IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APL NO 10 OF 2020&IA NOs 2269 OF 2019 & 543 & 909 OF 2020,
APL NO 11 OF 2020 &IA NOs2272 OF 2019 & 535 OF 2020,
APL NO 12 OF 2020 &IA NOs2273 OF 2019 & 539 OF 2020,
APL NO 13 OF 2020 &IA NOs2274 OF 2019 & 541 OF 2020
AND
APL NO 80 OF 2020 & IA NOs 2268 & 2267 OF 2019 &
IA NOs 537&804 OF 2020

Dated: 02nd November, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

APL NO 10 OF 2020& &
IA NOs 2269 OF 2019 & 543 & 909 OF 2020

In the matter of:

1. **Power Company of Karnataka Limited**
KPTCL Building, Kaveri Bhawan,
K.G. Road, Bengaluru 560 009
Through its Managing Director

2. **Chamundeshwari Electricity Supply Corporation Limited**
No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd Stage, Hinkal,
Mysore 570017
Through its General Manager (Commercial) …. Appellants

Versus

1. **Udupi Power Corporation Ltd.**
No. 160, Om Chambers, 2nd Floor, 1st Main Road,
Sheshadripuram, Near Total Gaz Pump,
Bangalore 560 020

Through the Managing Director

2. **The Central Electricity Regulatory Commission**
3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001
Through its Secretary

3. **Gulbarga Electricity Supply Company Limited**
Main Road,
Gulbarga 585 101
Through the Managing Director

4. **Hubli Electricity Supply Company Limited**
Navanagar,
Hubli 580 025
Through the Managing Director … Respondents

Counsel for the Appellant (s): **Mr. M.G. Ramachandran, Sr. Adv**.
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Mr. Basava Prabhu Patil, Sr. Adv.
Ms. Bhabna Das for R-3 & R-4

APL NO 11 OF 2020 &
IA NOs2272 OF 2019 & 535 OF 2020

In the matter of:

1. Gulbarga Electricity Supply Company Limited

Main Road,
Gulbarga 585 101
Through the Managing Director

2. **Hubli Electricity Supply Company Limited**
Navanagar,
Hubli 580 025
Through the Managing Director …. Appellants

Versus

1. **Udupi Power Corporation Ltd.**
No. 160, Om Chambers, 2nd Floor, 1st Main Road,
Sheshadripuram, Near Total Gaz Pump,
Bangalore 560 020
Through the Managing Director

2. **The Central Electricity Regulatory Commission**
3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001
Through its Secretary

3. **Power Company of Karnataka Limited**
KPTCL Building, Kaveri Bhawan,
K.G. Road, Bengaluru 560 009
Through its Managing Director

3. **Chamundeshwari Electricity Supply Corporation Limited**
No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd Stage, Hinkal,
Mysore 570017
Through its General Manager (Commercial) … Respondents

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Mr. Shikhar Saha
Ms. Anandini Kumar
Ms. Mahima Sinha for R-3 & R-4

APL NO 12 OF 2020 &
IA NOs2273 OF 2019 & 539 OF 2020

In the matter of:

1. **Power Company of Karnataka Limited**
KPTCL Building, Kaveri Bhawan,
K.G. Road, Bengaluru 560 009
Through its Managing Director

2. **Chamundeshwari Electricity Supply Corporation Limited**
No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd Stage, Hinkal,
Mysore 570017
Through its General Manager (Commercial)

3. **Mangalore Electricity Supply Company Limited**
Corporate Office, MESCOM Bhavan
First Floor, Kavoor Cross Road, Bijai,
Mangalore 575004 …. Appellants

Versus

1. **Udupi Power Corporation Ltd.**
No. 160, Om Chambers, 2nd Floor, 1st Main Road,
Sheshadripuram, Near Total Gaz Pump,
Bangalore 560 020
Through the Managing Director

2. **The Central Electricity Regulatory Commission**
3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001

Through its Secretary

3. Gulbarga Electricity Supply Company Limited
Main Road,
Gulbarga 585 101
Through the Managing Director

4. Hubli Electricity Supply Company Limited
Navanagar,
Hubli 580 025
Through the Managing Director

5. Bangalore Electricity Supply Company Limited
Krishna Rajendra Circle,
Bangalore 560 009
Through the Managing Director … Respondents

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APL NO 13 OF 2020 &
IA NOs2274 OF 2019 & 541 OF 2020

<u>In the matter of:</u>

1. Gulbarga Electricity Supply Company Limited
Main Road,

Gulbarga 585 101
Through the Managing Director

2. **Hubli Electricity Supply Company Limited**
Navanagar,
Hubli 580 025
Through the Managing Director …. Appellants

Versus

1. **Udupi Power Corporation Ltd.**
No. 160, Om Chambers, 2nd Floor, 1st Main Road,
Sheshadripuram, Near Total Gaz Pump,
Bangalore 560 020
Through the Managing Director

2. **The Central Electricity Regulatory Commission**
3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001
Through its Secretary

3. **Power Company of Karnataka Limited**
KPTCL Building, Kaveri Bhawan,
K.G. Road, Bengaluru 560 009
Through its Managing Director

4. **Chamundeshwari Electricity Supply Corporation Limited**
No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd Stage, Hinkal,
Mysore 570017
Through its General Manager (Commercial)

5. **Mangalore Electricity Supply Company Limited**
Corporate Office, MESCOM Bhavan
First Floor, Kavoor Cross Road, Bijai,
Mangalore 575004
Through the Managing Director

6. **Bangalore Electricity Supply Company Limited**
Krishna Rajendra Circle,
Bangalore 560 009
Through the Managing Director … Respondents

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Mr. Arunav Patnaik
Samya Chatterjee
Ms. Mahima Sinha
Ms. Anandini Kumar for R-3, R-4 & R-5

APL NO 80 OF 2020 &
IA NOs 2268 & 2267 OF 2019 &
IA NOs 537&804 OF 2020

In the matter of:

1. Bangalore Electricity Supply Company Limited
Registered Office at Krishna Rajendra Circle,
Bangalore 560 009
Represented herein by its
General Manager (Power Purchase) …. Appellants

Versus

1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001
Represented herein through its Secretary

2. Udupi Power Corporation Ltd.
Registered Office at 1st Floor, Lotus Towers
Devaraja Urs Road, Race Course,
Bangalore 560 001

Represented herein through its
General Manager – Business Development

3. **Power Company of Karnataka Limited**
Registered Office at KPTCL Building, Kaveri Bhawan,
K.G. Road,
Bengaluru 560 009
Represented herein by Managing Director

4. **Gulbarga Electricity Supply Company Limited**
Registered Office at Station Main Road,
Gulbarga 585 102
Represented herein by Managing Director

5. **Hubli Electricity Supply Company Limited**
Registered Office at P.B. Road, Navanagar,
Hubballi 580 025
Represented herein by Managing Director

6. **Chamundeshwari Electricity Supply Corporation Limited**
Registered office at No. 29, Kaveri Grameena Bank Road,
Inkal, Vijaynagar, 2nd Stage,
Mysuru 575 019
Represented herein by Managing Director

7. **Mangalore Electricity Supply Company Limited**
Registered Office at MESCOM Bhavana,
Kavoor Cross Road, Bejai,
Mangalore 575004
Represented herein by Managing Director … Respondents

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Mr. Saunak Kumar Rajguru
Ms. Adishree Chakraborty for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. These matters were taken up for final hearing by video conference, physical presence being not possible due to National Lockdown imposed for containing spread of corona virus (Covid-19).

2. The five appeals at hand have been presented by five distribution licencees operating in the State of Karnataka viz. Chamundeshwari Electricity Supply Corporation Limited (for short "CESCOM"), Gulbarga Electricity Supply Company Limited (for short "GESCOM"), Hubli Electricity Supply Company Limited (for short "HESCOM"), Mangalore Electricity Supply Company Limited (for short "MESCOM") and Bangalore Electricity Supply Company Limited (for short "BESCOM") – hereinafter referred to collectively as "the ESCOMs" or " the KESCOMs" – their cause being espoused and also represented by Power Company of Karnataka Limited (for short "PCKL"), the nodal agency coordinating, *inter alia*, power purchase related activities of the said ESCOMs - assailing the common order dated 08.11.2019 ("impugned order") passed by the Central Electricity Regulatory Commission (hereinafter referred to variously as "the Central Commission" or "the Commission" or "CERC") deciding on

the claim of late payment surcharge (LPSC) made by the first respondent - Udupi Power Company Limited (hereinafter referred to variously as “Udupi Power” or “Udupi” or “Genco”). By the Impugned Order, the Central Commission has allowed Petition Nos. 324/MP/2018 and 325/MP/2018 filed by the Genco i.e. Udupi Power.

PREFATORY

3. As indicated above, Udupi Power is a generating company which has established and operates a 1200 MW generating station in the State of Karnataka consisting of two units of 600 MW each. The first Unit (Unit-1) of the generating station attained Commercial Operations Date (hereinafter referred to as “COD”) on 11.11.2010 while the second Unit (Unit-2) attained COD on 19.08.2012. The Genco had entered into a Power Purchase Agreement dated 26.12.2005 (hereinafter referred to as “the PPA”) with the five ESCOMs in terms of which 90% of the power generated by the former is to be purchased by the latter.

4. The two petitions on which the impugned order was passed were presented by Udupi Power before CERC on 04.10.2018. By the first petition (no. 324/MP/2018) directions were sought against three of the above-mentioned five ESCOMs (i.e. GESCOM, HESCOM and CESCOM) for payment of LPSC related to invoices raised by Udupi towards *regular*

monthly bills for power supplied from COD of the respective Units (i.e. 11.11.2010 onwards for Unit-1 and from 19.08.2012 onwards for Unit-2*)*. By the second petition (no. 325/MP/2018) directions were sought against all the five ESCOMs for payment of LPSC along with interest for invoices raised for supply of *infirm power* i.e. power injected / supplied into the grid prior to the COD of each Unit i.e. between 03.06.2010 to 11.11.2010 (COD of Unit-1) to the extent of 495.50 Million Units (MUs) from Unit-1 and between 07.03.2011 to 19.08.2012 (COD of Unit-2) of 384.14 MUs from Unit-2. By the impugned order, both claims have been allowed.

5. The first two captioned appeals – instituted by PCKL & CESCOM and GESCOM & HESCOM respectively – arise out of claim of Udupi Power for LPSC in relation to *regular monthly bills* (after CODs) which was subject matter of proceedings in first above mentioned petition (no. 324/MP/2018) before CERC. The last three above captioned appeals have been brought respecting claim of Udupi for LPSC in relation to supply of *infirm power* (prior to CODs), the challenge being raised by PCKL, CESCOM & MESCOM; GESCOM & HESCOM; and BESCOM respectively.

6. The grounds of challenge in the appeals relating to claim of LPSC on *regular monthly bills* and also invoices for *infirm power* are based on doctrine of *res judicata*; the application of Rule 2 of Order II read with Section 34(2) of Code of Civil Procedure, 1908 (CPC); law of limitation;

the reliance on certain correspondence by Udupi Power being allegedly suspect and improper; absence of "acknowledgement" within the meaning of Section 18 of Limitation Act, there being no case made out of "deemed acceptance" under Article 6.3(a) of PPA or of "running account" or of "continuing cause of action"; the claim being contrary to Article 6.2(b) of PPA; the rate of LPSC claimed being not in accord with Article 6.4(a) of PPA; the computation being in violation of Article 6.14 of PPA; the plea of "waiver" of claim by Udupi Power; and the argument of "unjust enrichment" being groundless.

7. The appellant in last captioned appeal (BESCOM), while adopting the above arguments, additionally contends that the claim of LPSC in relation to *infirm power* against it is untenable because the invoices were not sent by the seller to it (the principal buyer) and instead sent to PCKL, the payments having been made as and when the same were received from PCKL. It is also contended that the seller has received payment in excess of the fuel cost incurred as per Regulation 11 of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter, "2009 Tariff Regulations") which it was liable to refund.

8. *Per contra,* the respondent Seller (Udupi Power) defends the impugned order contesting the above grounds, *inter alia,* pointing out that the ESCOMs have not been disputing that their contentions about rate of payment for supply of electricity were rejected and that there have been

delays in payments. It is argued that the claim of LPSC is based not on contractual terms but in the nature of enforcement of statutory Regulations, having the force of law. The second respondent contends that bar of limitation cannot apply to such claim as at hand. The invocation of doctrine of *res judicata* and the principles contained in Order II Rule 2 and Section 34(2) CPC and the plea of waiver are contested. While insisting that PCKL was the representative of the ESCOMs and so rightly treated as the entity through which invoices were routed, it has been the case of the second respondent that the parties have been maintaining running accounts and that it is a case of continuing cause of action. The computation of the claim of LPSC, as upheld by CERC, is defended.

THE BACKDROP

9. It is necessary to trace the history of the dispute as may be culled out from the decisions of CERC including the one impugned herein, the pleadings, and other material presented by the parties. It must be added, however, that questions about genuineness of some part of the material relied upon by respondent generator have been raised by the appellants. The said material is covered in the chronological narration which follows, subject to consideration of the objections in appropriate sequence and context.

10. In later part of year 2004, Nagarjuna Power Corporation Limited ("NPCL") had approached the Government of Karnataka ("GoK") offering to supply electricity from its Thermal Power Project proposed to be set up with a capacity of 1015 MW (2x 507.5 MW). Thereafter, NPCL filed a Petition before CERC for the approval of tariff for generation and sale of electricity from its Power Project to (i) State Utilities in Karnataka ("ESCOMs") and (ii) Kerala State Electricity Board. The CERC, by its Order in Petition No. 40/2005, accorded in-principle approval of the capital cost of the project with a capacity of 1015 MW for Rs. 4299.12 Crores inclusive of interest during construction. On 01.12.2005, GoK accorded approval for the draft Power Purchase Agreement ("PPA") in respect of 1015 MW coal-based power project of NPCL and also for entering Power Purchase Agreement between the ESCOMs and NPCL. The PPA was executed on 26.12.2005 between NPCL, on one hand, and BESCOM, MESCOM, GESCOM, HESCOM and CESCOM (collectively, "ESCOMs"), on the other, for supply of 913.5 MW power. The nominal gross electrical generating capacity of the project was initially 1,015 MW. As per the recital of the PPA, 90% of the gross capacity was agreed to be sold to the Karnataka ESCOMs ("KESCOMs").

11. In April 2007, the GoK accorded approval for setting up of a Special Purpose Vehicle ("SPV") named PCKL to supplement the efforts of Karnataka Power Company Limited in capacity addition. PCKL was

incorporated on 20.08.2007 under the Companies Act, 1956 with an initial authorized capital of Rs. five (Five) crore and commenced its business operations with effect from 16.10.2007. It may be added here itself that by its order (no. EN VSC 2011) dated 21.05.2011, GoK accorded approval for entering into a Memorandum of Understanding ("MOU") by PCKL and the ESCOMs for the purpose of debiting the expenditure of PCKL against the seed money received from the ESCOMs. The MOU detailed the manner and proportion in which the expenditure of PCKL has to be debited to ESCOMs. Accordingly, MOUs were entered by PCKL with ESCOMs during 2011-12. It is admitted fact that in order to bridge the short-term demand and supply gap, PCKL has been procuring power on behalf of the ESCOMs from various sources including purchase of power through Energy Exchange, Banking (SWAP) as well bilateral transactions.

12. The generating company NPCL was renamed as Udupi Power Corporation Limited ("Udupi Power") by "Certificate of Incorporation consequent upon change of name" issued on 08.02.2008 by Ministry of Corporate Affairs, Karnataka.

13. In July 2008, Udupi Power approached GoK and KESCOMs seeking approval for enhancement of capacity for the project from 1015 MW to 1500 MW and to provide power generation from the increased capacity to Karnataka ESCOMs. Udupi Power, on the basis of revision in capacity of power, sought revision in capital cost of the project. The GoK

gave in-principle approval to Udupi for expansion of capacity of the thermal power from 1015 MW to 1500 MW and later, in September 2010, constituted a committee to examine the enhancement of capital cost of the project due to enhancement of capacity which was allowed to be enhanced from 1015 MW to 1200 MW, the GoK agreeing in October 2010 to increase the capital cost of the project by 583.85 crore, excluding IDC, subject to approval by CERC, 1080 MW (90%) out of the enhanced capacity of 1200 MW being required to be sold to Karnataka ESCOMs.

14. The generator (Udupi Power) synchronized its Unit-1 and started supplying infirm power to the KESCOMs with effect from 03.06.2010. On 31.07.2010, it submitted the invoice for the infirm power supplied in the month of June 2010 and requested PCKL to make necessary arrangements to release the said payments. This was followed by submission of Invoice on 11.08.2010 for the infirm power supplied in the month of July 2010 with similar request to PCKL. On 16.08.2010, PCKL wrote to Udupi Power in response to its invoices dated 31.07.2010 and 11.08.2010 informing that Principal Secretary to GoK had been requested for making arrangements for depositing the amount with PCKL for disbursing the same to Udupi Power. The Invoices for the infirm power supplied in the months of August to November 2010 were similarly sent to PCKL on 16.09.2010, 06.10.2010, 08.11.2010 and 08.12.2010

respectively, some concerns about non-payment also having been raised each time.

15. By its letter dated 10.11.2010, PCKL intimated Udupi Power that pursuant to the enhancement of generating station capacity as approved by GoK on 25.10.2010, the interim/provisional tariff for 1200 MW worked out to Rs. 3.127/unit. Pursuant to this communication, Udupi Power started billing the KESCOMs for the period November 2010 (11.11.2010) to November 2011 (30.11.2011).

16. The Unit-1 was put into commercial operation on 11.11.2010. The tariff invoices issued on monthly basis by Udupi Power to ESCOMs from 04.01.2012 onwards would mention that payment beyond the due date shall carry interest.

17. On 07.03.2011, Unit-2 of Udupi Power was synchronized and the generator started supplying infirm power from that Unit to the ESCOMS. On 31.03.2011, it submitted the invoice for the infirm power supplied from its Unit-2 in the month of March 2011 and requested PCKL to make necessary arrangements to release the said payments.

18. On 30.03.2011, Udupi Power apprised PCKL about the non-payment of dues by HESCOM expressing concern over the fact that there had been no direction issued to HESCOM to comply with the PPA provisions, it being specifically stated that the pending invoices raised by

Udupi Power on HESCOM shall attract ‘interest’ as provided under Article 6.4 of the PPA.

19. On 21.04.2011, PCKL by its communication stated that KESCOMs had made full payment for infirm power supplied by Udupi Power. The Invoices for supply of infirm power from Unit-2 during the months of April to July 2011 were similarly sent on 03.05.2011, 06.06.2011, 05.07.2011 and 04.08.2011 respectively with some reminders in-between.

20. On 01.12.2011, Udupi Power filed Tariff Petition (no. 160/GT/2012) before CERC for determination of capital cost and tariff for the period 11.11.2010 to 31.03.2014 for Unit-1 and 01.04.2012 to 31.03.2014 for Unit-2. From December 2011 onwards, it started raising invoices for the billing period December 2011 to January 2014 based on Annual Fixed Charges (“AFC”) as claimed in its Tariff Petition dated 01.12.2011. On 03.04.2012, it requested GESCOM and HESCOM to release principal outstanding amounts against invoices along with applicable LPSC for the period 11.11.2010 to 31.03.2012 in the sum of Rs. 1.16 Crores and Rs. 6.70 Crores respectively as per provisions of the PPA and Regulation 35 of the 2009 Tariff Regulations.

21. In addition to follow-up by monthly invoices for supply of infirm power from Unit-1, Udupi was also sending requests to PCKL to make necessary arrangement for release of payments, its communication dated

14.03.2012 reminding that balance amount of Rs. 116,89,79,018/- had become outstanding against the infirm power bills submitted by it.

22. The Unit-2 attained COD on 19.08.2012. On 03.09.2012, Udupi Power submitted the invoice for the infirm power supplied from its Unit-2 in the month of August 2012 for the period 01.08.2012 to 19.08.2012 and requested PCKL to make necessary arrangements to release the said payments also requesting that arrangements be made towards payment of balance amount pending against the infirm power bills submitted by Udupi Power.

23. On 24.12.2012, CERC determined provisional tariff for Unit-1 in aforesaid Petition (no. 160/GT/2012) of Udupi Power. The order was challenged by PCKL filing appeal (no. 18 of 2013) before this tribunal. By interlocutory order dated 08.02.2013, PCKL was directed to pay provisional tariff as determined by CERC in respect of Units 1 and 2 from 01.09.2012 to 31.01.2013.

24. On 02.04.2013, Udupi Power requested CESCOM to release principal outstanding amounts against Invoices along with applicable LPSC of Rs. 15.72 Crores for the period 11.11.2010 to 31.03.2013 as per provisions of the PPA and Regulation 35 of the 2009 Tariff Regulations.

25. On 29.08.2013, Udupi Power sent another request to PCKL to release the outstanding payment of Rs. 127.92 Crores towards infirm power, this being followed by numerous reminders (by letters dated

06.06.2014, 19.06.2014 14.07.2014 and 21.02.2015) to PCKL with some addressed to ESCOMS requesting them to make payment with interest for delay.

26. On 20.02.2014, the Central Commission decided the tariff petition determining final tariff for Udupi Power's thermal power station (2x600 MW) for the period from 11.11.2010 to 31.03.2014 for Unit-1 and from 19.08.2012 to 31.03.2014 for Unit-2. Three appeals were filed against the said order - one (no. 108 of 2014) by PCKL, second (no. 119 of 2014) by Udupi Power and third (no 122 of 20140 by an association named *Janajagrithi Samithi Karnataka*. It appears that Udupi Power had also preferred review petition (no. 14/RP/2014) before CERC which was decided by Order dated 03.06.2014, *inter alia*, allowing carrying cost in terms of Regulation 5(3) of 2009 Tariff Regulations.

27. It is stated that Udupi Power by formal communication dated 01.03.2014 informed KESCOMs that the delayed payment charges shall be claimed as per the terms of the PPA considering the amounts payable as per tariff order and the actual payment received. On 01.04.2014, by separate communications, Udupi Power requested CESCOM, GESCOM and HESCOM to release principal outstanding amounts against Invoices along with applicable LPSC for the period 11.11.2010 to 31.03.2014 as per provisions of the PPA and Regulation 35 of the CERC 2009 Tariff

Regulations of Rs. 34.07 Crores, of Rs. 26.95 Crores and of Rs. 56.13 Crores respectively.

28. On 03.06.2014, this tribunal by an interlocutory order in appeal (nos. 108 and 122 of 2014), in supersession of earlier order, directed PCKL/KESCOMs to pay the charges at the final tariff determined by CERC by order dated 20.02.2014. On 19.06.2014, Udupi Power informed PCKL/ESCOMs about the outstanding amount towards regular invoices and infirm power as on 12.06.2014, specifically mentioning that the applicable interest shall be leviable over and above principal amount.

29. On 26.06.2014, Udupi requested the KESCOMS to release outstanding payment of Rs. 595.75 Crores and Rs. 127.92 Crores towards infirm power and to adjust the advance paid during December 2013/January 2014 against the final outcome of the hearing before this tribunal. It also approached the GoK by its letter seeking to highlight the difficulties being faced in the operations of the plant due to non-realization of invoices beseeching its support in release of outstanding payment of Rs. 116.82 Crores towards infirm power with interest for delay.

30. It is stated that on 25.08.2014, Udupi Power informed PCKL/ESCOMs about the outstanding amount towards regular invoices and infirm power as on that date adding that the applicable interest shall be applicable over and above principal amount. Based on CERC's Order dated 20.02.2014, Udupi Power revised the invoices for the billing period

11.11.2010 - 31.01.2014 and also started raising invoices for subsequent period i.e. from February 2014 (01.02.2014) to July 2015 (31.07.2015).

31. On 02.09.2014, PCKL through its proforma for payment towards infirm power submitted to Udupi Power admitted that a total amount of Rs. 237.30 Crore was payable towards infirm power.

32. Since there were consistent defaults in payments, Udupi Power again approached GoK by communications sent in January/February 2015 for issuance of necessary instructions to the KESCOMs to pay outstanding amounts towards regular bills followed by similar requests to PCKL on 21.02.2015 and the three ESCOMs (CESCOM, GESCOM and HESCOM) on 01.04.2015, the last set of communications also statedly raising the demand for LPSC. On 26.02.2015, PCKL wrote to Udupi, *inter alia*, stating that KESCOMs had paid Udupi Power for infirm power as per the PPA (i.e. fuel cost). On 27.02.2015, Udupi informed Chairman, PCKL that any delay in releasing the payment towards Infirm Power would attract applicable surcharge and that Udupi Power reserved its right to seek remedies against non-payment including payment of applicable surcharge.

33. The appeals against final tariff order of CERC were decided by this tribunal by judgment dated 15.05.2015. The generating company (Udupi Power) filed a review petition (no. 22 of 2015 in Appeal No 108 of 2014) against certain disallowances.

34. Based on the decision of this tribunal dated 15.05.2015, CERC revised the tariff by Order dated 10.07.2015 in Petition (no. 160/GT/2012) and Udupi Power started raising invoices for the billing period August 2015 (01.08.2015) till March 2016 (31.03.2016). The Commission would later (on 27.06.2019) re-determine the tariff (in Petition no. 160/GT/2012) for Unit-1 from 11.11.2010 to 31.03.2014 and 19.08.2012 to 31.03.2014 for Unit-2.

35. On 11.01.2016, Udupi Power filed Truing-up Petition (no. 07/GT/2016) before CERC for the period 11.11.2010 to 31.03.2014 praying, *inter-alia*, for allowance of capitalization of unrecovered infirm power amounting to Rs. 127.92 Crores along with carrying cost as on date.

36. It is stated that on 01.04.2016, Udupi Power requested CESCOM, GESCOM and HESCOM again by separate communications to release principal outstanding amounts against Invoices along with applicable LPSC for the period 11.11.2010 to 31.03.2016 in the sum of Rs. 84.02 Crores, Rs. 86.52 Crores and Rs.160.86 Crores respectively as per provisions of the PPA and Regulation 45 of the CERC (Terms and Conditions of Tariff) Regulations, 2014, such communications being reiterated to the latter two on 01.04.2017.

37. On 24.03.2017, CERC issued the Truing-up Order (in Petition no. 07/GT/2016) observing on the subject of payment of balance amount towards infirm power as under:

> "*19. In terms of the above regulation, the revenue earned (and not revenue realized) from sale of infirm power after accounting for fuel expenses shall be applied for reduction in capital cost. Accordingly, the plea of Udupi to capitalize the unrecovered towards infirm power in the capital cost is not accepted. As regards withholding of payment of ₹ 127.92 crore by the respondent, Karnataka discoms towards infirm power, we direct the respondents to pay the same directly to Udupi since, the supply of infirm power are to be accounted as UI in terms of the above regulations.*"

38. On 22.01.2018, Udupi Power raised supplementary invoices for LPSC for the period March 2011 till 05.01.2018 and requested ESCOMs (i.e. CESCOM, GESCOM and HESCOM) to fulfil their obligations under the PPA. Udupi Power is stated to have sent several reminders during 31.01.2018 to 20.09.2018 to the ESCOMs raising demand of incremental value of the LPSC against which no payment was made.

39. On 27.03.2018, PCKL, in its proforma for bill, again admitted Udupi Power's claim of Rs. 127.92 Crore towards balance payment of infirm power injected by Udupi Power from June 2010 to November 2010 and March 2011 to August 2012 also issuing directions for payment to Udupi Power. On 30.04.2018, MESCOM made payment of Rs. 10,65,55,730/- outstanding towards infirm power but did not make payment towards LPSC on balance principal amount. Similarly, GESCOM made payment

of Rs. 16,96,19,325/- outstanding towards infirm power on 17.09.2018 but not the LPSC on balance principal amount due towards Infirm Power.

40. By its letters dated 05.06.2018 and 20.07.2018 20.08.2018, PCKL informed Udupi Power that the amount of Rs. 164.60 Crores towards LPSC was not payable by Karnataka ESCOMs for the reasons that (i) Udupi Power is only entitled to payment towards infirm charges basis the actual fuel consumption and had accordingly been paid Rs. 104.07 crores at the rate of Rs. 1.208/kWh and (ii) that the bills towards balance payment of infirm power were received by PCKL on 24.01.2018.

41. On 01.09.2018, PCKL and GESCOM refused Udupi Power's claim concerning LPSC on ground that LPSC on regular bills is not payable in view of this tribunal's judgment dated 24.01.2013 in Appeal Nos. 82 and 90 of 2012 ruling that interest can be charged only after determination of final tariff in accordance with provision of Regulation 5(4) of the 2009 Tariff Regulations.

42. Feeling aggrieved by letters dated 01.09.2018 from PCKL and GESCOM and non-payment of supplementary invoices pertaining to LPSC by the defaulting ESCOMs, Udupi Power approached CERC on 04.10.2018 by filing petition (no. 324/MP/2019). On the same date, it also preferred another petition (no. 325/MP/2018) raising grievances about LPSC on delay in payment of Invoices concerning infirm power. As noted

earlier, the claim of Udupi Power for LPSC in both has been allowed by the Commission.

THE IMPUGNED ORDER

43. As is pointed out by both sides, the Central Commission has returned, *inter alia*, the following findings by the Impugned Order:

(i.) Udupi Power is entitled to LPSC on delay in payments of invoices of regular power supply as well as delay in payment of invoices of infirm power;

(ii.) Udupi Power has kept PCKL/ESCOMs informed about the quantum of LPSC payable by them at the end of each financial year, there having been no objection raised, until 05.06.2018, by PCKL or ESCOMs to dispute their liability to pay LPSC;

(iii.) The CERC in its Order dated 20.02.2014 in Petition No. 160/GT/2012 (Udupi Power's Tariff Petition) and Order dated 24.03.2017 in Petition No. 07/GT/2016 (Udupi Power's Truing-up Petition) did not return any finding qua payment of interest and, therefore, the principle of *res judicata* cannot be invoked;

(iv.) The genesis of LPSC lies in the non-payment of regular monthly bills by ESCOMs and that the petitions regarding non-payment of LPSC, apart from being a continuous cause of action, are within the period of limitation;

(v.) Udupi Power is entitled to LPSC at the rate specified in the relevant CERC Tariff Regulations and not the rate for interest agreed under the PPA;

(vi.) The CERC Tariff Regulations of 2009 and 2014 were notified after the signing of the PPA (dated 26.12.2005) and Udupi Power, by signing the PPA (in 2005), cannot be said to have waived its entitlement to LPSC in terms of the said 2009 and 2014 Tariff Regulations which were notified subsequent to date of signing of the PPA; and

(vii.) The functions of PCKL as well as the conduct of the Karnataka ESCOMs clearly demonstrate that PCKL is their authorized representative and if certain invoices were not sent specifically to BESCOM, that cannot be used by BESCOM as an excuse for not making payments towards Udupi Power's legitimate entitlements.

THE PPA PROVISIONS

44. The following provisions of the PPA have been referred to during arguments:

> *1.1 Definitions: In this Agreement, the following words and expressions shall have the respective meanings set forth below:*
>
> *"Acknowledgement date" means the date on which receipt of a Tariff Invoice or a Supplementary Invoice is acknowledged by the Designated Officer of the Principal Buyers*
>
> *"Billing month" means the period between any two consecutive Meter reading dates. The first billing month shall start from the Commercial Operation date and end with the next immediate meter reading date.*
>
> *"Bill" shall mean Tariff Invoice.*
>
> *"Commercial Operation date" means the date declared by the Seller which shall be the date on which the Unit is available for commercial operation and has established its installed capacity in accordance with Article 2-A.*
>
> *"Default Rate" means an interest rate of State Bank of India Prime Lending Rate subject to modifications from time to time*
>
> *"Due date of payment" shall mean sixty days reckoned from the Acknowledgement date, including the Acknowledgement date.*
>
> *"Energy charges" shall have the meaning specified in Article 4.4. (Note: defined in said Article as "the sum of recoverable*

cost of Primary fuel, secondary fuel and lime and …. Payable as determined by the Commission …..")

"Meter reading date" for any Billing Month means 12:00 hours of the first date of each calendar month.

"Principal Buyers" means Bangalore Electricity Supply Company Limited, Mangalore Electricity Supply Company Limited, Gulbarga Electricity Supply Company Limite, Hubli Electricity Supply Company Limited and Chamundeshwari Electricity Supply Company Limited and their authorised representatives.

"Supplementary Invoice" shall have the meaning set forth in Article 6 hereof.

"Target Availability (TA)" in relation to the Unit for recovery of full Capacity (fixed) charges for any period means the availability value of 80% or as enhanced by CERC from time to time.

"Target generation" means the product of 90% of the installed capacity,(1-%Auxiliary Consumption/100) of the Unit in MW and the number of hours in the Tariff period times 0.80 and expressed in MU, where the buyer is concerned…

"Tariff invoice" shall have the meaning set forth in Article 6 hereof

"Tariff Period" means the period commencing from the Commercial Operation Date and ending with the last day off the financial year immediately thereafter and every period of one year subsequently, during the Term of this agreement"

2.A.4.6 Electricity Generated Prior to Commercial Operation Date (Infirm Power):

"Any Electricity generated prior to Commercial Operation Date shall be construed to be for the purpose of testing, commissioning, synchronization and start-up. For generation of such electrical energy before Commercial

Operation Date, the Principal Buyers shall reimburse the fuel charges incurred by the Seller on the basis of actual fuel consumption to the extent the said Electricity is fed to Transmission Utilities grid. Further any amount (in excess of recovery of fuel cost) earned by the generating company from sale of infirm power, shall be taken as reduction in capital cost and shall not be treated as revenue."

2 B Allocation of power to Different Companies Generated from the Facility: Not later than forty five days prior to the Commercial Operation date, government of Karnataka shall allocate power from the facility totalling to 90% of the installed capacity among the Principal Buyers. The capacity so allocated shall remain firm for each of the Principal Buyers …

3.10 Third Party sale: (a) The Seller shall be allowed to sel electricity from the Unit/s beyond Target availability subject to first right of refusal resting with the Principal Buyers. …

4.3 Recoverable Capacity (fixed) charges (Capacity Charges): (a) the seller shall be entitled to recover Recoverable capacity (fixed) charges as determined by the Commission from time to time in accordance with the applicable regulations in force duly considering O&M charges … Target Availability and ……

"6.2. Billing by the Seller

(a) The Seller shall submit to the Principal Buyers a Tariff Invoice for each Billing month setting forth those amounts payable by the Principal Buyers for Monthly Capacity (fixed) charge amount, Energy charges and Incentive payment wherever applicable. Along with each monthly bill, the Seller will submit documents as agreed between Principal Buyers and Seller.
(b) The Seller shall, if necessary, submit to the Principal Buyers Supplementary Invoices each month for any other payment not included in the Tariff invoice.

Provided that no revision in respect of a Tariff invoice shall be included in a Supplementary invoice after one month of the expiry of the relevant Tariff period.

(c) Any Tariff Invoice or Supplementary Invoice shall specifically indicate the payments attributable to the Net metered energy. The Tariff Invoice or Supplementary invoice shall be submitted to the Principal Buyers along with a covering letter in triplicate during Business hours on a Business day.

(d) The Designated officer of the Principal Buyers shall promptly acknowledge the receipt of the invoice and covering letter and indicate the date of receipt of the invoice on the duplicate and third copy of the covering letter and return to the Seller."

6.3 Payment by the Principal Buyers:

(a) "The Principal Buyers shall communicate to the Seller and the Bank any dispute in respect of the Tariff invoice or the Supplementary invoice, within Ten Business days of the Acknowledgement date. If the Principal Buyers do not communicate to the Bank and the Seller any such dispute, it shall be construed as deemed acceptance by the Principal Buyers in respect of the entire amount of such invoice."

(b) In case the Principal Buyers communicates any dispute in respect of a Tariff invoice or a Supplementary invoice, both the Parties shall enter into good faith negotiations and resolve the same within thirty days of the Acknowledgement date. The Parties shall follow the process in Article 7.1 (a), (b) and (c) for resolving any dispute hereunder.

(c) Notwithstanding any dispute that may be raised under (a) above, the Principal Buyers shall pay the Seller the undisputed amount in respect of the Tariff invoice or Supplementary invoice on or before the Due date of

payment to a bank account designated in writing by the Seller.

(d) After settlement of dispute, if any amount becomes payable by the Seller to the Principal Buyers, then the same shall be paid within seven days."

For

"6.4 Interest on belated payment

(a) Any payment, including payment in respect of disputed amounts, made by the Principal Buyers beyond the Due date of payment shall carry interest at the Default rate. Notwithstanding the foregoing, this does not give any right whatsoever to the Principal Buyers to delay payment and accordingly is without prejudice to any other remedy the Seller may have for late payment by the Principal Buyers.

(b) All such interest shall accrue from day to day and shall be calculated on a 365 days year basis."

"6.14 Mode of accounting of payments:

I . All payments made by the Principal Buyers will be adjusted in the following order of priority:

a. Revenue arrears;
b. Interest on Revenue Arrears;
c. Current month's revenue."

45. Noticeably, the PPA does not define the word "Revenue", it to be construed in view of the above to comprise of, as far as procurers are concerned, the "*Monthly Capacity (fixed) charge amount, Energy charges and Incentive payment*" for which monthly billing is prescribed. The PPA does not provide for LPSC such claim being founded by the respondent Udupi in regulations. Hence, it cannot be said that the expression

"revenue' used in PPA was intended by parties to PPA to take into its fold the LPSC as well.

THE REGULATIONS

46. It is essential to also take note of the statutory regulations on the subject of terms and conditions of tariff framed by CERC as have been referred to. The regulations prevalent during the period from which the claim of LPSC commences were notified and enforced as the 2009 Tariff Regulations. They were replaced by 2014 Tariff Regulations brought into effect from 01.04.2014.

47. The relevant part of 2009 Tariff Regulations, as were referred during hearing, may be extracted as under:

> *"11. Sale of Infirm Power: Supply of infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional or State UI pool account at the applicable frequency-linked UI rate:*
>
> *Provided that any revenue earned by the generating company from sale of infirm power after accounting for the fuel expenses shall be applied for reduction in capital cost"*
>
> *18. Interest on Working Capital:*
> *(1) The working capital shall cover:*
> *(a) Coal-based/lignite-fired thermal generating stations*
> *(i) Cost of coal or lignite and limestone, if applicable, for 1½ months for pit- head generating stations and two months for non-pit-head generating stations, for generation corresponding to the normative annual plant availability factor;*

(ii) Cost of secondary fuel oil for two months for generation corresponding to the normative annual plant availability factor, and in case of use of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil.
(iii) Maintenance spares @ 20% of operation and maintenance expenses specified in regulation 19.
(iv) Receivables equivalent to two months of capacity charges and energy charges for sale of electricity calculated on the normative annual plant availability factor, and
(v) Operation and maintenance expenses for one month.

"32. Billing and Payment of charges: (1) Bills shall be raised for capacity charge, energy charge and the transmission charge on monthly basis by the generating company and the transmission licensee in accordance with these regulations, and payments shall be made by the beneficiaries or the transmission customers directly to the generating company or the transmission licensee, as the case may be."

"35. Late payment surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee, as the case may be."

"37. Norms of operation to be ceiling norms: Norms of operation specified in these regulations are the ceiling norms and shall not preclude the generating company or the transmission licensee, as the case may be, and the beneficiaries and the long-term transmission customers from agreeing to the improved norms of operation and in case the improved norms are agreed to, such improved norms shall be applicable for determination of tariff."

(emphasis supplied)

48. Similarly, the relevant part of 2014 Tariff Regulations may be extracted as under:

"28. Interest on Working Capital:
(1) The working capital shall cover:
(a) Coal-based/lignite-fired thermal generating stations

(i) Cost of coal or lignite and limestone towards stock, if applicable, for 15 days for pit-head generating stations and 30 days for non-pit-head generating stations for generation corresponding to the normative annual plant availability factor or the maximum coal/lignite stock storage capacity whichever is lower;
(ii) Cost of coal or lignite and limestone for 30 days for generation corresponding to the normative annual plant availability factor;
(iii) Cost of secondary fuel oil for two months for generation corresponding to the
normative annual plant availability factor, and in case of use of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil;
(iv) Maintenance spares @ 20% of operation and maintenance expenses specified in regulation 29;
(v) Receivables equivalent to two months of capacity charges and energy charges
for sale of electricity calculated on the normative annual plant availability factor; and
(vi) Operation and maintenance expenses for one month.

42. Billing and Payment of charges: (1) Bills shall be raised for capacity charge, energy charge and the transmission charge on monthly basis by the generating company and the transmission licensee in accordance with these regulations, and payments shall be made by the beneficiaries or the long term transmission customers /DICs directly to the generating company or the transmission licensee, as the case may be."

"45. Late payment surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be."

"47. Norms to be ceiling norms: Norms specified in these regulations are the ceiling norms and shall not preclude the generating company or the transmission licensee, as the case may be, and the beneficiaries and the long-term transmission customers /DICs from agreeing to the

> <u>*improved norms*</u> *and in case the improved norms are agreed to, such improved norms shall be applicable for determination of tariff.*"

(emphasis supplied)

49. A bare reading of above provisions shows that not much changed after the promulgation of the 2014 Regulations. The prescription for "*Billing and Payment of charges*" mandated Invoices towards "*capacity charge, energy charge and the transmission charge*" to be raised "*on monthly basis*". On the subject of "*Late payment surcharge*", only the rate of levy changed from 1.25% to 1.5% per month, the period of delay for such liability to kick in after sixty days from the date of billing. On the issue whether the norms prescribed by the Regulations applied with rigidity, the Regulations continued to clarify that the parties had the liberty to deviate provided the norms adopted by contractual terms with bearing on "determination of tariff" are "improved norms".

50. The provision regarding LPSC and the "*Norms of Operation*" or operational parameters are covered under different chapters of the Regulations. The only norms stipulated by the CERC Tariff Regulations are the "Norms of Operation" and they relate to elements in the nature of "Normative annual plant availability factor", "Normative annual plant load factor", "Gross station heat rate", "Secondary fuel oil consumption", and "Auxiliary energy consumption".

51. It is interesting to note that Tariff Regulations notified for 2019-24 by CERC provide modified regime on subjects of "*Interest on Working Capital*" and "*Late payment surcharge*" as under:

> *"34. Interest on Working Capital:*
> *(1) The working capital shall cover:*
> *(a) For Coal-based/lignite-fired thermal generating stations:*
> *(i) Cost of coal or lignite and limestone towards stock, if applicable, for 10 days for pit-head generating stations and 20 days for non-pit-head generating stations for generation corresponding to the normative annual plant availability factor or the maximum coal/lignite stock storage capacity whichever is lower;*
> *(ii) Advance payment for 30 days towards cost of coal or lignite and limestone for generation corresponding to the normative annual plant availability factor;*
> *(iii) Cost of secondary fuel oil for two months for generation corresponding to the normative annual plant availability factor, and in case of use of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil;*
> *(iv) Maintenance spares @ 20% of operation and maintenance expenses including water charges and security expenses;*
> *(v) Receivables equivalent to 45 days of capacity charge and energy charge for sale of electricity calculated on the normative annual plant availability factor; and*
> *(vi) Operation and maintenance expenses, including water charges and security expenses, for one month.*
>
> *59. Late payment surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary or long term customers as the case may be, beyond a period of 45 days from the date of presentation of bills, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.*"

(emphasis supplied)

52. What stands out from the above comparison of tariff regulations for the three control periods is that the threshold for liability on the part of beneficiary (procurer) to pay LPSC has a close and direct nexus with the period for which interest on working capital admissible for the generator (Seller).

53. The grounds of challenge to the impugned decision may now be considered.

COMMON CONSIDERATION OF CLAIM FOR LPSC ON REGULAR & INFIRM POWER ERRONEOUS APPROACH?

54. It is the grievance of the appellants that the Central Commission has committed a patent error by giving a common order with common findings on both Petition No. 324/MP/2018 (dealing with LPSC on regular tariff invoices) and Petition No. 325/MP/2018 (dealing with LPSC against infirm power invoices) ignoring that the facts and the issues involved in both are different. It is argued that instead of examining and deciding Petition No. 325/MP/2018, on its own distinct and different facts and circumstances, the Central Commission has mixed up both the Petitions and their issues on the presumption that the findings qua Petition No. 324/MP/2018 would apply to Petition No. 325/MP/2018 as well.

55. Suffice it to say at this stage that having heard the parties at length, we are of the view that there is no prejudice caused to the appellants.

Their contentions with respect to payment of LPSC on delayed payment of infirm power bills are substantially similar to the contentions raised for payment of regular bills for power supplied. The contentions specific to claim of LPSC against infirm power are separately considered in proper sequence and context.

RES JUDICATA, ORDER II RULE 2 & SECTION 34(2) CPC

56. The challenge to impugned order with reference to the doctrine of *Res Judicata,* and the provisions contained in Order II Rule 2 and Section 34(2) is based on same set of facts. Thus, the submissions founded on the three legal principles have been advanced together and in a manner which is overlapping.

57. Section 11 of the Code of Civil Procedure, 1908 (CPC), deals with the rule of *res judicata* and bars the same claim from being made over and over again in fresh proceedings. The appellants refer to Section 11 of the CPC and Explanation V thereto which read as under:

> "*Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

> …
> *Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*”
>
> (emphasis supplied)

58. It is trite that the previous decision which is referred to invoke the rule of *res judicata* must be one rendered in a case where the issue raised in subsequent case was also “*directly and substantially in issue*”. The explanation quoted above means that the principle of *res judicata* applies when a claim / contention is raised in a previous proceeding and is not expressly granted.

59. The provision contained in Section 34 CPC relates to “Interest” and, *inter alia*, provides that a Court while passing a decree for payment of money may “*order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged*” which may be past, *pendente lite*, or future. However, by sub-Section (2), it bars subsequent proceedings for claiming interest alone, the clause reading as follows:

> “*Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.”*

60. The settled procedural law expects the initiation of civil proceedings to be comprehensive and not piece-meal. For civil suits, the norm is that

they must include the "*whole claim*". This is to preclude multiplicity of proceedings. The principle contained in Rule 2 of Order II CPC runs thus:

> "*2. Suit to include the whole claim.—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*
>
> *Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*
>
> *Illustration*
>
> *A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907*"

61. It is clear that if there is cause of action for claiming certain reliefs against the opposite party, all such reliefs will have to be claimed in same proceedings before the same forum (subject, of course, to jurisdictional limits of such forum). If a relief is not claimed in the proceedings initiated,

it is deemed to have been given up or forgone or relinquished and cannot be claimed by subsequent action.

62. It appears that Udupi Power in its Tariff Petition No. 160/GT/2012 had claimed "*payment towards infirm power from the date of synchronization along with applicable interest*" but admittedly CERC did not make any observation regarding the same in its Order dated 20.02.2014 while determining the final tariff. The said tariff order was challenged before this tribunal in Appeals (nos. 108, 122 and 119/ 2014 and 18/ 2013) which were decided by order dated 15.05.2015 the tribunal having declined any order regarding interest on belated payments. The matter stood remanded to the Central Commission which passed fresh order dated 10.07.2015 in same matter (petition no. 160/GT/2012) but with no order regarding interest on belated payments having been granted.

63. It is also argued that in the Truing Up Petition (no. 7/GT/2016), carrying cost or interest on arrears of infirm power was directly and substantially in issue, yet the same was not granted by the Central Commission, the final order dated 24.03.2017 having directed the payment only of the principal sum of Rs. 127.92 Crores.

64. It is stated that both the above-mentioned orders were never challenged by Udupi Power and thus have attained finality. It is the argument of the appellants that the omission of any finding or observation

in favour of Udupi Power on the issue of interest on belated payments in the previous proceedings, despite the same having been raised by Udupi, implies that the said relief is deemed to have been rejected as per Explanation V to Section 11 of the CPC. Therefore, fresh proceedings for LPSC for the same period is barred by *res judicata*.

65. It is argued that the Commission having observed (in para 94 of the impugned order) that "*on both occasions, the issue was raised by the Petitioner, but it was neither decided nor dealt with by this Commission in the relevant orders*" and that this tribunal in appeal had also "*not given any finding in this regard*", it should have applied the rule of *res judicata* under Explanation V of Section 11 of the CPC and rejected the claim of LPSC. It is the submission that LPSC is in the nature of interest on delayed payments and, therefore, a separate proceeding only for such claim LPSC is barred also by the principle enshrined in Section 34(2) of the CPC.

66. In the alternative, it is argued that if it is to be considered that Udupi did not make a specific claim for LPSC in the previous proceedings, fresh proceedings for the same are barred under Rule 2 of Order II of the CPC since the norm is that a suit must include the whole claim and omission to do so invites a bar against separate proceeding being subsequently initiated for any claim which was omitted or relinquished when the initial suit was filed. Reliance is placed on two judgments of the Supreme Court reported as *Coffee Board v Ramesh Exports (P) Ltd.,* (2014) 6 SCC 424

and *CIT v T.P. Kumaran*, (1996) 10 SCC 561 besides two decisions of this tribunal viz. *Bihar Steel Manufacturers Association v Bihar Electricity Regulatory Commission*, [2011] APTEL 78; Judgment dated 18.05.2011 in Appeal No. 172 of 2010.

67. We are not impressed with above line of arguments. We elaborate our reasons hereinbelow.

68. The order dated 03.06.2014 of CERC (in Review Petition No. 14/RP/2014 relating to Petition No. 160/GT/2012), made it clear that Udupi Power is entitled to carrying cost applicable to tariff deferential/delta of final tariff and provisional tariff, this being distinct from LPSC over delay in payment against tariff invoices raised for power supplied, the key observations being:

> *"12. … As regards the payment of applicable interest, the same is guided by the proviso to Regulation 5(3) of the 2009 Tariff Regulations, as amended on 21.06.2011….. The difference between the tariff provisionally billed and tariff initially determined is required to be adjusted in terms of the said proviso to Regulation 5(3) of the 2009 Tariff Regulations…"*

69. This tribunal's judgment dated 15.05.2015 noted that the issue regarding interest on belated payments had been settled by CERC in its Order dated 03.06.2014 (in Petition no. 14/RP/2014) on the subjects of interest (i) on working capital and (ii) on loans. There was no occasion for any finding being returned on issue of LPSC on delayed payments which is different and distinct from the nature of interest considered in the said

decision it being governed instead by Regulations 35 and 45 of CERC Tariff Regulations 2009 and 2014 respectively.

70. The discussion in the aforesaid orders clearly related only to (i) interest on working capital in terms of Regulations 18 and 28 of CERC Tariff Regulations 2009 and 2014 respectively, (ii) interest on loans in terms of Regulations 16 and 26 of CERC Tariff Regulations 2009 and 2014 respectively and (iii) carrying cost over delta tariff pursuant to determination of final tariff in terms of Regulations 5(3) and 7(7)(iii) of CERC Tariff Regulations 2009 and 2014 respectively. These are claims distinct from the claim of LPSC as raised in terms of Regulations 35 and 45 of CERC Tariff Regulations 2009 and 2014 respectively by petitions (nos. 324/MP/2018 and 325/MP/2018) leading to the impugned order being passed.

71. It is a settled position of law that principle of *res judicata* does not apply in tariff matters [*U.P. Power Corporation Ltd. vs. NTPC Ltd.* (2009) 6 SCC 235]. As shall be discussed immediately hereafter, the issue of LPSC is one concerning enforcement of regulations. The dispute over non-payment of energy charges against regular supply or, for that matter, of dues on account of supply of infirm power would be outside the scope of the tariff determination exercise, there being not even a remotest possible connection thereto. The Tariff petition leading to orders dated 20.02.2014 and 10.07.2015 of CERC and in-between of this tribunal in

appeal rendered on 15.05.2015 was in due course of tariff determination exercise under the Regulations. Similar is the nature and status of proceedings before CERC arising out of Truing up petition leading to order dated 24.03.2017, the purpose and object of such exercise having a bearing on tariff determination for the following control period. In this view, it is wholly wrong to contend that the issue of recovery of amount not paid or of late payment, or the ancillary issue of LPSC on that account, are to be treated as matters having arisen "*directly or substantially in issue*" in said earlier proceedings.

72. It is factually wrong on part of appellants to contend that Udupi Power had raised the issue of LPSC before CERC or this tribunal or that such claim for LPSC has been expressly rejected in the said earlier proceedings. The said earlier petitions brought before CERC by the respondent Udupi were not proceedings instituted for recovery of money, not the least to be equated with a suit for payment of money within the meaning of Section 34 CPC. The dispute relating to rate of charges payable is *de hors* the obligation of both sides under the Regulations to have the tariff determined by the Commission periodically. Such disputes cannot be mixed up with the said statutory exercise. The previous decisions which have been referred can neither operate as *res judicata* against the claims instituted through the two petitions which have resulted

in the impugned order nor attract the inhibitions contained in Rule 2 of Order II or Section 34(2) of CPC.

73. For the foregoing reasons, we reject the arguments raised to above effect by the appellants.

LPSC – REGULATORY OR CONTRACTUAL LIABILITY?

74. The question as to whether statutory Regulations prevail over contractual terms represented in PPA (as at hand) on such issue as LPSC, in our considered view, goes to the root of the matter before us. It is of great significance and import and would have a direct bearing on the prime issue of limitation.

75. The PPA does not include a specific provision for late payment surcharge. The appellants equate the claim of seller to LPSC with levy of interest on delayed payments at the "Default rate" as provided in Article 6.4(a) of the PPA. In fact, this plea is extended by them to say that the PPA was entered into on 26.12.2005, and Regulation 26 of the 2004 Tariff Regulations, which was prevailing then, provided the same rate of LPSC as prescribed by 2009 Tariff Regulations and yet Udupi Power had agreed upon a rate different from the Tariff Regulations in the PPA, thereby waiving its right to claim a higher rate of LPSC under the Tariff Regulations. On the other hand, it has been the case of the seller that it

is entitled to LPSC in terms of statutory Regulations framed and enforced by the CERC.

76. The Electricity Act, 2003 has established the machinery through which its provisions are to be worked so as to achieve its objectives. The regulatory framework includes the Central Electricity Regulatory Commission (CERC), the functions assigned to it by Section 79(1) being in the nature of legislative, administrative, adjudicatory and advisory. The legislative roles primarily are "*(a) to regulate the tariff of generating companies owned or controlled by the Central Government; (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; (c) to regulate the inter-State transmission of electricity; (d) to determine tariff for inter-State transmission of electricity; and (e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations*". The power and jurisdiction "*to adjudicate upon disputes involving generating companies or transmission licensee*" or "*to refer any dispute for arbitration*" is conferred upon the Central Commission by clause (f) of sub-section (1) of Section 79. This clause, in fact, qualifies the dispute that can be brought before the Central Commission by restricting it to "*matters connected with clauses (a) to (d) above*".

77. For purposes of discussion that follows, it may be noted that sub-Section (4) of Section 79 enjoins upon the CERC while discharging its statutory functions to "*be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3*". The advisory functions, as set out in sub-section (2), seem to sum up the ethos of the reforms ushered in by this law since it lays emphasis on promotion of "*competition, efficiency and economy in activities of the electricity industry" and "investment in electricity industry*", all this agenda to fit in with the macro objectives articulated in preamble for taking of "*measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies*".

78. The legislative power to frame regulations to carry out the functions entrusted to an Electricity Regulatory Commission (Central or State) is distinct from the administrative power to determine tariff. The former is guided by the provision contained in Section 61 whilst the circumspection for latter duty is set out in Section 62 of the Electricity Act. It is also important to note that while specifying, by regulations (the power to do so being given by Sections 178 & 180), "*the terms and conditions for the determination of tariff*" the Commission is to bear in mind, *inter alia*, that

"*the generation, transmission, distribution and supply of electricity are conducted on commercial principles*" and "*the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments*", besides taking care that the consumers' interest is safeguarded even while "*recovery of the cost of electricity in a reasonable manner*" is ensured, and that "*efficiency in performance*" is rewarded.

79. It does not call for a lengthy discourse to say that "*efficiency*" and "*economy*", as indeed competitiveness, in activities of the electricity industry depend in a large measure on honesty, financial discipline, transparency and probity, adherence to highest standards of commerce & trade and sincerity in discharging obligations undertaken on the part of all players and stakeholders. The neglect of collection of revenue or discharge of financial obligations not only disturbs the sustainability of operations of those higher up in supply chain which is anathema to the overall "*interest of consumers*" that all concerned are duty-bound to sub-serve but also discourages *"investment in electricity industry*" so essential for "*development of electricity industry*" and to achieve ultimate goals of "*supply of electricity to all areas*" and "*rationalisation of electricity tariff*".

80. Pertinent to note that the petitions leading to the impugned order were filed before CERC by Udupi Power invoking its regulatory jurisdiction

under Section 79(1)(b) of Electricity Act. This was objected to by PCKL but CERC repelled it by observations (in paragraph 83):

> *"83. As regards applicability of Section 79(1)(b) of the Electricity Act, 2003, the Petitioner has submitted that the Respondents have wrongly contended that the Petitioner has invoked the wrong jurisdictional clause by filing the Petition under Section 79(1)(b) of the Electricity Act, 2003. This is a hyper-technical plea which is in denial of ambit of Section 79(1) of the Electricity Act, 2003. The powers of this Commission under Section 79(1)(b) are wide enough to include the Petitioner's claim for LPS over belated payments. The Hon'ble Supreme Court in the matter of Energy Watchdog vs. CERC & Ors. (2017) 14 SCC 80, has interpreted the powers of this Commission under Section 79(1)(b) of the Electricity Act, 2003 and held that the said power is not merely restricted to tariff determination, and that this Commission is conferred with wide regulatory powers"*

81. We are of the view that the above may not be the complete answer to the objection raised.

82. We agree with the respondent Seller (Udupi Power) that once the regulations cover the field the matter ceases to be contractual. The claim of LPSC does not arise out of PPA since the said document (contract) is silent on the subject. In the *lis* between the parties herein, it is relatable to provisions of Tariff Regulations (viz. 2009 Tariff Regulations 2009 and 2014 Tariff Regulations).

83. In *India Thermal Power Ltd. v. State of M.P.*, (2000) 3 SCC 379, the Supreme Court (in a matter covered by regime anterior to Electricity Act, 2003) held thus:

"*11. It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43- 6 A(2) and notifications issued thereunder. <u>Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory</u>. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the <u>PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements</u> of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs*

> *contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.”*
>
> (emphasis supplied)

84. The ruling remains valid even for purposes of regime put in position post-legislative reforms brought in by 2003 enactment.

85. It is settled that the Tariff Regulations have over-riding effect over the terms of PPAs executed between the parties. In *PTC India Limited vs. CERC & Ors.* (2010) 4 SCC 603, it was held:

> *“92(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.”*
>
> (emphasis supplied)

86. In *Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd.*, (2016) 8 SCC 743, in the context of Electricity Act, 2003, it was observed:

> “*12. While Section 61 of the Act lays down the principles for determination of tariff, Section 62 of the Act deals with different kinds of tariffs/charges to be fixed. Section 64 enumerates the manner in which determination of tariff is required to be made by the Commission. On the other hand, Section 86 which deals with the functions of the Commission reiterates determination of tariff to be one of the primary functions of the Commission which determination includes, as noticed above, a regulatory power with regard to purchase and procurement of electricity from generating companies by entering into PPA(s). The power of tariff determination/fixation undoubtedly is statutory and that has been the view of this Court expressed in paras 36 and 64 of A.P. TRANSCO v. Sai Renewable Power (P) Ltd. [A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34] This, of course, is subject to determination of price of power in open access (Section 42) or in the case of open*

bidding (Section 63). In the present case, admittedly, the tariff incorporated in PPA between the generating company and the distribution licensee is the tariff fixed by the State Regulatory Commission in exercise of its statutory powers. In such a situation it is not possible to hold that the tariff agreed by and between the parties, though finds mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. Rather, it is a determination made in the exercise of statutory powers which got incorporated in a mutual agreement between the two parties involved."

(emphasis supplied)

87. The matter leading to judgment reported as *Energy Watchdog v. CERC*, (2017) 14 SCC 80 was rendered on an appeal under Electricity Act, 2003 challenging decision of this tribunal in first appeal against order of CERC. Dealing, *inter alia*, with the scope and width of the regulatory power under section 79(1)(b), the Supreme Court held:

"*19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is*

immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.

20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which

is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

(emphasis supplied)

88. The view taken in the impugned order by CERC that the powers of Ld. CERC under Section 79(1)(b) of the Electricity Act, 2003 are wide enough to include jurisdiction to enforce regulations vis-à-vis claim of Udupi Power to LPSC over belated payments is in *sync* with above ruling in *Energy Watchdog*.

89. Tariff fixation is done in exercise of regulatory powers. It is a quasi-judicial process through which the Regulatory Commission determines tariff. The principles which are to be followed for and guide such *inter-partes* determination are pre-set, for sake of uniformity and consistency and so as to rule out arbitrariness, by Regulations framed by the Commission. The Regulations are in the nature of delegated legislation and have the force of law. The provision for LPSC is part of the regulatory regime. Simply because an appeal is provided against a tariff order or determination of

liability to pay LPSC it does not make it a judicial consideration of an adjudicatory issue.

90. The second respondent Udupi Power had gone to the Commission invoking its jurisdiction to regulate calling it upon to enforce its own Regulations which held out the assurance of LPSC in the event of default in timely payment by the procurer and rightly so. No doubt that for a party to seek recovery of tariff, carrying cost or LPSC dues, in the face of contest of the claim, the adjudicatory powers of the Commission have to be invoked but such adjudicatory power under Section 79(1)(f) in relation to the Central Commission must necessarily be in context of one or other of clauses (a) to (d). The adjudication has to be in exercise of power under clause (f) but the applicability of the bar of limitation would depend on the question as to whether the dispute has arisen out of contract (PPA) in contrast with a scenario (as in case at hand) where the dispute involves enforcement of law (Regulations) and it is in this context that the fact that request of the seller (Udupi Power) before CERC was to regulate by enforcing legal obligation towards LPSC within the framework of Section 79(1)(b) would make all the difference. There is, thus, merit in the submission that, unlike claim of interest for delayed payment for which the PPA provides making it contractual issue, the LPSC is part of the regulatory scheme of the

Tariff Regulations and, therefore, an issue of enforcement of law rather than a contractual dispute.

91. As has been noted earlier, the tariff Regulations provide for levy of "Late Payment Surcharge" (or LPSC) in case "*the payment of any bill for charges payable under these regulations is delayed by a beneficiary … beyond a period of 60 days from the date of billing*". There are valid and legitimate reasons for the period of "60 days" being so prescribed for such levy to be attracted, reasons being germane for present discussion.

92. As observed earlier while comparing the relevant provisions contained in last three tariff regulations (including the one now in vogue), the threshold for liability to pay LPSC has always and invariably had a connection with the period prescribed for claiming interest on working capital by the generator. The generator does not have an unbridled right to arrange for, or stock, working capital. The Regulations create a uniform discipline which has to be scrupulously followed. After all, the burden would percolate to the consumer at large. But whilst the interest of the consumer is to be protected, the generator is equally entitled to "*recovery of the cost of electricity in a reasonable manner*". Of course, the use of available capacity is dependent on dispatch order. But, under the PPAs (as in hand), there is a commitment of availability and supply. In larger public

interest, the generator is statutorily bound to maintain the required normative availability and sustain its operations accordingly. For this, it is obliged to maintain optimum levels of availability of working capital, the components of which include fuel – primary (coal or lignite and limestone) and secondary, provision for receivables (capacity charges and energy charges), operation and maintenance expenses (including spares) etc. As can be seen from the tariff regulations, the maximum period for which Interest on working capital is allowed is the one prescribed for “Receivables”. It is the said maximum period which has always been adopted as the maximum period for which delay in payment of dues by the procurer for supply of electricity to it is to be tolerated or acceptable. Thus, in the 2009 and 2014 Tariff Regulations, the period of sixty days for which Interest on “Receivables” as part of working capital was also prescribed as the period on elapse of which the procurer in default of payment of dues for supply of electricity would become additionally liable to pay the Late Payment Surcharge. And when the CERC has modified the tariff Regulations for the current control period i.e. 2019-24, whilst reducing the maximum period for Interest on working Capital (on subject of Receivables) to forty-five days (Regulation 34, quoted earlier), it has reduced the threshold for

liability towards LPSC also to identical or corresponding period of forty-five days.

93. From the above facts, and bearing in mind the operations of the generator of electricity, as indeed the philosophy and rationale of the Tariff Regulations, we conclude that the Late Payment Surcharge is imposed to restitute the party burdened with excessive working capital requirement due to delay in payments and, therefore, it is dependent or linked to the working capital regulation. The generator cannot claim LPS for delay up to the period covered in working capital provision. The applicability of LPS starts only after the period covered by working capital has elapsed. The reason is plain - if LPS is not paid, it would erode the return on equity violating the letter and spirit of Section 61 Electricity Act.

94. The above discourse reinforces the view that LPSC is part of tariff and, therefore, regulatory in nature – not a matter for the parties to PPA (generator and procurer) to negotiate and provide in, or control by, contractual terms.

BAR OF LIMITATION

95. The Limitation Act, 1963, by its Section 3, directs that, subject to the provisions contained in sections 4 to 24 (inclusive), "*every suit*

instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence". Article 25 of the Schedule to the Limitation Act specifies that "*(f)or money payable for interest upon money due from the defendant to the plaintiff*" the limitation period would be three years from the date "*when the interest becomes due*". Accordingly, a suit for recovery of interest must be filed within three years of such interest becoming due.

96. The importance of not allowing the time barred claims has been highlighted in various decisions and reference in this regard is made to the cases of *Tilokchand Motichand v. H.B. Munshi*, (1969) 1 SCC 110 and *State of Orissa v. Mamata Mohanty*, (2011) 3 SCC 436. Even where there is a claim with respect to non-payment of money payable on a monthly / periodic basis, the claim is only sustainable with respect to recovery of money for a period of not more than three years prior to the date of institution of the proceedings. [*State of MP* v. *Yogendra Srivastava*, (2010) 12 SCC 538; *M.R. Gupta v. Union of India [(1995) 5 SCC 628 : 1995 SCC (L&S) 1273 : (1995) 31 ATC 186*; *Union of India v. Tarsem Singh (2008) 8 SCC 648 : (2008) 2 SCC (L&S) 765; Punjab State Power Corporation Limited* v. *Induction Furnace Association of North India*, MANU/PH/3611/2016].

97. Since the contentions raised in these proceedings refer to two other specific provisions, the same may be noted at this very stage:

> *"18. Effect of acknowledgment in writing.—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
>
> *(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,*
>
> *(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and*
>
> *(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."*
>
> *22. Continuing breaches and torts.—In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every*

moment of the time during which the breach or tort, as the case may be, continues."

(emphasis supplied)

98. The issue of limitation raised by the appellants has several facets and must necessarily be approached accordingly.

Late Payment Surcharge : Interest

99. It is submitted by the appellants that LPSC is in the nature of interest on belated payments against invoices raised by Udupi Power and, therefore, any proceedings for recovery of LPSC was required to have been initiated within three years from the date on which interest came to be accrued as per Article 25 of the Schedule to the Limitation Act. The argument is that if Udupi could not have recovered the LPSC claimed by it in a regular suit owing to the bar of limitation, such a claim preferred on 04.10.2018 could not have been entertained by the Central Commission in the two petitions – from 2011 onwards for regular power bills and for infirm power for the period prior to 11.11.2010 (COD of Unit I) and 19.08.2012 (COD of Unit II). It is submitted that for invoices which became due prior to 05.10.2015, any claim of LPSC on said invoices is time barred, and could not have been allowed by the Central Commission.

100. The objections in above nature were considered by the Commission in the impugned order thus:

> *"…. Though no supplementary invoices were raised by the Petitioner for claiming LPSC prior to January 2018, the Petitioner has kept the Respondents informed about the LPSC payable by them at the end of each financial year by way of communications on various dates as furnished vide affidavit dated 8.5.2019 including the quantification of amount payable by the ESCOMs. At no time of point of time until 05.06.2018 did PCKL or the KESCOMs objected to or disputed their liability to pay LPSC for delayed payment of Tariff as communicated by the Petitioner.*
>
> *"87. We agree with the Petitioner that neither the provisions of the PPA nor the CERC Tariff Regulations stipulate any specific methodology to claim LPSC. Therefore, the Petitioner is entitled to claim LPSC on delay in payments of invoices of regular power supply as well as delay in payment of invoices of infirm power..."* [para 86-7]
>
> *"102. Genesis of LPSC lies in non-payment of regular monthly bills raised by the Petitioner. The Petitioner has claimed that the non-payment of regular monthly bills by the Respondents constitute a 'continuing breach' of the PPA and is squarely covered under exception provided in Section 22 of Limitation Act, 1963. The Petitioner has pointed out that the Petitioner's contractual arrangement with Karnataka ESCOMs is for a term of 25 years with a running account and hence Section 22 of the Limitation Act, 1963 will be applicable which provides that if a breach continues, then a fresh cause of action arises every time during which the breach is in operation.*
>
> *103. ………*
>
> *We have also noted that the Petitioner has been informing the Karnataka ESCOMs about the amount of LPSC payable by them at the end of each financial year since 2011. The Petitioner has placed copies of the letters written to the Respondents in this regard vide its affidavit dated 8.5.2018. The amounts towards LPSC claimed by the Petitioner from time to time have been compiled as under:*

……….

The above table shows that the Petitioner on 1st April of every year has been indicating the late payment surcharge due including the arrears of the previous year(s) starting from 11.11.2010. These claims have not been denied by the Respondents. On 22.1.2018, the Petitioner raised a supplementary invoice quantifying the late payment surcharge amount as on 5.1.2018 payable by the concerned Karnataka ESCOMs. The main objection of the Respondents is that since the petitions were filed on 4.10.2018, the bills for the period three years prior to that date are barred by limitation. We are not in agreement with the contention of the Respondents. The Petitioner has been raising cumulative consolidated claims for LPSC as on 1st April of every year. Even on 1.4.2016 and 1.7.2017, the Petitioner has raised consolidated bills for late payment surcharge for the period from 11.11.2010 till 31.3.2016 and from 11.11.2010 till 31.3.2017 respectively. The said claims are within the limitation period of three years reckoned from 4.10.2018 when the Petitioner approached the Commission by way of the present petition. In our view, non-payment of late payment surcharge, apart from being a continuous cause of action, is also within the period of limitation as explained above"

(emphasis supplied)

101. It appears that the impugned order proceeds on the basis that the limitation got extended because Udupi Power had consistently, on annual basis, claimed the LPSC amount by writing letters to the Karnataka ESCOMs, it also being held that Udupi had a continuing cause of action right till 2018 for claiming the amount from 11.11.2010 as per Section 22 of the Limitation Act, 1963.

102. It is a settled position of law that LPSC is "compensatory" in character and not "penal" [*Consolidated Coffee Ltd. vs. Agricultural*

ITO, (2001) 1 SCC 278]. But then, it is wrong to equate it with levy of interest for which provision is made in the PPA, the liability towards LPSC, in contrast, having arisen from the Regulations.

103. As per PPA, the payment against monthly bill (or tariff invoice) raised by the Seller is due on the sixtieth day reckoned from the date of acknowledgement of its receipt by the designated officer of the Principal Buyers (here, the appellants), the said sixtieth day being the "*Due Date of payment*", any payment made "beyond" the said "Due Date" to carry "Interest", the rate of such interest having been settled by the contract to be the "Default rate" which expression, in turn, is defined by the contract to be the "*interest rate of State Bank of India Prime Lending Rate subject to modifications from time to time*", there concededly having been no modification adopted by the parties.

104. The expression "interest", simply put, is money paid or allowed for the loan or use of some other sum, lent at a fixed rate. In general parlance, it is understood to connote interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.

105. It bears repetition to say that the entitlement to claim *Late Payment Surcharge* (LPSC) is rooted in the statutory Regulations having the force of law and not dependent on contractual terms mutually settled by the parties. The relevant Regulations which have universal application to all such contracts (PPAs) as at hand (and others such as for transmission of electricity) prescribe levy "*by the generating company* (or the transmission licensee, as the case may be)" of "*Late Payment Surcharge*" at the specified rate (modified in 2014) "*in case the payment of any bill for charges payable under these regulations"* is delayed by the beneficiary (procurer i.e. the appellants) *"beyond a period of 60 days from the date of billing".*

106. Noticeably, the threshold is same – sixty days from date of billing, but the rate is different, the concepts totally distinct.

107. The word "Surcharge" is used generally in taxation laws. In *Sarojini Tea Co. (P) Ltd. v. Collector of Dibrugarh*, (1992) 2 SCC 156, the Supreme Court was called upon to examine the question as to whether the expression 'annual land revenue' in Section 12 of the Assam Fixation of Ceiling on Land Holdings Act, 1956 would include, *inter alia*, 'surcharge' payable under the Assam Land Revenue and Rent (Surcharge) Act, 1970. It was held that:

> "16. From the aforesaid decisions, it is amply clear that the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the

> tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. A surcharge on land revenue is an enhancement of the land revenue to the extent of the imposition of surcharge. The nature of such imposition is the same viz., land revenue on which it is a surcharge."

(emphasis supplied)

108. Unlike "interest", it would be extremely rare to find it occurring amongst the financial terms of commercial contracts as a levy voluntarily undertaken as a consequence flowing from defaults in financial obligations. Power Purchase Agreements (PPAs) are also commercial contracts, but given the fact that they are governed by the special law in force (Electricity Act, 2003), they also have a statutory flavour, the duties, rights, obligations and responsibilities thereby created being enforceable in light of and guided by law and applicable statutory Regulations.

109. The PPA does not refer to liability in the nature of "Surcharge". The Regulations do not define the expression "Surcharge". But the meaning of the word has engaged the attention of courts in the past in the particular context of electricity sector. It is enlightening to notice at least two of them.

110. In *Bisra Lime Stone Co. Ltd. v. Orissa SEB*, (1976) 2 SCC 167, the appellant had entered into an agreement for supply of electricity with State of Orissa, the government having later constituted Orissa State Electricity Board (the Board) under Section

5 of the Electricity (Supply) Act, 1948, the Board having decided to levy a general and uniform surcharge on the power tariff. Whilst examining the validity of said action, the Supreme Court held thus:

> "*11. The word surcharge is not defined in the Act, but etymologically, inter alia, <u>surcharge stands for an additional or extra charge or payment</u> (see Shorter Oxford English Dictionary). <u>Surcharge is thus a super-added charge</u>, a charge <u>over and above the usual or current dues</u>. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. ….*"
>
> (emphasis supplied)

111. In *D.C.M. v. Rajasthan State Electricity Board*, (1986) 2 SCC 431, the issue before the Supreme Court was the constitutional validity of Sections 49-A and 49-B of the Electricity (Supply) Act, 1948, as introduced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976, with retrospective effect, making it lawful for the Rajasthan State Electricity Board (the Board) to revise from time to time the tariffs fixed for the supply of electricity, on the strength of which a notification had been issued by the Board for the levy of a general surcharge over and above the normal tariff. Construing the word "Surcharge" in that context, the Court reiterated thus:

> "*45. That takes us to the question whether the Board had no power under the Act to levy a surcharge. The word 'surcharge' is not defined in the Act. Plainly, <u>the word</u>*

<u>'surcharge' means an additional or extra charge or payment</u>: Shorter Oxford English Dictionary, p. 2199. As held by this Court in Bisra Stone Lime Co. Ltd. v. Orissa State Electricity Board [(1976) 2 SCC 167 : AIR 1976 SC 127 : (1976) 2 SCR 307] a <u>surcharge is in substance an addition to the stipulated rates of tariff and enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act</u>."

(emphasis supplied)

112. The appellants have raised a slightly differently nuanced argument to plead "waiver" on part of respondent seller based on the facts that the PPA was executed during the period the 2009 Tariff Regulations were in force, the contract not stipulating levy of LPSC and instead providing for interest on late payment coupled particularly with an exercise of reconciliation of accounts. We shall deal with that argument in due course in appropriate context. Presently, we only observe that the chronology of events and the omission of any clause (express or implied) in PPA indicating intent to render any part of Regulations inapplicable lead us to infer that the parties were conscious at the relevant point of time as to the provision for LPSC in extant Regulations and knowingly entered upon the PPA additionally stipulating for liability towards interest over and above the statutory charges.

113. In light of the above, we have no hesitation in concluding that LPSC is a levy entirely distinct from the liability towards interest. Unlike "Interest" (under the contract), it (LPSC) is a statutory liability and as held in *Bisra Lime Stone Co. Ltd. v. Orissa SEB* (supra) and *D.C.M. v. Rajasthan State Electricity Board* (supra) its nature "*in substance*" is that of *"a super-added charge, a charge over and above the usual or current dues"* or "*an addition to the stipulated rates of tariff*. Given such nature, LPSC is essentially part of tariff and thus merges in dues towards tariff infusing in it a statutory character.

Applicability of limitation law to the issue of LPSC

114. The appellants refer to *A.P. Power Co-ordination Committee* v. *Lanco Kondapalli Power Ltd.* (2016) 3 SCC 468, wherein the questions regarding applicability of Limitation Act to a claim before the Regulatory Commission were raised in the context of Electricity Act, 2003. As pointed out by the appellants, a bench of two Hon'ble Judges of the Supreme Court held (on 16.10.2015) as follows:

> "30. … *In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by the law of limitation, or taking away the right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power*

conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation…"

115. It is pointed out that the law to above effect has been followed by this tribunal in various cases, reference being made to Judgment dated 24.04.2018 in Appeal No. 75/2017 *Maharashtra State Electricity Distribution Co* v. *Maharashtra Electricity Regulatory Commission* and Judgment dated 25.10.2018 in Appeal No. 185 of 2015 *Kalani Industries Pvt. Ltd. vs. Rajasthan Electricity Regulatory Commission (RERC)* and Ors.

116. It is argued that it being an established position of law that the provisions of the Limitation Act, 1963 are applicable to proceedings under the Electricity Act, the claim of LPSC staked on 01.10.2018 for period prior to preceding three years was stale and so could and should not have been entertained by CERC.

117. It is also submitted that any entitlement of Udupi to claim LPSC is circumscribed by the law of limitation as well as the terms of the PPA. The plenary powers of the Central Commission do not empower it to decide a dispute in contravention of the statutory law of limitation or the PPA. The Limitation Act is not a mere procedural law but a substantive piece of legislation and cannot be dismissed

as a mere technicality. The Central Commission is bound by this law and could not have entertained arbitrary monetary claims which were hopelessly barred by limitation or extended the period of limitation. Doing so would constitute an overreach of its jurisdiction rather than aid justice. Similarly, the provisions of the PPA are not procedural law, and are binding on the parties thereto. Non-compliance of the PPA cannot, therefore, be condoned by the Central Commission in exercise of any plenary power.

118. *Per contra*, the respondent Udupi Power argues that it is not fair for the appellants to seek selective reference to the ruling in case of *Lanco* (supra). The respondent refers to the following passage from the same ruling:

> *"31. …Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory."*
>
> (emphasis supplied)

119. The respondent Udupi Power argues that the ruling in *Lanco* (supra), rendered by a bench of two Hon'ble Judges of Supreme Court on 16.10.2015, is not a binding precedent. It refers to *Tamil*

Nadu Generation & Distribution Corporation Ltd. v. PPN Power Generating Company (2014) 11 SCC 53; *MP Steel Corporation v. CCE* (2015) 7 SCC 58; and *Ganesan v. Commissioner, Tamil Nadu Hindu Religious & Charitable Endowments Board* (2019) 7 SCC 108 to urge a contrary view to be adopted.

120. In *T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd.* (supra), the challenge was by statutory appeal under section 125 of Electricity Act, 2003 to the judgment of this tribunal in appeal against decision of electricity regulatory Commission. One of the issues concerned applicability of law of limitation. The decision was rendered on 04.04.2014 by a bench of two Hon'ble Judges of the Supreme Court, holding thus:

> "*48. We have considered the submissions made by the learned counsel for the parties. In our opinion, the issues raised by the appellant with regard to the constitution of the State Commission and its discretion to either adjudicate or refer a particular dispute to arbitration is no longer res integra. Therefore, even though, Mr Nariman has very forcefully contended that the issue ought to be reconsidered, we are not inclined to adopt such a course. In our opinion, this Court has comprehensively addressed all the issues on the scope and ambit of Section 86 in general and Section 86(1)(f) in particular of the Act. We are also not inclined to accept the submission that since the appellant had made a request for a reference of the dispute to arbitration, the State Commission ought to have made the reference. We are also not able to accept the submission of Mr Nariman that the State Commission was dealing with only a pure and simple money claim. We also do not find much substance in the submission that the issues having been raised being complex and intricate ought to have been left to be decided*

either by the Arbitral Tribunal or by the civil court. APTEL in the impugned order [T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., Appeal No. 176 of 2011, decided on 22-2-2013 (Tri)] , in our opinion, has correctly culled out the ratio of the judgment of this Court in Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755] . It is also correctly held that the appellant cannot dictate that the State Commission ought to have referred the dispute to arbitration.

64. The next submission of Mr Nariman is that the claim of the respondents would have been held to be time-barred on reference to arbitration. We are not able to accept the aforesaid submission of Mr Nariman. On the facts of this case, in our opinion, the principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO basis. The procedure adopted by the respondent, as observed by the State Commission as well as by APTEL, would be covered under Sections 60 and 61 of the Contract Act. APTEL, upon a detailed consideration of the correspondence between the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part-payment of the invoices. During the course of the hearing, Mr Salve has pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. The learned Senior Counsel also pointed out that there was no complaint or objection ever raised by the appellant. The objection to the method adopted by the respondents on the method of FIFO, was only raised in the counter-affidavit to the petition filed by the appellant before the State Commission. According to the learned Senior Counsel, the plea is an afterthought and has been rightly rejected by the State Commission as well as APTEL. We also have no hesitation in rejecting the submission of Mr Nariman on this issue. In any event, <u>the Limitation Act is inapplicable to proceeding before the State Commission</u>."

(emphasis supplied)

121. Likewise, the ruling in *M.P. Steel Corpn. v. CCE* (supra) was handed down on 23.04.2015 by a bench of two Hon'ble Judges of the Supreme Court, the applicability of Section 14 of Limitation Act to appeal under Section 128 of Customs Act, 1962 being the prime issue, the relevant part of the judgment reading as under:

> "**11.** A perusal of the Limitation Act, 1963 would show that the bar of limitation contained in the Schedule to the Act applies to suits, appeals, and applications. "Suit" is defined in Section 2(*l*) as not including an appeal or an application. The word "court" is not defined under the Act. However, it appears in a number of its provisions [*see* Sections 4, 5, 13, 17(2), 21]. A perusal of the Schedule would show that it is divided into three divisions. The First Division concerns itself with suits. Articles 1 to 113, all deal with "suits"."
>
> **20.** Now to the case law. A number of decisions have established that the Limitation Act applies only to courts and not to tribunals. The distinction between courts and quasi-judicial decisions is succinctly brought out in *Bharat Bank Ltd.* v. *Employees* [1950 SCR 459 : AIR 1950 SC 188] . This root authority has been followed in a catena of judgments. This judgment refers to a decision of the King's Bench in *Cooper* v. *Wilson* [(1937) 2 KB 309 : (1937) 2 All ER 726 (CA)] . The relevant quotation from the said judgment is as follows: (*Bharat Bank Ltd. case* [1950 SCR 459 : AIR 1950 SC 188] , SCR p. 477 : AIR p. 195, para 24)
>
> "'A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (*1*) The presentation (not necessarily orally) of their case by the parties to the dispute; (*2*) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (*3*) if the dispute between them is a question of law, the submission of legal argument by the parties, and (*4*) a decision which disposes of the whole matter by a finding upon the facts in dispute and

an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (*1*) and (*2*), but does not necessarily involve (*3*) and never involves (*4*). The place of (*4*) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.' (*Cooper case* [(1937) 2 KB 309 : (1937) 2 All ER 726 (CA)] , KB pp. 340-41)"

23. In *Kerala SEB* v. *T.P. Kunhaliumma* [(1976) 4 SCC 634], a three-Judge Bench of this Court followed the aforesaid two judgments and stated: (SCC p. 639, para 22)

22. "The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-Judge Bench of this Court in *Athani Municipal Council case* [(1969) 1 SCC 873 : (1970) 1 SCR 51] and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

This judgment is an authoritative pronouncement by a three-Judge Bench that the Limitation Act applies only to courts and not to quasi-judicial tribunals. *Athani case* [(1969) 1 SCC 873 : (1970) 1 SCR 51] was dissented from on a different proposition—that Article 137 is not confined to applications under the Code of Civil Procedure alone. So long as an application is made under any statute to a civil court, such application will be covered by Article 137 of the Limitation Act.

35. This judgment is in line with a large number of authorities which have held that Section 14 should be liberally construed to advance the cause of justice—see *Shakti Tubes Ltd.* v. *State of Bihar* [(2009) 1 SCC 786 : (2009) 1 SCC (Civ) 370] and the judgments cited therein. Obviously,

the context of Section 14 would require that the term "court" be liberally construed to include within it quasi-judicial tribunals as well. This is for the very good reason that the principle of Section 14 is that whenever a person bona fide prosecutes with due diligence another proceeding which proves to be abortive because it is without jurisdiction, or otherwise no decision could be rendered on merits, the time taken in such proceeding ought to be excluded as otherwise the person who has approached the court in such proceeding would be penalised for no fault of his own. This judgment does not further the case of Shri Viswanathan in any way. The question that has to be answered in this case is whether suits, appeals or applications referred to by the Limitation Act are to be filed in courts. This has nothing to do with "civil proceedings" referred to in Section 14 which may be filed before other courts or authorities which ultimately do not answer the case before them on merits but throw the case out on some technical ground. Obviously the word "court" in Section 14 takes its colour from the preceding words "civil proceedings". Civil proceedings are of many kinds and need not be confined to suits, appeals or applications which are made only in courts stricto sensu. This is made even more clear by the explicit language of Section 14 by which a civil proceeding can even be a revision which may be to a quasi-judicial tribunal under a particular statute."

(emphasis supplied)

122. The case before Supreme Court in *Ganesan v. Commissioner, Tamil Nadu Hindu Religious & Charitable Endowments Board* (supra) related to the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 and it was held that the Commissioner hearing appeal under section 69 of said enactment was not a "court" and that Section 29(2) of Limitation Act applied only to suit, appeal or application before a court but not before statutory authority, quasi-judicial body or tribunal and further

that provisions of Limitation Act apply only if the special or local law provides for such applicability. The decision was handed down recently on 03.05.2019 by a bench of two Hon'ble Judges of the Supreme Court, holding:

> "*23. The Limitation Act, 1963 is an Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith. The law of limitation before the enactment of the 1963 Act was governed by the law of limitation under the Limitation Act, 1908. The* <u>*different provisions of the Limitation Act, 1963 refer to "court"*</u>*. Section 4 provides where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. Similarly, Section 5 provides that any appeal or any application, other than an application under any of the provisions of Order 21 of the Code of Civil Procedure, 1908 may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he has sufficient cause for not preferring the appeal or making the application within such period. Section 6 refers to institution of a suit or making of an application for the execution of a decree by a minor or insane, or an idiot who may institute the suit or make the application within the same period after the disability has ceased.*
>
> *26. The Schedule to the Act provides for "Periods of Limitation". First division deals with different kinds of suits. Second division deals with appeals and the third division deals with applications. The* <u>*suits, appeals and applications which have been referred to in the Schedule obviously mean suits, appeals and applications to be filed in court as per the provisions referred to in the Act noted above*</u>*.*
>
> *27. Section 29(2) provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for*

the purpose of determining any period of limitation and the provisions contained in Sections 4 to 21 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law. Whether prescription of appeal of limitation of any suit or application in any special or local law relates to suit, application or appeal to be filed in court or it may refer to statutory authorities and tribunals also, is the question to be answered. Different special or local laws have been enacted by the legislature covering different subjects, different rights and liabilities, methodology of establishing, determining rights and liabilities and remedies provided therein. Special or local law may also provide remedy by institution of suits, appeals and applications in the courts i.e. civil court and to its normal hierarchy and also create special forum for determining rights and liabilities and provide remedies. Most common example of creating statutory authorities for determining rights, liabilities and remedies are taxing statutes where assessing authorities have been provided for with hierarchy of authorities. The remedy of appeal and revision is also provided in the taxing statutes in which the authorities are different from the normal civil courts. Section 29(2) in reference to different special or local laws came for consideration before this Court in a large number of cases. This Court had occasion to consider the provisions of the Limitation Act, 1963, in reference to different statutes which contain provisions of suits, appeals or applications to the courts/authorities/tribunals. There are series of judgments of this Court holding that provisions of the Limitation Act are directed only when suit, appeal or application are to be filed in a court unless there are express provisions in a special or local law.

Questions (2) and (3)
22. Both the above questions being interconnected are taken together. The main question to be answered in this appeal is as to; whether the Commissioner while hearing appeal under Section 69 of the 1959 Act is entitled to condone the delay in filing an appeal by applying the provision of Section 5 of the Limitation Act, 1963? Whether on the strength of Section 29(2) of the Limitation Act, 1963 the provisions of Sections 4 to 24 (inclusive of the Limitation

Act) shall apply in the proceedings of appeal before the Commissioner under Section 69 of the 1959 Act? When by special or local law a different period of limitation is prescribed for any suit, appeal or application, the suit, appeal or application contemplated under Section 29(2) are suit, appeal or application in a court or Section 29(2) shall also cover suit, appeal or application which are to be filed before the statutory authorities or quasi-judicial authorities and tribunals also?

56. It is relevant to notice that this Court from the scheme of the 1983 Act, itself found that the legislative intent was not to exclude the applicability of Section 5 of the Limitation Act. There cannot be any dispute to the proposition that if the legislative scheme of special or local law indicate that enactment intended applicability of Section 5. Section 5 shall be applicable independent with operation of Section 29(2). However, in para 33, the Court did not delve into the question as to whether the Arbitral Tribunal is a court or not. Due to the reason that revision was filed before the High Court and there cannot be any issue as to the High Court is not a court, thus, when revision application was filed before a court, Section 29(2) was clearly attracted applying Section 5 of the Limitation Act. The said judgment cannot be said to be authority for the proposition that in appeals filed before statutory authorities which are not court, Section 5 of the Limitation Act shall be attracted.

59.1. The <u>suits, appeals and applications referred to in the Limitation Act, 1963 are suits, appeals and applications which are to be filed in a court</u>.
59.2. The <u>suits, appeals and applications referred to in the Limitation Act are not the suits, appeals and applications which are to be filed before a statutory authority like Commissioner under the 1959 Act</u>.
59.3. <u>Operation of Section 29(2) of the Limitation Act is confined to the suits, appeals and applications referred to in a special or local law to be filed in court and not before statutory authorities like Commissioner under the 1959 Act</u>.
59.4. However, <u>special or local law vide statutory scheme can make applicable any provision of the Limitation Act or exclude applicability of any provision of the Limitation Act</u>

> *<u>which can be decided only after looking into the scheme of particular, special or local law</u>.*
>
> *60.2. Section 29(2) cannot be pressed in service with regard to filing of suits, appeals and applications before the statutory authorities and tribunals provided in a special or local law. The Commissioner while hearing of the appeal under Section 69 of the 1959 Act is not entitled to condone the delay in filing appeal, since, provision of Section 5 shall not be attracted by strength of Section 29(2) of the Act.*"

123. Pertinent to note here that the decision in *Lanco* (supra) which is later in time to *T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd.* (supra) and *M.P. Steel Corpn. v. CCE* (supra) took note of both said previous rulings.

124. It is the contention of the respondent that the bench of two Hon'ble judges of Supreme Court in *Lanco* (supra) could not have ruled contrary to the two previous decisions in *T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd.* (supra) and *M.P. Steel Corpn. v. CCE* (supra) of benches of co-equal strength holding that Limitation Act has no applicability to proceedings before quasi-judicial tribunals or statutory bodies since the doctrine of *stare decisis* required the issue to be referred to a larger bench if the subsequent bench of co-equal strength had views which were contrary to law settled by previous authorities.

125. The doctrine of "stare decisis" ("*stare decisis et non quieta movere*" which translates as "*to stand by decisions and not to disturb*

settled matters") was evolved in the common law of England but has been followed by our jurisprudence. In fact, it is embodied in Article 141 of the Constitution of India which mandates that the law declared by the Supreme Court shall be binding on all courts in the territory, the words "*law declared*" definitely being of wider connotation. The general proposition expressed by the doctrine is that if a point of law has been decided by the higher court, it is of "*binding authority*" in all the courts of such jurisdiction. As Roscoe Pound said, the legal order must be flexible as well as stable because "*continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security*" [see *Law Finding Through Experience and Reason Three Lectures by Roscoe Pound*, University of Georgia Press, Athens, 1960]. But formulation of new normative has to be for reasons properly made out and by appropriate authority. As Salmond observed adherence to this doctrine "*is necessary to secure the certainty of law, predictability of decisions being more important than the approximation to an ideal…*" [see *Salmond on Jurisprudence*; P.J. Fitzgerald, Ed., 12th Edn., London, 1966].

126. There are numerous decisions of the Supreme Court on the subject of binding nature of the precedents of a superior court or of

co-ordinate bench. [including *Union of India* v. *Raghubir Singh*, (1989) 2 SCC 754; *Sub-Committee of Judicial Accountability* v. *Union of India*, (1992) 4 SCC 97; *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*, (2005) 2 SCC 673; *Safiya Bee* v. *Mohd. Vajahath Hussain @ Fasi*, (2011) 2 SCC 94; and *Union of India* v. *S.K. Kapoor*, (2011) 4 SCC 589].

127. The contention of the respondent Udupi Power that the decisions in T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd. (supra) and M.P. Steel Corpn. v. CCE (supra) still hold good and are rather strengthened by later ruling in Ganesan v. Commissioner, Tamil Nadu Hindu Religious & Charitable Endowments Board (supra) cannot be lightly brushed aside. We, however, need not go into the question whether ruling of Lanco (supra) is not binding on account of the doctrine of stare decisis. Pertinently, even in *Lanco*, the Supreme Court qualified the conclusion by observing that "such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory". We have already held that the issue of LPSC is one of enforcement of

Regulations and not a contractual dispute leading to claim for recovery.

128. *De hors* the above discussion, we have examined the contentions further on assumption that the Limitation Act does apply to such proceedings.

Objections to reliance on letters

129. It is the contention of Udupi Power that the conduct of ESCOMs and PCKL has been evasive particularly towards LPSC claim in spite of regular communications. In this context, it refers to the following specific communications:

(i.) Letter dated 29.08.2013 whereby Udupi Power requested PCKL to release the outstanding payment of Rs. 127.92 towards infirm power followed by regular reminders to PCKL requesting it to make outstanding payment of Rs 127.92 Crore with interest for delay by letters dated 06.06.2014, 14.07.2014 and 21.02.2015.

(ii.) Three separate letters dated 01.03.2014 of Udupi Power informing CESCOM, HESCOM and GESCOM respectively, that the delayed payment charges shall be claimed as per the terms of the PPA considering the amounts payable as per tariff order and the actual payment received.

(iii.) Letter dated 19.06.2014 whereby Udupi Power informed PCKL/ESCOMs about the outstanding amount towards regular invoices and infirm power as on 12.06.2014 specifically mentioning that the applicable

interest shall be applicable over and above principal amount.

(iv.) Letter dated 25.08.2014 of Udupi Power informing PCKL/ESCOMs about the outstanding amount towards regular invoices and infirm power as on date also specifically mentioning that the applicable interest shall be applicable over and above principal amount.

(v.) Letter dated 09.01.2015 of Udupi Power informing Additional Chief Secretary, Government of Karnataka that an amount of Rs. 116.82 Crores was pending from the ESCOMs towards infirm power supplied with request that PCKL/ ESCOMs be directed to release the payments along with interest for the delay as per CERC Tariff Regulations, copies being endorsed to PCKL and ESCOMs.

(vi.) Letter dated 10.02.2015 of Udupi Power requesting Additional Chief Secretary (Energy), GoK to direct PCKL/ESCOMs to release infirm power payment along with interest as per the CERC Regulations with copy endorsed to PCKL.

(vii.) Letter dated 27.02.2015 whereby Udupi Power informed Chairman, PCKL that any delay in releasing the payment towards Infirm Power would attract applicable surcharge and that Udupi Power reserved its right to seek remedies against non-payment including payment of applicable surcharge.

130. It has been the submission of the respondent Udupi Power that the non-obstante clause under Article 6.4(a) of the PPA (quoted earlier) rules out any conferred right on the Principal Buyers (i.e. ESCOMs) to delay the payments and that it declared in no uncertain terms that the entitlement to claim interest on belated payment "*is without prejudice to any other remedy the Seller may have for late*

payment". It is submitted that despite being fully aware about the quantum of LPSC payable, ESCOMs willfully ignored LPSC related communications of Udupi Power. It is pointed out that on 01.03.2014, Udupi Power had sent monthly tariff invoices for February 2014 and informed all ESCOMs that Udupi Power shall be claiming delayed payment charges as per terms of the PPA considering the difference in amounts payable as per CERC's Tariff Order and the actual payments received from ESCOMs and further that Udupi Power has been constantly informing PCKL/ESCOMs about the amount of LPSC payable by ESCOMs at the end of each financial year.

131. Questioning the veracity of material submitted by the generator the appellants contend that the letters relied upon are of suspect origin and should not have been given any credence. It is their submission that this material was allowed to be brought on record improperly. It is argued that there is no proof of delivery of such communications and that the burden of proving to the contrary is wrongly argued. It is also the plea that even if such letters had been issued, the same cannot extend the limitation.

132. The documents referred to in above-noted submissions are copies of letters dated 30.03.2011, 03.04.2012, 02.04.2013, 01.04.2014, 01.04.2015, 01.04.2016 and 01.04.2017 statedly sent

by Udupi Power were presented as Annexure PA-1 to its Additional Affidavit dated 08.05.2019 before the Commission. It is argued that based on such documents Udupi Power had for the first time claimed that it had been informing the Karnataka ESCOMs of the cumulative amount of LPSC payable. It is argued that since the letters dated 01.04.2016 and 01.07.2017 (which contained the consolidated bills of LPSC from 11.11.2010 onwards) have been acted upon by the Central Commission to hold that the claims are within the limitation period of three years from the date of filing the Petition, the order is vitiated.

133. The Appellants submit that they had disputed the receipt of the above-said letters at the relevant time. It is stated that Udupi Power failed to produce any material to substantiate that these letters were sent to PCKL / Karnataka ESCOMs by registered post or received by them in due course.

134. The respondent Udupi Power, however, points out that averments of PCKL/ESCOMs before this tribunal are materially different from the stand taken before the CERC as is shown by reading of the reply filed on behalf of PCKL dated 04.06.2019 to the additional affidavit dated 08.05.2019 filed by Udupi Power and its comparison with (Para LL of) the first captioned appeal (no. 10 of 2020).

135. The respondent Udupi Power is right in pointing out that the ESCOMs were parties to the petition (no. 324/MP/2018) wherein such material as mentioned above was submitted on affidavit. In spite of opportunity, the ESCOMs had chosen not to file any reply or participate. Although the letters in question were addressed to the three ESCOMs, the ESCOMs did not raise any such issue before CERC. There is no affidavit on behalf of any of the ESCOMs before CERC disputing the service. Even at the stage of appeal, the appellants started out by pleading vaguely when they stated (in stay application) that *"(t)here are serious issues in the manner of such letters being found in the records of some of the Karnataka Escoms but not being there with other Escoms…"*. It is not disclosed as to records of which ESCOMs did have such communications and if they were never issued or delivered as to how such material came to be so found in the files of the concerned ESCOMs. Having chosen not to contest such material before the forum of first instance, it is not open to the ESCOMs to contest the factum of service of letters at this appellate stage.

136. The documents, it is alleged by the appellants, are suspect because the invoice dated 22.01.2018 in Petition No. 324/MP/2018 and the rejoinder filed by Udupi would not contain even a whisper in their regard and it is in the wake of denial of receipt of invoices that

the generator filed such material one day before the matter was listed for hearing before the Central Commission *i.e.* on 08.05.2019.

137. The appellants argue that the material in above nature cannot be given credence because its genuineness is doubtful since the letters had purportedly been sent to Karnataka ESCOMs on the same date, with the same number and by the same official of Udupi Power as letters issued in regular course for the submission of monthly invoices, these letters having no reference to each other. The material is alleged to be suffering from various discrepancies - while all letters pertaining to billing and payment related issues were marked to PCKL, the letters in question were not addressed to PCKL; there are differences in the footer of the letter head used i.e. while the letter dated 01.03.2014 filed with the reply to the appeal carries prominent ISO certification marks on the left as well as right lower corners of the letter head, this is absent in the letters dated 03.04.2012, 02.04.2013 and 01.04.2014; there is difference in the manner in which the telephone number and address have been written; there is mismatch in telephone numbers: from 2014 the letter head of Udupi mentioned the telephone number of the site office to be 0820 2703500 instead of 0820 2550860 mentioned earlier whereas the letters in question purportedly sent even after 2014 continue to show the telephone number of site office of Udupi

Power as 0820 2550860; the number of the letter has been hand written in the letter filed earlier whereas the number is printed in the letters in question; there cannot be two letters bearing the same number on the same date since other sets of letters sent by Udupi on the same date reveal that different letters sent on the same day bear different numbers; there is no proof of delivery such as postal receipt or receiving stamp on the letters; and that these letters were sent by Udupi pursuant to the order dated 20.02.2014 passed by the Central Commission in Petition No. 160/GT/2012 which only indicated the principal amount claimed to be outstanding as on 01.03.2014 and did not contain any calculation or invoice for any surcharge amount.

138. In *Union of India (UOI) and Ors. vs. Master Construction Co.* (2011) 12 SCC 349, the Supreme Court held:

> *"24 …A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there."*

139. Again, in *Gian Chand and Brothers and Ors. vs. Rattan Lal* (2013) 2 SCC 606, it was observed thus:

"*16. … Thus, there was no plea whatsoever as regards the denial of signature or any kind of forgery or fraud…*
21. …The Defendant, on the contrary, except making a bald denial of the averments, had not stated anything else. That apart, nothing was put to the witnesses in the cross-examination when the documents were exhibited. He only came with a spacious plea in his evidence which was not pleaded…
26. Scrutinized thus, the irresistible conclusion would be that the Defendants could not have been permitted to lead any evidence when nothing was stated in the pleadings. The courts below had correctly rested the burden of proof on the Defendant but the High Court, in an erroneous impression, has overturned the said finding."

140. The two petitions (nos. 324-325/MP/2018) on which impugned order was passed were submitted by respondent Udupi Power before CERC on 04.10.2018. PCKL filed reply on 14.01.2019, the ESCOMs having chosen not to do so. Udupi Power filed rejoinder to reply of PCKL on 25.01.2019 and submitted the above-said material by affidavit on 08.05.2019. On 04.06.2019, PCKL filed its reply to the affidavit dated 08.05.2019 of the respondent only stating that it (Udupi Power) be put to strict proof of the letters even though it (PCKL) was representing the cause of ESCOMs and virtually answering to a matter that concerned them and to which they were to respond directly, particularly if they were to deny the receipt or question authenticity. The matter came up for hearing before CERC on several dates (09.05.2019, 04.06.2019, 06.08.2019, 20.08.2019 and 08.11.2019). It was not pleaded or argued at any stage, despite

full opportunity, that the correspondence had been fraudulently manufactured or ante-dated or never sent or received. In fact, the ESCOMs to whom such letters were addressed did not seek to raise any dispute or objection in such regard even while approaching this tribunal by appeals at hand, PCKL making a vague plea as to some discrepancies, not the least a plea of attempt to defraud, such argument being raised on 30.06.2020 in the midst of hearing.

141. It is the explanation of Udupi Power that the disputed letters were submitted by it as part of its monthly tariff invoices which is why they bear the same letter reference numbers and were sent through speed post to the offices of GESCOM, HESCOM and CESCOM, the speed post receipts evidencing due dispatch by postal transit of the covering letters being available in records, the telephone numbers and addresses in the letter-heads used being valid and in existence. The allegation of PCKL regarding difference in headers and footers of the cover letters and LPSC related letters are clearly misconceived, the appellants having relied on selective pages of the invoice. The footer of the LPSC related letter shown at hearing matches with certain other pages of the same invoice including the document capturing GCV related details. We do not find any such discrepancies in the material as could render the same suspect.

142. Even otherwise, bald or mere assertions as to the veracity of the letters or of fraud based on surmises and conjectures is not sufficient. The onus to prove has not been discharged particularly in face of implied admission of such material on account of default at the stage of pleadings. Such argument, as indeed such evidence if tendered, is unacceptable and inadmissible in absence of pleadings [*Bachhaj Nahar v. Nilima Mandal*, (2008) 17 SCC 491; *Ponnayal v. Karuppannan*, (2019) 11 SCC 800; and *Muddasani Venkata Narsaiah v. Muddasani Sarojana*, (2016) 12 SCC 288]. Crucially, in *Ponnayal v. Karuppannan* (supra), the Supreme Court held thus:

> "*14. It is settled law that <u>denial for want of knowledge is no denial at all</u>. The execution of the sale deed was not specifically denied in the written statement. Once the execution of the sale deed was not disputed it was not necessary to examine Buchamma to prove it. The provisions contained in <u>Order 8 Rule 5 require pleadings to be answered specifically in written statement</u>. This Court in Jahuri Sah v. Dwarika Prasad Jhunjhunwala [Jahuri Sah v. Dwarika Prasad Jhunjhunwala, AIR 1967 SC 18 109] has laid down that <u>if a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of existence of fact, not even an implied denial</u>. … The High Court of Madhya Pradesh in Samrathmal v. Union of India [Samrathmal v. Union of India, 1959 SCC OnLine MP 153 : AIR 1959 MP 305] , relying on P.L.N.K.L. Chettyar Firm v. Ko Lu Doke [P.L.N.K.L. Chettyar Firm v. Ko Lu Doke, 1934 SCC OnLine Rang 154 : AIR 1934 Rang 278] and Lakhmi Chand v. B. Ram Lal Kapoor Vakil [Lakhmi Chand v. B. Ram Lal Kapoor Vakil, 1931 SCC OnLine All 35 : AIR 1931 All 423] , had also opined that if the defendant did not know of a fact, <u>denial of the knowledge of a particular fact is not a</u>*

denial of the fact and has not even the effect of putting the fact in issue."

(emphasis supplied)

143. In *Bachhaj Nahar* (supra), the Supreme Court held as under:

"*11. The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.*

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a

claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

(emphasis supplied)

144. Dispute qua genuineness of documents is a question of fact and could and ought to have been raised before the forum of first instance (i.e. CERC). Raising these issues at such belated stage, for the first time before appellate forum, is a tactic designed to delay. In *Orissa State Financial Corpn. vs. Hotel Yogendra*, (1996) 5 SCC 357, the Supreme Court disapproved of such attempts observing thus:

"8. It would, thus, be seen that the respondent is only interested in delaying the repayment of the dues and has abused the process of the court taking indulgence of the court's direction. Under these circumstances, we find that no indulgence would be shown to such a recalcitrant defaulter in repayment of the loan. Public money is meant to be recycled to all the needy entrepreneurs. The dilatory tactics defeat the public policy and the court process becomes an instrument of abuse. Court would protect only honest and sincere litigants."

145. For similar views, reference may also be made to judgments reported as *SEBI vs. Sahara India Real Estate Corpn. Ltd.*, (2014) 5 SCC 429 and *Gayathri vs. M. Girish*, (2016) 14 SCC 142.

146. We agree with the respondent Udupi Power that such issues have been raised only to cause prejudice and, therefore, cannot be countenanced.

147. It is, no doubt, a settled principle of law that mere sending of letters making demands, without initiating any legal proceedings for recovery of money, cannot extend the period of limitation [see *CLP India Pvt. Ltd. v. Gujarat Urja Vikas Nigam Ltd. and Ors.*, 2020 SCC OnLine SC 445; *Geo Miller & Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Limited*, 2019 SCC Online SC 1137; *Mahesh Chand Sharma* v. *Union of India*, 2007 SCC Online Del 535 and *C.P. Kapur* v. *The Chairman*, 2012 SCC Online Del 5465]. But on this basis, we cannot throw out the claim of the respondent seller herein on the reasoning that such material as referred to above would not give rise to any fresh cause of action so as to bring the claims made in the two petitions within the limitation period of three years because the respondent's contention is that there is a continuing cause of action which plea we shall examine a little later.

Argument of no default towards Infirm power

148. It has been argued that timely payments were made against the invoices for infirm power and, therefore, there is no liability incurred for LPSC on that account. The plea is unacceptable as founded on wrong facts. There is enough material to show inordinate delay in paying the outstanding amounts against the infirm power invoices raised against ESCOMs, giving rise to title in favour of Udupi Power to claim LPSC amounting to Rs. 223.39 Crores (as on 31.07.2020).

149. It is admitted that Udupi Power supplied infirm power to ESCOMs during (i) 03.06.2010 to 10.11.2010 from Unit I, and (ii) 07.03.2011 to 18.08.2012 from Unit II. It raised thirteen invoices for infirm power supplied between 30.07.2010 and 18.08.2012. The CERC, by its Order dated 20.02.2014 (in petition no. 160/GT/2012), approved, on basis of Article 2.A.4.6 of the PPA, the capital cost after considering submission of Udupi regarding reduction of Rs. 35.13 Crore, it having supported such claim by audit certificate specifying Rs. 245.39 Crores as revenue billed for infirm power and fuel cost of Rs. 210.25 Crore, thereby determining excess revenue of Rs. 35.13 Crore to be considered as per CERC Regulations.

150. PCKL, through its proforma dated 02.09.2014 (certified by SLDC) submitted to Udupi Power, admitted total liability of Rs. 237.30 Crore - Rs. 119.71 Crores for Unit I and Rs. 117.59 Crores for Unit II - towards infirm power. Out of the admitted liability, the ESCOMs paid an amount of Rs. 114.05 Crores to Udupi Power. On 11.01.2016, Udupi Power filed before CERC its Truing-up Petition (no. 07/GT/2016) for the period 11.11.2010 to 31.03.2014 praying, *inter alia*, for allowance of capitalization of unrecovered infirm power amounting to Rs. 127.92 Crores giving adjustment for Rs. 117.47 Crores against total demand of Rs. 245.39 Crores along with carrying cost as on that date. On 24.03.2017, the CERC rejected the contentions of the ESCOMs and held, *inter alia*, that "*the supply of infirm power are to be accounted as UI in terms of the … regulations*", and found "*withholding of payment of ₹ 127.92 crore*" by them to be bad in law.

151. The liability of ESCOMs to pay the dues was, thus, upheld on 24.03.2017, this being followed up by multiple communications sent to PCKL requesting it to issue necessary directions to the defaulting ESCOMs to pay the infirm power bills raised by Udupi Power. On 24.01.2018, Udupi Power sent a reminder letter to PCKL/ESCOMs to make balance payment towards infirm power of Rs. 127.92 Crores in terms of the aforesaid order dated 24.03.2017 of CERC,

PCKL having been informed that the applicable LPSC on late payment towards infirm power as on 23.01.2018 stood at Rs. 155.72 Crores, this being followed up by numerous reminders sent during January to September 2018. On 27.03.2018, PCKL by its proforma bill admitted the claim of Udupi Power for Rs. 127.92 Crores towards balance payment of infirm power which was paid by ESCOMs on various dates during April to October 2018 - MESCOM paying Rs.10.66 Crores on 30.04.2018; BESCOM paying Rs. 63.47 Crores in four tranches on 25.05.2018, 29.05.2018, 01.06.2018 and 02.06.2018; HESCOM paying Rs. 23.26 Crores in three instalments on 01.06.2018, 22.06.2018 and 30.06.2018; GESCOM and CESCOM paying Rs. 16.96 Crores and Rs. 13.57 Crores on 17.09.2018 and 11.10.2018 respectively.

152. It is evident that the ESCOMs did not pay infirm power bills in terms of CERC Tariff Regulations. As per Regulation 11 of the 2009 Tariff Regulations (as is relevant for period in question), supply of infirm power was to be accounted as Unscheduled Interchange ("UI") and required to be paid at the applicable frequency-linked UI rate. The CERC, by its order dated 24.03.2017 (in petition no. 07/GT/2016), had directed the ESCOMs to pay the dues towards infirm power thereby rejecting the contrary position taken by them with reference to PPA. Their stand vis-à-vis rate having been held

to be wrong, they cannot be heard to say that they were making payments timely.

153. In *Devendra Kumar v. State of Uttaranchal*, (2013) 9 SCC 363, it was held that:

> *"25. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. Sublato fundamento cadit opus — a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case the legal maxim nullus commodum capere potest de injuria sua propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127 : 1996 SCC (Cri) 592 : AIR 1996 SC 1340] and Lily Thomas v. Union of India [(2000) 6 SCC 224 : 2000 SCC (Cri) 1056] .)..."*

154. It is a settled position of law that a party cannot take the benefit of its own wrong. For ready reference, besides the case of *Devendra Kumar* (supra), reliance is rightly placed on *Panchanan Dhara vs. Monmatha Nath Maity (Dead) through LRs*. (2006) 5 SCC 340 and *Union of India v. Shantiranjan Sarkar*, (2009) 3 SCC 90.

155. It is wrong to contend that the appellants were not aware of their liability to pay LPSC on account of delayed infirm power payments until Udupi Power raised the supplementary invoice in January 2018. The numerous communications sent by Udupi Power to PCKL/ESCOMs regarding LPSC over infirm power bills on

account of delay in payments, as noted earlier, nail the lie in the plea of ignorance. At the cost of repetition, reference may be made to some of the said communications including letter dated 29.08.2013 whereby Udupi Power requested PCKL to release the outstanding payment of Rs. 127.92 towards infirm power followed by various regular reminders by letters dated 06.06.2014, 14.07.2014 and 21.02.2015; letter dated 01.03.2014 whereunder Udupi Power sent monthly tariff invoices for March 2014 informing all ESCOMs that it shall be claiming delayed payment charges; letter sent on 09.01.2015 by Udupi Power to Additional Chief Secretary, GoK informing him that an amount of Rs. 116.82 Crores was outstanding against the ESCOMs towards infirm power supplied, copies being endorsed to PCKL and ESCOMs; and letter dated 27.02.2015 addressed by Udupi Power to PCKL on the subject of delay in payment of admitted dues towards infirm power with caution that it would attract applicable surcharge.

On "Acknowledgement"

156. The seller (Udupi Power) has contended that there is a "deemed acceptance" of its LPSC claims in terms of Art. 6.3(a) of

the PPA, and hence the limitation period is extended by way of acknowledgement of the amount due**.**

157. The above contention, the appellants argue, is without merit because Article 6.3(a) of the PPA is inapplicable in the present case as no invoice for LPSC was raised by Udupi Power in terms of the PPA; a supplementary invoice for LPSC claims from the year 2010 was raised for the first time only on 22.01.2018, by which time such claims were hopelessly time barred; a time barred claim cannot be revived by placing reliance on some contractual term; the Limitation Act, 1963 does not countenance such deemed acceptance as pleaded for the reason limitation period can only be extended if there is an 'acknowledgement of liability' in writing duly signed in terms of Section 18 of the Limitation Act; and that he "deemed acceptance" prior to the commencement of limitation period cannot have the effect of extending limitation under Section 18 of the Limitation Act, 1963 since the "deemed acceptance" under Article 6.3(a) of PPA occurs within ten business days of the acknowledgement date of the relevant invoice which is prior to the commencement of the limitation period to claim LPSC on the invoice which, in turn, is from the 'due date' *i.e.* 60 days from the acknowledgement date.

158. The contention of the appellants that limitation period can be claimed to have been extended only if there is an acknowledgment of the amount due by ESCOMs, in fact, supports the case of Udupi Power. Article 6.3 of the PPA provides that failure of the ESCOMs to dispute payment against bills raised within ten business days shall be construed as deemed acceptance by the ESCOMs in respect of the entire amount of such invoice. No disputes were raised in terms of the said contractual clause at any earlier stage in response to the invoices and communications reminding the appellants of the liability. Noticeably, even the supplementary invoices raised in January 2018 specifically pertaining to LPSC was not disputed by the ESCOMs within the said mandate of ten business days. Any submission to the contrary by the appellants fails the muster of Article 6.3 of the PPA relied upon by them.

159. Notwithstanding the above, the contention of the appellants in context of Section 18 of Limitation Act being correct to the effect that enlargement of time on ground of "acknowledgement' does require that "*acknowledgment of liability in respect of such … right has been made in writing signed by the party against whom such … right is claimed*", it being *sine qua non* for this to occur "*before the expiration of the prescribed period*", we do not find the plea to be of much consequence.

Effect of Article 6.2(b) of PPA

160. It is the argument of the appellants that the Central Commission has erroneously held that the PPA does not prescribe any specific methodology to claim LPSC ignoring the procedure stipulated in Article 6.2(b) of the PPA (quoted earlier). It is argued that the words "*any other payment*" in said clause of PPA are wide and comprehensive and would include LPSC. As such, in order to claim LPSC, a Supplementary Invoice is required to be raised by Udupi Power towards LPSC every month.

161. In above context, the appellants refer to Section 50 of the Indian Contract Act, 1872 which reads thus:

> *"50. Performance in manner or at time prescribed or sanctioned by promisee. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions."*

162. Relying upon the decision in *Talwandi Sabo Power Limited v Punjab State Power Corporation Limited* (in Appeal No. 97 of 2013 dated 03.06.2016), the appellants refer to the principle that when a thing is required to be done in a particular manner, it should be done in that manner and not in any other manner at the whims of any of the contracting parties. It is submitted that no

supplementary invoice respecting claim of LPSC has been raised by Udupi Power prior to 22.01.2018, this being in the teeth of Article 6.2(b) which does not contemplate the raising of supplementary invoices for any dues that may have arisen more than a month prior to the date of the invoice. Even when a supplementary invoice has to be raised for revision of a tariff invoice, the proviso to Article 6.2(b) stipulates a maximum period of one month after the expiry of the relevant "*tariff period*" i.e. "*the period commencing from the Commercial Operation Date and ending with the last day of the financial year immediately thereafter and every period of one year subsequently, during the Term (of the PPA).*"

163. The appellants submit that Udupi Power never disputed the interpretation of Article 6.2(b) with respect to the manner in which supplementary invoices are to be raised but, to cover up its failure to raise a supplementary invoice for LPSC in time, it wrongly claims that there is no specified methodology under the PPA to claim LPSC. The very fact that it eventually raised a "supplementary invoice" for LPSC on 22.01.2018 shows that it was conscious that Article 6.2(b) was applicable. The said invoice was neither a tariff invoice and nor could it be considered as a supplementary invoice since it was not raised in accordance with Article 6.2(b) of the PPA. The raising of such a "supplementary invoice" for LPSC at a belated

stage after several years is not in consonance with Article 6.2(b) of the PPA.

164. It is submitted that, on one hand, it has been contended by the Seller that there is no methodology to claim LPSC under the PPA, Article 6.2(b) being inapplicable while, on the other hand, it has relied on Article 6.3(a) of the PPA to claim that the Appellants are deemed to have accepted its supplementary invoice for LPSC. These contentions, it is argued, are mutually inconsistent and in the nature of approbation and reprobation which is impermissible.

165. To say the least, the above arguments with reference to Article 6.2(b) of PPA are wholly devoid of substance. Neither the CERC Tariff Regulations nor the PPA stipulate any specific methodology to claim LPSC. In such scenario, the LPSC claim of Udupi Power being a substantial right cannot be frustrated by procedural technicalities [see *Salim Haji Abdul Khayumsab vs. Kumar*, (2006) 1 SCC 46]. Udupi Power, by its regular communications to PCKL/ESCOMs, was keeping them informed about the amount payable towards LPSC.

166. The claim for LPSC is an inherent right accrued in favour of Udupi Power upon a delay in tariff payment beyond the due date. The same need not be specifically claimed. In taking this view, strength is drawn from the principle that in absence of an express

prohibition either in law, or in the contract entered into between the parties, interest must be made payable by exercise of equitable jurisdiction of the courts as expounded in *South Eastern Coalfields Ltd. vs. State of Madhya Pradesh & Ors*. (2003) 8 SCC 648 thus:

> *"24. … in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid…*
>
> *29. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978."*

167. It is a settled position of law that a party that has performed its obligations under a contract cannot be deprived of its legitimate entitlement. Any delay in the payment against the legitimate bills raised, entitles the aggrieved party to LPSC. In taking this view, we find support from the ruling of Supreme Court in *State of Rajasthan vs. J.K. Synthetics Ltd.*, (2011) 12 SCC 518 as under:

> *"20. In Kanoria Chemicals and Industries Ltd. v. U.P. SEB [(1997) 5 SCC 772] this Court held that grant of stay of a notification revising the electricity charges does not have the effect of relieving the consumer of its obligation to pay interest (or late payment surcharge) on the amount withheld by them by reason of the interim stay, if and when the writ petitions are dismissed ultimately. The said principle was*

based on the following reasoning: (SCC pp. 779-80, para 11)

> *"11. … Holding otherwise would mean that even though the Electricity Board, who was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses…."*

168. In view of the above, we reject the argument based on Article 6.2 of the PPA.

On "Cause of action"

169. It is argued by the appellants that cause of action to sue for a default in payment of a sum of money arises on the date when it is due and payable but is not paid. The submission is that breach of contract, and the injury to the party who is owed the money, is complete once and for all on this date, and the breach or wrong does not continue to occur thereafter. Therefore, proceedings for recovery of money must be initiated within a period of three years from the date such cause of action to sue arose and it cannot continue to arise till the amount is repaid, and further that under the

law, the period of limitation for recovery of money cannot be extended indefinitely.

170. The appellants submit that if the contention of Udupi and the finding of the Central Commission were to be accepted, it would result in an anomalous situation where no claim for recovery of money could ever be said to be time barred, this rendering the provisions of the Limitation Act nugatory.

171. There can be no quarrel with the broad proposition that under the general application of the Limitation Act, a claim with respect to non-payment of money payable on a monthly / periodic basis brought before an adjudicatory forum cannot be sustained with respect to recovery of money for a period of more than three years prior to the date of institution of the proceedings. Though we are holding to the contrary on both of these aspects, assuming that the claim of LPSC raised by Udupi Power is covered by the expression "Interest" and consequently also assuming that Article 25 of the Schedule to the Limitation Act is attracted, the limitation period would be three years from the date "*when the interest becomes due*". It naturally follows that the "*cause of action*" for lodging a claim for recovery of interest would arise on the day "*the interest becomes due*". Assuming the limitation is to be computed with aid of Article 113 of Limitation Act, 1963, as is contended by the second

respondent, the limitation period remains three years but effective from the date on which the "*right to sue accrues*" which effectively is same as the date on which the "*cause of action*" arises. Thus, in either case it is necessary to ascertain the date on which the "*cause of action*" arose in favour of the claimant (second respondent).

172. *Albeit* in the context of Section 20(c) of CPC, and while dealing with issues of territorial jurisdiction, Supreme Court in judgment reported as *South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises (P) Ltd.*, (1996) 3 SCC 443 explained the expression "cause of action" thus:

> "*3. It is settled law that* <u>*cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law*</u>*. The cause of action* <u>*means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court*</u>*. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant.* <u>*It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise*</u>*. ….*"
>
> (emphasis supplied)

173. In "*The Discipline of Law*" (published by Oxford University Press – South Asia Edition – Reprint 2014), Lord Denning refers to his decision in *Sparham-Souter v. Town Developments* ([1976] QB 858) to explain the pre-requisites for law of limitation to take effect thus:

> "Another thing is quite clear: "*A Statute of Limitations cannot begin to run unless there are two things present – a party capable of suing and a party liable to be sued" …. There is good sense in it. It would be most unjust that time should run against a plaintiff when there is no possibility of bringing an action to enforce it*"

174. While the appellants contend that the claim of respondent Udupi Power towards LPS for period prior to three years preceding the filing of petitions leading to impugned order of CERC is barred because Article 25 (applicable to "*for money payable for interest upon money due from the defendant to the plaintiff*") of the Schedule to Limitation Act applies (wherein the time of three years begins to run from the date "*when the interest becomes due*"), the respondent argues that there is continuing cause of action within the meaning of Section 22 and, therefore, fresh limitation begins on each day of default and, in the alternative, that Article 113 (applying to "*any suit for which no period of limitation is prescribed elsewhere*") is attracted (wherein the time of three years begins to run from the date "*when the right to sue accrues*"). We shall consider the argument of "*continuing cause of action*" later. Whether it is a case where Article 25 should apply or one wherein Article 113 is attracted, it is essential to subject the fact-situation to a scrutiny to ascertain as to when the twin requirements for limitation to have begun to run were met. It all boils down to construing as to when the cause of

action to approach CERC to claim LPSC arise, accrual of "*the right to sue*" being at best contemporaneous but definitely not anterior thereto.

175. The argument that Article 25 occurring in Part-I of the Schedule to Limitation Act, 1963 applies to the present dispute involving specific issue of LPSC itself is wrong. There is no specific limitation period specified for claiming LPSC in Schedule to the Limitation Act, 1963. Accordingly, even in cases where there is no running account, the period of limitation for LPSC claims will have to be governed by Article 113 of Limitation Act, 1963 (Part X- Suits for which there is no prescribed period), which provides the limitation period as three years computed from the date on which the "right to sue accrues" which is same as the date on which the "cause of action" arises.

176. The chronology speaks for itself. The respondent Udupi Power has kept the ESCOMs informed since 2011 about the amount of LPSC payable by them at the end of each financial year, due to delay in payment of monthly bills. Even on 01.04.2016 and 01.07.2017, Udupi Power raised consolidated bills for LPSC for the period from 11.11.2010 till 31.03.2016 and from 11.11.2010 till 31.03.2017 respectively. It was only on 05.06.2018 that PCKL/ESCOMs, for the first time, disputed their liability to pay

LPSC. It is on that date (05.06.2018) that the right to sue PCKL/ESCOMs effectively accrued in favour of Udupi Power.

177. In *Shakti Bhog Food Industries Ltd. vs. The Central Bank of India & Anr*. 2020 SCC OnLine SC 482, the Supreme Court held thus:

> *"8. Thus understood, the letter dated 8.5.2002 sent by the Senior Manager of the respondent Bank, at best, be reckoned as accrual of the cause of action to the appellant to sue the respondent Bank. It is then stated that the appellant received a communication dated 19.9.2002, informing the appellant that it should not carry on any further correspondence with the Bank relating to the subject matter. Until then, the appellant was having a sanguine hope of favourable resolution of its claim including by the Regional Office of the respondents…*
>
> *10. Concededly, the expression used in Article 113 is distinct from the expressions used in other Articles in the First Division dealing with suits such as Article 58 (when the right to sue "first" accrues)… The view taken by the trial Court, which commended to the first appellate Court and the High Court in second appeal, would inevitably entail in reading the expression in Article 113 as – when the right to sue (first) accrues. This would be rewriting of that provision and doing violence to the legislative intent. We must assume that the Parliament was conscious of the distinction between the provisions referred to above and had advisedly used generic expression "when the right to sue accrues" in Article 113 of the 1963 Act. Inasmuch as, it would also cover cases falling under Section 22 of the 1963 Act, to wit, continuing breaches and torts.*
>
> *11. We may usefully refer to the dictum of a threeJudge Bench of this Court in Union of India & Ors. vs. West Coast Paper Mills Ltd. & Anr. which has had an occasion to examine the expression used in Article 58 in contradistinction to Article 113 of the Limitation Act.*

> *"21. …The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose."*

13. It is well established position that the cause of action for filing a suit would consist of bundle of facts…In the present case, the assertion in the plaint is that the appellant verily believed that its claim was being processed by the Regional Office and the Regional Office would be taking appropriate decision at the earliest. That belief was shaken after receipt of letter from the Senior Manager of the Bank, dated 8.5.2002 followed by another letter dated 19.9.2002 to the effect that the action taken by the Bank was in accordance with the rules and the appellant need not correspond with the Bank in that regard any further. This firm response from the respondent Bank could trigger the right of the appellant to sue the respondent Bank...

"14. Reverting to the argument that exchange of letters or correspondence between the parties cannot be the basis to extend the period of limitation, in our opinion, for the view taken by us hitherto, the same need not be dilated further. Inasmuch as, having noticed from the averments in the plaint that the right to sue accrued to the appellant on receiving letter from the Senior Manager, dated 8.5.2002, and in particular letter dated 19.9.2002, and again on firm refusal by the respondents vide Advocate's letter dated 23.12.2003 in response to the legal notice sent by the appellant on 28.11.2003; and once again on the follow up legal notice on 7.1.2005, the plaint filed in February, 2005 would be well within limitation. Considering the former events of firm response by the respondents on 8.5.2002 and in particular, 19.9.2002, the correspondence ensued thereafter including the two legal notices sent by the appellant, even if disregarded, the plaint/suit filed on 23.2.2005 would be within limitation in terms of Article 113."

178. The ESCOMs delayed the payments (outstanding payments being made only between 25.05.2018 and 11.10.2018) even after the directions of the CERC by its Order dated 24.03.2017 determining the payable amount as Rs. 237 Crore on 02.09.2014. They were bound to make the infirm power payments in terms of Regulation 11 of the CERC Tariff Regulations, 2009. Having not done so, they intentionally and consciously committed defaults. Their submission contrary to the position in law vis-à-vis liability towards LPSC is unacceptable.

179. Till the decision was rendered on the dispute over rate of payment for infirm power – as per terms of PPA or UI Regulations – the Seller was unable to insist on full payment. The contentions of the appellants as to the rate were rejected by CERC by its decision dated 24.03.2017. It is only thereafter that the amount payable towards infirm power crystallized. In the wake of the said decision, the Seller (second respondent) issued invoices on 22.01.2018. The dispute about LPSC is subsequent to such events. The acts of the appellants disputing the liability to pay LPSC on 05.06.2018 is what gave rise to the cause of action in favour of the second respondent to approach the CERC by the two petitions which have resulted in the impugned order. Till then, the twin pre-requisites of "*a party capable of suing and a party liable to be sued*", postulated by Lord

Denning (as quoted earlier), had not been met, it being (borrowing his words) "*most unjust that time should run against (the claimant) when there (was) no possibility of bringing an action to enforce it*" prior to the said date. In view of these facts, the plea of limitation bar is unacceptable, the claim being within the prescribed period of three years.

180. The main plank of the respondent Udupi Power, however, is that its claim to LPSC is not hit by limitation bar because the arrangement between the parties gives rise to a continuing cause of action. We now proceed to examine the said plea.

On "Continuing cause of action"

181. It is the submission of Udupi Power that its LPSC claim pertains to an ongoing dispute for the consequential LPSC arising out of illegitimate withholding of dues by ESCOMs and the same cannot be barred by limitation. Section 3 of the Limitation Act, 1963 which relates to "Bar of Limitation" is subject to Section 22 of the Limitation Act, 1963 (quoted earlier) which specifically provides breach of a continuing nature as an exception to the rule of limitation.

182. It is argued by the appellants that the claim of Udupi Power as to the applicability of Section 22 of the Limitation Act and the decision in the impugned order is misplaced and fallacious. Reliance is placed on *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798, wherein the Supreme Court held that "(*if) the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue.*"

183. It is submitted by the appellants that there is no running account between the parties. Merely because the PPA between the parties is for a period of twenty-five years, the same would neither result in a running account nor a continuing cause of action. It is stated that Article 6.4(b) of the PPA, which has been relied upon by Udupi prescribes the method of calculation of LPSC but does not indicate that there is a continuing cause of action or a running account between the parties. The appellants further argue that even when there is a running account between the parties, the same has no bearing on the issue of limitation as regards any claim for interest for delayed payment of the principal amounts.

184. It is also submitted that any payment made towards revenue arrears / outstanding principal sum cannot be considered to be an acknowledgment of any claim for interest / LPSC so as to extend

the limitation period for initiating legal proceedings for recovery of interest as prescribed under Article 25 of the Schedule to the Limitation Act, 1963. By claiming that there is a running account, interest claims cannot be mixed up with principal amounts.

185. The expression "running account" is defined (by *Black's Law Dictionary*) as "*an open unset-tied account, as distinguished from a stated and liquidated account". It further explains that "running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled*". It is also described as "*revolving credit facility offered by a seller under which an approved buyer may continually obtain goods or services up to the agreed limit … amount paid by the buyer makes the same sum available again for purchases*" (see http://www.businessdictionary.com).

186. In *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board*, 1993 Supp (4) SCC 136, while dealing with a dispute under a contract of supply of electricity, the Supreme Court found it to be a case of "*running account*", reasoning it thus:

> "*88. The true nature of transaction in these cases is one of advance for consumption of electricity estimated for a period of three months subject to adjustment/revision, if necessary. Such an advance is liable to be made good and kept at a stipulated level from month to month. It is open to the consumer to permit adjustment of the advance in the first instance. Thereafter, make good the shortfall in*

> *consumption charges and the security deposit before actual disconnection of supply which takes at least about three months. In short, it is in the nature of a running account.*"
>
> (emphasis supplied)

187. The PPA provides for billing and payment in detail. No doubt, in terms of Article 6.2, the tariff invoice (Bill) is to be raised on monthly basis with regard to "*Monthly Capacity (fixed) charge amount, Energy charges and Incentive payment wherever applicable*", it to be supported by requisite documents particularly the record of "*metered energy*". In contrast, Supplementary Invoice is conceived in the PPA as a bill which may follow the monthly tariff invoice in respect of "*any other payment not included in the Tariff invoice*". But then, as observed in another context, the provisions of PPA do not cover LPSC and, therefore, it is not acceptable that the invoices mentioned in PPA would include demand of payment of LPSC.

188. The procurer (principal buyer) is expected to issue a formal acknowledgement of receipt of such invoices, the due date of payment being the sixtieth day from such date of acknowledgement (including the acknowledgement date). There may be an occasion for the procurer to question the correctness of the bill/invoice issued and for this provision is made in the PPA to raise a dispute, formally, though within ten business days of the acknowledgement date. If a

dispute is raised, the PPA provides for the resolution mechanism. But then, it is admitted case that no dispute about LPSC was raised before the invoices of 2018. The tariff period, however, is described in the PPA as the period corresponding to the financial year. It is own case of the appellants that the parties to the PPA (i.e. the appellants as the principal buyers and the second respondent as the seller) have been engaging each other in reconciliation of the accounts at the end of each financial year. The provisions of the contract (PPA) vest certain rights in the seller for initiation of action in case of default in payment including resort to payment security mechanism and sale to third parties. The said provisions, detrimental to the interests of the procurers in uninterrupted supply, were not resorted to.

189. It is noteworthy that there is a continuing nature of the relationship, it being a commercial arrangement for twenty-five years under the PPA coupled with a clear case of running account which itself leads us to consider it a case of continuing cause of action. Pertinently, Article 6.4(b) of the PPA stipulates, *albeit* in the context of interest liability, that amount payable "*shall accrue from day to day and shall be calculated on a 365-day year basis*".

190. In compliance with directions, the learned counsel for the appellants submitted for record, on 07.09.2020, the details of billing

and payments against the regular power bills for and up to 31.8.2018 and also qua infirm power for the period in dispute. The said details do not take into account the LPSC claimed by the respondent Udupi Power. The respondent Udupi Power submitted a note on 08.09.2020 commenting on the above mentioned submission of details of billing and payments taking exception to the accuracy pointing out, *inter alia*, that the calculations of PCKL/ESCOMs do not take into account the Supplementary Invoices raised by Udupi Power towards: (a) reimbursement of coal related charges and statutory charges which are payable to Udupi Power as per the CERC Tariff Regulations (2009 and 2014); (b) differential amount payable to Udupi Power based on CERC's Tariff order dated 20.02.2014 for the period November 2010 to January 2014 and that such charges remain unpaid by the ESCOMs, it (Udupi Power) having been constrained, on account of the failure of ESCOMs to pay the legitimate dues, to approach the CERC on 28.05.2019, by filing Petition No. 155/MP/2019 seeking resolution of payment disputes between Udupi Power and ESCOMs relating to capacity charges and energy charges for the period from November 2010 to March 2019, such petition being pending adjudication.

191. Be that as it may, even from the details submitted by PCKL/ESCOMs, it is clear that there have been numerous and continuous defaults by ESCOMs in making payment of monthly and infirm power charges of Udupi Power on time or in full. The range of such delays, as shown by data submitted by the appellants themselves, extends from a period of one month to even a year in some instances. In fact, defaults seem to be the rule, timely payments an exception.

192. The details submitted by the appellants demonstrate that the ESCOMs have treated their respective arrangement for procurement of electrical supply from the respondent Udupi Power as running accounts wherein the demands raised by the seller through bills/invoices issued on monthly basis could be satisfied by payments made, on account, for reconciliation/adjustment in due course, such part payments/instalments/tranches being piecemeal and in sums unilaterally decided as per convenience or sweet will of the procurer(s), the drawal of electricity having continued unabated despite such defaults consistently indulged in.

193. The above can be illustrated by reference to various instances. The details pertaining to CESCOM show that against the invoice amount of Rs. 10,77,80,583/- for the month of May 2011

issued on 03.06.2011 with due date of 03.08.2011, payments were made in three parts on 01.07.2011, 26.07.2011 and 03.10.2011 in the amounts of Rs. 30,81,367/-, Rs. 30,00,000/- and Rs. 19,79,363/- respectively. Similar is the pattern of payments for several months including December 2010, March 2011, April 2011, December 2011, January 2012, April 2012, July 2012, September to December 2012, January to April 2013, June 2013, April to August 2014, October to December 2015, January 2016, March 2016, June 2016 to April 2017, March to June 2018. So much so, that the CESCOM took liberties to pay the invoice for July 2016 in as many as ten instalments starting with 17.12.2016 and ending with the last on 13.1.2017 even though the amount claimed by the Bill was same as admitted liability and the due date of payment was 03.10.2016. The mode of payment against the invoices for August 2016, November 2016, January and February 2017 consistently reveal a similar pattern. The billing and payment details of other ESCOMs (HESCOM, GESCOM), as furnished by the appellants themselves, reveal a similar picture. It is wholly unnecessary to make a mention of the specific instances at length since the data furnished is replete with them to create the impression noted above. Just as a sample, reference can be made to the pattern of payments made by HESCOM. It made the payment through thirty-five instalments (from

11.09.2018 to 17.12.2018) against the invoice for September 2017 issued on 03.10.2017, the payment where against was due on 06.12.2017, the procurer having admitted liability to pay substantial part of what was billed. Likewise, the same procurer made the payment through fifteen instalments (from 17.12.2018 to 13.03.2019) against the invoice for October 2017 issued on 02.11.2017, the payment where against was due on 07.01.2018, the procurer having again admitted liability to pay substantial part of what was billed.

194. The pattern shown by the above-mentioned details of billing and payments is clearly indicative of the procurers having understood the arrangement with seller to be such as obliged running accounts to be maintained. This being the sequitur, the argument of the respondent Udupi Power that it is a case of "*continuing cause of action*" gets validated and strengthened rendering the plea of limitation bar superfluous. But the appellants contest invocation of section 22 Limitation Act by referring to provisions of PPA.

195. The above facts necessitate reference to the doctrine of *estoppel by conduct*. In *Sunderabai v. Devaji*, AIR 1954 SC 82, the doctrine as enshrined in law of evidence was explained thus:

"*14. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Evidence Act which lays down that when one person has by his declaration act or omission caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. This is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of res judicata.*"

196. In 1875, four propositions concerning an *estoppel by conduct* were laid down by Brett, J in *Carr* v. *London & N.W. Ry. Co.* [LR 10 CP 307], the third of which was quoted with approval by Supreme Court of India in *R.S. Maddanappa v. Chandramma*, (1965) 3 SCR 283 : AIR 1965 SC 1812, as under:

"*In order to justify the plaintiff in his assertion that the defendants are estopped as against him from denying that …, he must bring the case within one of the recognized propositions of an estoppel in pais.*

One such proposition is, <u>if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist</u>.

…

Another recognized proposition seems to be, that, <u>if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.</u>

> …
>
> *And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.*
>
> …
>
> *There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist.*"
>
> (emphasis supplied)

197. Referring to the third proposition, the Supreme Court in *R.S. Maddanappa* (supra) observed:

> "*the person claiming benefit of the doctrine must show that he has acted to his detriment on the faith of the representation made to him*".

198. In *TISCO Ltd. v. Union of India* [(2001) 2 SCC 41], the Supreme Court expounded the law on doctrine of estoppel by conduct by following observations:

> "*20. Estoppel by conduct in modern times stands elucidated with the decisions of the English Courts in Pickard v. Sears [(1837) 6 Ad & EL 469 : 112 ER 179] and its gradual elaboration until placement of its true principles by the Privy Council in Sarat Chunder Dey v. Gopal*

Chunder Laha [(1891-92) 19 IA 203] whereas earlier Lord Esher in Seton v. Lafone [(1887) 19 QBD 68 (CA)] evolved three basic elements of the doctrine of estoppel to wit: (QB p. 70)

> *Firstly, where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment: secondly, another may be where a man makes a false statement negligently though without fraud and another person acts upon it: and thirdly, there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.*

Lord Shand, however, was pleased to add one further element to the effect that there may be statements made, which have induced other party to do that from which otherwise he would have abstained and which cannot properly be characterised as misrepresentation. In this context, reference may be made to the decisions of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. [(1920) 28 CLR 305 (Aust)] Dixon, J. in his judgment in Grundt v. Great Boulder Pty. Gold Mines Ltd. [(1938) 59 CLR 641 (Aust)] stated that:

> *'In measuring the detriment, or demonstrating its existence, one does not compare the position of the representee, before and after acting upon the representation, upon the assumption that the representation is to be regarded as true, the question of estoppel does not arise. <u>It is only when the representor wished to disavow the assumption contained in his representation that an estoppel arises, and the question of detriment is considered, accordingly, in the light of the position which the representee would be in if the representor were allowed to disavow the truth of the representation.</u>'*

(In this context see Spencer Bower and Turner: Estoppel by Representation, 3rd Edn.)

Lord Denning also in Central Newbury Car Auctions Ltd. v. Unity Finance Ltd. [(1957) 1 QB 371 : (1956) 3 WLR 1068 : (1956) 3 All ER 905 (CA)] appears to have subscribed

to the view of Lord Dixon, J. pertaining to the test of 'detriment' to the effect as to whether it appears unjust or inequitable that the representor should now be allowed to resile from his representation, having regard to what the representee has done or refrained from doing in reliance on the representation, in short, the party asserting the estoppel must have been induced to act to his detriment. So long as the assumption is adhered to, the party who altered the situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs, the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment (vide Grundt [(1938) 59 CLR 641 (Aust)] : High Court of Australia).

21. Phipson on Evidence (14th Edn.) has the following to state as regards estoppels by conduct:

> *'Estoppels by conduct, or, as they are still sometimes called, estoppels by matter in pais, were anciently acts of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate and the like, and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. (Lyon v. Reed [(1844) 13 M & W 285 : 153 ER 118] , ER pp. 128-29 : M & W at p. 309.) The doctrine has, however, in modern times, been extended so as to embrace practically any act or statement by a party which it would be unconscionable to permit him to deny. The rule has been authoritatively stated as follows: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter this own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (Pickard v. Sears [(1837) 6 Ad & EL 469 : 112 ER 179] , ER p. 181 : Ad & El at p. 474.) And whatever a man's real intention may be, he is deemed to act wilfully "if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it." (Freeman v. Cooke [(1848) 2*

Exch 654 : (1843-60) All ER Rep 185 : 154 ER 652] , ER p. 656 : Exch at p. 663.)

Where the conduct is negligent or consists wholly of omission, there must be a duty to the person misled (Mercantile Bank of India Ltd. v. Central Bank of India Ltd. [1938 AC 287 : (1938) 1 All ER 52 (PC)] , AC at p. 304 and National Westminster Bank Ltd. v. Barclays Bank International Ltd. [1975 QB 654 : (1975) 2 WLR 12 : (1974) 3 All ER 834]). This principle sits oddly with the rest of the law of estoppel, but it appears to have been reaffirmed, at least by implication, by the House of Lords comparatively recently (Moorgate Mercantile Co. Ltd. v. Twitchings [1977 AC 890 : (1976) 3 WLR 66 : (1976) 2 All ER 641 (HL)]). The explanation is no doubt that this aspect of estoppel is properly to be considered a part of the law relating to negligent representations, rather than estoppel properly so-called. If two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped as against the other from asserting differently at another time (Square v. Square [1935 P 120]).'

22. A bare perusal of the same would go to show that the issue of an estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status. The contextual facts however, depict otherwise. Annexure 2 to the application form for benefit of price protection contains an undertaking to the following effect:

'We hereby undertake to refund to EEPC Rs … the amount paid to us in full or part thereof against our application for price protection. In terms of our application dated … against exports made during … In case any particular declaration/certificate furnished by us against our above referred to claims are found to be incorrect or any excess payment is determined to have been made due to oversight/wrong calculation, etc. at any time. We also undertake to refund the amount within 10 days of receipt of the notice asking for the refund, failing which the

amount erroneously paid or paid in excess shall be recovered from or adjusted against any other claim for export benefits by EEPC or by the licensing authorities of CCI & C.'

And it is on this score it may be noted that in the event of there being a specific undertaking to refund for any amount erroneously paid or paid in excess, question of there being any estoppel in our view would not arise. In this context correspondence exchanged between the parties are rather significant. In particular letter dated 30-11-1990 from the Assistant Development Commissioner for Iron & Steel and the reply thereto dated 8-3-1991 which unmistakably record the factum of non-payment of JPC price."

(emphasis supplied)

199. The above passage was quoted with approval and the principles reiterated in *Bhagwati Vanaspati Traders v. Supt. of Post Offices*, (2015) 1 SCC 617.

200. In *Supdt. of Taxes v. Onkarmal Nathmal Trust*, (1976) 1 SCC 766 : 1976 SCC (Tax) 73, explained the principle thus:

"*'23. … The doctrine of estoppel by conduct means that where one by words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an*

<u>*estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law*</u>*. ...*"

(emphasis supplied)

201. It is apt to also invoke the rule of waiver in this context, it too leading to similar conclusions. In "*The Discipline of Law*" (supra), Lord Denning refers to his decision in *W. J. Alan & Co. v. El Nasar Export* ([1972] 2 QB 189) to explain the doctrine of Waiver thus:

> "*The principle of waiver is simply this: if one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that behalf, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so …. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them …. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by the waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.*"

202. In our view, the doctrine of estoppel by conduct is attracted against the appellants. As noticed above, by treating the financial obligations as those pertaining to "*running accounts*", these government companies (procurers), their cause having been espoused by PCKL and the Government of Karnataka, making a

clear, concerted, consistent and regular departure from the contractual norms relied upon by them, have persuaded the seller (second respondent) to believe and accept the arrangement to be such as that of "*running accounts*" foregoing its rights to take action to cover up losses correspondingly suffered and thus detrimental to its lawful interests. The principle of waiver, as explained in *W. J. Alan & Co. v. El Nasar Export* (supra) also leads to same conclusions since the seller has been led by the appellants to believe "*that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that behalf*" in the matter of timely payments, month by month, and the Seller acted upon it accepting annual reconciliation of accounts, it would be unjust and inequitable now to permit the defaulting procurers to plead or argue to the contrary. We thus hold that the parties had been maintaining "*running accounts*" for sale and purchase of electricity under the PPA.

203. We do not find substance in any of the submissions of the appellants in context of factual matrix at hand. It is a settled position of law that a "*continuing wrong*" constitutes two elements. It is an act which creates (i) a continuing source of injury and (ii) renders the doer of the act responsible and liable for the continuance of the said injury. Every time a breach is committed, the aggrieved party

gets a fresh cause of action to invoke appropriate judicial proceedings.

204. The respondent refers to the case of *State of M.P. & Ors. vs. Yogendra Srivastava* (2010) 12 SCC 538, wherein it was held that if the denial of a benefit occurs every month, then such denial gives rise to a fresh cause of action every month based on a continuing wrong:

> *"18. ... Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong...."*

205. To similar effect are judgments reported as *Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798 (Para 31); *State of Bihar v. Deokaran Nenshi*, (1972) 2 SCC 890 (Para 5); *Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Co. Ltd. & Anr.* (1997) 1 SCC 99 (Para 10); and *Basic Shiksha Parishad and Ors. vs. Sugna Devi and Ors.* (2004) 9 SCC 68 (Paras 5 and 6).

206. Reliance is also placed on *Udai Shankar Awasthi vs. State of U.P.*, (2013) 2 SCC 435, wherein the Supreme Court explained the expression "*continuing breach*" as under:

> *"24. In Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan [AIR 1959 SC 798] AIR p. 807, para 31 this Court dealt with the aforementioned issue,*

and observed that a continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury… If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. …

26. While deciding the case in Gokak Patel Volkart Ltd. …this Court placed reliance upon its earlier judgment in State of Bihar v. Deokaran Nenshi…wherein the Court while dealing with the case of continuance of an offence has held as under:…

> *"5. A <u>continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all</u>. It is one of those offences which arises out of <u>a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with</u>. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.*

29. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the <u>ingredients</u> of the offence continue i.e. <u>endure even after the period of consummation</u>…."

(emphasis supplied)

207. We uphold the submission that, in the facts and circumstances presented before us, the elements of "*continuing breach*" are

satisfied. Indisputably, there have been breaches of the contract on account of the non-payment of regular monthly bills and invoices towards infirm power and LPSC by the ESCOMs in terms of the PPA as well as Regulations. Each '*breach*' by the ESCOMs resultantly burdened Udupi Power with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of '*continuing breach*'. Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. The '*breach*' being recurring, the second element of '*continuing breach*' is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic.

208. For the foregoing reasons, we uphold the submission of the second respondent that the default of ESCOMs in paying against monthly tariff bills as well as LPSC partakes the character of a "*continuing breach*" as contemplated under Section 22 of the Limitation Act, 1963. Thus, "*a fresh period of limitation begins to run at every moment of the time during which the breach … continues*". Since the breach continues on account of continued refusal to

discharge liability towards LPSC, a fresh cause of action is constituted so long as the breach is recurrent and continues.

209. We conclude that the plea of bar of limitation raised by the appellants is without substance and must be rejected.

Plea of BESCOM about ignorance

210. As noted earlier, appellant BESCOM by its independent appeal has taken the plea of no liability on account of ignorance on the position that the infirm power bills were not sent to it in terms of PPA and instead they were addressed to PCKL, an entity which was neither a party to the contract and nor empowered to undertake any commercial/financial transactions of ESCOMs as per the terms of the PPA. The plea is unacceptable for several reasons.

211. As already noted, the definition of the expression “Principal Buyers” as given in Article 1.1 of the PPA includes both the ESCOMS and their “authorized representatives”. As also highlighted in the background facts that after its incorporation on 20.08.2007 under the aegis of GoK as a SPV, to supplement the efforts for capacity addition and under approval granted on 21.05.2011 by GoK, PCKL entered into MOUs with the ESCOMs and that, in the wake of such arrangement, PCKL has been

procuring power on behalf of the ESCOMs from various sources including purchase of power through Energy Exchange, Banking (SWAP) as well bilateral transactions in order to bridge the short-term demand and supply gap and also representing them (the ESCOMs) in Southern Regional Power Committee.

212. From the material submitted and from the submissions made by all parties before us, it emerges as an admitted position that aside from other role, it has been a settled practice adopted ever since PCKL entered the scene that it is PCKL which would verify and scrutinize the power procurement bills of ESCOMs, particularly the Udupi Power energy charges bills. This effectively confers on the PCKL the status of "representative" authorised by the principal buyers, they having not made any payment till receiving go-ahead from PCKL.

213. In Kanchan Udyog Limited vs. United Spirits Limited (2017) 8 SCC 237, the Supreme Court held:

> *"22. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s VEC, for a period of nearly one year, and continuing to do so even after it wrote to the respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive concentrates from the respondent, undoubtedly*

amounts to <u>waiver by conduct and acquiescence by it to the new arrangement</u>. The plea that it was done under compulsion, and not voluntarily, is devoid of any material, substance and evidence. It is unacceptable and merits no consideration. Alternatively, if it was an assignment under Clause 5 of the agreement, there had been no termination of the contract by the respondent."

(emphasis supplied)

214. The functions assigned to it with express consent of all sides as well as the conduct of the ESCOMs clearly demonstrate that PCKL is the authorized representative of the ESCOMs. There has been acquiescence by conduct on part of ESCOMs, including BESCOM, recognizing PCKL as its authorized representative. Thus, Udupi Power has been rightly considering PCKL as the primary body to communicate with respect to the business transactions concerning its project. We endorse the following views expressed by CERC in the impugned order:

"114. … If certain invoices were not sent specifically to BESCOM, that cannot be used by BESCOM as an excuse from not making payments towards the Petitioner's legitimate entitlements. The bills were admittedly sent to PCKL, which after due scrutiny of the invoices, sent a proforma for payment to the concerned KESCOMs."

215. It is apt to also note here that PCKL, in its proforma dated 02.09.2014 (certified by SLDC), had expressly "admitted" the total amount of Rs. 237.30 Crore payable towards infirm power, it inclusive of the outstanding amounts payable by BESCOM, its copy

having been also sent to General Manager, BESCOM with a direction to clear the outstanding dues in favour of Udupi Power. Udupi had also sent to BESCOM a copy of the letter dated 09.01.2015 addressed to the Energy Department, GoK requesting, *inter alia*, the immediate release of the pending amounts along with interest for the delay as per CERC Tariff Regulations. The impugned order refers to such exchange and rightly observes:

> *"115. … BESCOM's contention that it was not aware of the pending amounts pertaining to infirm power supply prior to 2018 is erroneous and misplaced. Further, any invoice sent to PCKL is deemed to have been sent to the KESCOMs in terms of the PPA*.

216. The pleas of ignorance of BESCOM and of impropriety of invoices sent to PKCL raised by ESCOMs are clearly untenable and deserve to be perceived as an unfair attempt to wriggle out of statutory obligations under Regulations towards LPSC.

217. It must be added that the appellant BESCOM has been far from honest by raising a dispute about its liability even towards the full extent of outstanding dues towards infirm power as determined by reconciliation of accounts by the parties themselves. The contention of BESCOM that it has made payment of Rs. 2.01 Crores in excess of its liability and so the said amount needs to be refunded by Udupi Power is erroneous and misleading. The claim of Udupi Power to additional amount of Rs. 3.42 Crores (Rs. 117.47 -114.05

Crore) towards infirm power, on basis of reconciliation of accounts between the parties is valid and legitimate and cannot be defeated. The order dated 08.11.2019 of CERC allowing Udupi Power to claim LPSC subsumes such claim of balance amount outstanding as on date which Udupi Power is entitled to recover along with LPSC from BESCOM.

Summing up on plea of limitation

218. To recapitulate, we conclude that claim of LPSC under the Regulations is distinct from, and not same as, the liability incurred under the contract (PPA) towards interest. Though in our view the claim for LPSC being essentially one for enforcement of Regulations and, therefore, regulatory in nature and consequently beyond the pale of limitation bar, we have examined the dispute on assumption that Limitation Act applies. On facts, we hold that the claims through the two petitions leading to impugned order were brought before CERC within the period of three years after the right to sue or the cause of action had accrued in favour of the second respondent. Even otherwise, the parties having maintained running accounts, the defaults in question have given rise to a continuing cause of action.

219. Therefore, we reject the plea of limitation bar upholding the conclusion reached by the Central Commission.

PLEA OF WAIVER

220. It is argued by the appellants that the claim of Udupi Power is barred on account of doctrine of waiver. It is submitted that during the year 2017-18, the parties had undertaken a comprehensive exercise of reconciliation of accounts for the years 2011 to 2017, at which stage no claim for LPSC was raised. The appellants also contend that they had availed rebates against various payments made earlier than the due dates, which was accepted by Udupi without any protest or demur this, according to the appellants, showing that there was no outstanding LPSC in its books of accounts as otherwise the payments would have got adjusted against the outstanding LPSC. Having not made any claims or accounting for LPSC at the time of reconciliation, Udupi has waived or relinquished its claim, if any, towards LPSC, and is now estopped from claiming the same by initiating fresh proceedings.

221. In *All India Power Engineers Federation vs. Sasan Power Ltd*, (2017) 1 SCC 487, the Supreme Court ruled thus:

> *"21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. …."*
>
> (emphasis supplied)

222. The PPA was signed on 26.12.2005. Since the two Units of Udupi Power achieved CoD during the control period of the CERC Tariff Regulations, 2009, the said Regulations and subsequent CERC Tariff Regulations of 2014 are applicable. It is untenable to contend that Udupi Power had waived its entitlement to LPSC in terms of the CERC Tariff Regulations which were to be notified several years later.

223. Upon careful scrutiny of the material place before us, we find that there is nothing from which "*intention to relinquish*" could be inferred, it being, even otherwise, not permissible to draw such conclusion since the consequences flowing from it would be detrimental to public interest.

224. We, thus, reject the plea of waiver raised as aforesaid by the appellants.

ON COMPUTATION

On Rate

225. We have quoted the relevant Regulations on the subject of "Norms". The submission of the appellants is that a plain reading of Regulation 47 of the 2014 Tariff Regulations ("*Norms to be ceiling norms*") makes it evident that the provision is broad and applies to all types of norms without any restrictions. Both Regulation 47 of the 2014 Tariff Regulations as well as Regulation 37 of the 2009 Tariff Regulations (on same subject) fall under the Chapter titled "Miscellaneous Provisions". They are, it is argued, applicable to all the provisions of the Tariff Regulations, including those dealing with LPSC, and are not limited in their application to Chapter 4 of the 2009 Tariff Regulations or Chapter 8 of the 2014 Tariff Regulations, as contended by Udupi Power.

226. The appellants question the rate at which LPSC is claimed by the respondent seller. They refer to Article 6.4(a) of the PPA (quoted earlier) which provides for interest on delayed payments at the "Default rate" which expression, in turn, is defined as the "*interest rate of State Bank of India Prime Lending Rate subject to modifications from time to time*". It is submitted that LPSC, if any, is payable at the rate prescribed in Article 6.4(a) of the PPA and not the rate specified in the applicable Tariff Regulations. Regulation 47

of the 2014 Tariff Regulations and Regulation 37 of the 2009 Tariff Regulations permit the parties to mutually agree upon "*improved norms*" compared to what is prescribed in the Tariff Regulations. It is submitted that the *State Bank of India Prime Lending Rate* (SBI PLR) has varied between 12.25% p.a. at its lowest to 14.75% p.a. at its highest during the relevant period which is much lower than the rate of 15-18% p.a. that is being applied by Udupi to calculate LPSC. The different rate of interest under Article 6.4(a) of the PPA is such an "*improved norm*" as referred to above, and hence, the agreement between the parties would prevail. Since the claim of Udupi Power is in excess of the SBI PLR prevailing at the relevant time, and is not in consonance with Article 6.4 (a) of the PPA, the same cannot be awarded.

227. It is also the argument of the appellants that the PPA was entered into on 26.12.2005, and Regulation 26 of the 2004 Tariff Regulations, which was prevailing then, provided the same rate of LPSC as the 2009 Tariff Regulations. Nevertheless, Udupi Power agreed upon a different rate from the Tariff Regulations in the PPA, thereby waiving its right to claim a higher rate of LPSC under the Tariff Regulations.

228. Further, the appellants submit that a statutory right can be waived by the person in whose favour it is created so long such

waiver is not against public interest. Reference in this regard is made to the judgment of *All India Power Engineers Federation* v. *Sasan Power Ltd* (2017) 1 SCC 487. It is argued that an agreement between parties to levy LPSC at a lower rate is not in conflict with public interest. On the contrary, it is in public interest that LPSC be chargeable at a lower rate as mutually agreed between the parties. Therefore, LPSC, if any, can only be payable at the "Default rate" provided for under Article 6.4(a) of the PPA and not at the higher rate as per the Tariff Regulations, as claimed by Udupi.

229. The argument of the appellants that the rate of interest must be in terms of the PPA approved rate (SBI PLR) and not as per the provisions of the CERC Tariff Regulations is contrary to the settled law that the Tariff Regulations have over-riding effect over the PPAs executed between the parties.

230. As noted earlier, in *PTC India Limited vs. CERC (supra),* the Supreme Court held that "(*a) regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts … (and) casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation."* We may also refer to judgment of Supreme Court reported as *Transmission Corporation of Andhra Pradesh Limited vs. Rain Calcing Ltd. & Ors.*, 2019 SCC OnLine SC 1537 and of this

tribunal in matter of *Udupi Power vs. PCKL & Ors*. Appeal Nos. 108 of 2014 and 119 of 2014 decided on 15.05.2015 following the same principle.

231. The Tariff Regulations promulgated by CERC carry clear provisions regarding LPSC and stipulate that the applicable rate of LPSC is 1.25% per month in terms of Regulation 35 of CERC Tariff Regulations 2009 and 1.5% per month in terms 26 of Regulation 45 of CERC Tariff Regulations 2014. Thus, the rate of LPSC specified in the CERC Tariff Regulations will override the rate, if any, specified in PPA, the interest rate even if equated with LPSC rate in Article 6.4 of the PPA to be accordingly treated as revised in terms of the CERC Tariff Regulations promulgated from time to time, in terms of ruling in *PTC India* (supra).

232. An argument identical to the submission of the appellants herein that Regulations 47 and 48 of the CERC Tariff Regulations, 2014 contemplate that parties may agree for any improved norms more stringent than the norms stipulated in the said Regulations - which improved norms shall subsequently prevail and govern the rights and obligations of the parties - was considered and rejected by this tribunal in judgment dated 15.05.2015 in *Udupi Power vs. PCKL & Ors*. Appeal Nos. 108 of 2014 and 119 of 2014 with following observations:

> "*93. Regulation 16(5) of 2009 Regulations provides that rate of interest shall be weighted average of rate of interest calculated on the basis of actual loan prevalent at the beginning of each year applicable to the project. Therefore, we do not find any infirmity in CERC allowing interest rate as per the Regulations.*
>
> *94. We do not find any merit in the contentions of Mr. Ramachandran that improved norms as agreed in the PPA shall be applied for financial norms also as per Regulation 37 of 2009 Regulations... We also feel that Regulation 37 is relating to operation norms and not interest rates.*
>
> *95. Regulation 37 of 2009 Regulations provides that norms of operation specified in the Regulations are the ceiling norms and shall not preclude the generating company and beneficiaries from agreeing to improved norms of operation and in case the improved norms of operation are agreed to, such improved norms shall be applicable for determination of tariff. Norms of operations as specified in Chapter-4 relates to normative Annual Plant Availability Factor, gross station heat rate, secondary fuel oil consumption and auxiliary consumption and do not include interest rate. Further, the issue of interest has been under correspondence between Udupi Power and State Government and utilities since the signing of the PPA. We have examined all the documents furnished by both the parties and find that even after signing of the PPA there was an understanding that interest rate will be decided by CERC.*
>
> *96. CERC has correctly applied 2009 Regulations for interest rates. In view of above, the issue relating to interest rate is decided against PCKL."*

233. As already observed, the only norms stipulated by the CERC Tariff Regulations are the "*norms of operation*", they pertaining to such elements as "*Normative annual plant availability factor*", "*Normative annual plant load factor*", "*Gross station heat rate*", "*Secondary fuel oil consumption*" and "*Auxiliary energy*

consumption". The "default" or "delay in payment" and interest payable for the same cannot be considered as a norm for operation of thermal power plants. The said norm is discernible under Section 61 of the Electricity Act, 2003 which warrants timely and due payment. The provision of LPSC is a compensatory provision under the PPAs. The ESCOMs, having violated the provisions of the PPA with respect to payment of dues, cannot seek to take advantage of the rate stipulated for Interest under the PPA.

On mode of accounting

234. It is pointed out that the PPA, by its Article 6.14 (quoted earlier), prescribes the "*mode of accounting of payments*" in terms of which the "*order of priority*" for "*payments made by the Principal Buyers"* to be "*adjusted*" is "*Revenue arrears*", "*Interest on Revenue Arrears*" followed by "*Current month's revenue*". It is a grievance of the appellants that CERC has not adjudicated on the quantum of the claim or the methodology of its determination, Udupi having made unilateral determination in an arbitrary manner.

235. It is argued that any payment made must be adjusted first towards any pending revenue arrears and only after such arrears stand exhausted that the further payments would be adjusted

towards interest on such revenue arrears or LPSC. It is pointed out that the calculation sheets filed by the seller along with Petition No. 324/MP/2018 show that Udupi Power has been adjusting payments made first towards alleged outstanding LPSC and only the remaining balance is adjusted towards the revenue arrears. This, according to appellants, is in patent violation of the stipulation under Article 6.14 and, as a result, Udupi has calculated exaggerated amounts of LPSC by treating the arrears as unpaid. It is argued that since its calculation of revenue arrears is exaggerated, having not adjusted payments appropriately, its consequent computation of LPSC on such exaggerated revenue arrears is also inflated.

236. The appellants seek to exemplify the above by referring to the table for computation of LPSC filed by Udupi Power before the Central Commission, wherein payment dated 07.05.2018 of Rs. 4.66 crores received by Udupi Power is used to offset the amount mentioned under the columns "*surcharge amount outstanding/ cumulative surcharge amount*" and not the principal amount of Rs. 288.32 crores in the columns under "*opening dues/ total amount applicable for surcharge/ invoice amount outstanding*", this being the pattern of adjustments used throughout. It is alleged that the said method has led to a grossly exaggerated claim for late payment surcharge.

237. It is the grievance that the Central Commission has not given any finding on the issue of manner of adjustment of payments or the quantum of LPSC allegedly payable to Udupi Power, it having simply allowed the petition directing the appellants to make payments of the "outstanding amount" within 60 days, without quantifying such amount.

238. The contentions regarding appropriate methodology for adjustment of payments received by Udupi Power first towards revenue arrears and then towards LPSC have been rejected by CERC for reasons given as under:

> *"86. …. There is no denying the fact that the Petitioner has performed its obligations under the PPA as regards supplying electricity to the Respondents and raised bills against supply of power as also for infirm power. Though no supplementary invoices were raised by the Petitioner for claiming LPS prior to January 2018, the Petitioner has kept the Respondents informed about the LPS payable by them at the end of each financial year by way of communications on various dates as furnished vide affidavit dated 8.5.2019 including the quantification of amount payable by the ESCOMs. At no time of point of time until 05.06.2018 did PCKL or the KESCOMs objected to or disputed their liability to pay LPS for delayed payment of Tariff as communicated by the Petitioner.*
>
> *87. We agree with the Petitioner that neither the provisions of the PPA nor the CERC Tariff Regulations stipulate any specific methodology to claim LPS. Therefore, the Petitioner is entitled to claim LPS on delay in payments of invoices of regular power supply as well as delay in payment of invoices of infirm power."*

239. The arguments of the appellants are in the teeth of the settled principle that revenue arrears at the end of particular month will comprise of the arrears towards the outstanding principal amount and LPSC arrears. In *Central Bank of India vs. Ravindra*, (2002) 1 SCC 367, the Supreme Court held thus:

> "*44. We are of the opinion that the meaning assigned to the expression "the principal sum adjudged" should continue to be assigned to "principal sum" at such other places in Section 34(1) where the expression has been used qualified by the adjective "such", that is to say, as "such principal sum". Recognition of the method of <u>capitalisation of interest so as to make it a part of the principal consistently with the contract between the parties or established banking practice does not offend the sense of reason, justice and equity</u>…If the interest is not paid on the date due, from that date the creditor is deprived of such use of the money which it would have made if the debtor had paid the amount of interest on the date due. The creditor needs to be compensated for deprivation. … We are, therefore, of the opinion that <u>the expression "the principal sum adjudged" may include the amount of interest, charged on periodical rests, and capitalised with the principal sum actually advanced, so as to become an amalgam of principal</u> in such cases where it is permissible or obligatory for the court to hold so…*
>
> *54…(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy. (2) Novation, that is, a debtor entering into a fresh agreement with a creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express*

acknowledgement of accounts, are the best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

58. Subject to the above we answer the reference in the following terms: (1) Subject to a binding stipulation contained in a voluntary contract between the parties and/or an established practice or usage interest on loans and advances may be charged on periodical rests and also capitalised on remaining unpaid. <u>The principal sum actually advanced coupled with the interest on periodical rests so capitalised is capable of being adjudged as principal sum</u> on the date of the suit..."

(emphasis supplied)

240. At any rate, the LPSC provisions in Tariff Regulations of 2009, 2014 and 2019 override PPA stipulated methodology for adjustment of payments received (see *PTC India*).

241. By the impugned decision, the CERC has effectively acknowledged the quantum of LPSC payable by the ESCOMs. Since Article 6.14(c) of the PPA envisages the revenue for the current month to be considered at the end, any adjustment in terms of Article 6.14 of the PPA needs to be carried out on a "*monthly*" basis. Udupi Power has complied with the said mandate. The interpretation sought to be given by appellants to Article 6.14 of the PPA runs contrary to its basic objective.

242. We are of the considered view that Udupi Power submitted the consolidated bill to PCKL/ESCOMs on 08.11.2019 claiming the outstanding LPSC amounts (respecting delayed payment of tariff for regular supply as well as against supply of infirm power) in accord with, and pursuant to, the directions in the order of CERC in terms of which there was an obligation on the part of the latter (PCKL/ESCOMs) to pay (the LPSC) within sixty days, i.e. by 07.01.2020. The failure to discharge that obligation has not been justified.

Other objections

243. The appellants refer to two provisions in the tariff regulations - Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations - and submit that LPSC is payable only for a delay in payment of bills "*for charges payable under these regulations*". They argue that in order to create a liability to pay on the part of the procurer in terms of tariff regulations, the bills have to be raised as per said regulations - Regulation 32(1) of the 2009 Tariff Regulations and Regulation 42(1) of the 2014 Tariff Regulations. It is submitted that ESCOMs cannot be held liable to

pay LPSC on such invoices as have been referred because the same were raised contrary to the Regulations.

244. In above context, it has been the contention of the appellants that Udupi Power had arbitrarily and unilaterally raised invoices (for the period between December 2011 and January 2014) based on the AFC and GSHR claimed in its Tariff Petition No. 160/GT/2012, such invoices being in complete contravention of the PPA and Regulation 5(4) of the 2009 Tariff Regulations. The argument is that no LPSC with respect to such invoices is payable as in which respect the principal sum itself is not payable. It is also submitted that for the period January 2013 onwards, Udupi raised two sets of invoices, one as per the provisional tariff order dated 24.12.2012 of the Central Commission and another as per its unilateral assessment in its tariff petition. While there was no legal basis for claiming payments as per its own assessment, for computing LPSC, Udupi Power has relied on such invoices.

245. It is pointed out that the 2014 Tariff Regulations came into force on 01.04.2014. The computation of capacity charges and energy tariff charges underwent a significant change thereunder, as compared to the regime under the erstwhile 2009 Tariff Regulations. Nevertheless, till March, 2016, Udupi Power continued to raise invoices as per the methodology specified in the 2009 Tariff

Regulations. On basis of these facts, it is argued that the claims of LPSC on such higher principal sums are exaggerated and untenable.

246. It is also submitted that a certain portion of the claims made by Udupi with respect to disputed amounts along with carrying cost is pending adjudication before the Central Commission in Petition No. 155/MP/2019 and despite the fact that the said claims are *sub judice*, Udupi Power has calculated and claimed LPSC on such sums as well which is not justified.

247. We are not impressed. The invoices for the period December 2011 to January 2014 to the extent based on the AFC and GSHR as claimed in its Tariff Petition No. 160/GT/2012 have to be regulated as per decision rendered in such proceedings. The appellants had raised contention of prospective application of tariff in Petition No. 160/GT/2012 but the same was expressly rejected by CERC by its Order dated 24.12.2012, through following observations:

> *"31. The Respondents 1 to 6 have submitted that the provisional tariff to be granted by the Commission should be prospective in operation. The Ld. Counsel for the objectors have also submitted that the provisional tariff of the generating station may not be granted with retrospective effect as the Petition has been filed belatedly…The 2009 Tariff Regulations is applicable for the entire tariff period 2009-14. 25 The petitioner and the respondents have agreed on the interim tariff rate of Rs. 3.127/kWh subject to*

> *the determination of final tariff by this Commission. That being the case, it is not proper for the respondents to take a contrary view that the tariff determined by the Commission will not have its application from the date of commercial operation. In our view, the tariff determined by this Commission shall be applicable from the date of Commercial Operation till the end of the tariff period."*

248. The above order has since attained finality. The appellants are barred by the doctrine of *res judicata* from raising such contention again.

249. The claim of LPSC is founded on the dues computed as per prevalent and applicable tariff rates. If there is a dispute pertaining to charges or carrying cost for certain period pending adjudication before the Central Commission, the payment claimed or made would be subject to decision thereupon. Such issues do not arise in the proceedings at hand. The arguments of the appellants are nothing but an attempt to confuse the issue relating to LPSC liability for the period mentioned and, therefore, repelled.

UNJUST ENRICHMENT?

250. It has been the submission of the seller that the ESCOMs have unjustly enriched themselves at the cost of the former since they have recovered tariff from the consumers but delayed in making payments to it. It is submitted by the appellants that they

have made payments to Udupi Power as per the PPA, applicable Regulations and orders of the Central Commission and this tribunal. It is denied that the appellants have been "enriched" or received any "benefit" or excess amounts at the expense of Udupi since the LPSC charges have not been passed on to the consumers.

251. It is also the argument that the principle of unjust enrichment applies where there is no binding contract between the parties. Reference in this regard is made to the judgment of the Kerala High Court in *Madhavankutty* v. *Sreekumar T.*, 2012 SCC OnLine Ker 26089. It is submitted that since there is a binding contract (PPA) between the parties, any contention on the basis of unjust enrichment is legally misconceived and untenable.

252. The appellants have unfairly tried to distort the argument of the second respondent. There is no denial of the fact that the payments already made by them (the procurers) to the seller (generator) have been allowed a pass through. If there was no timely recovery from their consumers by the distribution licencees it cannot adversely impact the legitimate claim of the seller to receive timely payments of its lawful dues. In *Mahabir Kishore vs. State of M.P.* (1989) 4 SCC 1, Supreme Court explained the concept of "unjust enrichment", thus:

> "*10. … The doctrine of "unjust enrichment" is that in certain situation it would be "unjust" to allow the defendant to retain a benefit at the plaintiff's expense. ...*
>
> *11. …The principle of unjust enrichment requires: first, that the defendants has been "enriched" by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiffs"; and thirdly, that the retention of the enrichment be unjust. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved….*"
>
> (emphasis supplied)

253. Noticeably, unjust enrichment may accrue even indirectly by saving of inevitable expenses as well. The liability of the procurer under the PPA is to make timely payment. If this obligation is not discharged, it leads to further liability incurred under the Regulations to pay LPSC which is subsumed as part of the tariff. Since such liability towards LPSC is not founded in contractual terms, the ruling of Madhavankutty (supra) is inapplicable. Failure to account for such liability is an attempt on the part of appellants to make illegitimate savings which, going by above explanation in *Mahabir Kishore*, is gaining of indirect advantage resulting in unjust enrichment. This cannot be permitted in as much as it violates the letter and spirit of the objects and reasons, and philosophy, of Electricity Act, 2003, the hallmarks whereof include not only safeguarding of the consumers' interest but also, and equally important, the conduct of "*the generation, transmission, distribution and supply of electricity*"

based "*on commercial principles*", encouraging "*competition, efficiency, economical use of the resources, good performance and optimum investments*", and "*recovery of the cost of electricity in a reasonable manner*".

CONCLUSION

254. We, thus, find the appeals to be unmerited. We must observe that the appellant ESCOMs, seemingly supported by PCKL, an agency created by Government of Karnataka, have not conducted themselves in relation to pecuniary obligations towards purchase of electricity from the second respondent in a manner that could be called one of model customer or such as adhering to financial discipline subscribing to high standards of fairness, transparency and probity in commerce & trade. They seem to have totally forgotten that defaults in timely payments to the source from which electricity is procured would eventually be counter-productive for "*interest of consumers*" apart from the damaging effect such tendencies are bound to have on "*development of electricity industry*" striving to achieve ultimate goals set by the public policy to secure "*supply of electricity to all areas*" and "*rationalisation of electricity tariff*" which objectives are so very dependent on trust and

confidence of sectors ready and keen on providing support by optimum *"investment in electricity industry*". By such conduct, the appellants have violated the letter and spirit of the law which governs the regulated activities they have been entrusted with. It is hoped that they will henceforth show readiness to timely discharge their obligations – contractual and regulatory – and demonstrate that they can also be responsive, responsible and accountable.

255. For the foregoing reasons, and in the circumstances, we find no merit in the appeals. Thus, the appeals and the applications filed therewith are dismissed.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 02nd DAY OF NOVEMBER, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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