthly basis, it is not open for us, in execution proceedings, to go beyond the decree and grant the petitioner a relief which does not flow from the decree.

V. DOCTRINE OF RESTITUTION:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the final order passed by this Tribunal corrected the injury caused to the Petitioner, and had held that it was entitled to full PPA tariff i.e. Rs. 8.40 per unit from CoD itself i.e. 27.05.2017; and the Supreme Court has held that principles of restitution are applicable in cases of compensation for the loss caused to another; and applicability of the principles of restitution is not limited to change in law claims. Reliance is placed by the Learned Senior Counsel on **Southern Eastern Coalfields Ltd. v. State of M.P. & Ors., (2003) 8 SCC 648.**

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that the principle of restitution, as per the judgments in **Southern Eastern Coalfields Ltd. v. State of M.P. & Ors., (2003) 8 SCC 648, Uttar Haryana Bijli Vitran Nigam Ltd :(2023) 2 SCC 624**, **GMR Warora Energy Ltd: 2023 SCC OnLine SC 464** and **Indian Council for Enviro-Legal Action: (2011) 8 SCC 161**, are inapplicable in the present case; these are judgments in appellate proceedings, where restitutionary principles may be applied while adjudicating a dispute on merits; and this is impermissible in execution proceedings, where the Court's powers are circumscribed by the directions in the decree.

A. ANALYSIS:

On the liability of the consumers/purchasers, to pay interest to the Coalfields for the period for which the restraint order passed by the Court remained in operation, the Supreme Court, in **South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648,** noted the submission, urged on behalf of the consumers/purchasers, that their non-payment of enhanced amount of royalty was protected by judicial orders, though of an interim nature, passed by the courts, and therefore, they should not be held liable

for payment of interest so long as the money was withheld under the protective umbrella of the court order; merely because the writ petitions were finally held liable to be dismissed, it cannot be urged that the interim orders passed by the courts were erroneous; soon, on dismissal of their writ petitions, the payment of the enhanced amount of royalty which was disputed earlier was promptly cleared by the writ petitioners; and, therefore, their act was *bona fide*.

While holding that they found no merit in this submission, the Supreme Court observed that the principle of restitution took care of this submission; the word "restitution", in its etymological sense, means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of the decree or order of the court or in direct consequence of a decree or order (**Zafar Khan v. Board of Revenue, U.P. [1984 Supp SCC 505 : AIR 1985 SC 39**); in law, the term "restitution" is used in three senses: (*i*) return or restoration of some specific thing to its rightful owner or status; (*ii*) compensation for benefits derived from a wrong done to another; and (*iii*) compensation or reparation for the loss caused to another. (**Black's Law Dictionary, 7th Edn., p. 1315**); the principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908 which speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree; and the scope of the provision is wide enough to include therein almost all kinds of variation, reversal, setting aside or modification of a decree or order.

The Supreme Court further observed that the interim order passed by the court merges into a final decision; the validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage; unless otherwise ordered by the court, the successful party at the end would be justified, with all

expediency, in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it; the successful party can demand (*a*) the delivery of benefit earned by the opposite party under the interim order of the court, or (*b*) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that, in the facts and on the circumstances of the case, the restitution, far from meeting the ends of justice, would rather defeat the same; undoing the effect of an interim order by resorting to principles of restitution, is an obligation of the party who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed; and there is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

The law declared by the Supreme Court, in **South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648,** is that it is the duty of the Court (or Tribunal) to make restitution for what a party has lost unless it feels that, in the facts and on the circumstances of the case, the restitution, far from meeting the ends of justice, would defeat the same. In its judgement, in Appeal No.160 of 2020 dated 02.08.2021, this Tribunal, while providing for restitution to the Petitioner, chose to direct restitutionary payment of compensation only in terms of Article 6.4 of the PPA. It has not directed payment of carrying cost compounded on monthly basis. As the Petitioner chose not to prefer an appeal thereagainst, the said judgement of this Tribunal, in Appeal No.160 of 2020 dated 02.08.2021, has attained finality. In the guise of granting the petitioner the fruits of the decree, it is wholly impermissible for an executing court to go beyond and behind the decree and grant a relief which neither forms part of, nor flows from, the said decree.

VI. ARE THE JUDGEMENTS RELIED ON BEHALF OF THE PETITIONER APPLICABLE IN EXECUTION PROCEEDINGS?

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the petitioner, would rely on **Indian Council for Enviro-Legal Action Vs UOI & Ors., (2011) 8 SCC 161** to submit that the Supreme Court has held that to do complete justice, prevent wrongs or delays, and to implement the concept of time value of money and restitution of the differential amount (differential tariff in the present case) should be paid on compounding basis and not simple interest basis; the Supreme Court, in **Uttar Haryana Bijli Vitran Nigam Vs. Adani Power & Anr. (2023) 2 SCC 624**, allowed compounding of interest on carrying cost appreciating the principle of time value of money; though there the LPS clause provided for compounding, however the major factor that weighed with the Court, to allow compounding of carrying cost, was that the banks/lenders of the project charge compound interest on repayment of loans as per RBI guidelines/circular; and, going a step ahead, the Supreme Court, in **GMR Warora Energy Vs. CERC & Ors. 2023 SCC OnLine SC 464,** has reiterated that *'once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis'*.

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that the judgments of the Supreme Court, in **Uttar Haryana Bijli Vitran Nigam Ltd :(2023) 2 SCC 624** and **GMR Warora Energy Ltd: 2023 SCC OnLine SC 464,** are distinguishable on facts; clause 11.3.4 of the PPAs therein specifically provided for LPS to be "*calculated on a day to day basis* (**and compounded with monthly rest**) *for each day of delay*"; and these words are absent in Article 6.4 of the PPA; where the PPA and the decree are silent, only simple interest is payable (Section. 34(2) CPC); further, grant of interest on interest in this case will set a bad precedent and

lead to similar claims in other matters; and this will result in a significant financial burden on the State exchequer, and cause grave prejudice to the consumers at large.

A. ANALYSIS:

As noted by the Supreme Court itself, **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161** was a very unusual and extraordinary litigation where, even after fifteen years of the final judgment of the Supreme Court, the litigation had been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance with the judgment. The Supreme Court had observed that this was a classic example how, by abuse of the process of law, even the final judgment of the Apex Court can be circumvented for more than a decade-and-a-half; and this was indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the Apex Court in particular.

An environmentalist organisation had brought to light the sufferings and woes of people living in the vicinity of chemical industrial plants in India, and the petition related to the suffering of people of Village Bichhri in Udaipur District of Rajasthan, and how the conditions of a peaceful, nice and small village of Rajasthan were dramatically changed after Respondent 4 ie Hindustan Agro Chemicals Ltd. started producing certain chemicals. By its judgment, in **Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212**, the Supreme Court fixed the liability but did not fix any specific amount, which was ordered to be ascertained. By judgment, in **Indian Council for Enviro-Legal Action v. Union of India, (2011) 12 SCC 752,** the Supreme Court accepted the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing the National Productivity Council as the project management

consultant and observed that the Ministry of Environment and Forests, Government of India had rightly made a demand for Rs 37.385 crores.

Instead of making payment, IAs were filed on one ground or another questioning the manner of computation, including imposition of compound interest on the principal amount determined. It is in this context that the Supreme Court observed that restitution and unjust enrichment, along with an overlap, had to be viewed with reference to the two stages i.e. pre-suit and post-suit; in the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the court's own process, along with time delay, to do injustice; and, for this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise.

The Supreme Court referred to a nine-Judge Bench of the Supreme Court of Canada in ***Bank of America Canada* v. *Mutual Trust Co.*** **[(2002) 2 SCR 601,** wherein a view was taken that, in principle, there was no reason why compound interest should not be awarded; had prompt recompense been made at the date of the wrong, the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also; by the same token the defendant would have had the benefit of compound interest; although not historically available, compound interest was well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid; and this view of the Canadian Supreme Court seemed to be correct and in consonance with the principles of equity and justice.

On compound interest, the Supreme Court observed, in **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161,** that to do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concept of time value of money, restitution and unjust enrichment—or to simply levelise—a convenient approach is calculating interest, interest should be calculated on compound basis—and not simple—for the latter leaves much uncalled for benefits in the hands of the wrongdoer; a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out; "Compound interest" is defined in *Black's Law Dictionary*, 8th Edn. (Bryan A. Garner) at p. 830 as "interest paid on both the principal and the previously accumulated interest"; it is a method of arriving at a figure which nears the time value of money; compound interest is a norm for all commercial transactions.

As held by the Supreme Court, in **Indian Council for Enviro-Legal Action**, for the second stage of the proceedings ie post-suit, the need for restitution in relation to court proceedings, gives full jurisdiction to the court to pass appropriate orders. In the present case this Tribunal, in its judgement in Appeal No. 160 of 2020 dated 02.08.2021, granted the petitioner restitution by directing payment of carrying cost/LPS in terms of Article 6.4 of the PPA, and not for payment of carrying cost compounded on a monthly basis. As noted hereinabove, Article 6.4 does not stipulate payment of compound interest. While it was always open to the petitioner, if they were so aggrieved, to prefer an appeal to the Supreme Court against the judgement of this Tribunal in Appeal No. 160 of 2020 dated 02.08.2021, they chose not to do so and, instead, allowed the said judgement to attain finality.

Having chosen to accept the said judgement, it is not open to the Petitioner to now claim carrying cost compounded on monthly basis, in execution proceedings, as the relief sought for goes far beyond the decree passed in Appeal No. 160 of 2020 dated 02.08.2021. Reliance placed on behalf of the Petitioner, on **Indian Council for Enviro-Legal Action,** is therefore misplaced.

Clause 11 of the PPA, which fell for consideration in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624,** related to Billing and payment, and Clause 11.3 related to payment of monthly bills. Clause 11.3.4 of the PPA read thus: -

> ***"11.3.4.*** *In the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay".*
>
> (italics supplied)

Clause 11.8.3 of the PPA read thus:-

> **"**11.8.3. *In the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4."*

After taking note of the afore-said clauses of the PPA, the Supreme Court held that the relief relating to carrying cost was granted to Respondent 1 Adani Power by the Appellate Tribunal vide order dated 13-4-2018 (*Adani Power Ltd.* v. *CERC*, 2018 SCC OnLine APTEL 5) which was duly tested by the Supreme Court and upheld in ***Uttar Haryana Bijli Vitran Nigam Ltd.*** **v.** ***Adani Power Ltd.*****, (2019) 5 SCC 325;** once carrying cost has been

granted in favour of Respondent 1 Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple interest basis, instead of compound interest basis; grant of compound interest on carrying cost, and that too from the date of the occurrence of the change in law event, is based on sound logic; the idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a change in law event and restore it to its original economic position as if such a change in law event had not taken place; in the instant case, Respondent 1 Adani Power had to to arrange finances by borrowing from banks; the interest rate framework followed by scheduled commercial banks and regulated by Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests; in this view of the matter, Respondent 1 Adani Power was justified in stating that, if the banks had charged it interest on monthly rest basis for giving loans to purchase the FGD unit, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis; interest on carrying cost was nothing but time value for money, and the only manner in which a party can be afforded the benefit of restitution in every which way; in the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of Respondent 1 Adani Power for the period between the year 2014, when the FGD unit was installed, till the year 2021; they were not persuaded by the submission made on behalf of the appellants that, since no fault was attributable to them for the delay caused in determination of the amount, they could not be saddled with the liability to pay interest on carrying cost; nor was there any substance in the argument sought to be advanced that there was no provision in the PPAs for payment of compound interest from the date when the change in law event had occurred.

Like in ***Uttar Haryana Bijli Vitran Nigam Ltd.*** **v.** ***Adani Power Ltd.*****, (2019) 5 SCC 325**, Clause 11 of the PPA, which fell for consideration in **GMR Warora Energy Ltd. v. CERC, (2023) 10 SCC 401,** also related to Billing and payment, and Clause 11.3 related to payment of monthly bills. Clause 11.3.4 of the PPA read thus:-

> **"11.3.4.** *In the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay".*
>
> (italics supplied)

Clause 11.8.3 of the PPA read thus:-

> **"**11.8.3. *In the event of delay in payment of a supplementary bill by either party beyond one month from the date of billing, a late payment surcharge shall be payable at same terms applicable to the monthly bill in Article 11.3.4."*

It is in the context of the afore-said clauses of the PPA, that the Supreme Court, in **GMR Warora Energy Ltd**, observed that the Supreme Court had reiterated in **Uttar Haryana Bijli Vitran Nigam Ltd. v. Adani Power (Mundra) Ltd., (2023) 2 SCC 624,** that, once carrying cost has been granted, it cannot be urged that interest on carrying cost should be calculated on simple interest basis instead of compound interest basis; it had been held that grant of compound interest on carrying cost, and that too from the date of occurrence of the "change in law" event, was based on sound logic; it had been held that it was aimed at restituting a party that was adversely affected by a "change in law" event and restore it to its original economic position as if such a "change in law" event had not taken place;

the argument that there was no provision in the PPAs for payment of compound interest from the date when the "change in law" event had occurred, had been specifically rejected by the Supreme Court; in view of this consistent position of law, and application of restitutionary principles and privity of contractual obligations between the parties as contained in the PPAs, they did not find that the view taken by APTEL, with regard to carrying cost, warranted interference.

Clause 11.3.4 of the PPAs, both in **Uttar Haryana Bijli Vitran Nigam Ltd** and **GMR Warora Energy Ltd,** provided that, in the event of delay in payment of a monthly bill by any procurer beyond its due date, a late payment surcharge shall be payable by the procurer to the seller at the rate of two (2) per cent in excess of the applicable SBAR per annum, on the amount of outstanding payment, *calculated on a day to day basis (and compounded with monthly rest), for each day of the delay*".

The afore-said clause provides for payment of late payment surcharge calculated on a day-to-day basis, and compounded with monthly rests, for each day of delay. As there was a specific clause in the PPA for payment of LPS on compounding basis with monthly rests, it is evident that the contention urged on behalf of the appellant in the said cases was not that LPS could not be paid on a compounding basis with monthly rests, but that the PPAs did not provide for payment of compound interest from when the change in law event had occurred. This contention was rejected by the Supreme Court. In **Uttar Haryana Bijli Vitran Nigam Ltd**, making it clear that, in the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of Respondent 1 Adani Power.

Unlike in the judgements of the Supreme Court, in **Uttar Haryana Bijli Vitran Nigam Ltd** and **GMR Warora Energy Ltd**, where the PPA

specifically provided for payment of LPS on compounding basis with monthly rests, Clause 6.4 of the PPA, in the present case, provides that, in the event of payment of the monthly bill being made by GESCOM after the due date, a late payment surcharge shall be payable to the SPD at the rate of 1.0% per month on the bill amount (being "Late Payment Surcharge"), computed on a pro rata basis on the number of days of delay in payment; and the Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.

Clause 6.4 of the subject PPA does not specifically provide for payment of LPS on compounding basis. In the absence of a specific provision or an express stipulation in the PPA for payment of carrying cost on compound interest basis, and in as much as this Tribunal, in its judgement in Appeal No.160 of 2020 dated 02.08.2021, has only directed payment of carrying cost in terms of Article 6.4 of the PPA and not by compounding it monthly, the Petitioner is not entitled to such a relief in Execution Proceedings, as that would amount to granting a relief which does not flow from the decree ie a relief not granted by this Tribunal in Appeal No. 160 of 2020 dated 02.08.2021.

With regards the submission urged on behalf of the 2nd Respondent placing reliance on Section 34 CPC, it is relevant to note that the Supreme Court had observed, in **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161**, on the legal position under the Code of Civil Procedure, that one reason the law had not developed was because of the wording of Section 34 of the Code of Civil Procedure which still proceeded on the basis of simple interest; it is this difference which prompts much of our commercial litigation because the debtor feels—calculates and assesses—that to cause litigation and then to contest with obstructions and delays will be beneficial because the Court is empowered to allow only

simple interest; a case for law reform on this is a separate issue; in the point under consideration, which did not arise from a suit for recovery under the Code of Civil Procedure, the inherent powers in the court and the principles of justice and equity are each sufficient to enable an order directing payment of compound interest; and the power to order compound interest, as part of restitution, cannot be disputed, otherwise there can never be restitution.

While we see no reason, in such circumstances, to consider the submissions urged on behalf of the 2nd Respondent placing reliance on Section 34 CPC, suffice it to note that the Supreme Court, in **Indian Council for Enviro-Legal Action**, has made it amply clear that the Court has the inherent power to pass an order directing payment of compound interest. In the case on hand, this Tribunal, in its judgement in Appeal No. 160 of 2020 dated 02.08.2021, chose not to grant carrying cost compounded on monthly basis.

Suffice it, in conclusion, to hold that the afore-said judgements of the Supreme Court, in **Uttar Haryana Bijli Vitran Nigam Ltd** and **GMR Warora Energy Ltd**, were not in the context of execution proceedings, but in an appeal preferred against the order of this Tribunal specifically granting carrying cost compounded on monthly basis in terms of the PPAs which were the subject matter of the proceedings therein. In the present case, however, this Tribunal, while directing the 2nd Respondent to pay carrying cost, did not stipulate that payment of carrying cost should be compounded, much less on monthly basis, evidently because Article 6.4 of the subject PPA does not so provide.

VII. CONTENTION TAKEN FOR THE FIRST TIME IN EP THAT REPAYMENT OF LOANS TAKEN EARLIER WAS WITH COMPOUND INTEREST:

Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the petitioner, would submit that, in the present case, the Petitioner had taken loans from financial institutions/banks for constructing the project and is repaying them with compounding interest; therefore, the principles of time value of money and restitution should be applied more vigorously in the present case, otherwise the same will promote habitual non-compliance of the payment terms under the PPA; and Clause 3 of the Loan Agreement provides that the Petitioner is paying interest on monthly rests i.e. monthly compounding, the same is reproduced hereinbelow:

> *"3. RATE OF INTEREST:*
>
> *…*
>
> ***Term Loan:*** *Interest at the rate of 3.65% margin above the MCLR which is presently 9.05% p.a. Present effective rate: 12.70% p.a. calculated on daily products at monthly rests. Bank shall at any time and from time to time be entitled to vary the margin based on the Credit Risk Assessment of the borrower and the Base Rate at its discretion."*

Learned Senior Counsel would submit that the fact that the Government pays simple interest on income tax refunds has no relevance in the present case as Section 244-A of the Income Tax Act, 1961 specifically provides that interest on refund amounts shall be paid on simple interest basis; therefore, in terms of law laid down by the Supreme Court, the Petitioner must be held entitled for payment of carrying cost @1% per month on compounding basis in terms of Article 6.4 of the PPA; and a calculation sheet showing difference in calculation on simple interest @12% per annum vs calculation of carrying cost @1% per month on compounding basis.

Ms. Bhabna Das, Learned Counsel for the 2nd Respondent, would submit that the petitioner has neither shown that (a) he has paid compound interest on any loan taken by him for the Project; or (b) GESCOM has earned compound interest on the amount in question; and levy of compound interest in this case would tantamount to imposing a penalty on GESCOM, rather than compensating/ restituting the Petitioner.

A. ANALYSIS:

In **Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161,** the Supreme Court observed that, if the judgment-debtor had borrowed money from a nationalised bank as a clean loan, and had paid the money into the Supreme Court, then what was relevant was what would be the bank's demand; in other words, if payment of an amount, equivalent of what the ledger account in the nationalised bank on a clean loan would have shown as a debit balance today, was not paid and something less than that was paid, that differential or shortfall was that there had been: (*1*) failure to restitute; (*2*) unfair gain by the non-complier; and (*3*) provided the incentive to obstruct or delay payment; unless this differential was paid, justice would not be done to the creditor; it only encouraged non-compliance and litigation; even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money; in other words, it was not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited was what justice required

While, as an abstract proposition of law, the developer would undoubtedly be entitled to be compensated to the extent it had to pay compound interest to the bank for obtaining a loan to tide over the problems faced by it, on being deprived of timely payment of the amounts due, we

must bear in mind the fact that an executing court cannot go behind the decree under execution. It can, however, construe a decree, to find out the true effect of that decree, by taking into consideration the pleadings as well as the proceedings leading up to the decree. (**Bhavan Vaja & Ors V. Solanki Hanuji Khodaji Mansang & Anr: (1973) 2 SCC 40).**

Bearing in mind the limited scope of enquiry into these aspects in execution proceedings, let us examine what the petitioner had pleaded, in the appeal preferred before this Tribunal, regarding compound interest, if any, paid by them to the Bank as a result of their being deprived of timely payment of the amounts due to them from the 2nd Respondent.

Reference to the issue of *"loan"* has only been taken in the following paragraphs of the appeal. In Para 7.14 it is stated that a letter dated 19.10.2015 was issued by GESCOM requesting KERC to return the original approved PPAs; and GESCOM, in this letter, recognized the fact that banks were insisting upon the original copies of the approved PPAs for sanctioning *loans.* Thereafter, in Para 9.9 of the Appeal, the petitioner extracted the impugned Order of the KERC in para 15 in which it was held that the Petitioner had not mentioned the authority or institution which refused the application of the SPD for *loans,* approval, etc., required for Project implementation for want of approved copy of the PPA. Again, in Para 9.9 of the Appeal, the Petitioner had stated that, while KERC observed that an approved copy of the PPA is mandatorily required for obtaining land conversion approval and *loans,* etc, it had conveniently brushed aside such a requirement by holding that such requirement comes only at the final stages; and, further, KERC had erroneously observed that the Appellant had failed to point out as to which specific authority had refused the application for *loans,* etc.

Thereafter in Para 9.10 of the Appeal, the Petitioner again extracted para 15 of the impugned judgement of the KERC wherein it was held, regarding delay in handing over the Original PPA, that the petitioner, along with the rejoinder filed on 09.07.2019, had filed certain documents; in the letter dated 19.10.2015, written by the Chief Engineer (Ele.), Corporate Planning, GESCOM to the Secretary, KERC, it was stated that GESCOM had entered into PPA with 1-3 MW Solar Power Developers for development of solar power project in GESCOM; the PPA copies were sent to KERC for approval, and the same had been approved by the Commission; and the individual solar power developers were requesting for returning of original PPAs for the project implementation as bankers were insisting for furnishing original PPA for sanctioning the *loans.*

In Para 148 of its order, in Appeal No.160 of 2020 dated 02.08.2021, this Tribunal observed that, after approval of the original PPA, the original PPA was with the Commission itself; since the bank and other authorities were insisting for the original of the approved PPA for sanctioning the loan, the developer had to approach GESCOM requesting for return of the PPA; and, in the letter addressed by GESCOM on 19.10.2015, it notes that banks were insisting upon the copies of the original approved PPA for sanctioning the loan.

It is evident that, in the appeal filed by them before this Tribunal, the Petitioner had referred to sanctioning of *"loans"* in a completely different context, and had nowhere stated that they had obtained *"loans"* from banks on payment of compound interest. Even in its order, in Appeal No.160 of 2020 dated 02.08.2021, all that this Tribunal has observed is that the bank and other authorities were insisting for the original of the approved PPA for sanctioning the loan.

As this Tribunal was not even appraised of the Petitioner even having obtained a loan, much less on payment of compound interest, the question of this Tribunal considering this issue, when it heard and passed judgement, in Appeal No. 160 of 2020 on 02.08.2021, does not arise. Consequently, this Tribunal could not have intended, when it issued directions to the Respondent to pay carrying cost/LPS to the appellant, in terms of Article 6.4 of the PPA, that the carrying cost should be compounded, that too on monthly basis.

It is for the first time, in Para 1.12 of the Execution Petition, that the Petitioner stated that, while calculating carrying cost/late payment surcharge, the 2nd Respondent had not taken into consideration the fact that the Petitioner had taken financial assistance from banks by way of loans for which interest was being paid on compounding basis and not on simple interest basis; when the Petitioner is paying interest on the loan amount on compounding basis to the banks/financial institutions and receiving interest from GESCOM on the delayed payment of differential tariff on simple interest basis, the Petitioner is financially prejudiced; and, by calculating interest on simple interest basis, the 2nd Respondent has acted contrary to the settled principle of 'time value of money i.e. the purpose of granting interest is to compensate for time value of money for the money denied at the appropriate time and paid after a lapse of time; the act of the 2nd Respondent, in calculating interest on simple interest basis, is a desperate attempt to arm twist the Petitioner and deprive him of the money which he is legally entitled to; and, as per law, the 2nd Respondent is liable to reimburse the said interest as well.

Thereafter, in Para 17 of the Rejoinder filed by them in the present Execution proceedings, the Petitioner stated that, while calculating carrying cost/late payment surcharge, the 2nd Respondent did not take into

consideration the fact that the Petitioner had taken financial assistance from banks (for the project) by way of loans, for which the interest was being paid on compounding basis, and not on simple interest basis; when they were paying interest on the loan amount on compounding basis to banks/financial institutions, and were receiving interest from the 2nd Respondent on delayed payment of differential tariff on simple interest basis, the Petitioner is financially prejudiced; and, by calculating interest on simple interest basis, the 2nd Respondent has acted contrary to the settled principle of 'time value of money' i.e. the purpose of granting interest is to compensate for time value of money for the money denied at the appropriate time and paid after a lapse of time.

Though they had claimed, for the first time in the Execution Petition filed by them, that they were entitled to be paid interest on compounding basis, no documentary proof in support of such a claim was filed even with the EP. It is for the first time, in the Written Submissions filed by the Counsel for the Petitioner in the present Execution Proceedings, is it stated that Clause 3 of the Loan Agreement provides that the Petitioner is paying interest on monthly rests i.e. monthly compounding.

Written submissions are filed to supplement the submissions made, by Counsel on either side, during the oral hearing of the Execution Petition, and the contentions urged therein, by the Counsel appearing for the parties to the proceedings, is based on the pleadings and evidence on record. As evidence in support of a plea is required to be adduced by the parties, and not by their Counsel, new evidence cannot be introduced for the first time in the Written submissions. In any event, in the absence of any such plea having been taken in the Appeal filed before this Tribunal, and, since this aspect is not reflected in the judgement or the decretal part of the appellate order passed by this Tribunal, it is impermissible for us to go behind and

beyond the decree to examine these contentions for the first time in Execution Proceedings.

X. CONCLUSION:

For the afore-said reasons, we are satisfied that the Petitioner's claim in the present Execution Proceedings, for payment of carrying cost compounded on monthly basis, goes behind and beyond the decree passed by this Tribunal in Appeal No. 160 of 2020 dated 02.08.2021. Such a relief can neither be sought nor granted in Execution Proceedings. The Execution Petition fails and is, accordingly, dismissed. IAs. If any pending, shall also stand dismissed.

Pronounced in the open court on this the **2nd day of July, 2024**.

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

REPORTABLE / ~~NON-REPORTABLE~~