Maharashtra State Electricity ... vs Maharashtra Electricity Regulatory ... on 8 October, 2021

Author: Indira Banerjee

Bench: V. Ramasubramanian, Indira Banerjee

REPORTAB

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1843 OF 2021

MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION COMPANY LIMITED ....Appellan

versus

MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION & ORS. .…Respondent(

JUDGMENT

Indira Banerjee, J.

This appeal, under Section 125 of the Electricity Act 2003, is against a judgment and order dated 27 th April 2021 passed by the Appellate Tribunal for Electricity, hereinafter referred to, in short, as 'APTEL', dismissing Appeal No.77 of 2018 filed by the Appellant, Maharashtra State Electricity Distribution Company Ltd., and affirming an order dated 16th November, 2017 passed by the Maharashtra Electricity Regulatory Commission, hereinafter referred to, in short, as 18:05:35 IST 'MERC', whereby MERC dismissed the petition filed by the Appellant under Section 86 of the Electricity Act, being Case No.24 of 2017, rejecting the contention of the Appellant that, introduction by Reserve Bank of India of the Base Rate system and the Marginal Cost of Funds Based Lending Rate system constituted a change in law, within the meaning of the expression 'Change in Law' as defined in the respective Power Purchase Agreements between the Appellant and the Respondent Nos.2, 3, 4 and 5, hereinafter collectively referred to as the "Power Generating Companies", so as to alter the rate of Late Payment Surcharge(LPS) payable by the Appellant to the Power Generating Companies under the respective Power Purchase Agreements.

2. The Appellant, incorporated under the Companies Act, 1956, pursuant to the decision of the Government of Maharashtra to reorganize erstwhile Maharashtra State Electricity Board, is a Distribution Licensee under the provisions of the Electricity Act, 2003, with license to supply

electricity all over the State of Maharashtra, except some parts of the city of Mumbai. The Appellant is a bulk purchaser of electricity from generators of electricity.

3. The Appellant had, from time to time, issued Tender Notices, inviting bids for bulk supply of electricity to the Appellant, pursuant to which, the Power Generating Companies submitted their bids.

4. The Appellant has executed Power Purchase Agreements with the Power Generating Companies, arrayed as Respondent Nos. 2 to 5 in this appeal in two stages. The two sets of Power Purchase Agreements, hereinafter referred to as the stage 1 and stage 2 Power Purchase Agreements, contain almost identical terms and conditions. The respective dates and brief particulars of the respective agreements (five in number) are as follows:-

> "Stage 1-PPA Sl. Date of PPA Name of the Generating Drawal of Tariff (Rs/Unit) Name of the No. Company Power (in relevant projects of MW) the Generating Company
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> (i) 14.08.2008 Adani Power 1320 2.64 Units 2 and 3 of its Maharashtra Ltd. Tiroda Project (Respondent No. 2)
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> (ii) 23.02.2010 JSW Energy Ratnagiri 300 2.71 Unit 1 of its Ltd. (Respondent No.3) Ratnagiri Project Stage 2-PPA Sl. Date of PPA Name of the Generating Drawal of Tariff Name of the No. Company Power (in MW) (Rs/Unit) relevant projects of the Generating Company
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> (i) 17.03.2010 GMR Warora Energy Ltd. 200 2.88 Warora Project (Respondent No.5)
>
> (ii) 22.04.2010 Rattan India Power Ltd. 450 3.26 Amravati Project
>
> (iii) 31.03.2010 Adani Power Maharashtra 1200 3.28 Tiroda Project

5. The relevant terms and conditions of the Stage 1 Power Purchase Agreements are set out hereunder:-

> "Article 1 : Definitions and interpretation Change in law – shall have the meaning ascribed thereto in Article 13.1.1 of this agreement.
>
> Indian Governmental instrumentality – means the GoI, Government of Maharashtra and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GoI or Government of States where the procurer and project are located and includes the CERC and MERC.
>
> Late Payment Surcharge – shall have the meaning ascribed there to in Article 11.3.4 Law – means, in relation to this Agreement, all laws including Electricity Laws in

force in India and any stature, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC.

SBAR – means the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.

Article 11: Billing and Payment .

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11.3.4 In the event of delay in payment of a monthly bill by the procurer beyond its due date month billing, a Late Payment Surcharge shall be payable by the procurer to the seller at the rate of two (2) percent in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each date of the delay.

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Article 13 : Change in Law 13.1. Definitions In this Article 13, the following terms have the following meanings. 13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal or any law or

(ii) a change in interpretation of any law by a competent court of law, tribunal or Indian governmental instrumentality provided such court of law, tribunal or Indian governmental instrumentality is final authority under law for such interpretation.

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) Change in respect of UI charges or frequency intervals by an Appropriate Commission.

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13.2 Application and principal for computing impact of Change in Law While determining the consequence of Change in Law under this Article 13, the parties shall have due regard to the principle that the purpose compensating the party affected by such change in law, is to restore through monthly tariff payments to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.

a) .....

b) Operation Period – As a result of change in Law, the compensation for any increase/decrease in revenue or cost to the seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the parties, subject to right of appeal provided under applicable law and effective from the date specified in 13.4.1 13.3 Notification of Change in Law:

13.3.1 If the seller is affected by a Change in Law in accordance with Article 13.2 and the Seller wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

13.3.2 Notwithstanding Article 13.3.1, the seller shall be obliged to serve notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material.

Provided that in case the seller has not provided such notice, the Procurer shall have the right to issue such notice to the seller. 13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

a) The Change in Law; and

b) The effects on the Seller of the matters referred to in Article 13.2 13.4 Tariff adjustment payment on account of Change in Law 13.4.1 subject to Article 13.2, the adjustment in monthly tariff payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment, repeal of the Law or Change in Law, or

(ii) the date of order/judgment of the competent court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of law."

6. The Stage 2 Power Purchase Agreements, as stated hereinbefore, contain terms and conditions almost identical to those of the first set of agreements. The relevant provisions of the second set of agreements (Stage 2) are as follows:-

"Article 1 : Definitions and Interpretation Change in law – shall have the meaning ascribed thereto in Article 10.1.1 of this agreement.

Indian Governmental Instrumentality – shall mean the Government of India, Governments of state(s) of Maharashtra, and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above State Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer.

Late Payment Surcharge – shall have the meaning ascribed thereto in Article 8.3.5 of this Agreement.

Law – Shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.

SBAR – Shall mean the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.

Article 8 : Billing and Payment .

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8.3.5 In the event of delay in payment of a monthly bill by the procurer beyond its due date, a Late Payment Surcharge shall be payable by such procurer to the seller at the rate of two (2) percent in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each date of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.

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Article 10 : Change in Law 10.1 Definitions In this Article 10, the following terms have the following meanings 10.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

> * the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
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> * a change in interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law; * the imposition of requirement for obtaining any Consents, Clearances and Permits which was not required earlier; * a change in the terms of conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller; * any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or
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> (ii) Change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law 10.2.1 While determining the consequence of Change in Law under this Article 10, the parties shall have due regard to the principle that the purpose compensating the party affected by such Change in Law, is to restore through monthly tariff Payment, to the extent contemplated in this Article 10, the affected party to the same economic position as if such Change in Law has not occurred. 10.3 Relief for Change in Law 10.3.2 During Operation Period The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.4 Notification of change in Law:

> 10.4.1 If the seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim a Change in Law under this Article 10, it shall give notice to

the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller. 10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

a) The Change in Law; and

b) The effects on the Seller.

10.5 Tariff Adjustment Payment on account of Change in Law 10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment, repeal of the Law or Change in Law, or

(ii)the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed tariff."

7. With the object of bringing transparency in the lending rates, that is, the rates of interest charged by banks on loans and advances, the Reserve Bank of India had introduced the Benchmark Prime Lending Rate (BPLR) system in 2003.

8. By a notification dated 1st July 2010, the Reserve Bank of India introduced the Base Rate System, replacing the BPLR system with immediate effect. The relevant extracts of the notification dated 01.07.2010 are set out hereinbelow :-

"2.2.1 The Base Rate system, as detailed below and in Annex 1 will replace the BPLR system with effect from July 1, 2010.

For loans sanctioned up to June 30, 2010, BPLR will be applicable, as given in Annex 3 and 4. However, for those loans sanctioned up to June 30, 2010 which come up for renewal from July 1, 2010 onwards, Base Rate would be applicable.....

2.3.6. The Base Rate system would be applicable for all new loans and for those old loans that come up for renewal.

Existing loans based on the BPLR system may run till their maturity. In case existing borrowers want to switch to the new system, before expiry of existing contracts, an option may be given to them, on mutually agreed terms. Banks, however, should not charge any fee for such switch-over.

2.3.7 Interest rates under the BPLR system are applicable to all existing loans sanctioned up to June 30, 2010. However, wherever loans sanctioned up to June 30, 2010 come up for renewal from July 1, 2010 the Base Rate system would be applicable. The guidelines on Benchmark Prime Lending Rate (BPLR) and Spreads and its determination for existing loans sanctioned up to June 30, 2010 are given in Annex 3 and Annex 4." (Emphasis supplied)

9. Later by a further notification dated 3 rd March 2016, the Reserve Bank of India introduced the Marginal Cost of Funds Based Lending Rate (MCLR) replacing the Base Rate System with effect from 1 st April 2016. The notification dated 03.03.2016 provided:

> "6 (a) (i) All floating rate rupee loans sanctioned and renewed between July 1, 2010 and March 31, 2016 shall be priced with reference to the Base Rate which will be the internal benchmark for such purposes.
>
> .....
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> 6 (b) (i) All floating rate rupee loans sanctioned and renewed w.e.f. April 1, 2016 shall be priced with reference to the Marginal Cost of Funds based Lending Rate (MCLR) which will be the internal benchmark for such purposes subject to the provisions contained in paragraph 7 of this Master Direction.

"(Emphasis supplied)

10. There can be no dispute that the obligation to pay Late Payment Surcharge (LPS) in case of delay in payment of bills raised by the Power Generating Companies on the Appellant arises from the Power Purchase Agreements, the relevant clauses being Article 11.3.4 of the Stage 1 Power Purchase Agreements and Article 8.3.5 of the Stage 2 Power Purchase Agreements.

11. LPS is payable at the rate agreed upon by the parties to the Power Purchase Agreements. The Power Purchase Agreements stipulate that LPS for delay in payment of bills is to be computed on the basis of the Prime Lending Rate fixed as per SBAR, that is, the State Bank Advance Rate.

12. The expression SBAR (State Bank Advance Rate) refers to the Prime Lending Rate notified by the State Bank of India (hereinafter referred to as 'SBI') from time to time, that is applicable per annum for loans with one year maturity, advanced by SBI. It is only in the absence of SBAR that the rate of LPS may be substituted by some other arrangement, by mutual agreement.

13. On 23.09.2016, the Appellant issued notice of 'Change in Law' to independent power producers including the Power Generating Companies impleaded as Respondent Nos.2 to 5.

14. On 02.12.2016, the Appellant filed Case No.24 of 2017 before the MERC claiming that the introduction of the Base Rate and MCLR qualifies as Change in Law. Case No.24 of 2017 has been dismissed by a judgment and order dated 16.11.2017, which has been affirmed by the APTEL in Appeal No.77 of 2018, by the judgment and order impugned in this Appeal under Section 125 of the Electricity Act, 2003.

15. Mr. Vikas Singh appearing on behalf of the Appellant submitted that this appeal raises the following substantial questions of law:

> (a) Whether Late Payment Surcharge (LPS) can be determined on the basis of the Prime Lending Rate (PLR) methodology, particularly when:-
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> (i) Reserve Bank of India discontinued the PLR methodology and shifted to Base Rate system by its notification dated 01.07.2010 and Marginal Cost of Fund-based Lending Rate System (MCLR) by its notification dated 03.03.2016 as methodologies for calculation of rate of interest?

(ii) Should the State Bank Advance Rate (SBAR) as defined in the Power Purchase Agreement be determined only on the basis of PLR even though SBAR is for loans with one year maturity (i.e., short term loans) and not for long term loans?

(b) Whether the notifications dated 01.07.2010 and 03.03.2016 issued by the Reserve Bank of India are an event of change in law in terms of Article 13 and Article 10 of the two sets of Power Purchase Agreements executed by the Appellant with the Power Generators?

(c) Whether LPS, which admittedly is compensatory in nature, can in law be awarded to the Respondents without any evidence of actual loss (equivalent to the LPS determined at the rate of PLR +2%), particularly when Power Generators are availing working capital loan at much lower rate of interest, based on Base Rate or MCLR?

(d) Whether LPS, which is admittedly compensatory in nature, can in law be awarded in such a manner that it results in unjust enrichment of the Power Generators, especially since the interest is to be paid by compounding monthly?

16. Mr. Singh argued that none of the above questions of law have yet been decided by this Court, in the context of LPS. All these questions of law go to the root of the dispute between the Appellant and

the Power Generating Companies and have a direct bearing on the outcome of the lis between the parties. If any of these substantial questions of law are decided either way, the same shall not only be determinative of inter-se rights between the parties during the entire term of the Power Purchase Agreements but shall also have wide ranging impact across the entire electricity sector.

17. In support of his argument that this Appeal involves a substantial question of law, well within the four corners of Section 125 of the Electricity Act, 2003 Mr. Singh cited State Bank of India and Ors. v. S.N. Goyal1, where this Court held:-

> "13. Second appeals would lie in cases which involve substantial questions of law. The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is 1 (2008) 8 SCC 92 a clear enunciation of law by this Court (or by the High Court concerned), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the High Court concerned) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case. Be that as it may." (Emphasis supplied)

18. Mr. Singh also cited Nazir Mohamed v. J. Kamala and Others2, authored by one of us (Indira Banerjee, J), where this Court reiterated that :-

> "32. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way." (Emphasis supplied)

19. Mr. Singh submitted that the LPS under the Power Purchase Agreements must be calculated at prevailing Base Rate/ MCLR Rates as issued by the RBI from time to time. Mr. Singh argued that, as per the definition of SBAR in the Power Purchase Agreement, SBAR means the Prime Lending Rate per annum applicable for loans with one (1) year maturity, as fixed from time to time by the State Bank of India, and in the absence of such rate, any other arrangement that substitutes such Prime Lending Rate, as mutually agreed to by the parties. 2 2020 SCC OnLine SC 676

20. Mr. Singh argued that the definition of SBAR as provided under the Power Purchase Agreements expressly refers to the interest rate that is applicable for loans with one year maturity. The interest rate is therefore, to be renewed on a yearly basis, and further, only the interest rates for short term loans would be applicable to LPS under the Power Purchase Agreements. Upon renewal of the loan, the Base Rate system and/or MCLR system, as the case may be, is to be applicable, for the relevant period for which LPS is to be calculated.

21. Mr. Singh submitted that no PLR rates are being notified by SBI for short term loans. The PLR rates issued by SBI, after notification of the Base Rate system and the MCLR rates by the RBI, are only for long term loans that have not come up for renewal, and for those loans which are running to maturity. Even in case of loans there is option of switching to the Base Rate / MCLR system.

22. Mr. Singh submitted that in Jaipur Vidyut Vitaran Nigam Limited & Ors. v. Adani Power Rajasthan Limited and Anr3., this Court has capped the interest rate on LPS at 9% per annum, inclusive of the 2% in excess of the applicable interest rate. Moreover, this Court has directed that the interest should be compounded annually and not monthly as provided in the clause therein. The relevant portion of the said judgment cited to by Mr. Singh, is reproduced hereunder:

> 3 2020 SCC Online SC 697 "71. Considering the facts of this case and keeping in view that the RERC and APTEL have given concurrent findings in favour of the respondent with regard to change in law, with which we also concur, we may now deal with the question of liability of appellants-

Rajasthan Discoms with regard to late payment surcharge. In this regard, the following Articles 8.3.5 and 8.8 of PPA, which are relevant for the present purpose, are extracted hereunder:

> "8.3.5. In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.

> 72. Liability of the Late Payment Surcharge which has been saddled upon the appellants is at the rate of 2% in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay. Therefore, there shall be huge liability of payment of Late Payment Surcharge upon the appellants-Rajasthan Discoms.
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> 73. With regard to the question of interest/late payment surcharge, we notice that the plea of change in law was initially raised by APRL in the year 2013. A case was also filed by APRL in the year 2013 itself raising its claim on such basis. However, the appellants-

Rajasthan Discoms did not allow the claim regarding change in law, because of which APRL was deprived of raising the bills with effect from the date of change in law in the year 2013. We are, thus, of the opinion that considering the totality of the facts of this case and in order to do complete justice and to reduce the liability of the appellants-Rajasthan Discoms, payment of 2 per cent in excess of the applicable SBAR per annum with monthly rest would be on higher side. In our opinion, it would be appropriate to direct the appellants-Rajasthan Discoms to pay interest/late payment surcharge as per applicable SBAR for the relevant years, which should not exceed 9 per cent per annum. It is also provided that instead of monthly rest, the interest would be compounded per annum.

74. We accordingly direct that the rate of interest/late payment surcharge would be at SBAR, not exceeding 9 per cent per annum, to be compounded annually, and the 2 per cent above the SBAR (as provided in Article 8.3.5 of PPA) would not be charged in the present case."

23. Mr. Singh argued that the provisions of the Power Purchase Agreement considered in Jaipur Vidyut Vitaran Nigam Ltd. (supra) with regard to LPS are in pari materia with the corresponding provisions in the Power Purchase Agreements under consideration in this case. Thus, the aforesaid judgment squarely covers the present case.

24. Mr. Singh argued that, in terms of Article 1 of the Power Purchase Agreements, "law means all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules," Change in Law has been defined to include the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law.

25. Mr. Singh further argued that the Reserve Bank of India is an Indian Government Instrumentality. The Notifications referred to above, were issued by the Reserve Bank of India under Sections 21 and 35A of the Banking Regulation Act, 1949 and have the force of law. Thus, these Notifications are well within the definition of law provided in the Power Purchase Agreements.

26. Mr. Singh emphatically argued that the Reserve Bank of India Notifications dated 01.07.2010 and 03.03.2016, issued after execution of the Power Purchase Agreements with the Respondent Nos. 2 to 5 constituted change in Law, as contemplated in the Power Purchase Agreements.

27. Mr. Singh submitted that the APTEL has erroneously come to the conclusion that LPS is not tariff and also not part of the income of the Respondent Power Generating Companies and thus does not constitute change in law. Mr. Singh submitted that any payment made by a procurer of electricity to the generator of electricity is nothing but a facet of the tariff payable under the Power Purchase Agreement. The term 'tariff' cannot be restricted to only two facets of tariff, i.e., per unit energy charge and fixed energy charge on the basis of production capacity (capacity charge). All payments that are payable to a generator of electricity for supply of electricity under the Power Purchase Agreements including LPS are different facets of tariff. Tariff will also include what the distribution licencees would ultimately charge the consumers.

28. Referring to the meaning of the word 'tariff' as given in Merriam Webster Dictionary, as downloaded from the website https://www.merriam-webster.com/dictionary/tariff on 29.07.2021, which includes a charge, Mr. Singh argued that LPS is part of the charges that are payable by the Appellant to the Respondent Generating Companies under their respective Power Purchase Agreements, and is therefore tariff.

29. Mr. Singh submitted that interest income is considered as income under the Income Tax Act, 1961. LPS is nothing but interest on account of delay in payment of the tariff under the Power Purchase Agreements, and is payable as a part of the said tariff. However, APTEL has by its impugned judgment and order wrongly held that LPS neither has any bearing on the income of the Respondent Power Generating Companies nor is part of the tariff. APTEL has erroneously held that change in methodology in computation of the rate of interest is not change in law.

30. Mr. Singh further argued that the LPS, as a concept, is compensatory in nature for delayed payment, if any. The Order dated 16.11.2017 passed by the MERC in Case No.24 of 2017 also holds that LPS is essentially compensatory in character, in terms of the effect on the seller on account of delay by the procurer in making payments.

31. Mr. Singh further argued that LPS is paid to compensate a power generator for delay in making payments of invoices, because the power generator would have to arrange additional working capital loan to the extent of the amount of outstanding delayed invoice(s). Thus, to offset the loss that may have been caused on account of additional interest on such additional working capital loan, the Power Purchase Agreements contain a provision for LPS. The fact that LPS is to be compounded monthly is a further benefit to the Power Generating Companies. Thus, LPS in essence is nothing but a kind of liquidated damages for delay in payment of invoice(s).

32. Mr. Singh emphatically argued that LPS being compensatory in nature, the same cannot be claimed as a windfall gain. A comparative analysis of the LPS rate claimed by the Respondents, with the prevailing rates of interest for availing working capital loans would reveal that the Respondent Power Generating Companies were making profit from LPS, at the cost of the Appellant, contrary to

the concept of compensation and/or damages.

33. Mr. Singh submitted that it is well settled that law does not permit any windfall gain, while awarding any compensation. In this context Mr. Singh cited M/s Kailash Nath Associates v. Delhi Development Authority and Anr.4 where this court held :-

> 4 (2015) 4 SCC 136 "43. .....On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-
>
> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation." 43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act. 43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section. 43.4. The section applies whether a person is a plaintiff or a defendant in a suit. 43.5. The sum spoken of may already be paid or be payable in future. 43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
>
> 43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.
>
> 44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered.

If damage or loss is not suffered, the law does not provide for a windfall" (emphasis supplied)"

34. To impress upon this Court that the Respondents were making a huge gain from LPS as claimed by them, Mr. Singh emphasized the difference between LPS rates as claimed by the Respondents

and the rates of LPS which the Appellant seeks, based on rates of interest on loans (excluding an additional 2% as payable in terms of the Power Purchase Agreements) as given in the Table below:-

Financial Year	Average PLR (In %) (LPS Claimed by Respondents*	Average Base rate (In %) (Rate sought by Appellant up to Mar 2016)	Average MCLR (In %) (Rate sought by Appellant from Apr 2016)**
2010-11	12.17	7.55	--
2011-12	13.67	8.92	--
2012-13	14.50	9.73	--
2013-14	14.48	9.90	--
2014-15	14.75	9.85	--
2015-16	14.37	9.62	--
2016-17	14.05		9.08
2017-18	13.83		7.98
2018-19	13.43		8.15
2019-20	13.70		8.15
2020-21	12.28		7.10

35. Mr. Singh also relied on a table reproduced below, of the monetary difference between the LPS claimed by the Respondents and the LPS if charged as per Base Rate/MCLR methodologies :-

> Summary of LPS claims of IPPs Final Calculated Additional LPS Amount @ LPS @ quantified by MERC PLR as per Total LPS as LPS paid by Base Generator in order in case no MSEDCL upto per PLR rate MSEDCL Rate/MCLR 24 of 2017 dated March 2021 up to 28.07.2021 March A B C D=B+C E F APML 1001.64 15.92 1017.56 764.7 537.61 RIPL 241.78 2.17 243.95 191.54 138.09 JSW 185.26 0.96 186.22 132.07 92.48 GMR 41.01 0.47 41.48 36.61 28.88 Total 1469.69 19.52 1489.21 1124.92 797.06

36. Mr. Singh emphatically submitted that the Respondent Power Generating Companies have been availing their working capital loans at interest computed in accordance with the Reserve Bank of India Notifications, but are claiming LPS applying archaic and discontinued PLR methodology. There are, however, no materials on record to substantiate the contention that the Respondent Power Companies are availing working capital loans at interest computed in accordance with the Notification dated 3rd March, 2016 of the Reserve Bank of India.

37. Mr. Singh submitted that the Respondent No.2 sought for bill discounting from the Appellant during the financial year 2020-2021. Such bill discounting was done at the rate of 7% per annum. He pointed out that other Power Generators had also discounted their energy bills at interest rates varying from 4 to 6.5%. However, those Power Generators are not parties to this appeal.

38. Mr. Singh adverted to the Independent Auditor's Certificate on computation of actual rate of interest on short term borrowings for Coastal Gujarat Power Limited (CGPL), which is also an Independent Power Producer. The actual rates of interest on short term borrowings by CGPL between 01.04.2018 to 25.01.2021 are as follows:

Period	Rate of interest (In %)
April 01, 2018- March 31, 2019	9.04%
April 01, 2019- March 31, 2020	9.28%
April 01, 2020- January 25, 2021	8.18%

CGPL not being a party to these proceedings its borrowings or the interest paid by them on borrowings is inconsequential.

39. Mr. Singh further submitted that the Appellant is a revenue neutral entity. The Annual Revenue Requirement of the Appellant is required to be approved by the MERC. Expenditure not allowed by the MERC is excluded from the Annual Revenue Requirement that is approved by the MERC. The delay in payments made under the Power Purchase Agreements is due to several extraneous and unavoidable circumstances, which are beyond the control of the Appellant, including but not limited to delayed recovery of dues from the consumers of the Appellant. Even before the outbreak of the COVID-19 pandemic, the Appellant had been suffering major cashflow crunches.

40. Mr. Singh submitted that the Appellant has been facing severe cash flow issues, as the tariff hike approved by the MERC is much lower than the required tariff hike. The same is evident from the gap in the revenue sought by the Appellant as against the revenue allowed by the MERC, the figures of which are as follows:

Particulars	Claimed by MSEDCL (Rs in Crs.)	Approved by MERC (Rs in Crs)
True up requirement for F.Y. 15-16	5546	5032
True up requirement for F.Y. 16-17	6704	4897
Revenue Gap for 17-18	5420	5308

Total	17670	15237

41. Mr. Singh argued that a Revenue gap of Rs.2433 Crores has not been approved by the MERC for the Financial Years 2015-16, 2016-17 and 2017-18. Furthermore, the Appellant has projected/claimed Revenue Gap of Rs. 34,646 Crores upto the Financial Year 2019-20 (including past period revenue gap, from 2015-16 to FY 2017-18). However, the MERC has determined the total Revenue Gap at Rs. 20,651 Crores only vide its Order dated 12.09.2018 passed in a Mid- term Review Petition being Case No. 195 of 2017 out of which Rs. 8,269 Crores was allowed to be recovered in tariff. As per the order of the MERC a "Regulatory Asset" has been created, in respect of the balance amount Rs.12,382 Crores. There is, however, no timeline or stipulations provided in the order of the MERC for recovery of the aforesaid amount. This has led to severe financial problems for Appellant.

42. Mr. Singh submitted that the MERC has disallowed various components of Annual Revenue Requirement sought by the Appellant, such as Agriculture (AG) Sales. The MERC has suo motu disallowed sale of agriculture units for the Financial Years 2014-15 and 2015-16 by 2414 and 3399 units respectively, thereby penalizing the Appellant for Rs.935 Crores & 2286 Crores, for each of the years, which has widened the revenue gap and cannot be met unless the MERC allows the Revenue Gap in terms of Case No. 195 of 2017 (supra). Mr. Singh has referred to the yearwise approval of total sales and AG sale, which are not relevant to this appeal and therefore not reproduced in this judgment, to avoid prolixity.

43. Mr. Singh submitted that, even though the AG Sales figures submitted by the Appellant were based on actual consumption, the MERC was of the opinion that the methodology followed by the Appellant needed to be revisited and validated. Pending the enquiry into the methodology, the MERC mechanically devised its own methodology to calculate AG Sales, which does not take into consideration the details / actual figures submitted by the Appellant. This led to disallowance of a quantum of AG sales. The difference between the AG Sales claimed by the Appellant, as against the quantum allowed, has led to shortfall in cash flow and inability of the Appellant to make payments.

44. Mr. Singh further submitted that the tariff for the Financial Year 2016-2017 came into effect from 01.11.2016 instead of 01.04.2016 in view of Tariff Order dated 03.11.2016 passed by the MERC in Case No.48 of 2016, leading to the older tariff to continue to remain in effect after 7 months of commencement of the Financial Year.

45. Mr. Singh submitted that the shortfall in actual revenue vis-à-vis the approved revenue requirement was made up after almost 2 years, by an order dated 12.09.2018 in Case No. 195 of 2017. The Appellant has therefore been constrained to take loans, the interest component of which is not allowed to be passed on as a tariff component. 46 Mr. Singh submitted that the actual growth in sales of the Appellant in relation to subsidized categories (e.g. HT industrial and Commercial) was very low. Further, tariff subsidy for making prompt payment has widened the gap between expenditure and revenue receipts, so has the rise in the number of consumers from different

categories, who delay payment of their dues.

47. Mr. Singh argued that the MERC determines tariff upon consideration of actual gains and losses. He argued that the MERC considered the Gains/Losses of the Appellant at time of passing the Multi Year Tariff (MYT) Order instead of considering the same at the time of true up of the Appellant as specified in MYT regulations, which resulted into loss of revenue to the Appellant.

48. Mr. Singh further argued that the data submitted and approved in determining Multi Year tariff (MYT) and/or Annual Revenue Requirement (ARR) is based on estimation/ projections/ norms, as against the data which is submitted at the time of True-up Petition, which is based on audited accounts and figures which are actually frozen, as per Regulation 11 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2015, referred to hereinafter as the 'MYT Regulations'.

49. By way of example, Mr. Singh pointed out that, if a particular expense is approved at a certain amount but during true-up exercise, the actual expenditure is higher than that approved by the MYT Order, the Appellant ends up borrowing additional working capital for which the interest is not approved by the MERC, if it crosses the normative working capital. As per the MYT Regulations, the difference would be subject to treatment of sharing of gains or loss as envisaged under Regulation 11. In other words, only 1/3rd of the loss and/or difference would be permitted to be recovered through tariff, and the balance 2/3rd amount would have to be borne by the Appellant as financial loss. This led to further cashflow crunch for the Appellant.

50. Mr. Singh submitted that the time gap between the approval of the Annual Revenue Requirement and the final true up has resulted in grave mismatch in revenue and expenditure thereby increasing the working capital requirement of the Appellant. The Appellant has been constrained to borrow from Financial Institutions/ Banks, on an interest component, which is not passed through in its Annual Revenue Requirement.

51. Mr. Singh argued that another important factor that has deepened the financial crisis of the Appellant is low recovery of dues from agricultural consumers who consume about 30% of the electricity supplied through the Appellant. Similarly, the arrears on account of supply of electricity to Government departments, public water works and for street-lights have also accumulated. Under the MYT Regulations MERC allows a provision for bad debts to the extent of 1.5% of receivables only, even though the largest consumer base of the Appellant is in rural areas where consumers are less likely to pay bills on time.

52. Mr. Singh submitted that these issues are not within the control of the Appellant, but has continued to deeply impact the financial position of the Appellant for many years. It is not that the Appellant has been realising its dues from its consumers in time, but not making payments to the Power Generating Companies. The Appellant is itself in a precarious financial position which becomes worse by levy of interest beyond rates prescribed in RBI Notifications for delay, which is not in the control of the Appellant.

53. Mr. Singh submitted that the COVID 19 pandemic has also severely affected the financial viability of the Appellant, and has led to the Appellant incurring losses to the tune of Rs.7500 crores. Further, the financial position of the Appellant has also been affected by the measures taken to alleviate difficulties of the consumers during the pandemic. The Appellant has given rebate of 2% to all residential consumers for timely payment of all bills (including arrears) of June-20 and July-20 in full, based on actual readings. Further, residential category consumers who were not able to pay the electricity bills of June-20 and July-20 at one go, were allowed to pay bills in three equal instalments, without interest or delayed payment charges.

54. Mr. Singh further submitted that on 26.03.2020 the MERC issued the following 'Practice Direction- Measures to Minimize Public Interface in View of the Coronavirus Epidemic'.

(a) Distribution Licensees were to ensure continuity of supply. Complaints related to restoration of supply as also safety related complaints were to continue to be attended by the Distribution Licensee.

(b) The Distribution Licensees might suspend other non-essential services which required visit to premises of consumers or meeting consumers in person i.e., Meter reading, Billing, Offline Bill Collection at Bill Payment Centres, release of new connections etc.

(c) Automated Meter Reading facility whenever available was to be used for meter reading.

(d) In the absence of Meter reading, the Consumers were to be intimated through digital channels such as email, sms, mobile app about their estimated bill, computed on average basis, as per Supply Code Regulations.

(e) For bill payment, Distribution Licensee was required to facilitate and update alternate payment modes i.e. digital payment mode.

(f) All the above measures were directed to be communicated through social media, electronic media and print media for wider publicity.

55. Later, on 30.03.2020, the MERC issued an order approving a moratorium for consumers under the Industrial and Commercial category, on payment of electricity bills for three billing cycles beginning from the lockdown date of 25.03.2020. Mr. Singh submitted that the said moratorium granted by the MERC has badly affected the revenue mechanism of the Appellant as the Appellant continued to incur expenditure due to its universal service obligations whilst the recovery got badly hit. Further, the MERC, through its practice directions issued on 09.05.2020 and 21.05.2020, gave the following relaxations and/or reliefs to the consumers:

> (a) It was clarified that moratorium of 3 billing cycles had been given to the industrial and commercial establishments for payment of fixed charges, which they would be liable to pay in the subsequent three billing cycles, in equal interest free instalments.

(b) If the consumers chose to pay the entire moratorium amount in one go, rebate of 1% would be given to such consumers.

(c) HT Industrial and HT Commercial consumers were allowed to revise their contract Demand upto 3 times in a Billing Cycle.

(d) Low Tension Industrial and Low Tension Commercial consumers having demand-based tariff were allowed to revise their Contract Demand up to 2 times in a Billing Cycle.

(e) for Industrial and Commercial consumers, only a token amount of 10% of the average energy consumption was to be billed in respect of premises under Lockdown.

56. Mr. Singh argued that these factors clearly show that the Appellant could not make timely payments for reasons beyond its control, for which the Appellant cannot be blamed. It is for this delay that compensation is prescribed under the Power Purchase Agreements by way of LPS. Mr. Singh emphatically reiterated his submission that such compensation cannot in law be a windfall gain or unjust enrichment of the Respondents at the cost of the Appellant, and the consumers including marginalised consumers i.e., agricultural consumers, people living in slums and the downtrodden strata of the society.

57. Mr. Singh finally argued that the claim of the Appellant is not time barred, as contended by the Power Generators. In terms of Article 13.3.2 of the Power Purchase Agreements, the seller is obligated to serve the Change in Law notice to the procurer, if it is beneficially affected by a Change in Law. The Respondent Nos. 2 to 5 however, failed to issue any such notice, and are now attempting to take advantage of their own wrong, in contravention of settled principles of law to this effect. Moreover, on account of the failure of the Respondent Power Generating Companies to issue Change in Law notices under the Power Purchase Agreements, the Appellant herein was constrained to issue the Change in Law notices to the Respondent Generating Companies.

58. In conclusion, Mr. Singh submitted the argument that APTEL erred in law in issuing directions on the Appellant for payment of LPS as claimed. Such directions to make payment to the Respondent Power Generators could not have been made, more so in the Appellant's appeal. No monetary relief could be granted in the Appellant's appeal. The Respondents should have been remitted to MERC for execution and quantification of the Change in Law claims.

59. The only issue in this appeal is whether the change in interest rate system by the RBI from Prime Lending Rate (PLR) to Base Rate and then to MCLR amounts to Change in Law under the Power Purchase Agreements.

60. Mr. Mukul Rohatgi, Senior Advocate appearing on behalf of the Respondent No.2, followed by Dr. Abhishek Manu Singhvi, Senior Advocate appearing on behalf of the Respondent No.3, Mr. Vishrov Mukherjee appearing on behalf of the Respondent No.4 and Ms. Divya Anand appearing on behalf of the Respondent No.5 advanced arguments, opposing the appeal. There being some

overlapping of arguments of the respective Counsel, this Court has not recorded the submission of all Counsel in entirety, to avoid unnecessary repetition.

61. Mr. Rohatgi, Mr. Singhvi, Mr. Vishrov Mukerjee and Ms. Divya Anand all argued in one voice that this Appeal under Section 125 of the Electricity Act 2003, is not maintainable, there being no question of law, not to speak of substantial question of law raised by the Appellant.

62. Mr. Rohatgi appearing for the Respondent No.2, Mr. Singhvi appearing for Respondent No.3, Mr. Mukerjee appearing for the Respondent No.4 and Ms. Divya Anand appearing for the Respondent No.5 submitted that Article 8.3.5 of the Stage 2 Power Purchase Agreements corresponding to Article 11.3.4 of the Stage 1 Power Purchase Agreements between the Distribution Licensee, that is, the Appellant, as purchaser, and the Power Generating Companies being the Respondent Nos.2 to 5, for supply of electricity, governs the LPS payable by the Appellant to the Power Generating Companies, whenever there is delay in payment of bills. Article 11.3.4. of the Stage 1 Power Purchase Agreement, and Article 8.3.5 of the Stage 2 Power Purchase Agreement have been set out earlier in this Judgment.

63. Mr. Rohatgi submitted that the SBAR which is actually the rate of interest for grant of loan/finance by the State Bank of India, has been incorporated in the Power Purchase Agreements and the agreed rate for LPS is 2% above the SBAR. This SBAR keeps changing. LPS is therefore 2% in excess of the applicable SBAR during the billing period.

64. Mr. Rohatgi pointed out that the SBI rate is existing even today, as pleaded by the Respondent No.2 at pages 48 to 50 of its Reply to the application for stay being I.A. No. 69796 of 2021 filed by the Appellant. The SBAR for the month of March 2021 is 12.15%.

65. Ms. Divya Anand appearing on behalf of the Respondent No.5, drew the attention of this Court to Clause 10 of the Notification dated 03.03.2016 of the Reserve Bank of India, introducing the MCLR system with effect from 01.04.2016, in place of the Base Rate System, in terms whereof existing loans based on the PLR system were to continue under the PLR System till maturity. She submitted that MCLR System was to apply to loans sanctioned after 01.04.2016, and not loans already in existence as on that date.

66. Ms. Divya Anand submitted that the State Bank of India has been notifying all three rates, that is, PLR, Base Rate and MCLR as demonstrated in the Table of interest rates of the State Bank of India during the year 2020 which is reproduced below:-

> SBI notified Rate 10.12.2020 10.09.2020 10.06.2020 10.03.2020 BPLR 12.05 12.15 12.15 12.90 Base Rate 7.30 7.40 7.40 8.15 MCLR 7.30 7.30 7.30 8.05

67. Mr. Rohatgi argued that, the contention of the Appellant that, the contractual rate, as incorporated in the Power Purchase Agreements, which is the SBI Rate, will stand altered by introduction by the Reserve Bank of India of the MCLR w.e.f. from 2016, is completely misconceived. The Power Purchase Agreement cannot be deemed to be amended by introduction of

the MCLR. It is open to the Appellant, a Government entity, to take a loan at a cheaper rate if it wants to, and clear the bills raised by the Power Generating Companies.

68. Mr. Rohatgi submitted that the Appellant is purporting to portray late payments as an act of virtue. If the Appellant did not delay payment, it would not have to pay any LPS. LPS is attracted only in the event of delay in payment beyond the due date. The Appellant cannot circumvent the provisions of the Power Purchase Agreement which is a binding contract.

69. Mr. Rohatgi argued that the APTEL has, by its impugned Judgment and order dated 27.04.2021, correctly dismissed the Statutory Appeal filed by the Appellant, and upheld the order of the MERC dated 16.11.2017. The limited issue involved in the present Civil Appeal is, whether the Appellant is liable to pay LPS calculated as per the SBAR (State Bank Advance Rate) as provided in the Power Purchase Agreements executed between the Appellant and Mr. Rohatgi's client or as per the Base Rate System introduced in 2010 and Marginal Cost of Funds Based Lending Rate System(MCLR) introduced in 2016 as notified by the Reserve Bank of India. Mr. Rohatgi pointed out that the Appellant had not, at any stage, denied that it had committed a series of defaults in timely payments.

70. Mr. Rohatgi emphatically argued that the APTEL had, by the impugned judgment and order, very rightly held that the notifications, guidelines or circulars issued by the Reserve Bank of India, including the Notifications dated 09.04.2010 introducing the Base Rate and 03.03.2016 introducing the MCLR, after execution of the Power Purchase Agreements dated 14.08.2008, 31.03.2010, 09.08.2010 and 16.02.2013 between the Appellant and the Respondent No.2 would not qualify as Change in Law. He argued that the APTEL had correctly held that the payment of LPS along with interest calculated on the SBAR, has authorisation in the express terms of the aforesaid Power Purchase Agreements. Moreover, since the Circulars dated 09.04.2010 of the Reserve Bank of India, introducing Base Rate had been in existence since 2010, the Change in Law notice, issued only on 23.09.2016, had rightly been held to be time barred.

71. Mr. Rohatgi submitted that this Appeal does not meet the requirement of Section 125 of the Electricity Act, 2003, which only permits grounds as specified under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"). Section 100 of the CPC mandates that the first Appellate Court is the final Court of facts. Section 100 of the CPC does not permit interference with findings of fact of the first Appellate Court.

72. Mr. Rohatgi submitted that contrary to the grounds permitted in Section 100 of the CPC, in this Appeal under Section 125 of the Electricity Act, 2003, the Appellant has raised pure questions of fact, which have been concurrently decided in favour of the Power Generating Companies. This Appeal is, therefore not maintainable. In support of the aforesaid argument, Mr. Rohatgi cited DSR Steel (P). Ltd. v. State of Rajasthan and others5, Tamil Nadu Generation & Distribution Corporation Ltd. v. PPN Power Generating Company Private Limted6 and Wardha Power Company Limited v. Maharashtra State Electricity Distribution Co. Limited and Another7.

73. Mr. Vishrov Mukherjee cited DSR Steel (P) Ltd. v. State of Rajasthan and Ors. (supra) referring to paras 4, 14, 15, 16, 18 & 19 and Power Grid Corporation of India and Ors. v. Tamil Nadu Generation and Distribution Company Limited and Others .8 in support of the argument that this appeal under Section 125 of the 5 (2012) 6 SCC 782 (para 14) 6 (2014) 11 SCC 53 (paras 53 and 70)

7. (2016) 16 SCC 541 (para 5) 8 (2019) 7 SCC 34 (para 1 and 6) Electricity Act, 2003 is liable to be dismissed as it does not involve any substantial question of law.

74. Mr. Mukherjee also cited Bharat Sanchar Nigam Ltd. v. Pawan Kumar Gupta9, Wardha Power Co. Ltd. v. MSEDCL & Anr ., (supra) and Tuppadahalli Energy India Private Limited v. Karnataka Electricity Regulatory Commission and Anr. 10, where this Court dismissed statutory appeals on the ground of absence of any substantial question of law.

75. Mr. Rohatgi pointed out that both the MERC and t he APTEL have rendered concurrent findings against the Appellant as shown in the tabular statement given below:

Concurrent Findings	Order of MERC	Judgment and Orders of APTEL
The Appellant (MSEDCL) is called upon to pay LPS only when it delays payment of monthly or supplementary bills beyond the due date.	Para 12 @ pg 109-111	Para 13 @ page 11-14
SBI PLR for loans with maturity of one year, remains in vogue and its value continues to be declared by SBI from time to time.	Para 13 @ page 109-111	Para 12 @ page 11-14
The RBI revisions of PLR to Base Rate in 2010 and MCLR in 2016 do not amount to Change in Law in terms of the Power Purchase Agreements (PPAs).	Para 14 @ page 109-111	Para 14 @ page 11-14

9. (2016) 1 SCC 363
10. (2017) 11 SCC 194

The Appellant (MSEDCL) entered into several PPAs, assumably with open eyes, subsequent to the notification of the Base Rate System by RBI.	Para 16 @ page 109-111	Para 23 @ page 16
MSEDCL issued Notices of Change in Law to the	Para 15 @	Para 23 @

Respondents only in September, 2016, i.e. more than 6 years after RBI introduced the Base Rate system in place of the BPLR system.	page 109-111	page 16

76. Mr. Rohatgi argued that the Appellant is seeking to raise the above issues which have been concurrently decided, once again. No substantial question of law has arisen in this Appeal filed under Section 125 of the Electricity Act, 2003 warranting interference by this Court. Mr. Rohatgi cited Ramanuja Naidu v. V. Kanniah Naidu and Another11 and Navaneethammal v. Arjuna Chetty12 in support of his aforesaid argument.

77. Mr. Rohatgi argued that since SBAR continues to be in operation, it cannot be said that there is any change in law. The Respondent No.2 and the Appellant have entered into four Power Purchase Agreements, the first dated 14.08.2008 for supply of 1320 MW, the second dated 31.03.2010 for supply of 1200 MW, the third dated 09.08.2010 for supply of 125 MW and the fourth dated 16.02.2013 for supply of 440 MW of electricity, pursuant to the competitive bidding process initiated by the Appellant. Article 8.3.5 of the Power Purchase Agreements

11. (1996) 3 SCC 392 (para 11)

12. (1996) 6 SCC 166 (para 11) dated 31.03.2010, 09.8.2010 and 16.02.2013, executed after introduction of the Base Rate System, specially provide for computation of LPS as per the SBAR, in invocation of the principle of incorporation by reference. There is a specific reference to the SBAR in the Power Purchase Agreements, binding on the parties for the entire term of the contract i.e., 25 years. The Power Purchase Agreement dated 14.08.2008 for supply of 1320 MW entered into between the Appellant and the R espondent No.2 also contains similar provision for LPS.

78. Mr. Rohatgi further argued that the Power Purchase Agreements define SBAR to mean “the prime lending rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties”.

79. Mr. Rohatgi submitted that the definition of SBAR in the Power Purchase Agreements makes it clear that any reference in the Power Purchase Agreements to SBAR has to be construed as reference to the Prime Lending Rate as fixed by State Bank of India. These provisions have no reference at all to the Reserve Bank of India. Further, the Power Purchase Agreements do not contemplate automatic shift to Base Rate / MCLR notified by RBI, even if SBI PLR ceased to be in existence. The agreed position in such situation is for the contracting parties to substitute SBI PLR with any other mutually agreed arrangement. Having agreed to such an arrangement in the Power Purchase Agreements, the claim of Appellant for treating Base Rate/MCLR as Change in Law event cannot be entertained.

80. Mr. Rohatgi argued that, while introducing the Base Rate system in 2010 and the MCLR system in 2016, the Reserve Bank of India had provided for the continuation of the earlier Benchmark Prime Lending Rate (BPLR) dispensation for existing loans. Consequently, the SBAR Rate referred to in Clause 8.3.5 and/or 11.3.4 of the two sets of Power Purchase Agreements, which is the SBI PLR for loans with maturity of one year, continues to be notified even to this day. The same is evident from the Notification dated 03.03.2016 of the Reserve Bank of India.

81. Mr. Rohatgi further argued that, in terms of the relevant clauses in the Power Purchase Agreements regarding Change in Law, the pre- requisites are that the event in question must be one that is covered by Clause 10.1.1 of the Stage 2 Power Purchase Agreements corresponding to Clause 13.1.1. of the Stage 1 Power Purchase Agreements, that is, it must be a new enactment, or amendment of existing legislation, or new interpretation by a competent court, the event must have occurred after the Cut-off Date, which is in this case, concededly 31.07.2009, that is, the date seven days prior to the Bid Deadline date, which is 07.08.2009 and such event must have resulted in additional recurring or non-recurring expenditure or income for the Seller. The first and third of these conditions are not fulfilled by the Appellant since the LPS Rate under the Power Purchase Agreements is not linked to Reserve Bank of India circulars or guidelines and the RBI notifications referred to are not shown to have resulted in any additional income or expenditure for the Power Generating Companies. The introduction of Base Rate in 2010 and MCLR in 2016 by the Reserve Bank of India by its Notifications/Circulars does not, therefore, amount to Change in Law. Therefore, the contention of the Appellant that Reserve Bank of India Directive of 2016 amounts to "Change in Law" is erroneous and misleading. The Appellant is, therefore, liable to pay the LPS as per SBAR as rightly held by the MERC and the APTEL.

82. Refuting the argument of Mr. Singh that the RBI circulars are to be considered as Change in Law, Mr. Rohatgi advanced an alternate submission that the Appellant is not entitled to claim Change in Law since Clause 13.3.1 of the Power Purchase Agreement dated 14.08.2008 for supply of 1320 MW and Article 10.4.1 of the other three Power Purchase Agreements provides that notices of Change in Law events are to be issued by the affected party as soon as reasonably practicable after becoming aware of the Change in Law. While the changes cited by the Appellant were effected by Reserve Bank of India from July, 2010 and again April, 2016 and notified in advance, the Appellant issued notices of Change in Law to the Respondent No.2 only in September 2016 i.e. more than 6 years after Reserve Bank of India introduced the Base Rate system in place of the BPLR system. The Appellant could not have been unaware of the revision effected by the Reserve Bank of India at that time. Nor has it explained this inordinate delay in raising its claim. Further, while Base Rate was introduced on 09.04.2010, the Appellant entered into Power Purchase Agreements with the Respondent No.2 on 09.08.2010 and 16.02.2013 incorporating PLR as the LPS rate for supply of contracted quantum of 125 MW and 440 MW of electricity respectively to the Appellant. As such, the Appellant's claim is inadmissible, the same being barred by limitation.

83. Mr. Rohatgi emphatically reiterated that Late Payment Surcharge (LPS) is imposed only when the re is delay in the payment of bills. The liability towards LPS was therefore, within the control of the Appellant, for there would be no LPS liability, if the Appellant did not delay payment of monthly or supplementary bills beyond the due date. Mr. Rohatgi argued that, LPS is a penalty to which the

Appellant has voluntarily agreed, in case it delays payment to the Power Generating Companies. Any changes by the Reserve Bank of India in respect of interest on loans advanced by Banks and Financial Institutions, do not affect in any manner the rates at which power was agreed to be sold and purchased or the rate at which LPS is chargeable. Mr. Rohatgi emphatically argued that LPS is a deterrent to inculcate payment discipline and is also entirely avoidable.

84. Mr. Rohatgi pointed out that the APTEL has, by its impugned judgment and order (para 21) categorically rejected the Appellant's contention of there being unjust enrichment of the Respondent Power Generating Companies, on account of LPS being calculated at SBAR Rate. The APTEL has held :-

> (i) In order to be termed as unjust enrichment, benefit gained by a party must be such as to have been retained without any legal basis;
>
> (ii) The primary purpose of LPS being to compensate the Power Generators for the time value of money lost on account of delay in payment by the Appellant, it cannot be said that recovery of LPS results in the generators being unjustly enriched;
>
> (iii) The payment of LPS, with interest calculated on the Prime Lending Rate, has authorisation in the express terms of the Power Purchase Agreements;
>
> (iv) The claim of LPS does not represent any benefit accruing to the Respondent Power Generating Companies, but is compensatory in nature. Moreover, LPS is not economic restitution but is a disincentive;
>
> (v) It is wrong to equate LPS with carrying cost or actual cost incurred because any interest paid for finances raised cannot have any nexus to the LPS as it is not the same as a loan advanced, but is a penalty for delay;
>
> (vi) The LPS payable in terms of legally enforceable contracts cannot be termed as unjust enrichment, as payment of LPS is due to default by the Appellant and not for any action taken by the Power Generators. That being the factual position, it is incorrect on the part of Appellant to allege unjust enrichment.

85. Mr. Rohatgi drew the attention of this Court to Paragraph 35 of the impugned judgment and order of the APTEL recording its categorical finding that the Appellant had never denied the serious defaults it committed, by inordinately delaying the payment of bills to the Respondent Power Generating Companies. The APTEL found that the Appellant was indisputably liable to pay LPS.

86. Mr. Rohatgi finally argued that even though the proceedings were initiated before the MERC in 2017, the Appellant is now citing the pandemic related financial hardships caused during the year 2020 to renege on its contractually binding obligation of payment of LPS in terms of the Power Purchase Agreements and somehow seeking to unilaterally amend the terms of the Power Purchase Agreements so that they are favourable to them, which is impermissible in law.

87. Mr. Rohatgi submitted that LPS is calculated on compounding basis with monthly rests in terms of the Power Purchase Agreements and further the same cannot be passed on to consumers in view of the Order dated 29.08.2020 of MERC in Case No.45 of 2020.

88. Mr. Rohatgi argued that by way of this Appeal, the Appellant is, in fact, seeking a downward revision of a contractually determined penalty in order to unjustly enrich itself at the cost of the Respondent Power Generating Companies, more so, since admittedly the Appellant recovers delayed payment surcharge from its consumers at much higher rates than the SBI PLR.

89. Mr. Singhvi appearing on behalf of the Respondent No.3 referred to the Power Purchase Agreement dated 23.02.2010 executed by and between the Appellant and the Respondent No.3 for supply of electricity to the Appellant. Mr. Singhvi pointed out that the Power Purchase Agreement was executed pursuant to a bidding process carried out by the Appellant under the aegis of the MERC under Section 63 of the Electricity Act, 2003. The tariff was adopted by the MERC (Respondent No.1) and the Power Purchase Agreement was approved by the MERC.

90. Mr. Singhvi argued that, it was not in dispute that payment against monthly bill for electricity charges raised by the Respondent No.3, was agreed to be made by the Appellant within 30 days. It is also not disputed that in the event of delay in payment of a monthly, beyond its due date, that is, 30 days, the Appellant would be bound to pay a Late Payment Surcharge (LPS). In this context, Mr. Singhvi referred to Clause 11.3.4 of the Power Purchase Agreement which has already been reproduced hereinbefore.

91. Mr. Singhvi submitted that in this case too the rate of LPS was 2% in excess of SBAR. Mr. Singhvi referred to the definition of SBAR in the concerned Power Purchase Agreement, defining SBAR to mean the prime lending rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. Mr. Singhvi pointed out that it was only in the absence of any prime lending rate that the rate of LPS could be fixed at such rate as might be mutually agreed to by the parties.

92. Mr. Singhvi questioned the legality of the argument of the Appellant that the purpose of publication of the SBI PLR having undergone a change in view of the RBI circulars/notifications, the SBI PLR, which admittedly continues to be published, can no longer be used as a benchmark reference in a Power Purchase Agreement, that the Power Purchase Agreement reference benchmark rate should be modified in accordance with the RBI circulars/guidelines. Mr. Singhvi argued that the arguments of the Appellant neither had legal nor contractual basis. Both the forums below have rightly rendered concurrent decisions holding that the RBI circulars/guidelines have no impact on the rate of LPS in the contract and the agreed terms of a contract cannot be rewritten.

93. Mr. Singhvi argued that the Power Purchase Agreement for sale and purchase of power, was between a power generating company and a procurer of electricity, to which the circulars/guidelines of RBI applicable to banks and financial institutions can have no application. The Power Purchase Agreement does not incorporate or refer to any RBI circulars or guidelines. Mr. Singhvi cited the judgment of this Court in B.O.I. Finance Limited v. Custodian and Ors.13 where this Court held that

RBI

13. (1997) 10 SCC 488 circulars/instructions/guidelines cannot result in invalidation of a contract even between a bank and a third party and the consequence for violation is penalty as provided for in Section 46 of the Banking Regulation Act. The RBI circulars/guidelines cannot therefore vary or modify a contract between two parties, none of which is a bank or a financial institutions.

94. Mr. Singhvi argued that reliance by the Appellant on the RBI circulars/guidelines, in the context of the agreement between the Appellant and the Respondent is totally misplaced. The RBI circulars/guidelines are admittedly instructions issued to banks and financial institutions and are not applicable to either the Appellant or the Respondent, who are engaged in the business of sale and purchase of electricity and not of advancing loans. Further, SBAR as defined under the PPA is also admittedly, not linked to the RBI circulars/guidelines. Therefore, the impact of the RBI circulars/guidelines on the purpose for which the SBI PLR continues to be notified, is totally irrelevant for the purposes of the present case.

95. Mr. Singhvi emphatically argued that the agreement provides for the parties to mutually agree on a substitute of SBI PLR, in case of its absence. This dispensation is contained in the definition of SBAR itself. This special provision in the agreement applicable to the specific case of absence of SBI PLR, excludes the applicability of the general 'Change in Law' provision contained in Article 13 of the PPA. In the context of his arguments Mr. Singhvi cited Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission and Others 14 the relevant paragraph whereof is reproduced herein below:-

> "38. In the present case, the perusal of various Articles would reveal that the provisions under Article 14 are general in nature. The provision under Article 3.4.2 is specific, only to be invoked in the case of non-compliance with any of the conditions as provided under Article 3.1.2. As such, the special provision made in Article 3.4.2 will exclude the applicability of general provisions contained in Article 14 of the contract."

96. Mr. Singhvi argued that the general provisions of the Change in Law clause have been consciously kept out by the parties, in relation to a situation arising out of absence of the SBI PLR and the consequent calculation of LPS. Therefore, the Hon'ble APTEL correctly found as under:

> "13.... On the contrary, there is a conscious exclusion regarding any suo moto change in the rate to be applied while calculating LPS, it being incorrect to argue on the assumption that the contract permits automatic change in system."

97. Mr. Singhvi submitted that the consequence of a change in law event under the Power Purchase Agreement is determination of compensation for any increase/decrease in revenues of cost to the Seller by the MERC. Late payment surcharge is payable only in case payment against the monthly bills is delayed by the Procurer. As such, the LPS rate does not in any manner affect the tariff at which electricity is agreed to be sold and purchased. Therefore, there is absolutely no

increase/decrease in the

14. (2019) 19 SCC 9 revenues or cost to the Respondent, connected with the object of the agreement, i.e. generation and sale of electricity, as a result of the RBI notification/circulars. Consequently, the RBI notifications/circulars relied upon by the Appellant, in the context of LPS, do not require any determination of change in law compensation.

98. Mr. Singhvi ponted out that the MERC had, in its order dated 16.11.2017, rightly rejected the claim of the Appellant inter alia observing:-

> "12. However, the LPS provision is attracted only when the payments are not made by MSEDCL against the Monthly Bills of the Seller within the time stipulated in the PPAs Any changes in the basis of the LPS rates consequent to revisions by the RBI do not affect in any manner the rates at which power was agreed to be sold and purchased under the PPAs and in the consequent financial implications for either Party resulting in a liability to compensate the affected Party...."

99. Mr. Singhvi submitted that the APTEL, aptly concurred with the finding of the MERC and held:-

> "16. Having regard to the terms of the contract (PPA) as a whole, there is no doubt that provision for compensation to the affected party for a Change in Law event is essential with regard to tariff only. The rate of LPS has no bearing or impact on tariff. Any possible changes in the basis of the LPS rates consequent to revisions by the RBI, or for that matter, SBI would not affect the rate at which power was agreed to be sold and purchased under the PPAs and consequently there is no financial implications on expenditure or income for either Party. The LPS only recompenses what was lost in terms of real value of money due to delay in payment."

100. Mr. Singhvi argued that the Appellant has till 24.06.2016, signed reconciliation statements with the Respondent No.3 in which the Appellant calculated the LPS on the basis of the PLR published by the State Bank of India and not the Base Rate or the MCLR, as is now being claimed by the Appellant. It is, therefore, clear that in this case, there has never been any dispute whatsoever with regard to the principal liability of the Appellant towards energy charges, and no dispute was raised regarding LPS for over 5 years.

101. Mr. Rohatgi, Mr. Singhvi, Mr. Mukherjee and Ms. Anand all submitted that the contentions of the Appellant are liable to be rejected outright, since LPS provision in the Power Purchase Agreements, is not linked to the rate at which the affected party is able to get loans from Banks or Financial Institutions. The Appellant having agreed to pay LPS at SBI PLR, till such time it exists, cannot now seek any other rate such as MCLR or actual interest rates at which the Respondent Power Generating Companies obtain financial accommodation. On behalf of the Respondent No.3 Mr. Singhvi supported the submissions of Mr. Rohatgi.

102. Mr. Singhvi distinguished the judgment of this Court in Jaipur Vidyut Vitran Nigam Limited v. Adani Power Rajasthan Ltd. And Anr. (supra) and argued that there is no bona fide dispute in this case. The Appellant has acted in conscious disregard of its obligations under the Power Purchase Agreements. Mr. Singhvi cited the decision of this Court in Union of India v. Association of Unified Telecom Service Providers of India & Ors. 15 where this Court considered an identical interest clause in the license. The interest clause, which has been reproduced in Paragraph 182 of the judgment of this Court, reads:

> "In re: Levy of interest, penalty, and interest on penalty. Para 182. Levy of licence fee is provided in Clause 20.2. In case of any delay in payment of licence fee beyond the stipulated period would attract penalty at the rate, which would be 2% above the prime lending rate (PLR) of State Bank of India. As per Clauses 20.5 and 20.8, if the licensee does not pay the demand, consequences would follow. The clauses are extracted hereunder:
>
> "20.5. Any delay in payment of licence fee payable or any other dues payable under the Licence beyond the stipulated period will attract interest at a rate which will be 2% above the prime lending rate (PLR) of State Bank of India existing as on the beginning of the financial year (namely 1st April) in respect of the licence fees pertaining to the said financial year. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest. A month shall be reckoned as an English calendar month."

103. Mr. Singhvi submitted that in the case of Association of Unified Telecom Service Providers of India (supra), it was contended by the Distribution licensee that under section 74 of the Contract Act, compensation must only be reasonable compensation. For this, reliance was placed on Hindustan Steel Ltd. v. State of 15 2020 (3) SCC 525 Orissa16, Akbar Badrudin Giwani v. Collector of Customs 17, Jaiprakash Industries Ltd. v. Commissioner of Central Excise, Chandigarh18, Tecumseh Products India Ltd. v. Commissioner of Central Excise, Hyderabad19, J.K. Synthetics Ltd. v. Commercial Taxes Officer20, Kailash Nath Associates v. Delhi Development Authority and Another21 and Central Bank of India v. Ravindra and Others22. However, this Court found that the dispute raised by the Distribution Licensee with regard to the definition of gross revenue, in that case, was not bona fide and had only been raised to delay payment in accordance with the Power Purchase Agreement. This Court, accordingly, held that none of the above decisions would come to the aid of the Distribution Licensee and concluded that since there is a contractual stipulation, the interest can be levied and compounded. Mr. Singhvi referred to the part of said judgment reproduced hereinbeow:-

> "192....The ratio of the case, it is not attracted for the reason that in the instant matter, it is the contractual rate of interest and penalty agreed to which cannot be said to be arduous in any manner. The rate of interest has been agreed and particularly since it is a revenue sharing regime, and the licensees have acted in conscious

16 1969 (2) SCC 627 17 1990 (2) SCC 203 18 2003 (1) SCC 67 19 2004 (6) SCC 30 20 1994 (4) SCC 276 21 2015 (4) SCC 136 22 2002 (1) SCC 367 disregards of their obligation. Thus on the anvil of the decision above also, they are liable to pay the dues with interest and penalty..... ..... There is no such discretion available when the parties have agreed in default what amount is to be paid. It automatically follows that it is not to be determined by the licensor once over again. Parties (licensor and licensees) are bound by the terms and conditions of the contract. There is no enabling clause to vary either the rate of interest or the penalty provided therein and even if permissible, it is not called for to vary interest or penalty fixed under the agreement in the facts and circumstances of the case.....

197. It is not levy of penal interest which is involved in the instant case. Thus, based on the decision mentioned above, we find that when there is contractual stipulation, the interest can be levied and compounded"

104. Mr. Singhvi submitted that there being no dispute in this case, regarding the principal sums due under the monthly bills; and this Court having taken a view in Association of Unified Telecom Providers of India (supra) that interest on delayed payment at 2% in excess of SBI PLR is not arduous, there is no case made out for this Court to reduce the contractually agreed rate of interest, in exercise of powers under Article 142 of the Constitution of India. On the other hand, facts would reveal that in this case the Appellant has deliberately and consciously been disregarding its obligation and raising frivolous disputes as an afterthought, only with a view to further delay payment in accordance with the terms of the Power Purchase Agreement. No indulgence need, therefore, be granted to the Appellant.

105. Mr. Singhvi submitted that the Appellant has the funds to clear the interest liability. This is apparent from the fact that the Appellant had, itself made an offer before the MERC, to clear all dues of the Respondent No. 3 in 1 weeks' time. The Appellant is, therefore not entitled to further time.

106. Mr. Singhvi submitted that, it is wrong for the Appellant to suggest that the burden of interest shall be passed on to the consumers. The MERC has already held that as the Appellant solely is responsible for the delay in making payment and therefore the said burden cannot be passed on to the consumers.

107. Mr. Singhvi further submitted that in any case, claims pertaining to the period of 3 years prior to the filing of the Petition before the MERC that is, before 02.12.2016, are clearly barred by limitation.

108. Mr. Singhvi concluded his arguments with the submission that the Regulations relied upon by the Appellant were the Tariff Regulations, framed by the MERC for the purpose of determination of tariff for generating stations under Section 62 of the Act, which have no application in this case, where the Power Purchase Agreements have been executed pursuant to a bid process under Section 63 of the Electricity Act. Mr.

Singhvi submitted that the Appellant as purchaser was in no way concerned with how the Respondent manages the shortfall in working capital, whether from internal accruals, additional equity infusion, foreign loans, domestic loans etc. in a bid out tariff, adopted by the MERC under Section 63 of the Electricity Act.

109. Mr. Singhvi submitted that the second appeal filed by the Appellant should be dismissed with directions to the Appellant to make payment of the balance reconciled outstanding interest liability of Rs.48.55 crore (i.e. 47.79 crore + Rs. 0.76 crore as per the Appellant's affidavit dated 29.06.2021 I.A. No.73474/2021.

110. Mr. Vishrov Mukherjee, appearing on behalf of the Respondent No.4, adopted the arguments advanced by Mr. Rohatgi and Mr. Singhvi, and also argued that the Appellant's contention that the PLR had been replaced with other interest rate systems was incorrect. He argued that Reserve Bank of India had introduced Base Rate and MCLR prospectively. Referring to Annexure R-2 of the reply of the respondent no.4 to the appellant's stay application being IA 69709/2021, Mr. Mukherjee pointed out that the PLR system was still continuing. He submitted that SBI continues to notify PLR on quarterly basis.

111. Mr. Mukherjee reiterated the submission of Mr. Rohatgi and Mr. Singhvi that the introduction of Base Rate and MCLR interest rate system does not constitute a Change in Law under the Power Purchase Agreements. Mr. Mukherjee argued that in terms of Article 13.1.1 of the agreement dated 23.02.2010, between the Appellant and the Respondent No.4, the Change in Law evaluation is a two step process being:

a) Occurrence of an event described as a change in law event in Article 13.1.1 and;

b) Such change in law has to result in any increase/ decrease in cost / revenue of the Seller, i.e.,the Power Generating Company i.e. the Respondent no.4 [Art. 13.2(b)].

112. Referring to Uttar Haryana Bijli Vitran Nigam Limited and Another v Adani Power Limited and Others23 Mr. Mukherjee argued that a change or amendment in the LPS rate does not constitute Change in Law because there is no impact on cost or revenue of the Generating Company. LPS is payment for a default committed by the Appellant in making timely payment. It has no impact on the cost incurred or the revenue received by the Generating Company. It is in the nature of a contingent liability incurred by the Appellant for failing to adhere to its contractual obligations under the PPA.

113. Mr. Mukherjee argued that compensation to the Affected Party for a Change in Law event is by adjustment of tariff. LPS has no bearing or impact on tariff., Therefore, the Appellant's claim does not qualify as a Change in Law event, as change in the LPS rates do not affect the tariff under the Power Purchase Agreements, and consequently there are no

23. (2019) 5 SCC 325 (para 11) financial implications on expenditure/income for either Party. In support of his argument, Mr. Mukherjee referred to paragraphs of Adani Power Ltd. (supra).

114. Mr. Mukherjee reiterated the submission of Mr. Rohatgi and Mr. Singhvi that the LPS rate under the Power Purchase Agreements, is not linked to RBI Notifications/Circulars/Guidelines. The applicable interest rate for payment of LPS is contractually defined, and linked to PLR rates notified by State Bank of India. This is independent of any RBI Notification/Circular/Guideline. Citing Union of India v. Association of Unified Telecom Service Providers of India and Others 24, Mr. Mukherjee argued that, once a term has been defined contractually, parties cannot vary such terms.

115. Mr. Mukherjee reiterated the submission of Mr. Rohatgi and Mr. Singhvi that in terms of Article 11.3.4 read with the definition of SBAR, the parties have agreed to apply the Prime Lending Rate applicable for loans with one year maturity as fixed from time to time by State Bank of India in fixing the applicable LPS rate and the parties have also agreed that in case SBI PLR is not available, the parties are to mutually agree to the interest rate. Therefore, the parties have, by doctrine of incorporation, included a particular interest rate for calculation of LPS.

24. 2020 (3) SCC 525 It is not open to the Appellant to seek an interest rate different from what has been contractually agreed, as held in CLP India Private Limited v. Gujarat Urja Vikas Nigam Limited and Another25.

116. Mr. Mukerjee argued that State Bank of India is, in any event, still notifying the Prime Lending Rate. Mr. Mukerjee submitted that the rate so notified is applicable to all cases and instances irrespective of the tenor, duration and type of transaction, including loans of one year maturity.

117. Mr. Mukherjee further argued that Power Purchase Agreements are complex technical documents which the parties having knowingly executed. The express terms of the Power Purchase Agreements must be given effect. Citing Nabha Power Limited v. Punjab State Power Corporation Limited (PSPCL) And Another 26, Transmission Corporation of Andhra Pradesh Ltd. And Others v. GMR Vemagiri Power Generation Ltd. And Another 27, and Shree Ambica Medical Stores and Others. v. Surat People's Cooperative Bank Limited and Others28, Mr. Mukherjee submitted that it is settled law that Courts will neither rewrite nor substitute the

25. 2020 (5) SCC 185 (paras 32 & 34) 26 (2018) 11 SCC 508 (paras 45 & 72) 27 (2018) 3 SCC 716 28 (2020) 13 SCC 564 (para 20) terms of a Contract.

118. Mr. Mukherjee argued that, if Change in Law is applied to change in interest rate it would render the provision relating to parties having to mutually agree on a different interest rate redundant. Mr. Mukherjee adverted to Article 1.2.13 of the Power Purchase Agreements, which states that different provisions of the Power Purchase Agreements have to be read and interpreted harmoniously in order to give effect to all provisions. Treating change in interest rate system as change in law (despite parties having agreed to mutually decide on the consequences) will render the latter part of the SBAR definition otiose since only the Regulatory Commission can decide change in law claims.

119. Mr Mukerjee submitted that Base Rate was introduced with effect from 09.04.2010 whereas the appellant entered into the Power Purchase Agreements with the Respondent No.4 on 22.04.2010 and 05.06.2010. This further establishes the point that parties have consciously agreed to apply a particular interest rate (SBI PLR) and not the Reserve Bank of India notifed interest rate.

120. Mr.Mukherjee submitted that the present Power Purchase Agreement has been entered into under Section 63 of the Electricity Act pursuant to competitive bidding, based on quoted tariff alone. There is no separate element of interest on working capital. Irrespective of the expenditure / cost incurred by the generating company, it only receives the bid tariff. Therefore, the argument that generating companies are benefitting on account of an arbitrage between the LPS Rate and interest rates being paid by them is incorrect.

121. Mr. Mukherjee finally argued that the APTEL and the MERC have rightly held that payment / imposition of LPS is within the control of the Appellant. Mr. Mukherjee submitted that, being in default admittedly, the Appellant ought not to be permitted to benefit from its default and seek a lower penalty for failure to comply with its obligations of making timely payment. The defaults were during 2011 to 2017 during which time there was no pandemic. The Appellant has recovered the amount it was supposed to pay to the Respondent No. 5 during the period in question. Despite recovering this amount as part of its tariff, it deliberately and wilfully delayed in payment of these amounts to the Respondent Power Generating Companies. In light of the admitted default, the Appellant is not entitled to relief, let alone relief in exercise of jurisdiction under Article 142 of the Constitution.

122. In response to the submission of the Appellant that the Respondent No.2 and other Power Generating Companies had unjustly enriched themselves by availing bill discounting from the Appellant during the Financial Year 2020-21, at the rate of 7% per annum, which rate is substantially lower than the LPS calculated at MCLR, let alone PLR, Mr. Rohatgi submitted that if the Appellant's contention were to be believed then being a government entity, the Appellant could easily avail loans at much lower rate than the rate of LPS in terms of the Power Purchase Agreements and pay the bills raised by the Power Generating Companies promptly, rather than end up paying LPS. There is no impediment to the Appellant raising loans to promptly clear the bills due to the Respondent Power Generating Companies.

123. Mr. Mukerjee also pointed out that the Appellant had been charging interest for delay in payment from its consumers @ 1.25% per month, i.e. 15% on an annual basis as per MERC MYT Regulations, 2019. This belies the argument of the Appellant that LPS rate is correlated to the actual interest rate on loans taken by the Appellant or generating companies.

124. Mr. Mukerjee argued that at no stage had the Appellant denied that the Reserve Bank of India was continuing to notify PLR. It is only before this Hon'ble Court that the Appellant has submitted that PLR is not available. The Appellant is precluded from raising such a plea at this belated stage. Further, such plea is factually incorrect since SBI is notifying PLR.

125. Mr. Mukherjee submitted that the Appellant is the only Discom in the country to raise this claim of change in law. None of the other Discoms in Maharashtra or other States have claimed this as a change in law.

126. Mr. Mukherjee further submitted that, during the period of the alleged financial hardship, the Appellant has not only paid NTPC and other Central Generating Stations, but has also entered into several Power Purchase Agreements, for additional power.

127. Mr. Mukherjee argued that the Appellant's contention that the consumers in the State of Maharashtra will ultimately bear the alleged charges is incorrect. As per the MERC Tariff Regulations, only such expenditure as is prudently incurred can be claimed as part of tariff. In case the expenditure is on account of the Appellant's imprudence or default, such amounts cannot be claimed by the Appellant as part of tariff. Mr. Mukerjee submitted that Mr. Singh's argument of bill discounting has no bearing on this case at hand since RattanIndia is not availing of bill discounting.

128. Ms. Divya Anand adopted the submissions of Mr. Rohatgi and Mr. Singhvi and added that Court has defined 'unjust enrichment' as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. She argued that a person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. In support of her argument, Ms. Anand cited Indian Council for Enviro-Legal Action v. Union of India29.

129. Justifying the direction of APTEL on the Appellant to make payment in terms of the order of MERC, Mr. Rohatgi referred to an Office Memorandum dated 08.03.2019 of the Ministry of Power, Government of India mandating that Electricity Regulatory Commissions must ensure payment of LPS as per the Power Purchase Agreements where payment is delayed. Mr. Rohatgi argued that it is in the interest of the Appellant to liquidate the outstanding dues of the Respondent Power Generating Companies including LPS, at the earliest. This will also enable the Respondent No.2 and other Power Generating Companies to comply with their obligations under the Power Purchase Agreements, of supplying uninterrupted power by procuring coal with available funds.

130. Mr. Rohatgi argued that under Section 111 (3) of the Electricity Act, 2003, the APTEL is empowered to pass an order either confirming, modifying or setting aside the order appealed against. The APTEL acted within the scope of its powers under Section 111 (3) by directing payment of the LPS dues to the Respondent Generating Companies. Further, in

29. (2011) 8 SCC 161 terms of Section 120 of the Electricity Act, 2003, the APTEL has the power to direct the Appellant to pay the outstanding LPS amounts in a time bound manner to ensure that the principles laid down under Section 61 of the Electricity Act, 2003 are achieved.

131. Mr. Rohatgi argued that the APTEL directed the Appellant to pay the LPS within the time stipulated in the impugned judgment and order, in keeping with the objective of the Electricity Act which is aimed at taking measures conducive to development of the power sector while protecting the interest of consumers. Mr. Rohatgi submitted that this is also consistent with the principles set

out in Section 61 of the Electricity Act, specifically Sections 61(b) and (d) i.e., to conduct generation, transmission and distribution of electricity on commercial principles and at the same time safeguard consumer interest while ensuring reasonable recovery of the cost of electricity in a reasonable manner.

132. Mr. Rohatgi submitted that any further delay in payment of LPS would not be in the interest of the Respondent Generating Companies as they have been deprived of their legitimate dues for long. Further delay would also be detrimental to the interest of the Appellant as it is not allowed to pass on LPS to end consumers in terms of the order dated 29.08.2020 of the MERC in Case No. 45 of 2020, which has attained finality.

133. Mr. Mukerjee submitted that the directions given by the APTEL in Paragraphs 35 and 36 of the Impugned Judgment are aimed at quantification rather than execution. The time period for compliance under the Impugned Judgment was 90 days whereas the period of limitation for filing an appeal under Section 125 of the Electricity Act is 60 days.

134. Mr. Mukerjee further submitted that, in terms of Section 120 of the Electricity Act, the APTEL is not bound by the procedure laid down by the Code of Civil Procedure 1908. The directions for time bound payment or payment within the prescribed timeframe is consistent with past judgments of the APTEL including the judgment dated 14.09.2019 in Appeal 202 of 2018, which was upheld by this Hon'ble Court in Jaipur Vidyut Vitran Nigam Limited v. Adani Power Rajasthan Limited (supra).

135. Mr. Mukerjee submitted that, one of the objectives of the Electricity Act is time-bound disposal of matters. This is evident from Section 111(5) of the Electricity Act. Any direction for payment, is only in furtherance of such direction.

136. Mr. Mukerjee further argued that the Paragraphs 27 to 34 of the Impugned Judgment deal with sectoral issues including delay in adjudication of claims. In this case, the delay in adjudication has resulted in severe stress in the power sector in addition to financial impact in the form of carrying cost and LPS. However, the APTEL held that since the Electricity Act does not have a specific provision granting power to the Electricity Regulatory Commission to execute its orders, it requires legislative intervention. [Para 33 & 34 @ Pg. 22 - 24 of the Appeal].

137. Mr. Mukerjee submitted that this is a fit case for this Hon'ble Court to consider interpreting the regulatory powers of regulatory commissions under Section 79 / 86 of the Electricity Act to include the power to execute their own orders. Mr. Mukerjee cited Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others30, wherein this Hon'ble Court held that pending legislative action, the courts can devise a workable formula that advances the goals and objective of the legislation.

138. Mr. Mukerjee submitted that, while the Electricity Act, 2003 does not have a specific provision on execution of decrees/orders by the Regulatory Commissions, Regulatory Commissions have been held to be "courts". In Tamil Nadu Generation & Distribution

30. (2021) SCC OnLine 194 (paras 142 & 188) Corporation Ltd. vs. PPN Power (supra), this Court held that the State Electricity Regulatory Commissions have the trappings of a court. The relevant portion of the aforesaid judgment is reproduced below:-

> "59. In view of the aforesaid categorical statement of law, we would accept the submission of Mr Nariman that the tribunal such as the State Commission in deciding a lis, between the appellant and the respondent discharges judicial functions and exercises judicial power to the State. It exercises judicial functions of far-reaching effect. Therefore, in our opinion, Mr Nariman is correct in his submission that it must have essential trapping of the court. This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a civil court. Not only the decisions of the State Commission have far-reaching consequences, they are final and binding between the parties, subject, of course, to judicial review."

139. Mr. Mukerjee referred to the judgment of this Court in Andhra Pradesh Power Coordination Committee & Others v. Lanco Kondapalli Power Ltd & Ors.31, where the court held that in view of its judgment in Gujarat Urja Vikas Nigam Ltd. v. Essar Power Limited32, the Commission has been elevated to the status of a substitute for Civil Court in respect of all disputes between the licensees and the generating companies.

140. It is a settled position of law that Courts have the power to execute their own orders. The aforesaid position has been confirmed

31. (2016) 3 SCC 468

32. (2008) 4 SCC 755 by the Hon'ble Supreme Court in State of Karnataka v. Vishwabharathi House Building Cooperative Society and Others33.

141. Mr. Mukerjee argued that the Electricity Act, 2003 has to be interpreted to also include and incorporate the power to execute by steps such as attachment of accounts, suspension/revocation of license etc. Mr. Mukerjee further argued that the role and function of Electricity Regulatory Commissions should not be viewed from the perspective of 'civil courts' alone. Unlike Civil Courts which assume jurisdiction only when a dispute arises, the Regulatory Commissions have an overarching regulatory power over licensees. The Regulatory Commissions continue to exercise continuous regulatory supervision over the parties (licensees) especially over tariff. In support of his submission Mr. Mukherjee cited All India Power Engineering Federation & Ors. vs. Sasan Power Limited & Others 34 . This will protect the financial health of the sector while protecting public interest by abusing the financial liability in the form of carry cost/ sign value for money. This approach is also consistent with the Preamble to the Electricity Act, 2003 which stipulates that it is aimed at taking measures conducive to development of the power sector while protecting the interest of consumers.

33. (2003) 2 SCC 412 (paras 59 to 62)

34. (2017) 1 SCC 487 (para 31)

142. Distinguishing the judgment of this Court in Jaipur Vidyut Vitran Nigam Ltd v. Adani Power Rajasthan Ltd (supra) Mr. Rohatgi argued that the issue involved in that case, was the rate at which interest on carrying cost is to be paid. While a specific rate is stipulated in the Power Purchase Agreement for LPS the interest on delayed payment of carrying cost is not specified in Power Purchase Agreement. Therefore, APTEL directed that charges for deferred payment of carrying cost should be paid at the same rate as LPS, since both are meant for time value of money. This was disputed in the Appeal. This Court, keeping in view the peculiarities of the facts of the case, where the power generator was unable to raise bills while the question of change in law raised by the power generator was pending adjudication before the MERC and the APTEL reduced the rate of interest on carrying cost to 9%. Mr. Rohatgi submitted that it is important to note that there was no dispute in relation to Late Payment Surcharge in the case of Jaipur Vidyut Vitran Nigam Limited (supra).

143. Mr. Singhvi also submitted that Jaipur Vidyut Vitran Nigam Ltd. v. Adani Power Rajasthan Ltd. (supra) was distinguishable. In Jaipur Vidyut Vitran Nigam Ltd. (supra), there were change in law claims for cost of imported coal, made by the generator which were disputed by the distribution licensee on the ground that the bid submitted by the generator itself was premised on imported coal. Since the principal claim was disputed by the distribution licensee in the first instance, the generator could not raise any supplementary bills, for change in law compensation.

144. In contrast, in this case the bills, payment against which has been delayed, are energy bills, pertaining to energy supplied to the Appellant; and supplied further by the Appellant to its consumers against payment of retail tariff. Secondly, the energy bills in question, raised by the Respondent Generating Companies have never been disputed by the Appellant. This has duly been noticed by the APTEL in its judgment and order impugned in Paragraph 24, reproduced below:-

> 24. It is submitted by the contesting respondents (generators) that LPS liability of the appellant on account of defaults in timely payments for the period between 01.07.2010 and 31.03.2017 had crystallized and the dispute as to the rate of LPS was raised to vex it further. It is not denied that the appellant had not disputed any of the Monthly Bills or Supplementary Bills as per the procedure prescribed under the PPA. This rendered the demands to have become final and conclusive . The notice based on plea of CIL was issued in 2016, the issue having remained pending for 5 years, depriving the generators of the recompense for the loss suffered. Payment of LPS is triggered only when there is a default by MSEDCL. LPS is levied under the PPAs which were duly executed by MSEDCL.

In these circumstances, it is inappropriate to project the outstanding liability towards LPS as an additional burden being placed upon MSEDCL.. "

145. Mr. Mukerjee submitted that the judgment in Jaipur Vidyut Vitran Nigam Ltd. v. Adani Power Rajasthan Ltd . (supra) to contend that the LPS rate should be limited to 9% is misconceived. He submitted that reliance of the Appellant, on the judgment is inapplicable in the facts of the present case for the following reasons:-

> (i) The matter pertained to a change in law claim which required prior adjudication by the Rajasthan Electricity Regulatory Commission. The liability to pay arose only after the APTEL dismissed the Appeal filed by the Rajasthan Distribution companies and directed payment of change in law amount. To Adani Power Rajasthan Ltd. [Paras 24, 70 & 73].
>
> (ii) The judgment in Jaipur Vidyut Vitran Nigam Ltd. (supra) is in the context of carrying cost payable by the Rajasthan Distribution Companies and not in the context of LPS. This is evident from Paragraphs 62, 69, 70, 71 and 73 of the judgment. The LPS rate is referenced for determining the carrying cost rate that would apply given the inordinate delay in adjudication of claims and the inability of Adani Power Rajasthan Ltd. to raise bills till the adjudication was completed.
>
> (iii) This Hon'ble Court limited the interest rate in the facts of that case and in order to do complete justice. There was no default on the part of the Distribution Licencee, Jaipur Vidyut Vitran Nigam Ltd.
>
> (iv) In this case, the Appellant has admitted that it delayed payment. No adjudication was required prior to payment of monthly bills. Therefore, the judgment is inapplicable.

Reduction of LPS rate will result in rewarding the Appellant for repeatedly defaulting on its obligations.

146. Mr. Rohatgi, Mr. Singhvi, Mr. Mukherjee and Ms. Anand all submitted that in Jaipur Vidyut Vitran Nigam Ltd v. Adani Power Rajasthan Ltd. (supra), this Court had reduced the rate of interest to SBAR not exceeding 9% per annum, to be compounded annually, in exercise of its power under Article 142 of the Constitution to do complete justice. A direction given in the facts and circumstances of any particular case, to do complete justice under Article 142 of the Constitution does not operate as a precedent.

147. This appeal is under Section 125 of the Electricity Act, 2003 which is set out out hereinbelow for convenience:-

> "125. Appeal to Supreme Court.—Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908:

> Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

148. An appeal lies to this Court under Section 125 only on grounds permitted in Section 100 of the Code of Civil Procedure, 1908 (CPC). Section 100 of CPC is set out hereinbelow:-

> "100. Second appeal.--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

149. As held by this Court in State Bank of India and Ors. v. S.N. Goyal (supra) cited by Mr. Singh, the word "substantial question of law" means not only a substantial question of law of general importance, but also any substantial question of law arising in a case between the parties on which the decision in the lis depends. A question of law which arises incidentally or collaterally and has no bearing on the final outcome, will not be a substantial question of law. Whether the question raised is a question of law and if so, whether the question is a substantial question of law is also not determined by the enormity of the stakes involved in the case.

150. In Nazir Mohamed v. J. Kamala and Others (supra), also cited by Mr. Singh, this Court held that, to be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

151. The proposition of law laid down in Nazir Mohamed v. J. Kamala and Others (supra) and State Bank of India v. S.N. Goyal (supra) is well settled. The aforesaid judgments do not, however support the contention of Mr. Singh that there is a substantial question of law involved in this appeal. Rather, the judgments lend support to the contention of the Respondent-Power Generating Companies that there is no substantial question of law involved in this appeal.

152. On a conjoint reading of Section 125 of the Electricity Act with Section 100 of the CPC, it is absolutely clear that an appeal to this Court lies on a substantial question of law. The condition precedent for entertaining an appeal under Section 125 of the Electricity Act, 2003 is the existence of a substantial question.

153. In DSR Steel (P) Ltd. v. State of Rajasthan (supra) cited by Mr. Singhvi, this Court held:-

> "14. An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 CPC in turn permits filing of an appeal only if the case involves a substantial question of law. Findings of fact recorded by the courts below, which would in the present case, imply the Regulatory Commission as the court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be reopened before this Court in an appeal under Section 125 of the Electricity Act, 2003. Just as the High Court cannot interfere with the concurrent findings of fact recorded by the courts below in a second appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loath to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to Govindaraju v. Mariamman [(2005) 2 SCC 500 : AIR 2005 SC 1008] , Hari Singh v. Kanhaiya Lal [(1999) 7 SCC 288 : AIR 1999 SC 3325] , Ramaswamy Kalingaryar v. Mathayan Padayachi [1992 Supp (1) SCC 712 : AIR 1992 SC 115] , Kehar Singh v. Yash Pal [AIR 1990 SC 2212] and Bismillah Begum v. Rahmatullah Khan [(1998) 2 SCC 226 : AIR 1998 SC 970] should, however, suffice."

154. In Wardha Power Co. Ltd. v. Maharashtra State Electricity Distribution Co. Ltd. (supra) also cited by Mr. Singhvi, this Court held:-

> "5. Under Section 125 of the Electricity Act, 2003, an appeal to this Court lies only when there is a substantial question of law, as required for a second appeal under Section 100 of the Code of Civil Procedure, 1908. Though the appellant has raised 34 questions, they are actually grounds for attacking the appellate order. Grounds for attacking an order are different from substantial question of law evolved in the appeal. On appreciation of the correspondence between the parties during the subsistence of the agreement, both the Commission and the Appellate Tribunal have held against the appellant."

155. In Tuppadahalli Energy India (P) Ltd. v. Karnataka Electricity Regulatory Commission and Anr. (supra), this Court held that the view taken by the Kerala State Electricity Regulatory Commission and APTEL in interpreting of Clause 6(5) of the Power Purchase Agreement as an incentive, being a plausible view, there was no substantial question of law to warrant interference under Section 125 of the Electricity Act.

156. In Ramanuja Naidu v. V Kanniah Naidu and Another 35, cited by Mr. Rohatgi, this Court held:-

> 35 (1996) 3 SCC 392 "7. The scope of Section 100 of Civil Procedure Code even before the amendment of the section in 1976 has been neatly summarised in Mulla's Code of Civil Procedure (15th Edn., Vol. I) at p. 703. It is stated therein as follows:
>
> "The section even as it stood before its recent amendment allowed a second appeal only on the grounds set out in clauses (a),
>
> (b) or (c). Therefore, whereas a Court of First Appeal is competent to enter into questions of fact and decide for itself whether the findings of fact by the lower Court are or are not erroneous, a Court of Second Appeal was not and is not competent to entertain the question as to the soundness of a finding of fact by the court below. A second appeal, accordingly, could lie only on one or the other grounds specified in the section. ....

8. In Madamanchi Ramappa v. Muthalur Bojjappa [(1964) 2 SCR 673 : AIR 1963 SC 1633] , speaking for a three-member Bench, Gajendragadkar, J. summarised the law thus: (SCR pp. 683-85) "The question about the limits of the powers conferred on the High Court in dealing with second appeals has been considered by High Courts in India and by the Privy Council on several occasions. One of the earliest pronouncements of the Privy Council on this point is to be found in the case of Durga Choudhrain [17 IA 122 :

ILR (1891) 18 Cal 23 (PC)] . In the case of Deity Pattabhiramaswamy v. S. Hanymayya [AIR 1959 SC 57 : 1958 Andh LT 834] , this Court had occasion to refer to the said decision of the Privy Council and it was constrained to observe that 'notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100, CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in litigation and confusion in the mind of the litigant public.' On this ground, this Court set aside the second appellate decision which had been brought before it by the appellants.

In R. Ramachandran Ayyar v. Ramalingam Chettiar [(1963) 3 SCR 604 : AIR 1963 SC 302] , this Court had occasion to revert to the same subject once again. The true legal position in regard to the powers of the second appellate court under Section 100 was once more examined and it was pointed out that the learned Judges of the High Courts should bear in mind the caution and warning pronounced by the Privy Council in the case of Durga Choudhrain and should not interfere with findings of fact. It appears that the decision of this Court in Deity Pattabhiramaswamy, was in fact

cited before the learned Single Judge, but he was inclined to take the view that some aspects of the provisions contained in Section 100 of the Code had not been duly considered by this Court and so, he thought that it was open to him to interfere with the conclusions of the courts below in the present appeal. According to the learned Judge, it is open to the second appellate court to interfere with the conclusions of fact recorded by the District Judge not only where the said conclusions are based on no evidence, but also where the said conclusions are based on evidence which the High Court considers insufficient to support them. In other words, the learned Judge seems to think that the adequacy or sufficiency of evidence to sustain a conclusion of fact is a matter of law which can be effectively raised in a second appeal. In our opinion, this is clearly a misconception of the true legal position. The admissibility of evidence is no doubt a point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. It has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a second appeal. Sometimes, this position is expressed by saying that like all questions of fact, sufficiency or adequacy of evidence in support of a case is also left to the jury for its verdict. This position has always been accepted without dissent and it can be stated without any doubt that it enunciates what can be properly characterised as an elementary proposition. Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

9. In Dudh Nath Pandey v. Suresh Chandra Bhattasali [(1986) 3 SCC 360] , a Bench of this Court held that: (SCC Headone P.360) "High Court cannot set aside findings of fact of first appellate court and come to a different conclusion on reappraisal of evidence."

10. There are innumerable subsequent decisions of this Court which have held that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of Civil Procedure Code. (See: Kamala Devi Budhia v. Hem Prabha Ganguli [(1989) 3 SCC 145] , Jahejo Devi v. Moharam Ali [(1988) 1 SCC 372] , P. Velayudhan v. Kurungot Imbichia Moidu's son Ayammad [1990 Supp SCC 9] , etc.)

11. We are of the view that in interfering with the concurrent findings of facts of the lower courts, the learned Single Judge of the High Court acted in excess of the jurisdiction vested in him under Section 100 of Civil Procedure Code. The learned Judge totally erred in his approach to the entire

question and in reappraising and reappreciating the entire evidence and in considering the probabilities of the case, to hold that the judgments of the courts below are 'perverse' and that the plaintiff is entitled to the declaration of title to suit property and recovery of possession.

157. In Navaneethammal v. Arjuna Chetty 36, this Court held that interference with concurrent findings of the courts below must be avoided under Section 100 of the CPC unless warranted by compelling reasons. In any case, this Court is not expected to reappreciate the evidence.

158. The questions of law raised by Mr. Vikas Singh, which have been set forth hereinabove in Paragraph 15, would not have a material bearing on the decision in this appeal, for the reasons discussed hereinafter.

159. The only issue in this appeal is, whether the change applicable in respect of interest charged by banks and financial institutions from the Prime Lending Rate to Base Rate and then to MCLR amounts to change in law in terms of the Power Purchase Agreement, and if so, whether there is any substantial question of law involved in this appeal, as argued by Mr. Singh, on behalf of the Appellant. It is not for this Court 36 (1996) 6 SCC 166 to reanalyze evidence adduced before the forums below or to sit in appeal over concurrent findings of facts.

160. There can be no doubt that a notification issued by the Reserve Bank of India constitutes law. A Reserve Bank of India notification which alters, modifies, cancels or replaces an earlier notification would tantamount to a change in law. However the notification relating to alteration of the lending rates chargeable by banks and financial institutions are not laws which relate to the Power Purchase Agreements in question, and therefore do not attract, as the case may be, Article 13 of the Stage 1 Agreements or Article 10 of the Stage 2 Agreements.

161. The RBI circulars/guidelines referred to above are admittedly instructions issued to banks and financial institutions and are not applicable to the Appellant or to the Respondent-Power Generating Companies, who are engaged in the business of production, sale/purchase and/or distribution of electricity and not of advancing loans. Moreover, SBAR as defined in the Power Purchase Agreements is admittedly not linked to any RBI guidelines or circulars. The guidelines/circulars are thus not relevant to the issues involved in this appeal.

162. As rightly argued by the counsels appearing for the Power Generating Companies, the RBI circulars/guidelines to banks, advising the banks to follow certain norms, while setting their benchmark reference rates for loans, and the amendments thereto, have no legal consequence on the contract between the parties. This has been correctly appreciated by both the forums below.

163. In B.O.I. Finance Limited v. Custodian and Ors.(supra) this Court held that the RBI Circulars/Instructions/Guidelines could not result in invalidation of a contract even between a bank and a third party and the consequence for violation is penalty as provided for in Section 46 of the Banking Regulation Act. The RBI Circulars/Guidelines cannot therefore vary or modify a contract between two parties.

164. As pointed out by Counsel appearing on behalf of the Respondent- Power Generating Companies and admitted on behalf of the Appellant, SBI has been notifying and continues to notify Prime Lending Rates for its loans. The Appellant itself has given the average PLR notified by SBI from 2010 till date in its application being I.A. No. 69796 of 2021. Therefore, Late Payment Surcharge as per the Power Purchase Agreement has been calculated at the rate of 2% in excess of the SBI notified Prime Lending Rate.

165. From paragraph 12 of the impugned judgment and order of the APTEL, it appears that the Appellant conceded before the APTEL that the SBI continues to issue the PLR rates till date. The relevant part of the impugned judgment and order is reproduced hereinbelow:-

> "....It is fairly conceded that SBI continues to issue the PLR rates till date..."

166. The definition of SBAR is clear and has been correctly applied by both the forums below. There are concurrent findings of fact that the SBI PLR (i.e. the benchmark reference rate mentioned in the PPA) is still being published and is available. The Court cannot, at this stage of a second appeal under Section 125 of the Electricity Act reopen the factual question of whether at all PLR rates were being notified by SBI for short term loans.

167. Therefore, as submitted on behalf of the Respondent-Power Generating Companies, there is no substantial question of law involved in this appeal filed under section 125 of the Electricity Act, 2003.

168. As argued by Mr. Singhvi, Mr. Rohatgi and other Counsel, the definition of SBAR in the Power Purchase Agreements is clear. SBAR is the Prime Lending Rate per annum fixed by the State Bank of India (SBI) from time to time for loans with one year maturity. LPS is to be calculated at the rate of 2% in excess of the PLR for loans with 1 year maturity, as fixed from time to time by SBI. Moreover, the parties have consciously agreed that in the absence of such rate, the LPS rate shall be mutually agreed to by the Parties.

169. As argued by Mr. Rohatagi, Mr. Singhvi and Mr. Mukherjee, the purpose for which the Guidelines/Circulars have been issued by the Reserve Bank of India or their impact on the rates of interest on loans and advances, are not relevant to this appeal.

170. The provision in the Power Purchase Agreement, whereby the parties are to mutually agree on a rate of interest, in case there is no SBI Prime Lending Rate, in itself excludes the applicability of the general provision for Change in Law contained in Article 13 of the Power Purchase Agreement to Late Payment Surcharge.

171. In Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission (supra), this Court found :-

> "38. In the present case, the perusal of various Articles would reveal that the provisions under Article 14 are general in nature. The provision under Article 3.4.2 is

> specific, only to be invoked in the case of non-compliance with any of the conditions as provided under Article 3.1.2....."

172. The APTEL correctly found that:-

> "13.... On the contrary, there is a conscious exclusion regarding any suo moto change in the rate to be applied while calculating LPS, it being incorrect to argue on the assumption that the contract permits automatic change in system."

173. This Court is unable to accept Mr. Singh's submission that the conclusion of APTEL that LPS is not tariff is erroneous. The meaning of the expression tariff has to be considered, and has rightly been considered by APTEL in the context of the relevant provision of the Power Purchase Agreements. The dictionary meaning of tariff may be charge. However, in Article 13 of the Stage 1 and Article 10 of the Stage 2 Power Purchase Agreements, tariff means monthly tariff and tariff adjustment consequential to change in law, is of monthly tariff in respect of supply of electricity.

174. As argued by the Respondent- Power Generating Companies appearing through Mr. Rohatagi, Mr. Singhvi, Mr. Mukherjee and Ms. Anand respectively, LPS is only payable when payment against monthly bills is delayed and not otherwise.

175. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer, i.e. the Appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the Power Purchase Agreements. The principle of restitution under the Change in Law provisions of the Power Purchase Agreements are attracted in respect of tariff.

176. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The Appellant has a contractual obligation to make timely payment of the invoices raised by the Power Generating Companies, subject, of course, to scrutiny and verification of the same. Mr. Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the Appellant, the Appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the Power Generating Companies, and avoided LPS.

177. The proposition that Courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores and Ors. v. Surat People's Co-operative Bank (supra), cited by Ms. Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms. Divya Anand as also other Counsel. It is well settled that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (supra) cited by Ms. Anand.

178. There is substance in Ms. Anand's argument that the Appellant is obliged to seek amendment of the provisions of the Power Purchase Agreement only in accordance with the agreed procedure for amendment of the terms thereof. The agreed rate of Late Payment Surcharge can only be amended in the absence of SBI PLR and that too with the mutual consent of the parties to the Power Purchase Agreement.

179. The argument that the Power Generating Companies are availing loans at a lesser rate of interest, but charging LPS on the basis of a higher rate of interest, leading to unjust enrichment, is untenable in law. LPS under the Power Purchase Agreements do not correspond to the actual interest paid by the Power Generating Companies for funds raised by them. The payment of Late Payment Surcharg LPS enalty suffered by the Procurer, that is, the Appellant, on account of default in timely payment.

180. As observed above, the Parties to the Power Purchase Agreements have mutually and consciously agreed to the incorporation of the PLR as notified by SBI from time to time, as the rate for levy of LPS. Therefore, by virtue of the doctrine of incorporation, the PLR as notified by SBI each year gets incorporated in the Power Purchasing Agreements, as binding between the parties. Thus, any other system notified by the Reserve Bank of India by its circulars has no bearing on the terms of the Power Purchase Agreement and cannot be deemed to be incorporated in the Power Purchase Agreement, except in case of mutual agreement between the parties, in the event of absence of SBI PLR, and approved by the MERC.

181. As argued by Ms. Anand, conceptually, PLR, Base Rate and MCLR are not comparable. The submission that the definition of SBAR should be read in the context of MCLR instead of PLR, is therefore not tenable. PLR is the internal benchmark rate for charing of interest on floating rate loans, calculated on the basis of average cost of funds and the loans were offered at a discount on their existing PLR. However, Base Rate is the lending rate calculated based on the total cost of funds of the banks and is the minimum interest rate at which a bank can lend, except for loans to its own employees, its retired employees and against bank's own deposits. MCLR is a lending rate calculated on the cost of raising new funds for the bank which include the cost of maintaining CRR/SLR (Credit Reserve Ratio/Statutory Liquidity Ratio), operating costs of banks and tenor premium. MCLR is the lowest interest rate that a bank or lender can offer. Thus, loans are offered at a markup on the MCLR. Thus, the basis of both the rates are different and cannot be compared, as has been sought to be done by the Appellant. When PLR, Base Rate and MCLR are compared side by side. The difference is that very stark. Loans are advanced at a mark-up over Base Rate and MCLR, while during the PLR regime, loans were offered at a discount on PLR.

182. In any case, the Appellant cannot contend that the Reserve Bank of India circulars are to be considered as Change in Law, since Article 13.3.1 of the Stage 1 agreements corresponding to Article 10.4.1 of the Stage 2 agreements provides that notices of Change in Law events are to be issued by the affected party, as soon as reasonably practicable, after the affected party becomes aware of Change in Law event or when it should reasonably have known of the Change in Law.

183. In this case, the changes cited by the Appellant were effected by RBI from July 2010 and April 2016 and notified in advance. The Appellant issued notices of Change in Law as late as in September 2016, more than six years after the Reserve Bank of India introduced the base rate system in place of the BPLR system. Furthermore, while the guidelines on the base rate system were published on 9 th April 2010 and introduced with effect from 01.07.2010, the Appellant entered into Power Purchase Agreements with the Respondent No. 2 on 9th August 2010 and on 16th February 2013 incorporating PLR as the Late Payment Surcharge rate for supply of contracted quantum of electricity to the Appellant.

184. Significantly, the Appellant charges interest from its consumers for delay in payment @ 1.25% per month and/or in other words 15% per annum as per the MYT Regulations of MERC. This also shows that interest rate is not co-related to the actual interest rate on loans taken by the Appellant or by Power Generating Companies. According to the Respondent- Power Generating Companies, no other distribution licencee other than the Appellant has raised the claim of Change in Law. All other Distribution Licencees procuring electricity from producers of electricity pay LPS in accordance with the respective Power Purchase Agreements.

185. In Halliburton Offshore Services Inc. v. Vedanta Limited & Anr., O.M.P (I) (COMM.) No. 88/2020, decided on 29.05.2020 to which reference was made by Ms. Anand, the Delhi High Court aptly remarked that the outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. In the aforesaid case, the Delhi High Court rightly observed that the Court, while considering the plea of non performance of the condition due to outbreak of the COVID-19 pandemic, ought to examine factors such as the conduct of the parties prior to the outbreak.

186. Admittedly, the Appellant has landed itself in its present predicament, due to delay in making timely payments to the Respondent Power Generating Companies. There was no pandemic at the time of filing of the petition before the MERC in 2017 and the Appeal before the APTEL in 2018. It, cannot, therefore be said that the Appellant defaulted in payment of bills by reason of its financial predicament as a result of the outbreak of COVID 19 in India, which was in March 2020.

187. Extensive submissions have been made by Mr. Singh, to impress upon the Court, that the Appellant committed default in payment of the bills raised by the Power Generating Companies on account of various circumstances, beyond its control. The various circumstances mentioned by the Appellant, which allegedly impacted the financial position of the Appellant, have no bearing on the merits of the Appeal. Mr. Rohatgi, Mr. Singhvi, Mr. Mukerjee and Ms. Anand submitted in one voice that the delays in payment and/or non-payment of the invoices raised by the Power Generating Companies for the supply of power to the Appellant, had put the Respondent-Power Generating Companies under immense financial stress, as their source of revenue is from the sale and supply of power generated from their power plants. The Respondent Power Generating Companies cannot be burdened with the consequences of the Appellant's defaults.

188. The judgment of this Court in M/s Kailash Nath Associates v. Delhi Development Authority (supra) cited by Mr. Singh is clearly distinguishable since this Court found that there had been no

breach of contract by the Appellant (Para 44). Further, the Court did not accept the view of the Division Bench, that the fact that DDA had made a profit from re-auction was irrelevant, since compensation for breach of a contract can be given for damage or loss suffered. If no damage is suffered by reason of the breach, the law does not provide for a windfall.

189. In this case, the Appellant admittedly did not pay the bills raised by the Power Generating Companies within time. The Power Purchase Agreements provided for Late Payment Surcharge on the presumption that delayed payment of bills causes prejudice and loss to the seller whose bill remains outstanding. Accordingly, the Appellant also imposes delayed payment charges on its consumers, who pay their bills after the stipulated due date for payment of the bills at the rate of 1.5% per month and/or in other 18% per annum. LPS rate of 2% above the SBAR is neither unreasonably exorbitant nor arbitrary. It cannot be said that the LPS agreed upon is not a genuine pre estimate of damages.

190. The issues raised in this appeal are almost identical to the issues involved in Union of India v. Association of Unified Telecom Service Providers of India & Ors. 37 where this Court was considering an identical interest clause in a contract which is reproduced hereinbelow:

> “In re: Levy of interest, penalty, and interest on penalty. Para 182. Levy of licence fee is provided in Clause 20.2. In case of any delay in payment of licence fee beyond the stipulated period would attract penalty at the rate, which would be 2% above the prime lending rate (PLR) of State Bank of India. As per Clauses 20.5 and 20.8, if the licensee does not pay the demand, consequences would follow. The clauses are extracted hereunder:
>
> "20.5. Any delay in payment of licence fee payable or any other dues payable under the Licence beyond the stipulated period will attract interest at a rate which will be 2% above the prime lending rate (PLR) of State Bank of India existing as on the beginning of the financial year (namely 1st April) in respect of the licence fees pertaining to the said financial year. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest. A month shall be reckoned as an English calendar month.”

191. In the aforesaid case, the licensee had contended that under Section 74 of the Contract Act, compensation has to be reasonable compensation. This Court after considering Hindustan Steel Ltd. v. State of Orissa38, Akbar Badrudin Giwani v. Collector of Customs39, Jaiprakash Industries Ltd. v. Commissioner of Central Excise, Chandigarh40, Tecumseh Products (India) Ltd. v. Commissioner of Central Excise, Hyderabad41, J.K. Synthetics Ltd. v. 37 2020 (3) SCC 525 38 1969 (2) SCC 627 39 1990 (2) SCC 203 40 2003 (1) SCC 67 41 2004 (6) SCC 30 Commercial Taxes Officer42, Kailash Nath Associates v. Delhi Development Authority and Another43 and Central Bank of India v. Ravindra and Others44. This Court after considering the above- mentioned judgments of this Court cited on behalf of the licensee held that none of the decisions would come to the aid of the licensee. This Court held:

> "192....The ratio of the case, it is not attracted for the reason that in the instant matter, it is the contractual rate of interest and penalty agreed to which cannot be said to be arduous in any manner. The rate of interest has been agreed and particularly since it is a revenue sharing regime, and the licensees have acted in conscious disregards of their obligation. Thus on the anvil of the decision above also, they are liable to pay the dues with interest and penalty..... ..... There is no such discretion available when the parties have agreed in default what amount is to be paid. It automatically follows that it is not to be determined by the licensor once over again. Parties (licensor and licensees) are bound by the terms and conditions of the contract. There is no enabling clause to vary either the rate of interest or the penalty provided therein and even if permissible, it is not called for to vary interest or penalty fixed under the agreement in the facts and circumstances of the case.....
>
> 197. It is not levy of penal interest which is involved in the instant case. Thus, based on the decision mentioned above, we find that when there is contractual stipulation, the interest can be levied and compounded"

192. It would perhaps be pertinent to note that stereotype Power Purchase Agreements containing identical terms and conditions are executed by the Appellant with different Power Generating Companies. 42 1994 (4) SCC 276 43 2015 (4) SCC 136 44 2002 (1) SCC 367 It is patently obvious that the Power Generating Companies only agree to terms and conditions of an agreement prepared by the Appellant. It is difficult to accept that the Appellant should incorporate in their stereotype Power Purchase Agreements, a provision for payment of LPS at a rate 2% higher than the SBAR, in case of late payment of invoices/bills, without any pre estimation of the loss likely to be suffered by a Power Generating Company, by reason of non payment of bills in time, more so when the Late Payment Surcharge is linked to the rate of interest in respect of specific types of loan, charged by a leading nationalised bank with the largest numbers of branches spread all over the country including in mofussil and rural areas.

193. In any case, in this second appeal under Section 125 of the Electricity Act 2003, which is only to be heard on a substantial question of law, this Court would not embark upon the exercise of making a factual enquiry into the mode and manner in which the Power Generating Companies meet their working capital requirements and interest that individual Power Generating Companies pay to their lenders.

194. It is axiomatic that the Power Purchase Agreements provide for computation of Late Payment Surcharge in a particular manner to avoid the time consuming exercise of assessing the losses of individual Power Generating Companies by reason of late payment of their bills. The SBAR has been made the bench mark for computation of Late Payment Surcharge, irrespective of whether the Power Generating Companies are financed by the State Bank of India or any of its subsidiaries. The LPS provision is in the nature of a caution to arrange their affairs and finances keeping the upper limit of LPS of 2% above the SBAR in view, so that the Power Generating Company desists from borrowing at uneconomic rate of interest.

195. There being no dispute in the present case with regard to the principal sums due under the monthly bills, interest on delayed payment at 2% in excess of SBI PLR cannot be said to be arbitrarily high. There is no reason for this Court to reduce the contractual rate of interest and thereby alter or modify the contract between the parties, in exercise of its powers under Article 142 of the Constitution of India.

196. We need not go into the question whether or not the Appellant has funds to clear its interest liability. The Appellant cannot continue to get supply of electricity without having appropriate funds. Appellant would necessarily have to raise funds to clear its contractual obligations.

197. Even assuming that the burden of interest would have to be passed on to the consumers, that cannot be the ground for the Appellant to resile from its contractual commitment to the Power Generating Companies. The Appellant cannot pass on the burden for delay in making payment to the Power Generating Companies. In any case the claims as argued by Mr. Singhvi pertains to a period of three years before filing of the petition before the MERC on 2nd December, 2016 and therefore barred by limitation.

198. Reliance by the Appellant, upon the tariff regulations framed by MERC for determination of tariff for Power Generating Companies under Section 62 of the Electricity Act 2003, is untenable since the Tariff Regulations have no application in this case where PPAs have been executed pursuant to a bidding process, under Section 63 of the Electricity Act.

199. MERC, rightly rejected the claim of the Appellant by its order dated 16.11.2017, holding:

> "12..... However, the LPS provision is attracted only when the payments are not made by MSEDCL against the Monthly Bills of the Seller within the time stipulated in the PPA's. Any changes in the basis of the LPS rates, consequent to revisions by the RBI do not affect in any manner, the rates at which the power was agreed to be sold and purchased under the PPA's and in the consequent financial implication for either party resulting in a liability to compensate the affected party...."

200. The APTEL, concurred with the finding of MERC and held:-

> "16. Having regard to the terms of the contract (PPA) as a whole, there is no doubt that provision for compensation to the affected party for a Change in Law event is essential with regard to tariff only. The rate of LPS has no bearing or impact on tariff. Any possible changes in the basis of the LPS rates consequent to revisions by the RBI, or for that matter, SBI would not affect the rate at which power was agreed to be sold and purchased under the PPAs and consequently there is no financial implications on expenditure or income for either Party. The LPS only recompenses what was lost in terms of real value of money due to delay in payment."

201. The decision of this Court in Jaipur Vidyut Vitran Nigam Ltd. (supra) is distinguishable on facts. In Jaipur Vidyut Vitran Nigam Ltd. (supra), there were change in law claims for cost of

imported coal, made by the Power Generating Company which were disputed by the distribution licensee on the ground that the bid submitted by the Generating Company was premised on imported coal. Since the principal claim was disputed by the distribution licensee in the first instance, the Generating Company could not raise any supplementary bills, for change in law compensation.

202. In this case, the bills, payment of which has been delayed, are energy bills, pertaining to energy supplied to the Appellant; and supplied further by the Appellant to its consumers against payment of retail tariff. Secondly, the energy bills in question, raised by the respondent Power Generating Companies have never been disputed by the Appellant, as noticed by the APTEL in the impugned judgment and order, the relevant part whereof is extracted hereunder:-

> "24. It is submitted by the contesting respondents (generators) that LPS liability of the appellant on account of defaults in timely payments for the period between 01.07.2010 and 31.03.2017 had crystallised and the dispute as to rate of LPS was raised to vex it further. It is not denied that the appellant had not disputed any of the Monthly Bills or Supplementary Bills as per the procedure prescribed under the PPA. This renders the demands to have become final and conclusive. The notice based on plea of CIL was issued in 2016, the issue having remained pending for five years, depriving the generators of the recompense for the loss suffered. Payment of LPS is triggered only when there is a default by MSEDCL. LPS is levied under the PPAs which were duly executed by MSEDCL. In these circumstances, it is inappropriate to project the outstanding liability towards LPS as an additional burden being placed upon MSEDCL.. "

203. Mr. Singh's challenge to the impugned judgment and order on the ground of the directions on the Appellant to make payment of the LPS found due and payable, within a stipulated date, is also not sustainable.

204. APTEL is not bound by the procedure laid down in the Civil Procedure Code, as argued by Mr. Mukerjee. Directions for time bound payment within a prescribed time frame are in conformity with the judgment of this Court in Jaipur Vidyut Vitran Nigam Ltd. v. Adani Power (supra) which has been upheld by this Court. Moreover, one of the objectives of the Electricity Act is time bound disposal of matters. This is evident from various provisions of the said Act including in particular Section 111(5) of the Act. Since APTEL and MERC are not bound by the procedure as laid down in the Civil Procedure Code, it was open to APTEL to pass such orders as would finally put an end to litigation.

205. It is now well settled by various decisions of this Court that an Electricity Regulatory Commission such as MERC constituted under the Electricity Act, 2003 has all the trappings of a Court. The MERC is a substitute for a Civil Court in respect of all disputes between licensees and Power Generating Companies. This proposition finds support from the judgments of this Court in Tamil Nadu Generation & Distribution Corporation Ltd. v. PPN Power Generating Co. Pvt. Ltd.45, Andhra Pradesh Power Coordination Committee & Ors. v. Lanco Kondapalli Power Ltd. & Others.

46 and Gujarat Urja Vikas Nigam Limited v. Amit Kumar & Others47 cited by Mr. Vishrov Mukerjee.

206. As held by this Court in State of Karnataka v. Vishwabharathi House Building Cooperative Society and Others48, cited by Mr. Mukerjee, Courts have the power to execute their own order. The impugned judgment and order cannot, therefore, be faulted for giving directions for payment of the outstanding dues of the Appellant. Moreover, State Regulatory Commissions exercise continuous regulatory supervision as affirmed by this Court in All 45 (2014) 11 SCC 53 46 (2016) 3 SCC 468 47 (2021) SCC OnLine 194 48 (2003) 2 SCC 412 (Paras 59-62) India Power Engineering Federation & Ors. v. Sasan Power Limited & Others49, cited by Mr. Mukerjee.

207. MERC acted within the scope of its power of regulatory supervision in directing the Appellant to make payment of LPS within the time stipulated in the order of MERC. The APTEL rightly upheld the direction. In any case, such a direction cannot be interfered with in exercise of powers under Section 125 of the Electricity Act which corresponds to the power of Second Appeal under Section 100 of the CPC, since the sine qua non for entertaining an appeal is the existence of a substantial question of law.

208. After the the hearing of this appeal was concluded and the appeal was reserved for judgment, the Appellant filed an application to bring on record additional facts and documents in the form of queries under the Right to Information Act, 2005 made by one Alka Mehta to the State Bank of India and the responses thereto in an attempt to show that PLR would not apply to short term loans advanced by SBI after transition to the Base Rate/MCLR system. This Court cannot take note of any documents sought to be introduced after the conclusion of hearing. In any case, as observed above, this Court cannot in a second appeal under Section 125 of the Electricity Act, 2003 interfere with concurrent factual findings arrived at by MERC and APTEL on the basis of facts admitted by the Appellant. The Appellant had been 49 (2017) 1 SCC 487 (Para 31) accepting the invoices raised by the Respondent–Power Generating companies and accounts had duly been reconciled by the Appellant. The LPS charged by the Respondent Power Generating Companies was never disputed. Further more, this Court cannot look into documents introduced for the first time in this second appeal, which were not tendered in evidence before the MERC or the APTEL. Even otherwise, queries made by one Alka Mehta, a rank outsider as late as on 12 th July 2021 or replies thereto cannot be relied upon in evidence, by the Appellant.

209. For the reasons discussed above, we find no grounds to interfere with the judgment and order of the learned APTEL confirming the judgment and order passed by MERC. The appeal is accordingly dismissed.

…….J [INDIRA BANERJEE] ……J [V. RAMASUBRAMANIAN] OCTOBER 08, 2021;

NEW DELHI.