IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEALNO.386 OF 2019&
IA NOs.1888 OF 2019, 279 OF 2020 & 1256 OF 2021

Dated: 20th September 2021

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

In the matter of:

1. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.**
[Through its Chief Engineer (Renewable Energy),
5th Floor, Prakashgadh, Plot No. G-9,
Anant Kanekar Mag, Bandra (East)
Mumbai – 700 051 .... Appellants

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Colaba,
Mumbai – 400 005

2. RAJLAKSHMI MINERALS
[Through Its Managing Director]
D.No. 1499/1, P.O. Box No. 38,
Post Hospet 583 201, Bellary District
Karnataka …. Respondents

Counsel for the Appellant (s): **Mr. Basava Prabhu Patil, Sr. Adv.**
Mr. G. Saikumar
Mr. Samir Malik
Mr. Rahul Sinha
Ms. Prerna Gandhi

Counsel for the Respondent (s): **Ms. PrithaSrikumar**
Mr. KaustavSaha for R-2

J U D G M E N T

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

1. The Electricity Act, 2003 was brought on the statute book against the backdrop of general consensus for public policy to be adopted to usher in reforms such that the electricity industry could see optimum development and the consumers' interest is safeguarded and protected, *inter alia*, by promotion of competition, rationalization of tariff, encouragement of efficiency, economical use of resources, good performance, recovery of the cost of electricity in a reasonable manner and conduct of generation, transmission, distribution and supply on commercial principles. Experience has shown that though the electricity sector has received great impetuous leading to phenomenal growth, the objectives of the legislation to create discipline in matters of finance are far from being achieved. The defaults in timely payments of dues by the procurer in supply chain seem to be too many, too frequent and too brazen to be acceptable. The fact that distribution licensees controlled by the State Governments indulge in such conduct, forcing the sellers into protracted litigation, demonstrating by conduct disinclination to discharge liability, is a matter particularly of grave concern. That this has the potential of eroding confidence of the investors in electricity sector and so not conducive for growth of the industry seems to be least of the worries of the concerned State agencies, or regulators, makes the malady even more alarming. The case at hand presents such a scenario.

2. The appellant *Maharashtra State Electricity Distribution Company Ltd.* ("MSEDCL" or "the Discom" or "the procurer" or "the appellant") had on 20.08.2014 entered into a Wind Energy Purchase Agreement ("WEPA") with the second respondent *Rajlakshmi Minerals* (hereinafter referred to variously as "the seller" or "the wind power generator" or "the WPG" or "the

second respondent") for the entire quantum of electricity generated from the operation of its 3.40 MW power plant, situated in Kolhapur District of Maharashtra, the purchase price being determined at Rs. 5.81 per Kwh, the WEPA containing provision, *inter alia*, for levy of *delayed payment surcharge* ("DPC") at 1.25% per month in case of delay in payment beyond the due date. Indisputably, there were defaults made by the procurer in timely payments of dues for electricity supplied under the WEPA and on 09.01.2019, the Seller filed a petition (case no. 26 of 2019) – latest one of many for different periods - before first respondent Maharashtra Electricity Regulatory Commission ("MERC" or "the State Commission"). The MERC, by order dated 26.03.2019, allowed the petition granting relief of direction to pay the outstanding dues but also directed that in the event of timely payment, the appellant (procurer) would pay penal interest at 1.25% per month. A petition for review (case no. 105 of 2019) was filed but it was rejected by the impugned order dated 02.08.2019. By the appeal at hand, the appellant cries foul arguing that the levy of penal interest as above amounts to levy of interest on interest which is impermissible.

3. The following clauses of WEPA need to be taken note of:

> *"Section 11.04 Payments:*
>
> *The due date of payment shall be 60 days from receipt of the Seller's monthly energy bills by the MSEDCL and will be paid by the account payee's cheque in the name of Seller or authorized representative in whose name power of attorney is given by the seller. In case of delay in payment beyond the due date, the Seller shall be entitled to a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company. The MSEDCL however shall be entitled to make adjustments in the Seller's Invoices for any charges/costs incurred on behalf of the Seller and payable by the Seller under this Agreement. This shall be shown in the audited statement issued by the MSEDCL."*

"Section 13.02 Limitations on Damages:

The parties hereby confirm that the express remedies and measures of damages provided in this agreement satisfy the essential purposes hereof. For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages shall be the sole and exclusive remedy and the obligor's liability shall be limited as provided in such provision. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct actual damages only. Neither party shall be liable to the other party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein.)"

(Emphasis supplied)

4. As said before, on account of non-payment of its dues by the appellant, the second respondent was constrained to file the petition (Case No. 26 of 2019) on 09.01.2019, seeking payment towards the outstanding principal amounts payable to it under its monthly bills, the prayer clause reading thus:

A. Direct the Respondent to pay sum of Rs.3,59,90,095/- towards the principal amounts for electricity generated by the Petitioner in respect of the said monthly electricity bills raised from October, 2017 to October, 2018, as more particularly set out in Annexure 'GG' hereto;

B. Direct the Respondent to pay a sum of Rs. 57,71,312/- to the Petitioner as delayed payments in respect of the months of May, 2017 to October, 2018, as more particularly set out in Annexure 'HH' hereto;

C. Direct the Respondent to pay a sum of Rs. 17,77,160/- to the Petitioner as interest on delayed payment charges, as more particularly set out in Annexure 'HH' and 'II' hereto;

D. Direct the Respondent to comply with the terms of the Wind Energy Purchase Agreement dated 20th August, 2014 for the duration thereof, including by honouring its commitments thereunder;

E. Direct the Respondent to pay interest pendente-lite till the eventual payment of the sum at the rate of 1.25% per months;

F. Pending the hearing and final disposal of the present Petition, this Hon'ble Commission be pleased to direct the Respondent to deposit a sum of Rs. 4,35,38,567/- or such other amount as this Hon'ble Commission may deem fit in this Hon'ble Commission;

G. For ad-interim reliefs in terms of prayer clause (F);

H. For costs; and

I. For such other and further reliefs as this Hon'ble Commission may deem fit and proper in the nature and circumstances of the present Petition.

5. Crucially, the response filed by the appellant on 12.03.2019 before MERC did not deny the allegations of non-payment of monthly bills by due date(s) for yet another prolonged period and calculation of DPS thereupon. It appears that MSEDCL was facing similar outstanding claims of other generators. Instead of contesting, it (MSEDCL) offered to pay to the sellers, submitting a plan to the Commission indicating timeframe for the purpose.

6. The MERC, by its order dated 26.03.2019, passed in the case of second Respondent, held as under:

"ORDER

1. The Case No.26 of 2019 is allowed.

2. Maharashtra State Electricity Distribution Co. Ltd., is directed to release the agreed/admitted payments to Rajlakshmi Minerals on account of the principal amount and DPC as per the plan submitted to the Commission. Reconciliation, wherever necessary, shall be completed within two weeks from the date of this Order and

Reconciliation Report of outstanding dues along with exact time limit by which the payment would be made shall be intimated to Rajlakshmi Minerals with copy to the Commission within two working days thereafter.
3. Further, Maharashtra State Electricity Distribution Co. Ltd, should note that if it deviates from its commitment given in the payment plan, penal interest will accrue thereafter (beyond the date committed in the plan) at 1.25% per month on any LPS/DPC."

(Emphasis supplied)

7. Concededly, the main relief qua the outstanding bills and DPS was granted on the basis of admissions made by the appellant and the plan for discharge of such liability submitted by it. The operative part of the above-quoted order, in so far as directions in para 2 are concerned, was invited by the appellant itself thereby not only admitting the liability towards the monthly bills for electricity procured but also failure to pay the same in time and the liability towards DPS thereby incurred. The direction in para 3 of the order quoted above was added by the State Commission as a liability to be incurred in the event of non-compliance with directions in para 2.

8. The appellant, however, assailed the direction about penal interest at 1.25% by Appeal No. 141 of 2019 filed on 05.04.2019 but withdrew it on 16.04.2019 taking liberty to seek review by the State Commission. The review petition (Case No. 105 of 2019) filed on 02.05.2019 was dismissed by MERC on 02.08.2019 justifying the levy of penal interest as under:

"12. Thus, the Commission while providing above dispensation has not altered/changed the terms of WEPA, but considered it necessary to levy penal interest on the amount of DPC which remained unpaid even after passage of several months. Initially, such interest on unpaid DPC amount was made applicable after 30 days from the Order. However, after considering efforts of MSEDCL towards developing mechanism to clear the outstanding claims of all the Wind generators, the Commission relaxed payment of such interest on unpaid

DPC amount and made it applicable only if MSEDCL does not honor its own committed payment plan. The entire approach of the Commission was conciliatory balancing the interest of both the parties and at the same time allowing some room to MSEDCL to resolve its chronic financial difficulties. By doing so the Commission has not altered or changed the terms of the WEPA. The Commission time and again stated that it expects MSEDCL to release the outstanding dues of the wind generators as per the terms of the WEPA without waiting for the wind generators to approach the Commission.

13. Regarding MSEDCL's contention that double penalty i.e. interest on interest is not in consonance with the terms of WEPA, the Commission notes that MSEDCL has relied on Section 13.03 (Liquidated Damages) of WEPA to state that any liability out of the WEPA are restricted to this clause and the Commission cannot grant penalty/compensation dehors this provision of WEPA. Section 13.03 (Liquidated Damages) of WEPA is reproduced as under:

> *The parties hereby confirm that the express remedies and measures of damages provided in this agreement satisfy the essential purposes hereof. For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages shall be the sole and exclusive remedy and the obligor's liability shall be limited as provided in such provision. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct actual damages only. Neither party shall be liable to the other party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein.)*

In this regard, the Commission notes that provision of WEPA needs to be honored and any relief granted should be in accordance with the provisions of WEPA. In the present case, MSEDCL's contention is that once WEPA provides for DPC for compensating delayed payment, the Commission cannot allow interest on DPC

as additional compensation for same purpose i.e. delayed payment. The Commission notes that just because WEPA has provision of DPC, buyer cannot take a stand that it will not pay amount outstanding for several months and then compensate the seller with DPC. The Commission is mandated by the EA to promote renewable energy sources. Hence, the Commission has to intervene when it comes across the cases were MSEDCL has not paid amount due to Wind Generators for several months. While doing so, the Commission cannot be restricted by any provision of WEPA in giving its dispensation when the Commission is statutorily bound with the responsibility of ensuring compliances by balancing the interests of all the stake holders. Delay payment charges are in the nature of compensation for the working capital available to MSEDCL for the amount unpaid to seller. It has a cost and that legitimately gets paid as DPC to the seller of energy. Prolonged nonpayment for whatever reasons, puts the seller in serious cash flow issues for which distribution licensee cannot escape its liability to comply with the WEPA in honoring the payment. Commission has not altered any provision of WEPA but had to intervene in the interest of justice and impose penal interest on unpaid DPC amount so that MSEDCL expedites the payment of dues to Wind Generators as per WEPA. Hence, there is no merit in MSEDCL's contention that the interest of DPC cannot be allowed.

14. The Commission also notes that RM in its reply has relied upon judgment of the Supreme Court of India in the matter of Oil and Natural Gas Commission v/s M.C. Celland Engineers S.A (1999) SCC 327. Relevant part of judgment is reproduced below:

> *"3. ….His point is that there cannot be interest upon interest when the claim itself is one of interest and interest upon that amount could not have been granted by the arbitrators and relied upon Section 3 of the Interest Act, 1978.*
>
> *4. ……It is clear that interest is not granted upon interest awarded but upon the claim made. The claim made in the proceedings is under two heads - one is the balance of amount claimed under*

invoices and letter dated February 10, 1981 and the amount certified and paid by the appellant and the second is the interest on delayed payment. That is how the claim for interest on delayed payment stood crystallized by the time the claim was filed before the Arbitrators. Therefore, the power of the Arbitrators to grant interest on the amount of interest which may, in other words, be termed as interest on damages or compensation for delayed payment which would also become part of the principal. If that is the correct position in law, we do not think that Section 3 of the Interest Act has any relevance in the context of the matter which we are dealing with in the present case. Therefore, the first contention raised by Shri Datta, though interesting, deserves to be and is rejected."

(2002) 1 Supreme Court Cases 367, Central Bank of India v/s Ravindra & others is cited on the point that a creditor can charge interest from his debtor on periodical rests and also capitalize the same so as to make it part of the principal. It has further held as follows:

"Such a course can be justified by stipulation in contract voluntarily entered in to between the parties or by a practice or usage well established in the world to which parties belong. Such practice is to be found already in vogue in the field of banking business. Such contract or uses of practice can stand abrogated by legislation such as usury laws or debt relief laws and so on."

For want of such abrogation, pecuniary loss caused to the creditors by delayed payments can not at all be allowed to automatically enrich the debtors. If the debtor does not want to pay penalty or say interest on interest it has to work out on financial discipline to clear dues of the creditors in time. At times delays have dangerous consequences. The party inviting such delay has obviously to face the same.

15. In view of above citations, DPC merges with the principal amount once such claim is submitted. Thereafter, interest can be granted for delay in payment of such claim.

> *16. As far as issue of interest on DPC negatively affecting MSEDCL, the Commission notes that the Commission was constrained to impose such interest as MSEDCL has repeatedly failed to honor the commitment under payment plan submitted by it. Hence, this cannot be ground for review of Order."*

9. The appeal at hand assails the order passed in review arguing that the impugned direction constitutes imposition of interest on interest which is illegal, the penal levy being against the express prohibition in the WEPA as stipulated in Section 13.02 quoted above. The second respondent contests the appeal primarily submitting that interest has been awarded not on the interest but upon the claim made. It is submitted that similar directions of the State Commission in other matters were not challenged and, thus, have become binding precedents.

10. The submission of the second respondent that since the appellant being a party to other orders passed against it by the MERC with similar directions to pay interest on LPS/DPC had failed to challenge such orders ought to be deemed to have waived its objections to the such direction or being held estopped from now raising the said contention in the present appeal does not impress us. The issue raised is a question of law and omission to so contend in the past cannot result in waiver or estoppel.

11. The second respondent questions the maintainability of the appeal arguing that since original order dated 26.03.2019 is not challenged, the appellant cannot succeed, reliance being placed on two decisions of Supreme Court reported as *DSR Steel (Private) Limited v State of Rajasthan and Ors.*, (2012) 6 SCC 782 and *Bussa Overseas and Properties Private Limited and Anr. v. Union of India and Anr.*, (2016) 4 SCC 696 besides two judgments of this tribunal they being *Power Grid Corporation of India Ltd. v Central Electricity Regulatory Commission and Ors.*, order dated 11.10.2018 in Appeal No. 101 of 2016 and *NLC India*

Limited v Central Electricity Regulatory Commission and Ors., order dated 23.09.2019 in Appeal No. 145 of 2019. We would reject this objection for the reason that if the review petition were found to be good on merit, the natural corollary would be that the main order cannot be allowed to stand, the order in review being essentially in continuation adding to the justification for the impugned direction. We would rather deal with the main issue on merits since it is of some importance.

12. Pertinent to note here that in terms of the prime directions (the legality of which is not questioned) in the order dated 26.03.2019, the appellant was obliged to release the admitted dues on account of principal amount and LPS / DPC to second respondent, the parties having been directed to reconcile their accounts within two weeks, and a Reconciliation Report to be submitted by the appellant within two days thereafter. Indisputably, the appellant failed to comply with the said directions in the main Order dated 26.03.2019 (which have become final and binding) of filing on record within the period specified the Reconciliation Report of outstanding dues with time limits by when the payment were to be made.

13. Though the direction of reconciliation of accounts by the parties has not been challenged by the second respondent (seller), and it has become inconsequential since the appellant (procurer) failed to abide by the same and by default has admitted the claim of dues quantified by the seller, we feel it is necessary to observe that such direction for reconciliation of accounts in the final adjudicatory order was inappropriate on the part of the State Commission. In an identical fact-situation, the *Central Electricity Regulatory Commission* (CERC) while determining by its order dated 08.01.2020 the liability of a procurer *(Tamil Nadu Generation and Distribution Corporation Ltd.*) on the petition of the generating company (D.B. Power Limited) had qualified the final order making it similarly subject to reconciliation by the parties and giving time for discharge of liability. The

said directions were questioned in appeal before this tribunal in the matter of *D.B. Power Ltd. V. Central Electricity Regulatory Commission and another* (appeal no. 56 of 2020). The appeal was decided by judgment passed on 04.02.2021 and we were constrained to observe as under:

> *"13. The proceedings before the Central Commission, in the matter brought before it by the Appellant, if we may use such analogy, was in the nature of civil suit for recovery of money claimed as due. The party against whom such claim had been pressed was expected to render all assistance to the adjudicatory forum so that, if any issues required to be determined, necessary inquiry could be made and clear decision thereupon was rendered. The Central Commission, while dealing with a matter of this nature, was expected to reach a decision that was clear, unambiguous, executable and led to finality. In such adjudicatory proceedings, the liability, if it exists, requires to be found and enforced. If there was any amount found due from the Respondent TANGEDCO unto the Appellant, in absence of any provision to the contrary in the contract or law, there was no occasion for the Commission to give any extended time for payment unless, of course, the party claiming had given consent for such enlargement of period for payment to be granted on request.*
>
> *14. Concededly, there was neither any contest to correctness of the claim nor any specific request for three months to be given to TANGEDCO for satisfaction of the claim. Be that as it may, the three months period offered by the Central Commission also passed by with no effective compliance being attempted by the Respondent TANGEDCO.*
>
> *15. <u>What we are unable to understand is the justification for the inclusion of qualifying clause that was added by the Central Commission as tailpiece to the operative portion of the Impugned Order requiring payment to be made of the amount thereby determined it being made conditional upon "reconciliation of bills with the Petitioner"</u>. If in the opinion of the Central Commission there was a need for reconciliation, questions of fact had arisen. If so, it was the responsibility of the Commission*

itself to ask the parties to present or discover their respective accounts and on such basis and with their assistance, on the basis of evidence gathered, determine the liability which was to be directed to be discharged. The decree, if we may borrow that expression from the civil jurisprudence, that the Central Commission was intending to pass could not have been made conditional or subject to reconciliation since that would relegate the parties to the same stage as they were prior to the adjudicatory process being initiated. It has to be remembered that such disputes end up before adjudicatory authorities because the parties are unable to reconcile or resolve on their own. Rendering the enforcement of legitimate claim of a creditor subject to reconciliation by the debtor at its own convenience is throwing the former into a vicious circle, virtually denying the relief indefinitely. Such condition added to the direction to pay the lawful dues is in fact taking back by one hand what has been given by the other. The parties to the case are left in uncertainty as to what is the extent to which the claim has been allowed and what is the roadmap ahead for the liability to be discharged. If we may add, this smacks of abdication of responsibility vested by law in the adjudicatory forum.

16. We hope and expect that while dealing with matters of such nature in future the Regulatory Commission will bear in mind that there is a need for clear findings to be returned on the liabilities which are subject matter of the lis. Coming back to the matter at hand, …"

(Emphasis supplied)

14. The above observations would apply equally to the manner of handling of the dispute of second Respondent by the State Commission. We disapprove of the same and direct that in future all the State Commissions shall bear in mind the views expressed by us in the case of *D.B. Power* (supra).

15. As noted above, the appellant having committed default even in respect of opportunity to reconcile, the amount claimed and admitted to be due had become payable at least in terms of the plan submitted by the

appellant and accepted by the State Commission. Having regard to this, by order dated 09.07.2021, we directed the appellant to discover on oath through a responsible officer full details and particulars of the payments made (including the dates of such payments) in terms of para 2 of the operative part of the original Order dated 26.03.2019 and reasons, if any, for defaults, if any, thereagainst, supported by all relevant documents.

16. In compliance, the appellant submitted an affidavit sworn on 15.07.2021 by its Chief Engineer (Renewable Energy), declaring as under:

> " …
> *3. I say that the Appellant, in compliance of daily orders in Case Nos. 28, 101, 128 & 134 of 2018, submitted a payment plan dated 12.09.2018 to the Hon'ble MERC in respect of approximately over 1000 Wind Generators having a total amount outstanding of Rs.2235.03 Crores of units generated upto June 2018 Hereto annexed and marked as Annexure A 1 is the copy of the Payment Plan dated 12.09.2018 submitted to the Hon'ble Commission.*
>
> *4. Out of the outstanding amount of Rs.2235.03 Crores upto 30.06.2018 given in the payment plan, a total amount of Rs. 67.70 Lakhs was payable to Rajalxmi Minerals for the dues between October 2017 to March 2018. I say that under the payment plan, the dues against the generation upto March 2018 were to be paid until March 2019. MSEDCL has made the payment of an amount of Rs.3.30 Crores against the generation up to August 2018 on 30.03.2019. Hereto annexed and marked as Annexure A2 is the excel sheet indicating the amounts due and the date on which the same have been paid along with the ledger evidencing payment.*
>
> *5. Additionally, the Appellant also paid a total amount of Rs.69 Lakhs towards DPC on 26.04.2021 for the electricity generated in the months of May 2017 to September 2018. The payment has been made under UTR NO. 153041402.*"

17. Pertinent to note, as per the afore-mentioned affidavit dated 15.07.2021 submitted on behalf of the appellant, the claim of second Respondent in *Case No.26 of 2019* was not what had prompted the plan to be submitted before the State Commission. The plan was presented for consideration in context of certain other claim cases of different entities. Be that as it may, it was stated that the outstanding dues had been computed up to 30.06.2018 and amounted to Rs.2235.03 Crores out of which Rs. 67.70 Lakhs was payable to second respondent Rajalxmi Minerals for the period October 2017 to March 2018. We recall that the claim in Case No.26 of 2019 of second Respondent was primarily for the principal sum of Rs.3,59,90,095/- towards the monthly electricity bills raised from October, 2017 to October, 2018. The affidavit would not explain as to how the bills for the period April to October 2018 could be excluded and as to how the principal claim for over Rs. 3.59 Crores could be taken care of by assurance (in the plan) of payment of only Rs. 67.70 Lakhs.

18. Lest it be misconstrued, we must make it clear that we are not attempting here to determine afresh the amount payable under the claim in which the impugned order was passed. We may note the concession of the learned counsel for the second respondent that the amounts payable towards monthly bills and on account of DPS for the period which was subject matter of case no. 26 of 2019 have since been paid by the appellant, admittedly belatedly, concededly much after the period specified for reconciliation or stipulated in the payment plan referred to in the impugned order. It is the said delays which give trigger to the expectation for further payment in terms of the direction in para 3 of the impugned order which is being assailed.

19. We were not satisfied with the declaration made in affidavit dated 15.07.2021 since it did not clarify the position in terms of the order dated 09.07.2021. The appellant through Counsel sought and we granted, by

order dated 16.07.2021, opportunity for more detailed affidavit giving complete disclosure to be filed. Thus, another affidavit sworn by the same official on 29.07.2021 was filed. It may be added that the second respondent joined issue by filing affidavit dated 12.08.2019 of its authorized representative.

20. Upon close scrutiny of the additional affidavit dated 29.07.2021 on behalf of the appellant, we find that there is an attempt to project that there was no plan specific to the claim case of the second respondent herein. At the same time, the appellant seeks to plead further facts in support of its averment as to financial distress referring to such reasons as *difference between the approval of revenue requirement*; *disallowance of the AG sales in ARR*; *delayed implementation of the Tariff Order for FY 2016-17*; *low growth in sales in subsidizing categories*; *approvals of gains and losses in MYT Order instead of True up*; *belated approval of the final true up*; and *low recovery from agricultural consumers*. To say the least, in the first leg of proceedings arising out of claim for recovery of money due, the prime question is the determination of the amount that is to be recovered. The difficulties in payment resulting in defaults may have a bearing but on the enforcement of liability which follows the determination.

21. In the affidavit dated 29.07.2021, the appellant extracts the following part of the order dated 26.03.2019 in case of second respondent:

> *"12. MSEDCL in its reply dated 12 March, 2019 has stated that it has made payment as per the payment plan submitted to the Commission. The prayer of RM for the principal amount for the period beyond payment plan has become infructuous and hence, needs to be dismissed. The remaining payment for from the period of October 2017 to March 18 will be made as per the availability of funds on best effort basis. Similarly the prayer of RM demanding DPS also needs to be dismissed. In this regards, the Commission notes that MSEDCL in its payment plan submitted to the*

Commission in Case Nos. 128 and 134 of 2018 has committed to make payment for energy supplied till March, 2018 by March, 2019. Therefore, RM's request of releasing outstanding amount for the period of October 2017 to October 2018, forms part of MSEDCL's committed plan and hence MSEDCL's contention that RM's request of releasing outstanding payment is completely outside of the payment plan is not correct.

18 The Commission is sympathetic to the difficulties faced by MSEDCL on account of various factors on which MSEDCL might not have direct control within the prevailing operating mechanism. The Commission is inclined to look into additional burden that MSEDCL gets to bear because of such difficulties provided it makes sincere efforts to find lasting solution to recurring issue of nonpayment of dues including those of the wind generators. The Commission has already directed MSEDCL in recent Order in Case No 205, 221, 232, 265, 285, 287 and 288 of 2018 dated 9 January, 2019 as under:

> *"34. The Commission recognizes the fact that MSEDCL in compliance with the Commission's earlier directions has worked out a time bound mechanism vide its letter dated 12 September, 2018, MSEDCL again reiterated the same plan in its submission dated 18 December, 2018 which is specified in para 25 of this Order, to clear the outstanding claims of all the Wind generators. The Commission expects the plan to be adhered to in a very just and fair and transparent manner to cover the payments of all the Wind generators in a chronological manner (Date wise seniority of outstanding dues) irrespective whether the Wind Generators have petitioned or otherwise. Commission did not limit the time period of making payment of DPC within 30 days as directed in its earlier Orders as cited in para 21 and 23 of this Order. Commission treats such payment mechanism an exception and onetime settlement as a practical and pragmatic way to clear long outstanding dues, given the financial situation of MSEDCL. Admittedly, financial issues*

of MSEDCL post MTR order are getting sorted out and therefore Commission expects the situation to return to normalcy by March-end as per the payment plan given by MSEDCL to the Commission. MSEDCL is bound to make all ancillary payments like DPC, LPS etc. as are committed under PPA and so included in the payment plan, so as to bring financial discipline in its transactions with the generators.

35. Further, the Commission notes that the plan is based on objective criteria for clearing outstanding dues in a sequence among concerned wind energy generators. The Commission directs MSEDCL to strictly adhere to the plan as submitted to the Commission in its true letter and spirit and release the amount to the Wind generators without any deviation in chronological order. In order to resolve issues of crystallization of outstanding dues (disputes, if any), the Commission directs the parties involved from both the sides in the present Cases to sit together and reconcile the statement of account within two weeks from the date of this Order. At the time of reconciliation, MSEDCL shall inform the Petitioners the exact time limit in which the payment would be made to wind generators for their outstanding dues of principal and DPC amount. Further, MSEDCL should note that if it deviated from its commitment given in the plan, interest will be payable thereafter (beyond the date committed in the plan) at 1.25 % per month on any LPS/DPC".(Underline added)

Accordingly, in order to resolve issues of crystallization of outstanding dues, the Commission once again directs the parties involved from both the sides in the present Case to sit together and reconcile the statement of account within two weeks from the date of this Order. At the time of reconciliation, MSEDCL shall inform RM the exact time limit in which the payment would be made to RM for its outstanding dues of principal and DPC amount. Further, MSEDCL should note that if it deviates from its commitment, interest will be payable thereafter

(beyond the date committed in the plan) at 1.25 % per month on any LPS/DPC."

(Emphasis by appellant)

22. What stands out from the above is that the appellant has been in serious default towards various sellers (including wind power generators like the second respondent herein) over prolonged period, the Commission only prodding it to adhere to payment plans which were submitted from time to time. It also appears that the directions of such nature (payments as per schedule proposed by the appellant) were earlier given in cases of other generators similarly placed as the second respondent, specific reference being made to order dated 09.01.2019 (in case nos. 205, 221, 232, 265, 285, 287 and 288 of 2018). The Commission rejected as incorrect the contention of appellant that the request of second respondent for "*releasing outstanding payment is completely outside of the payment plan*". Though observing that the "*difficulties faced by (MSEDCL) were on account of various factors on which MSEDCL might not have direct control within the prevailing operating mechanism*" and assuring "*to look into additional burden that MSEDCL gets to bear because of such difficulties*", the Commission put a pre-condition that MSEDCL made "*sincere efforts to find lasting solution to recurring issue of nonpayment of dues including those of the wind generators*". The "*time bound mechanism*", accepted as a solution, even in case of the second respondent, seems to have been mooted by the appellant on 12.09.2018 and reiterated on 18.12.2018. By the impugned order, quoted by the appellant itself, the State Commission had, *inter alia*, directed "*MSEDCL to strictly adhere to the plan as submitted to the Commission in its true letter and spirit*". Having regard to the facts which have emerged during the hearing, the appellant has failed to live up to its promises or abide by directions towards a large number of sellers, the

submission and reiteration of various payments plans seemingly being only ploys to buy time.

23. But, what disturbs us more is the fact that the Commission, in the impugned order after doing some lip service, having shown gullibility by accepting mere paper promises of the appellant towards its liabilities, also added that "(in) *order to resolve issues of crystallization of outstanding dues (disputes, if any), the Commission directs the parties involved from both the sides in the present Cases to sit together and reconcile the statement of account within two weeks from the date of this Order*", the appellant being obliged "*at the time of reconciliation*" to inform the second respondent "*the exact time limit in which the payment would be made to (it) for its outstanding dues of principal and DPC amount*" it being cautioned that "*if it deviates from its commitment, interest will be payable thereafter (beyond the date committed in the plan) at 1.25 % per month on any LPS/DPC*". What is jarring is the fact that the directions were made subject to "reconciliation", the responsibility of the Commission to determine having been all but forgotten – irresponsibly abdicated.

24. Quite apparently abusing the above-mentioned deficiency in the order of the State Commission, the appellant through the affidavit dated 29.07.2021 of its authorized representative has attempted to take the position that "(there) *has been no separate payment plan submitted in respect of Case No. 26 of 2019* (of the second respondent)", it being attributed to the second Respondent that "*false statements*" have been made "*with a motive to mislead*" this tribunal and to "*malign the reputation of the Appellant*". We find this line taken mid-way the hearing on this appeal to be reflective of dishonest and *malafide* intent on the part of the appellant. In our judgment, it is the appellant which has been misleading the State Commission and has attempted to do so before this tribunal as well.

25. While on the subject, it may be noted that huge arrears on account of monthly energy bills raised by the second respondent have accumulated for the subsequent period, the State Commission having statedly repelled the endeavor to recover in the forum of complaint under section 142 of Electricity Act. The view taken by the Commission may be technically correct. The proper course for the second respondent would be to file a case for recovery for the subsequent period. Such course, if the second respondent were to be constrained to adopt, would concededly be fourth or fifth round of legal action of this nature. When asked, the learned counsel for the appellant, having taken instructions, submitted on 07.09.2021 that the appellant shall discharge its liability for the past period (from January 2020 to December 2020) by December 2021. Noticeably, there is no inclination or *plan* yet to pay for the subsequent eight months. This only means that the malaise continues, the creditors continue to be forced to litigate to recover their lawful dues, the affairs of the appellant suffering on account of financial mis-management, the payment plans neither being sincere nor an effective solution. The distribution licensee does not feel obliged to adhere to the standards prescribed by law - *efficiency*, *good performance*, *recovery of the cost of electricity in a reasonable manner and conduct of generation, transmission, distribution and supply on commercial principles*, et al.

26. Coming to the grouse in this appeal, it is the argument of the appellant that the directions to pay 1.25% penalty interest above the DPC envisaged by Clause 11.04 under the WEPA is contrary to the contract. It is submitted that the late payment surcharge in case of delay in payment of the generator by a period beyond 60 days as stipulated under the WEPA is in the nature of interest which is itself a penalty upon the appellant on account of delay in payment of invoices and that a penalty over and above

the same is contrary to the established principles and precedents in matters of *sanctity of contract*.

27. Reference is made to Section 13.02 of WEPA quoted earlier to argue that the contract provides for cases of breach or deviation from the terms of the WEPA and that it is only where for breach of any provision of the WEPA for which an express remedy or measure of damages is provided, such express remedy or measure of damages is to be the sole and exclusive remedy and the obligor's liability is limited as provided in such provision and that if no remedy or measure of damages is expressly provided, the obligor's liability is limited to direct actual damages only. Arguing that a contract, by its very nature, consists of obligations that are consented to by the Parties executing the Contract, it is submitted that under the subject contract (WEPA) there is no provision for the State Commission to pass such onerous directions over and above the contractual agreement.

28. Relying on decisions of the Supreme Court reported as *PTC India Ltd. Vs. CERC*, (2010) 4 SCC 603, *Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor power (India) P. Ltd* (2017) 16 SCC 498, *Shree Ambica Medical Stores v/s The Surat People's Co-operative Bank Ltd. and ors*, [AIR 2O2O 5C 803], *Nabha Power Ltd. v. Punjab SPCL* (2018) 11 SCC 508 and *Export Credit Guarantee Corporation of India Ltd, v. Garg Sons International*, (2O14) 1 SCC 686, it has been argued by the appellant that the impugned direction granting a penalty interest of 1.25 % over and above the agreed DPC of 1.25% under the WEPA is an act amounting to rewriting the clauses of the contract (WEPA) or its novation by the State Commission which is not permissible, the role of the Commission being limited to interpreting the clauses and nothing beyond. It is submitted that the MERC has failed to appreciate that the WEPA is sacrosanct between parties which contains a clause in the name of "Delayed Payment Charges"

which is a provision for levy of interest, in case, the appellant delays payment of outstanding bills.

29. Whilst there can be no quarrel with the proposition that the explicit terms of a contract are always the final word with regard to the intention of the parties and that it is not for the Courts or adjudicating authorities to interfere with existing contracts or rewrite the contracts entered into by the parties, or create new contracts for them, the moot question is as to whether the impugned direction constitutes such excess in law committed by the State Commission. Our answer is in the negative.

30. The regulatory commission under the Electricity Act, while *adjudicating upon a dispute*, exercises powers and jurisdiction which are essentially that of a *civil court* but transferred to the regulator under the special regime governing this sector. In legal proceedings for recovery of money due - the case in which the impugned order was passed being proceedings of such nature, the adjudicating authority is competent not only to award (or *decree*) the principal sum but also interest – past, *pendente lite,* and future. It is trite that if future interest (over and above the sum determined to be paid till the date of the decision) were to be denied, and if the sum determined were not paid for substantial period after the decision, the party held entitled to recover will not receive the money due in full, the compensation suffering erosion of real value due to time elapse. That would not be complete justice. Thus, the practice of adding the condition of future interest to the sum awarded in such cases is the norm, denial an exception. If the claim arises out of a contract, the addition of such condition does not amount to re-writing of contract. On the contrary, as is clear from Section 13.02 of WEPA on the subject of "*Limitations on Damages*", the very fact that the "*obligor's liability (is to) be limited to direct actual damages"* means the real value has to reach the hands of the

creditor, the loss of real value due to delay in discharge of liability determined by the decision representing "*actual damages*".

31. It is the grievance of the appellant that the levy of additional penalty of 1.25% amounts to imposition of double penalty in the form of interest which is unjust particularly since it would negatively burden the appellant herein as the same would never be allowed to be a pass through in tariff. The submission is that penalty in the form of DPC in case of delayed payments having been imposed, the levy of penal interest on the same issue would effectively lead to penalizing the appellant for the same delay twice, which is against the principles of double jeopardy.

32. The appellant also pleads precarious financial situation particularly in the current economic scenario with the ongoing pandemic of COVID-19, *inter alia,* stating that it has affected the recovery of dues by the appellant from its customers, the demand from consumers - excluding the subsidies - having significantly reduced from 2019-2020 (75432.1 Cr) to 2020-21 (69626.8 Cr), the collection of tariffs having considerably dropped from 2019-2020 (70048.9 Cr) to 2020-21 (64653.1 Cr.) impacting the collection efficiency which has gone down from 96.20% in F.Y 2018-19 to 93.56% in F.Y 2019-20 and even less than that in F.Y 2020- 21, the total loan and payables as on 31.03.2021 being Rs. 57,757 Cr which includes loans of about Rs 43000 Cr and payables of around Rs.14757 Cr., the arrears/receivables from consumers including DPC being around Rs.66,193 Cr., it (MSEDCL) having crossed the normative level of working capital loan to reduce the burden of DPC.

33. It is wrong to invoke the argument of *double jeopardy*. The impugned direction comes in post the point of computation of principal sum plus the element of DPC. There is no overlap. Since the defaults have occurred due primarily and *prima facie* to mismanagement, the possibility of that part of burden being not given *pass through* to the appellant is of no concern to

the creditor. That at any rate is no reason why the latter be denied full relief.

34. The prime argument of the appellant, however, is that the impugned levy is *interest on interest*. Section 3 of the Interest Act, 1978 provides as follows:

> *3. Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,—*
> *(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;*
> *(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:*
>
> *Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.*
>
> *(2) Where, in any such proceedings as are mentioned in sub-section (1),—*
> *(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and*
> *(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,*
>
> *then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers*

appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,—
(a) shall apply in relation to—
(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or
(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;
(b) shall affect—
(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or
(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);
(c) *shall empower the court to award interest upon interest.*

(Emphasis supplied)

35. The plea of the appellant is that, in law there is no principle of imposition of interest over interest and yet the MERC has practically awarded penalty interest of 1.25% on the DPC interest of 1.25% as envisaged under the WEPA.

36. It appears that in the impugned order on review, the MERC has proceeded on the reasoning that the claim of DPC merges with the principal amount, once such claim is submitted and, therefore, interest on the submitted claim can be awarded. This is how the second respondent seems to defend the impugned direction submitting that the award of interest on LPS / DPC is entirely in accordance with law, and the appellant's characterization of the order is misleading. The seller argues that upon the passing of a decree, a claim for interest becomes merged with the principal sum as part of the decretal amount, and the court has power to award interest on the decretal amount. The second respondent

submits that the importance of interest payments in compensating for delayed payment of dues has been repeatedly stressed by this tribunal and such view has been upheld by the Supreme Court, reliance being placed on *Central Bank of India v Ravindra*, (2002) 1 SCC 367 and *Chairman, Tamil Nadu Electricity Board and Anr. v. Indian Wind Power Association and Ors. with Chief Controller, Tamil Nadu Generation and Distribution Company Ltd. v. T.T. Industries Ltd.*, (2017) 15 SCC 550 (hereinafter referred to as "*TANGEDCO Ltd. v. T.T. Industries Ltd*").

37. In *Central Bank of India v. Ravindra* (supra), the Supreme Court held thus:

> "*Conclusion which follows*
> *36. The English decisions and the decisions of this Court and almost all the High Courts of the country have noticed and approved long-established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same on remaining unpaid. Such a practice is prevalent and also recognised in non-banking moneylending transactions. The legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging compound interest and its capitalisation to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transactions, evidenced by deeds incorporating covenant or stipulation for payment of compound interest at reasonable rates, and authorising the creditor to capitalise the interest on remaining unpaid so as to enable interest being charged at the agreed rate on the interest component of the capitalised sum for the succeeding period. Interest once capitalised, sheds its colour of being interest and becomes a part of principal so as to bind the debtor/borrower.*
> *…*
> *41. A few points are clear from a bare reading of the provision. While decreeing a suit if the decree be for payment of money, the court would adjudge the principal sum on the date of the suit. The court may also be called*

upon to adjudge interest due and payable by the defendant to the plaintiff for the pre-suit period which interest would, on the findings arrived at and noted by us hereinabove, obviously be other than such interest as has already stood capitalised and having shed its character as interest, has acquired the colour of the principal and having stood amalgamated in the principal sum would be adjudged so. The principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised. Interest pendente lite and future interest (i.e. interest post-decree not exceeding 6 per cent per annum) shall be awarded on such principal sum i.e. the principal sum adjudged on the date of the suit. It is well settled that the use of the word "may" in Section 34 confers a discretion on the court to award or not to award interest or to award interest at such rate as it deems fit. Such interest, so far as future interest is concerned may commence from the date of the decree and may be made to stop running either with payment or with such earlier date as the court thinks fit. Shortly hereinafter we propose to give an indication of the circumstances in which the court may decline award of interest or may award interest at a rate lesser than the permissible rate.

…

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 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. As we have noticed, such a system has a long-established practice and a series of judicial precedents upholding the same. Secondly, the underlying principle as noticed in several decided cases is that when interest is debited to the account of the borrower on periodical rests, it is debited because of it having fallen due on that day. Nothing prevents the borrower from paying the amount of interest

on the date it falls due. If the amount of interest is paid there will be no occasion for capitalising the amount of interest and converting it into principal. 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. As held in Pazhaniappa Mudaliar v. Narayana Ayyar [AIR 1943 Mad 157 : (1942) 2 MLJ 753] the fact situation is analogous to one as if the creditor has advanced money to the borrower equivalent to the amount of interest debited. We are, therefore, of the opinion that 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 in such cases where it is permissible or obligatory for the court to hold so. Where the principal sum (on the date of suit) has been so adjudged, the same shall be treated as "principal sum" for the purpose of "such principal sum" — the expression employed later in Section 34 CPC. The expression "principal sum" cannot be given different meanings at different places in the language of same section i.e. Section 34 CPC.

…

55. …However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:

> *(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.*

…"

(Emphasis supplied)

38. In *TANGEDCO Ltd. v. T.T. Industries Ltd.*(supra), the relevant part of the judgment of this tribunal [*TANGEDCO Ltd.* v. *T.T. Industries*, 2013 SCC OnLine Aptel 161] under challenge was as under:

> "*13. The respondents, being Wind Power Generators have entered into Energy Purchase Agreements with the appellants. Clause 5(b) of the agreements provides that the payments to the Wind Power Generators in respect of the power supplied shall be made by the Electricity Board within the same period as provided by the Board to recover payments from its HT industrial consumers. The period stipulated for recovery of dues from HT consumers is 7 days. The appellants admittedly failed to make such payments within the stipulated 7 days to the respondents and they made delayed payments long after the expiry of stipulated date without making payment towards interest on delayed payment.*
> *14. Clause 5(4) of the Tamil Nadu Electricity Code 2004 entitles the Electricity Board to charge interest of 1.5% per month on delayed payment in the case of HT consumers. Similarly, Clause 5(b) of the Energy Purchase Agreement provides that the payments to the Wind Power Generators in respect of the power supplied by them to the Board shall be made by the Electricity Board within the same period as provided by the Board to recover payments from its HT industrial consumers.*
> *15. Therefore, the appellant is bound to pay within the same period as provided to HT consumers. It has not paid within time. It ought to pay interest on delayed payment. If it is claimed that the Board is not liable to pay the interest on delayed payment, there will be no sanctity of clause 5(b) of the agreement imposing the time-frame for payment. Therefore, the appellants cannot claim for an exemption on payment of interest on admitted delayed payments, especially when the Board is entitled for the same from consumers.*

16. The provisions of tariff Order No. 1 of 2009 dated 20-3-2009 which govern all Wind Power Generating Stations commissioned on or after 19-9-2008 have specifically stipulated payment of interest on delayed payments in Clause 8.11 of the agreement. That apart, Clause 8.12 provides that stipulation regarding provision of bankable security in favour of the Generators as required by the Order No. 3 of 2006 dated 15-5-2006 by the distribution licensee was found to be impracticable. Therefore, the penalty of 1% per month was stipulated for delayed payments to serve the ends of justice.

17. It is settled law, when a certain time-limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to the payment of interest as indicated above. As pointed out by the learned counsel for the respondents, a person deprived of the use of money to which he is legitimately entitled for a particular period has got a right to be compensated by way of interest. This principle has been laid down by the Hon'ble Supreme Court in the Constitution Bench judgment in Central Bank of India v. Ravindra [Central Bank of India v. Ravindra, (2002) 1 SCC 367] .

18. As held by the Hon'ble Supreme Court, the delayed payments without any entitlement to interest on the same, will lead to a situation whereby the appellant would not be inclined to pay in time.

…

20. In the present case, even though there is no express stipulation with regard to the interest, as pointed out by the Commission, the Commission has invoked the powers, as provided in the relevant sections of CPC to order the same. In the light of the various principles regarding the grant of interest laid down by the Hon'ble Supreme Court in Irrigation Deptt., State of Orissa v. G.C. Roy [Irrigation Deptt., State of Orissa v. G.C. Roy, (1992) 1 SCC 508] , the respondent Wind Power Generators are entitled to receive interest on the admitted delayed payment.

> *21. In any power project, one of the important aspects is promptitude in payment since the delays would seriously affect the viability of the project. All these projects which are substantially funded through finances obtained from various funding organisations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied, the loans can be serviced along with the promised return of investment.*"
>
> (Emphasis supplied)

39. The Supreme Court dismissed the challenge to above decision of this tribunal observing that the Court could "*see no reason to interfere with the award of simple interest @ 10% p.a. on the amount outstanding against the appellant Electricity Board*".

40. The impugned direction that in the event the procurer (appellant) "*deviates from its commitment given in the payment plan, penal interest will accrue thereafter (beyond the date committed in the plan) at 1.25% per month on any LPS/DPC*" does not fall foul of Section 3 of the Interest Act,1978 for the simple reason that it is not "*interest upon interest*", the levy also being not over the amount of debt (arrears) after it has been repaid. Instead, it is in accord with what was accepted in *Central Bank of India v. Ravindra* (supra) as long-established practice of awarding future interest on the "*principal sum adjudged*". We fully agree with the submission of the Seller resisting the appeal that the contention of the procurer would lead to a patently unfair and absurd situation wherein defaulting parties could simply avoid meeting their payment commitments to generating companies by providing committed dates for payment for calculation of LPS / DPC, and thereafter not paying interest if the said amounts are not paid in a timely manner. The present case is a perfect illustration of the importance of awarding interest on LPS / DPC, as the appellant has, year after year, caused massive delay in payments and compelled the respondent to

initiate legal proceedings before the State Commission for recovery of its legitimate dues.

41. For the foregoing reasons, in the given facts and circumstances, we find no merit in this appeal which, consequently, is dismissed. The pending applications are rendered infructuous and stand disposed of accordingly.

42. The above result of the appeal, however, cannot be the end of the matter. The case calls for further directives.

43. We direct the State Commission to determine the amount payable by the appellant to the second respondent in terms of directions in the impugned para 3 of the operative part of the order dated 26.03.2019 and take measures in accordance with law to ensure that the appellant discharges the liability on that score within three months of the date of this judgment.

44. We are deeply disturbed over the manner in which the appellant has been warding off its creditors depriving them of timely payments of their legitimate dues. This is reflective of financial mis-management on the part of the appellant but, more gravely, a conduct not expected of a distribution licensee. The MERC seems to have been playing along believing the promises held out through payment-plans without insisting on scrupulous adherence thereto. This has been leading to unnecessary litigation adding to the cost for all stake-holders. The Commission, as the sector regulator, equipped as it is with the requisite powers, can do better. If the reasons for the mess indicated in the additional affidavit dated 29.07.2021 (mentioned earlier) are any pointer, it is the duty of the regulator to effectively deal with some of the issues that statedly plague the food chain and are attributable to actions (or inaction) of the regulatory authority including certain disallowances, delayed implementation of the tariff orders, approvals of gains and losses in MYT Order instead of True up; belated approval of the final true up etc. It is the obligation of the State Commission to ensure, by

issuing appropriate directions and enforcement thereof to the logical end, that the Distribution licensee conducts itself in such a manner that it lives up to the objectives of the Electricity Act by maintaining financial discipline, adopting efficient systems, aiding in recovery of the cost of electricity in a reasonable manner and conduct of its business of distribution and supply on commercial principles which only would safeguard the consumers' interest.

45. We direct the State Commission to examine the financial affairs of the appellant and take appropriate measures in such regard in accordance with law so as to bring about financial discipline in a time-bound manner, bearing in mind the observations recorded above.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 20th DAY OF SEPTEMBER, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member