

A CLP INDIA PVT. LTD.

v.

GUJARAT URJA VIKAS NIGAM LTD. & ANR.

(Civil Appeal No. 2793 of 2010)

B MAY 06, 2020

**[ARUN MISHRA, VINEET SARAN AND
S. RAVINDRA BHAT, JJ.]**

Electricity Supply Act, 1948 – s.43(A) – Gujarat Electricity

- C *Board (Gujarat Urja) entered into a power purchase agreement (PPA) with CLP on 03.02.1994 – In terms of the PPA, Gujarat Urja was under an obligation to purchase and CLP was under the corresponding obligation to supply electricity – Prior PPA, the Central Government had issued notification on 30.03.1992, one of the conditions in it was the provision for incentive to units using naphtha – After the signing of the PPA, an amendment notification dated 06.11.1995 was issued by the Central Government amending the notification (dated 30.03.1992), which provided that there would no longer be any deemed Generation Incentive payable to any generating company on available declaration of naphtha as fuel –*
- D *Gujarat Urja sought to enforce said notification – However, CLP ignored the amended notification and billed Gujarat Urja for the power supplied, w.e.f. December, 1997 and Gujarat Urja paid deemed Generation Incentive – Thereafter, Gujarat Urja filed application for recovery of the amounts from CLP paid during the period from 1997-1998 to 2005-06 – GERC, by its order held that the notification of 06.11.1995 was applicable and deemed Generation Incentive is not payable to CLP – However, it permitted recovery of only for a period of three years prior to the date of filing of the petition: the recovery for the period prior to 14.09.2002 was held to be time-barred – APTEL upheld the order of the GERC*
- E *– On appeal, held: The two notifications dated 30.03.1992 and 06.11.1995 were issued u/s. 43(A) of the Electricity Supply Act, 1948 – Concededly, these notifications are statutory and are binding on the parties – Any PPA between a generating company and the purchaser of electricity is subject to such statutory notifications; parties by agreement cannot override statutory provisions, or such notifications, as far as they relate to matters of tariff – So, the*

notification amended on 06.11.1995 was a statutory one and was binding on both the parties – The effect of this statutory incorporation by way of amendment was that incentive no longer became payable – Also, the concurrent findings of the GERC and APTEL in granting restricted refund calculable for the 3 year period prior to Gujarat Urja's application are reasonable – The findings of the lower authorities, therefore, are correct; no interference required.

Electricity Supply Act, 1948 – s.43(A) – Gujarat Electricity Board (Gujarat Urja) entered into a power purchase agreement (PPA) with CLP on 03.02.1994 – In terms of the PPA, Gujarat Urja was under an obligation to purchase and CLP was under corresponding obligation to supply electricity – A supplementary agreement was executed between the parties on 05.12.2003 – CLP stated that the amount, i.e Rs. 53.90 crores was in fact due as a loan – If it was deemed as a loan, then interest was payable on the basis of normative repayment of principal amount during the period of the loan, i.e. the loan would not remain as a constant – Gujarat Urja resisted this claim – The GERC rejected the CLP's argument on a plain reading of the clause in the supplementary agreement, which stated that the agreement too recognized Rs.53.9 crores as own Capital for which the cost of Own Capital @ 14% was to be a pass through – The effective date for such recognition was from 01.07.2003 to 31.03.2009 and no amounts were due and payable as interest after that date – This excluded any liability on part of Gujarat Urja for the past period, i.e. December 1997 – The CLP Limited was aggrieved by that portion of GERC's order which rejected its claim on the deemed loan component prior to the period 2003 – The APTEL concurred with the decision of GERC – On appeal, held: The clear agreement between the parties was that interest on the sum of Rs.53.90 crores was payable for the specified period 01.07.2003 to 31.12.2009 – Therefore, CLP's claim that any amount was payable, for any period prior to 01.07.2003, was not tenable – Had CLP wished so, nothing prevented it to claim for it during negotiations and have it included as a term of the contract – Once having settled for a specified sum, on an amount Rs.53.90 crores that was only fictionally a loan - and treated as such, for purpose of fixing interest payable, considering the equity infused, in excess of the tariff regulations, the absence of any like item,

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- A such as interest for prior period, precludes a claim – The findings of the lower authorities are therefore, sound and reasonable.

Dismissing the appeals, the Court

- HELD:** 1. The submissions of parties are with respect to two notifications dated 30.03.1992 and 06.11.1995. These Notifications were under Section 43(A) of the Supply Act. Concededly, these notifications are statutory and are binding on the parties. Any PPA between a generating company and the purchaser of electricity is subject to such statutory notifications; parties by agreement cannot override statutory provisions, or such notifications, as far as they relate to matters of tariff. Therefore, the rights and obligations of the parties under the PPA have to be read subject to the statutory provisions. The provisions of the PPA, if they are contrary to the statutory provisions, cannot be given effect to. [Paras 19 and 20][611-D-F]
2. In view of the fact that the notification amended on 06.11.1995 was a statutory one, there cannot be any doubt that it was binding upon the parties. Therefore, the earlier notification which left it free to the parties to negotiate on various aspects, including on the incentive payable, stood amended by Note 2, which was added to clause 1.6 of the tariff. The effect of this statutory incorporation by way of amendment was that incentive no longer became payable. The arguments by the CLP, in the opinion of the Court, that the parties were bound only by the terms of the agreement and that the amendment notification being prospective, could not have altered the terms of the tariff, especially the incentive payable, are insubstantial and have no force. The concurrent findings on this aspect, therefore, are sound and do not call for interference. Likewise, the change of law provision (Clause 6.5 of the PPA) clearly contemplated that any amendment to the prevailing tariff notification (dated 30.03.1992) would bind the parties. Since Note (2) was an amendment, which dealt with the issue of incentive, it cannot now be said that it was inapplicable. The findings of the lower authorities, therefore, are correct; no interference is called for. [Para 25][614-D-F; 615-A-B]

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3. The next question is whether the GERC and APTEL fell into error in granting restricted refund calculable for the 3 year period prior to Gujarat Urja's application. The concurred findings on this aspect, in the opinion of this court, are reasonable. There is merit in CLP's submission that the earliest point in time, when the cause of action arose, was in May, 1996, when Gujarat Urja rejected its contention that incentive was payable in terms of the PPA, notwithstanding the notification of 06.11.1995. Despite this stated position, meetings continued to be held and, what is more, incentive amounts, were paid to CLP. No doubt, no document conclusively stated that CLP's claim was accepted. This Court does not find any merit in the submission of Gujarat Urja that the issue was kept alive, due to a series of communications. In this regard, APTEL's findings about inapplicability of Section 18 of the Limitation Act, are correct. There was no admission on the part of CLP, at least of the kind, that extended the time for preferring an application for recovery of excess payments. It has been consistently ruled by this court that repeated letters, or exchange of communications, do not extend the period of limitation, provided by law. [Para 26][615-B-E]

4. The third, and last issue, is with respect to payment of interest on deemed equity. The debt-equity ratio in this case, was disturbed; accordingly Rs.53.9 crores was treated as "deemed" or normative loan, for which the parties had to agree the rate of interest payable, in accordance with the tariff notification. It was in the light of these developments that the supplementary agreement was entered into. [Para 28][616-B]

5. It is apparent, that the parties did not harbor any doubt about the period for which the specified interest was payable on such deemed loan. The rate of interest was fixed; likewise, the date from which payment obligations were to arise, too were known. Also, the date upto which the interest on such deemed loan payments were to be made, was known and fixed. In these circumstances, CLP's claim that the payment of interest for a prior period was outstanding, and constituted Gujarat Urja's liability, is insubstantial. In a recent judgment a similar issue had

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- A arisen. The court quoted from the decision in *National Thermal Power Corporation Ltd. v. Madhya Pradesh State Electricity Board* where another previous decision was cited with approval on the issue that the express provision for something, in an agreement, meant that other similar matters stood excluded. [Para 29] [616-D-F]
- B 6. In the present case, the clear agreement between the parties was that interest on the sum of Rs.53.90 crores was payable for the specified period 01.07.2003 to 31.12.2009. Therefore, CLP's claim that any amount was payable, for any period prior to 01.07.2003, was not tenable. Had CLP wished so, nothing prevented it to claim for it during negotiations and have it included as a term of the contract. Once having settled for a specified sum, on an amount (Rs.53.90 crores) that was only fictionally a loan - and treated as such, for purpose of fixing interest payable, considering the equity infused, in excess of the tariff regulations, the absence of any like item, such as interest for prior period, precludes a claim. But it was really part of the equity component. Therefore, interest was *per se* not payable, but could be paid in terms of the tariff notification or the agreement. No claim on any other legal or equitable considerations could have been made. The findings of the lower authorities are therefore, sound and reasonable. [Para 31][619-E-G]

India Thermal Power Ltd. v. State of M.P. & Ors. (2000)

3 SCC 379 : [2000] 1 SCR 925; Binani Zinc Ltd. v.

Kerala State Electricity Board (2009) 11 SCC 244 :

[2009] 4 SCR 636; Tata Power Company Ltd. v. Adani

Electricity Mumbai Ltd. & Ors. 2019 (7) SCALE 297 :

[2019] 6 SCR 845; Damodar Valley Corporation v.

Central Electricity Regulatory Commission & Ors. 2018

(15) SCALE 451 : [2018] 14 SCR 433 – relied on.

Hari Shankar Singhania v. Gaur Hari Singhania (2006)

4 SCC 658 : [2006] 3 SCR 726; Sri Ram Mills Ltd. v.

Utility Premises Ltd. (2007) 4 SCC 599 : [2007] 4 SCR

279; S.S. Rathore v. State of Madhya Pradesh (1989) 4

SCC 582 : [1989] 1 Suppl. SCR 43; Union of India v.

Har Dayal (2010) 1 SCC 394 : [2009] 15 SCR 1126;

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Schlumberger Asia Services Ltd. v. Oil and Natural Gas Corporation Ltd. (2013) 7 SCC 562; Uttar Haryana Bijli Vitran Nigam Ltd. And Ors. v. Adani Power Ltd. & Ors. (2019) 5 SCC 325 : [2019] 4 SCR 487; National Thermal Power Corporation Ltd. v. Madhya Pradesh State Electricity Board (2011) 5 SCC 580 : [2011] 11 SCR 651 – referred to.

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<u>Case Law Reference</u>		
[2006] 3 SCR 726	referred to	Para 16
[2007] 4 SCR 279	referred to	Para 16
[2000] 1 SCR 925	relied on	Para 23
[2009] 4 SCR 636	relied on	Para 23
[2019] 6 SCR 845	relied on	Para 23
[1989] 1 Suppl. SCR 43	referred to	Para 26
[2009] 15 SCR 1126	referred to	Para 26
(2013) 7 SCC 562	referred to	Para 26
[2019] 4 SCR 487	referred to	Para 29
[2011] 11 SCR 651	referred to	Para 29
[2018] 14 SCR 433	relied on	Para 30

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2793 of 2010.

From the Judgment and Order dated 19.01.2010 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 44 of 2009.

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With

C. A. No. 2969/2010

Sajjan Povaya, C. A. Sundaram, Sr. Advs., V. Mukherjee, Pukhrambam Ramesh Kumar, Ms. Raveena Dhamija, Karun Sharma, Akshat Jain, Prati Bhanu, Anand Ganesan, Ms. Hemantika Wahi, Shubham Arya, Ms. Jesal Wahi, Ms. Puja Singh, Ms. Rohini Musa, Abhishek Gupta, Zafar Inayat, Ms. Ranjitha Ramachandran, Ms. Puja Singh, Advs. for the appearing parties.

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- A The Judgment of the Court was delivered by
S. RAVINDRA BHAT, J.
- B 1. The present judgment will dispose of two appeals preferred under Section 125 of the Electricity Act, 2003. One appeal (CA 2969/2010) has been preferred by the Gujarat Urja Vikas Nigam Ltd. (hereafter, "Gujarat Urja" or "GUVN"); the second (CA 2793/2010) has been preferred by CLP (India) Pvt. Ltd. (formerly, Gujarat Torrent Energy Corporation Ltd; later, Gujarat Paguthan Energy Corporation Ltd, a generating company, hereafter collectively "CLP"). Both appeals challenge a common order of the Appellate Tribunal for Electricity "APTEL" hereafter).
- C 2. The erstwhile Gujarat Electricity Board (GEB) (now "Gujarat Urja") entered into a power purchase agreement ("PPA" with CLP on 03.02.1994. In terms of the PPA, Gujarat Urja was under an obligation to purchase - and CLP was under corresponding obligation to supply -
- D 635 MW of electricity; the tenure of the agreement was 20 years. In terms of Section 43(A) of the Electricity Supply Act, 1948, (hereafter "the Act"), a generating company may enter into a contract for the sale of electricity with the Electricity Board and the tariff for the sale of electricity shall be determined by the authority through the notification issued by the Central Government. Prior the PPA in this case, the Central
- E Government had issued a notification under Section 43A, on 30.03.1992, specifying the controlling norms, terms and conditions for determination of tariff for sale of electricity by the generating company to the Electricity Boards. One of those conditions was the provision for incentive to units using naphtha. On 17.01.1994, an amendment to the notification dated
- F 30.03.1992 was made providing for Note (1) stating that the incentive for generation above the target availability of 68.49% for fixed cost recovery was to be capped.
- G 3. After the signing of the PPA between the parties, an amendment notification dated 06.11.1995 was issued by the Central Government amending the notification (dated 30.03.1992). By this, the Central Government provided that there would no longer be any deemed Generation Incentive payable to any generating company on available declaration of Naphtha as fuel. Based on this notification, the Electricity Board sought to enforce the said notification claiming that this generating company is not entitled to get the incentive for deemed generation. The
- H Electricity Board also sent a letter dated 18.04.1996 informing the CLP,

that it proposed to amend the Clause 7.5.2.1 of the PPA to the effect that no deemed generation shall be admissible beyond the level of generation in respect of Naphtha. CLP did not agree to the proposal and by its reply dated 24.04.1996 stated that the notification of 06.11.1995 was inapplicable. Gujarat Urja did not agree to CLP's position and reiterated its earlier position about the change in the incentive terms. A meeting was held in respect of various issues on 06.10.1997 during which several issues were discussed and decisions taken, between the parties. However, the minutes of meeting did not record any decision on the issue of incentive restricted in terms of the notification dated 06.11.1995. There was some more correspondence and meetings, which however, did not lead to any result in regard to both parties accepting that the incentive was payable in terms of the notification of November, 1995. Ultimately, with effect from December 1997, CLP started billing Gujarat Urja for the power supplied, including the incentive (ignoring the amending notification); Gujarat Urja continued to pay deemed generation incentive from June, 1998 to 2000.

4. The Union Ministry of Power issued a notification (dated 09.06.1998) which clarified profits on operating norms; several components such as station heat rate, auxiliary consumption and secondary fuel consumption were eliminated and income tax on incentives was no longer permitted (as a pass through in tariff). It was stated that this was prospective in operation and would apply to power purchase agreements which were not executed and delivered by the parties by 09.06.1998. For a long time, incentive continued to be paid, ignoring the notification of 06.11.1995 by Gujarat Urja, to CLP. On 05.12.2003, CLP and Gujarat Urja entered into a supplementary agreement, amending the PPA, to incorporate concessions offered by CLP to reduce tariff. Pursuant to execution of the supplementary agreement dated 05.12.2003, Gujarat Urja issued a letter to CLP stating that all the outstanding issues stood fully and finally resolved. Gujarat Urja continued to pay deemed generation incentive from 05.12.2003 to 23.02.2005. In February, 2005, a high-level committee was constituted to examine the issue of recovery of excess payouts made on the basis of deemed generation incentive. The receipt of the report, of that committee, led Gujarat Urja to file an application for recovery of the amounts from CLP (Petition No.874/2006 under Section 86(1)(f) of the Act, before the Gujarat Electricity Regulatory Commission ("GERC"), claiming for recovery of deemed generation incentive paid to CLP during the period from 1997-98 to 2005-06.

- A 5. CLP resisted Gujarat Urja's application, contending that principles of estoppel precluded recovery; that in any event, parties had not agreed to change the terms of the PPA and that the previous correspondence evidenced that the matter had been closed, which meant that Gujarat Urja could not claim recovery of any so-called excess amounts.
- B The GERC, by its order held that Note 2 (introduced by the notification of 06.11.1995) was applicable to the project and thus deemed generation incentive is not payable to CLP. However, it permitted recovery of only for a period of three years prior to the date of filing of the petition: the recovery for the period prior to 14.09.2002 were held to be time-barred.
- C 6. The second appeal, i.e. CA 2793/2010 by CLP Limited, questions the impugned order of the APTEL which had upheld the rejection of its claim for interest on deemed loan component.
- D 7. The facts as far as this appeal is concerned are that a supplementary agreement was executed between the parties on 05.12.2003. In terms of Article 4.6 of the Supplementary Agreement, original clause 7.5.14(a) of the PPA dated 03.02.1994 was substituted¹. CLP stated that the amount, i.e. ₹ 53.90 crores was in fact due as a loan. If it was deemed as a loan, then interest was payable on the basis of normative repayment of principal amount during the period of the loan.
- E i.e. the loan would not remain as a constant. In this regard, CLP had relied upon Clause 1.5 of the notification dated 30.03.1992². The PPA dated 03.02.1994 by Schedule VII Clause 7.5.10 defined "*Interest on Loan Capital*" in the following terms:

- F *7.5.10: Interest on Loan Capital-shall mean the sum of all payment of interest along with bank charges and all associated financing costs paid to the bank annually on the outstanding loans paid by GTEC, converted, as of the first day of the fortnight for the applicable fixed charge, into the*

¹ The substituted term, i.e. the new clause 7.5.14(a) reads as follows:

"The parties have agreed to recognize an amount of Rs.53.90 crores as "Own Capital" deployed to meet with the Capital Cost and allowance of Payment of cost in the form of "Cost of Own Capital" @ the rate of 14% per annum effective from 1.7.2003 and up to 31.12.2009. No payment of any nature will accrue after the said date on the said amount."

² Clause 1.5 reads as follows:

"1.5.....(a) Interest on loan capital shall be computed on the outstanding loans, including the schedule of repayment, as per the financial package approved by the Authority....."

currencies in which it is payable employing exchange rates at bank's selling rate prevailing on that day obtained from the source mutually agreed." A

8. The *CERC Tariff Regulations, 2001* which provided for "Interest on loan capital" [clause 2.7(a)] and *CERC Tariff Regulations, 2004* were relied upon. B

They are set out below:

"2.7(a) *Interest on loan capital*

Interest on loan capital shall be computed on the outstanding loans, duly taking into account the schedule of repayment as per the financial package approved by the Authority or an appropriate independent agency, as the case may be." C

9. CERC Tariff Regulations, 2004 *inter alia* provides as under:

"20. Debt-Equity Ratio:(1) In case of alia generating stations, declared under commercial operation on or after 1.4.2004, debt-equity ratio as on the date of commercial operation shall be 70:30 for determination of tariff. Where equity employed is more than 30%, the amount of equity for determination of tariff shall be limited to 30% and the balance amount shall be considered as the normative loan. D

Provided that in case of a generating station where actual equity employed is less than 30%, the actual debt and equity shall be considered for determination of tariff. E

(2) The debt and equity amount arrived at in accordance with clause (1) shall be used for calculating interest on loan, return on equity, Advance against Depreciation and Foreign Exchange Rate Variation." F

10. Gujarat Urja resisted this claim. After adjudication, the GERC rejected the CLP's argument on a plain reading of the clause, saying that for the first time in the supplementary agreement, which stated that the agreement too recognized ₹ 53.9 crores as own Capital for which the cost of Own Capital @ 14% was to be a pass through. The effective date for such recognition was from 01.07.2003 to 31.03.2009 and no amounts were due and payable as interest after that date. It was specifically stated that this condition constituted the complete bargain to G

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- A the extent it provided for treatment of cost of Own Capital @ 14% per annum for a defined period. The agreement had to be and was given prospective operation. This excluded any liability on part of Gujarat Urja for the past period, i.e. December 1997. It was also held that the claim made in 2010 was substantially barred to the extent it sought for any amount of interest beyond a period of three years.
- B 11. The CLP claimed on another issue, i.e. interest on ₹ 14.48 crores @ 16% per annum from July 2000 to 30.06.2003 was payable. In terms of the supplementary agreement, the condition specifically stated that GPEC (i.e. CLC) had further deployed a sum of ₹ 14,48,40,831/- from its internal accrual to complete shortfall and disbursal of loan by the lenders, which agreed to allow payment on this amount @ 16% per annum from July 2000 to 30.06.2012. Gujarat Urja stated that this interest was payable on reducing balance terms, not as bullet payment of interest.
- C 12. The CERC ruled that it was quite clear that the parties had agreed to allow interest at the said rate, @ 16% on the said sum, i.e. 14.48 crores. Therefore, Gujarat Urja could not argue that interest was payable on the reducing balance method and that the payment of interest on a bullet repayment method was not permissible. The Commission, i.e. GERC noted that the statutory notification, i.e. clause 1.5 of the notification dated 30.03.1992 did not prohibit calculation of interest on bullet repayment as regards clause 7.5.10 in Schedule VII of the PPA dated 03.02.1994, the subject matter or its content was deemed loan. On this second aspect, therefore, the terms of the contract contained in the supplementary agreement directing 16% per annum interest on ₹14.48 crores is bullet repayment, was upheld.
- D 13. The CLP Limited was aggrieved by that portion of GERC's order which rejected its claim on the deemed loan component prior to the period 2003. It appealed to the APTEL (Appeal No.44/2009). The APTEL concurred with the decision of the GERC and held that clause 7.5.14(a) of the supplementary agreement did not oblige Gujarat Urja to refund interest paid upon the deemed loan component upon the equity portion treated as deemed loan, i.e. ' 53.9 crores for any period prior to 01.07.2003. Therefore, CLP's appeal was rejected. It, therefore, has appealed to this Court on the said findings.

Analysis and Findings

- H 14. Section 43A of the Electricity (Supply) Act, 1948 (hereafter "the Supply Act") reads as follows:

"43A. Terms, conditions and tariff for sale of electricity by A Generating Company.-

(1) A Generating Company may enter into a contract for the sale of electricity generated by it-

a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;

b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section(3) of section 15A; and

c) with any other person with consent of the competent government or governments.

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

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

15. At the outset, it is noticeable that on the issue, whether amounts paid to CLP, for the period 1998 to 2005 onwards, were in excess of what was actually payable by Gujarat Urja, the findings of GERC and the APTEL are concurrent. This court does not discern any unreasonableness or facial omission of material factors, to warrant appellate review. Nevertheless, the court would proceed to deal with the submissions made on this aspect. Gujarat Urja contends that the concurrent findings, to the extent they limit the refund to a period up-to 2002 are erroneous, because in effect CLP has been unjustly enriched. Learned senior counsel for Gujarat Urja, Mr. C.A. Sundaram, argued

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- A that once the GERC found, on a plain reading and interpretation of the tariff order of 1992 – as amended by the notification dated 06.11.1995, that incentive could not be paid in the same manner as was contemplated by the parties, when they entered into the PPA (on 03.02.1994), as a matter of law, the amounts paid were excess; consequently, both in law as well as in equity, CLP was under an obligation to refund the entire excess, from the time it was not entitled to those amounts.

- 16. On the question of limitation, learned senior counsel argued that the APTEL erred in law, in not following the decisions of this court in *Hari Shankar Singhania v. Gaur Hari Singhania*³ and *Sri Ram Mills Ltd.v. Utility Premises Ltd.*⁴ in considering that the issue was not time-barred. Counsel submitted that the question was engaging the attention of the parties and CLP was aware of the fact that the Central Electricity Authority and the Central Government had taken decisions on this aspect. Moreover, as a matter of law, by reason of the amendment, to the notification (dated 06.11.1995), CLP could not have legitimately claimed more tariff based on the incentive policy that was no longer applicable. Therefore, the amounts paid *to the extent they were not in conformity with the said amendment, had to be refunded in entirety.*
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- 17. On behalf of CLP it was urged, by Mr. Sajan Poovayya, learned senior counsel, that both the authorities below erred in their interpretation of the terms of the PPA, the notification of 30.03.1992 and the amendment of 06.11.1995. It was argued that CLP's generation station is gas-based and not a Naphtha based station. The notification dated 06.11.1995 applied only to 100% Naphtha based stations and not to gas based stations like that of CLP, where Naphtha was used as a secondary fuel when the Gas was not available. The expression "Naphtha based station" used in the notification is a term of art; it refers merely to the physical characteristic of the plant and not to the nature of fuel to be used. It was further contended that the amending notification of 06.11.1995 itself makes a distinction between gas based stations and naphtha based stations. CLP's plant, in terms of PPA is a gas based, not Naphtha based.
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³ (2006) 4 SCC 658
H ⁴ (2007) 4 SCC 599

that Clause 6.5 of the PPA dated 03.02.1994 regarding change of law is A clarificatory in nature. It deals only with the earlier part to protect the interest of the GPEC for change in law. “The change in law” referred to in Clause 6.5 covers amendment to notification dated 30.03.1992. Therefore, the financial difficulties resulting from the amendment notification dated 06.11.1995 are to be compensated in favour of the CLP. B

18. It was argued that Note(2) of the amended notification dated 06.11.1995 unambiguously states that it applies only to Naphtha based stations for whom generation incentive was inapplicable. Therefore, the gas based units like CLP were clearly not covered by Note(2) since they used naphtha only as an alternative fuel or substitute fuel. Therefore, the findings given by the GERC and APTEL to the effect that Naphtha based station include those that are capable of firing Naphtha also as a fuel, and not mean those which are capable of firing only Naphtha, is wrong. C

19. The submissions of parties are with respect to two notifications dated 30.03.1992 and 06.11.1995. These Notifications were under Section 43(A) of the Supply Act. Concededly, these notifications are statutory and are binding on the parties. Any PPA between a generating company and the purchaser of electricity is subject to such statutory notifications; parties by agreement cannot override statutory provisions, or such notifications, as far as they relate to matters of tariff. D E

20. Therefore, the rights and obligations of the parties under the PPA have to be read subject to the statutory provisions. The provisions of the PPA, if they are contrary to the statutory provisions, cannot be given effect to. In terms of the PPA of 03.02.1994, “fuel” is defined as follows: F

“Fuel natural gas and/or any liquid fuel selected by Gujarat Torrant Electricity Company (GTEC) (now CLP) for use in power station for generating electricity”

‘fuel management’ is defined as follows: G

“Fuel Management:-The power station of the GTEC is designed to use natural gas and liquid fuel as fuel. GTEC shall decide selection and use and proportion gas and other fuel in best economic way depending on the situation from time to time.” H

- A 21. The kind of alternative fuel and its long-term purchase contract could be jointly decided by CLP and Gujarat Urja. The cost of the alternate fuel when used by CLP shall be taken into account for calculation of variable charges as defined in Schedule VII (of the PPA). Clause 7.1 and Clause 7.4 of Schedule VII to the PPA are relevant.⁵ Under the former, Gujarat Urja had to purchase power from CLP on the basis of the notification of 30.03.1992 of the Central Government. It further provided that the tariff for the first 6000 Kwh/kw (i.e 68.5% PLF – i.e. plant load factor) of net availability in any year was to be the sum of (a) the fixed charge and (b) the variable charge (i.e those terms defined by clauses 7.2 and 7.3). For all excess energy of actual and deemed generation in excess of 68.5%, the tariff payable was to be the sum of (a) incentive and (b) variable charge. Clause 7.4 provided for incentive, which was to be @ 0.575% for every 1% increase in the generation above the normative level of 6000 hours per kWH/KW (i.e 68.5% PLF) in accordance with the notification S.O. 251(E), dated 30.03.1992 (as amended on 17.01.1994).

- B 22. The argument of CLP that its unit was essentially gas-based and that the definition of naphtha-based unit meant only that unit which depended entirely on naphtha as a fuel, or that which used naphtha at least to the extent of 50%, in our opinion is not correct.

- C 23. The judgment of this court in *India Thermal Power Ltd. vs. State of M.P. & Ors.*⁶ is an authority for the proposition that parties can

E ⁵ For convenience, they are set out as follows:

"7.1 Tariff"

GEB shall purchase power from GTEC, generally on the basis of GOI notification No.SO 251(E) dtd. 30-3-1992. The Tariff for the first 6,000 kWh/KW (i.e. 68.5 PLF) of Net Availability in any year during the terms of this Agreement shall be the sum of (a) the Fixed Charge and (b) the Variable Charge. For all the energy of actual and deemed generation in excess of 68.4 % PLF in any Year ,the Tariff payable by GEB shall be the sum of (a) the Incentive described below and (b) the Variable Charge. Any tax or impost on or pertaining to sale of energy or capacity shall be payable by GEB over and above the Tariff.

.....

G ^{7.4 Incentive} The incentive referred to in 7.1 above with respect to any fortnight shall be in the form of additional return on equity at the rate of 0.575% for every 1% increase in the generation above the normative level of 6000 hours per kWh/KW(i.e 68.5% PLF) in accordance with the amendment dated 17.1.94 to the said notification No.SO 251(E). "

H ⁶ (2000) 3 SCC 379, where it was held pertinently that:

H "Section 43 empowers Electricity Board to enter into 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 Electricity

agree to terms as they deem appropriate, for generation and sale of electricity under Section 43A except that the tariff is to be in accordance with the provision contained in Section 43A. The decision in *Binani Zinc Ltd. v. Kerala State Electricity Board*⁷; *Tata Power Company Ltd. vs. Adani Electricity Mumbai Ltd. and Ors.*⁸ too have taken a similar approach.

24. Clause 6.5 of the PPA of 03.02.1994 dealt with a situation concerning change of law. It also stated that any amendment in the Central Government's notification dated 30.03.1992 would be taken into account for tariff calculation.⁹ The relevant part of the notification of

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 provision 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-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute than that contract becomes a statutory contract. If a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory. 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 a mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). "

⁷ (2009) 11 SCC 244

⁸ 2019(7) SCALE 297

⁹ The stipulation reads as follows:

"6.5 Change in Law: In the event that as a result of any laws or regulations of any Governmental Authority or any national, regional or municipal authority thereof coming into effect after the date hereof, and in force at the date hereof being amended, modified or repealed, the interest of GTEC in the Project and/or GTEC's projected economic return net of tax (or other imposition) on its investment in the Project is materially reduced prejudiced or otherwise adversely affected (including without limitation, any restriction on the ability to convert Rupees or remit funds in foreign currencies outside of India) then the parties hereto shall meet and endeavour to agree on amendments to this Agreement to the effect that all of the increased cost or lost return on investment incurred by GTEC that would result from complying with or being subject to any such change in law shall be passed through to GEB under GTEC Tariff. Any amendment in Government of India Notification No.S.O.251(E)dated 30.3.92 shall be taken into account for Tariff calculation."

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- A 30.03.1992 which dealt with charges recoverable by the generating company was clause 1.6.¹⁰ That condition was amended by the notification dated 06.11.1995 which clearly stated, by Note(2) that:

"Note: 2-For Naptha based thermal plants, the extent of backing down, as ordered by Regional Electricity Boards,

- B *beyond plant Load Factor of 6000 kwh/kw/year, shall not be reckoned as generation achieved for incentive purpose."*

25. There is no dispute that the PPA which the parties entered into specifically referred to the notification of 30.03.1992 and further went on to state that for the first Kwh/KW, a plant load factor of 68.5% C fixed charges and variable charges were deployed. For generation achieved over and above this by the concerned unit – CLP, an incentive @ 5.75% for every 1% increase over and above the fixed and variable charge payable was agreed to. Significantly, the fixed and variable charges are in consonance with the statutory notification of 30.03.1992 (which was also later amended on 17.01.1994). This much is clear from a plain D reading of clause 7.1 of the Schedule VII to the PPA itself. In view of the fact that the notification amended on 06.11.1995 was a statutory one, there cannot be any doubt that it was binding upon the parties. Therefore, the earlier notification which left it free to the parties to negotiate on various aspects, including on the incentive payable, stood E amended by Note 2, which was added to clause 1.6 of the tariff. The effect of this statutory incorporation by way of amendment was that incentive no longer became payable. The arguments by the CLP, in the opinion of the Court, that the parties were bound only by the terms of the agreement and that the amendment notification being prospective, could not have altered the terms of the tariff, especially the incentive payable, F are insubstantial and have no force. The concurrent findings on this aspect, therefore, are sound and do not call for interference. Likewise,

¹⁰ The said condition in the notification is as follows:

"1.6 Full fixed charges shall be recoverable at generation level of 5500-6000 hours./KW/year: Payment of fixed charges below the level of 5500 KWh./KW/year shall

- G *be on pro-rata basis. There shall not be any payment of fixed charges for generation levels above 6000 hours./KW/year: However generation above 6000 hours./KW/Year shall be at negotiated rates between the Generating companies and the Board, which shall not include fixed cost element. While computing the level of generation, the extent of backing down, as ordered by the Regional Electricity Board shall be reckoned as generation achieved. The payment of fixed charges shall be on monthly basis, proportionate to the electricity drawn by the respective Boards. Necessary adjustment H based on actual sales and deemed sales shall be made at the end of each year."*

the change of law provision (Clause 6.5 of the PPA) clearly contemplated that any amendment to the prevailing tariff notification (dated 30.03.1992) would bind the parties. Since Note (2) was an amendment, which dealt with the issue of incentive, it cannot now be said that it was inapplicable. The findings of the lower authorities, therefore, are correct; no interference is called for.

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26. The next question is whether the GERC and APTEL fell into error in granting restricted refund calculable for the 3 year period prior to Gujarat Urja's application. The concurred findings on this aspect, in the opinion of this court, are reasonable. There is merit in CPL's submission that the earliest point in time, when the cause of action arose, was in May, 1996, when Gujarat Urja rejected its contention that incentive was payable in terms of the PPA, notwithstanding the notification of 06.11.1995. Despite this stated position, meetings continued to be held and, what is more, incentive amounts, were paid to CLP. No doubt, no document conclusively stated that CLP's claim was accepted. We do not find any merit in the submission of Gujarat Urja that the issue was kept alive, due to a series of communications. In this regard, APTEL's findings about inapplicability of Section 18 of the Limitation Act, are correct. There was no admission on the part of CLP, at least of the kind, that extended the time for preferring an application for recovery of excess payments. It has been consistently ruled by this court that repeated letters, or exchange of communications, do not extend the period of limitation, provided by law.¹¹

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27. The third, and last issue, is with respect to payment of interest on deemed equity. Clause 1.5 of the 30.03.1992 notification provided for interest on loan, as a component of tariff; it stipulated that interest (on outstanding loan) shall be computed as per financial package approved by the Authority (CEA). The PPA of 03.02.1994 (Schedule VII) clause 7.5.10 defined interest on loan capital as *the sum of all payments of interest along with bank charges and all associated financing costs paid to the bank annually on the outstanding loans paid by GTEC....*" The Central Commission's order of 21.02.2000 led to a stipulation in the tariff regulations of 2001. Eventually, the Tariff Regulations of 2004 was brought into force; it provided for a debt ratio of 70:30 for determination of tariff. It also provided that:

¹¹ *S.S.Rathore v State of Madhya Pradesh 1989 (4) SCC 582; Union of India v Har Dayal 2010 (1) SCC 394; Schlumberger Asia Services Ltd vs. Oil and Natural Gas Corporation Ltd. 2013 (7) SCC 562.*

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- A “Where equity employed is more than 30%, the amount of equity for determination of tariff shall be limited to 30% and the balance amount shall be considered as the normative loan”
- B 28. The debt-equity ratio in this case, was disturbed; accordingly ₹ 53.9 crores was treated as “deemed” or normative loan, for which the parties had to agree the rate of interest payable, in accordance with the tariff notification. It was in the light of these developments that the supplementary agreement was entered into. That amended the existing PPA, to the following effect¹²:
- C “The parties have agreed to recognize an amount of Rs.53.90 crores as “Own Capital” deployed to meet with the Capital Cost and allowance of Payment of cost in the form of “Cost of Own Capital”@ the rate of 14% per annum effective from 1.7.2003 and up to 31.12.2009. No payment of any nature will accrue after the said date on the said amount.”
- D 29. It is thus apparent, that the parties did not harbor any doubt about the period for which the specified interest was payable on such deemed loan. The rate of interest was fixed; likewise, the date from which payment obligations were to arise, too were known. Also, the date upto which the interest on such deemed loan payments were to be made, was known and fixed. In these circumstances, CLP’s claim that the payment of interest for a prior period was outstanding, and constituted Gujarat Urja’s liability, is insubstantial. In a recent judgment¹³ a similar issue had arisen. The court quoted from the decision in *National Thermal Power Corporation Ltd. v. Madhya Pradesh State Electricity Board*¹⁴ where another previous decision was cited with approval on the issue
- E F that the express provision for something, in an agreement, meant that other similar matters stood excluded.¹⁵

¹²f.n.1 *ibid*.

¹³ *Uttar Haryana Bijli Vitran Nigam Ltd. and Ors. vs. Adani Power Ltd. and Ors.* 2019 (5) SCC 325

¹⁴ (2011)15 SCC 580

G ¹⁵ The relevant portions of this court’s observations, in *Uttar Haryana* (f.n.13 *ibid*) are as under.:

H “25. In this connection, it is material to note that the claim in *South Eastern Coalfields* (2003) 8 SCC 6487 was essentially covered Under Section 61 of the Sale of Goods Act, 1930, and the interest by way of damages was payable as per this statutory provision itself. The liability had been crystallised and the interest had become payable because of the failure to pay the amount as per the liability. Besides, there was nothing

30. A somewhat analogous issue, i.e. interest on normative deemed loan (i.e. deemed loan), in the context of changed debt-equity ratios, under tariff regimes was considered in a decision of this court¹⁶, where it was held that:

"20. In the order of the Appellate Tribunal dated 23.11.2007 the matter came to be dealt with under the heading 'debt equity ratio'. The Tribunal went on to accept the case of the Appellant in respect of all old projects of DVC and normative debt equity of 50:50 was assigned, commissioned prior to 1992. In respect of recent projects such as Mejina, it was assigned debt equity ratio of 70:30 on capital structure as specified in the Regulations. This finding has become final. It was contended on behalf of the Appellant that equity has been the primary source of capital. Thereafter, in paragraph A-10, it was found by the Appellate Tribunal that owners take upon themselves business related risk and are entitled to interest on capital investment, but the return is to be governed by the scheme of determination of tariff for the supply of electricity as mandated by the law in place. The Appellate Tribunal further proceeds to hold that the scheme provides for assured Return on Equity (ROE) which is at the rate of 14% on the equity employed for the purpose of supplying electricity. The scheme does not permit return on investment made on projects other than for supply of electricity to be recovered from supply of electricity. The Tribunal went on to hold that the DVC Act does not recognise capital as borrowings and there is no reference about repayment of such capital to the participating Governments. The Appellate Tribunal proceeds to hold that the capital infused by participating Governments is in the nature of equity capital and for the determination of tariff,

in the agreement between the parties to the contrary on the issue of grant of interest. In the present matter, we have the second proviso to Regulation 79(2) of the 1999 Regulations which permitted the generating company to continue to charge the existing tariff for such period as may be specified in the notification by the Commission, and the notifications permitted continuation of the existing tariff as on 31-3-2001, until the final tariff was determined. There was no provision for payment of interest therein. The very fact that interest came to be provided subsequently by a notification under the Regulations of 2004 is also indicative of a contrary situation in the present matter viz. that interest was not payable earlier."

¹⁶ *Damodar Valley Corporation vs. Central Electricity Regulatory Commission & Ors.*
2018 (15) SCALE 451.

- A *the same would be eligible for return on equity but the Appellate Tribunal does not end there. It clearly provides that the return on equity is as may be permitted by the tariff Regulation of 2004. It is thereafter that the Appellate Tribunal in para 15 proceeded to hold that the DVC Act provides for interest on capital which is contributed by the participating Governments. The accrued interest due to the Governments apparently has been allowed to be retained by the Appellant. The same however came to be ploughed back into the capital with the tacit consent of the participating Governments. Thereafter, it is stated that this has to be provided to the DVC as per the provisions of Section 38 of the DVC Act. It is thereafter paragraph A-16 which we have already extracted, the Tribunal proceeded to observe that under the DVC Act if there is any deficit in the capital contributed by the participating Governments, it is to be made good by taking loan on behalf of the participating Governments. The said debt would attract interest. The average interest rate of the repayment payable is to be applied on a 50:50 normative debt capital. This means that out of the aggregate equity including reserves, equity considering the normative debt ratio of 50:50 would be eligible for return on equity as specified in the Regulations and the excess of equity, if any, over the equity earning ratio of 14% is to be considered as interest bearing debt. In the example which has been given it is shown that if the debt equity ratio is 40:60, return on equity at 14% will be available on 50% equity whereas interest would be available at 10% portion of equity and 40% loan which were reduced by repayments.*
- B *21. On the basis of the remand, the Commission has worked out the debt equity ratio as directed by the Appellate Tribunal. It has further provided return on equity at the rate of 14% on the equity portion, namely 50%. In respect of the debt portion, interest has been calculated no doubt after deducting depreciation, the legality of which is the subject matter of the other contention which we will deal with separately. It is quite clear to us that Appellant has already been given return on equity in terms of the tariff Regulation in respect of capital on the basis of debt equity ratio which has been fixed by the Appellate Tribunal on a ratio which has become final between the parties.*
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22. Though a perusal of para A-9 of order dated 23.11.2007 A may appear to show that equity has been found to be the main source of capital, a perusal of paragraph A-10,A-16 and more importantly E-13 would show that capital Under Section 38 of the DVC Act has been understood as the value of the operating assets when they were first put to commercial use. Capital is also understood not as equity alone but it has been understood both as loan and equity. The ratio between loan and equity is also fixed in respect of the old projects at 50:50 and under the new projects it is at 70:30. It is further clear from paragraph E-13 of the order of the Appellate Tribunal dated 23.11.2007 that the appellate Tribunal contemplated that the equity component would remain static and it would earn the rate of return as provided in the tariff Regulation. As far as the loan component is concerned, it would get reduced on account of repayments. Therefore, the recovery as contemplated under the Regulations was found to be in two forms, namely, either as return on equity in respect of the equity portion and as interest on the loan component.” B C D

31. In the present case, the clear agreement between the parties was that interest on the sum of ₹ 53.90 crores was payable for the specified period 01.07.2003 to 31.12.2009. Therefore, CLP's claim that any amount was payable, for any period prior to 01.07.2003, was not tenable. Had CLP wished so, nothing prevented it to claim for it during negotiations and have it included as a term of the contract. Once having settled for a specified sum, on an amount (₹ 53.90 crores) that was only fictionally a loan - and treated as such, for purpose of fixing interest payable, considering the equity infused, in excess of the tariff regulations, the absence of any like item, such as interest for prior period, precludes a claim. But it was really part of the equity component. Therefore, interest was *per se* not payable, but could be paid in terms of the tariff notification or the agreement. No claim on any other legal or equitable considerations could have been made. The findings of the lower authorities are therefore, sound and reasonable. E F G

32. In view of the foregoing analysis and conclusions, both appeals have to fail. They are accordingly dismissed, without order on costs.