Supreme Court of India
T.N.Generation & Distbn. Corpn ... vs Ppn Power Gen.Co.Pvt.Ltd on 4 April, 1947
Author: .....J.
Bench: Surinder Singh Nijjar, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4126 OF 2013

T.N. Generation & Distbn. Corpn. Ltd. …Appellant

VERSUS

PPN power Gen. Co. Pvt. Ltd. ...Respondent

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. This statutory appeal under Section 125 of the Electricity Act, 2003 (hereinafter referred to as the "Act") is directed against the final judgment and order dated 22nd February, 2013 passed by the Appellate Tribunal for Electricity (hereinafter referred to as "APTEL" or "Appellate Tribunal"), at New Delhi in Appeal No. 176 of 2011, whereby it has dismissed the appeal preferred by the appellant against the final judgment and order dated 17th June, 2011 of Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the "State Commission") in D.R.P. No. 12 of 2009. The facts have been noticed in detail both by the State Commission and the APTEL, therefore, we shall make a reference only to the very essential facts necessary for deciding this appeal.

2. The respondent, a generating company, has entered into a Power Purchase Agreement (PPA) with the appellant on 3rd January, 1997 for the supply of the entire Electricity to be generated by the respondent for a period of 30 years. The respondent commenced commercial operations on 26th April, 2001. Under the PPA, the respondent has to submit an annual invoice indicating the amounts owed under the Tariff. The amounts receivable from the appellant for the previous year are to be reconciled against the sum of monthly estimated payment made by the appellant as soon as possible after the end of each year. Accordingly, respondent started raising monthly invoices from 26th April, 2001 for the Electricity supplied by it to the appellant. According to the appellant, invoices of the respondent inter alia included interest on debt sanctioned but not disbursed, charges towards energy consumed at the residential quarters at the generating station etc. The appellant claims that

substantial payments towards the monthly invoices raised by the Respondent for every month were paid against the admitted amount in the invoice. The disputed amount was withheld. The respondent accepted the admitted amount paid against each invoice without raising any dispute either with respect to the disputed amount or the substantial payment made by the appellant.

3. Government of India by Notification dated 30th March, 1992 incorporated a rebate scheme on the receivables. Under this scheme, the purchaser, i.e., appellant is entitled to a rebate @ 2.5% if the payment is released within 5 days from the date of invoice and @ 1% if the payment is released within 30 days from the date of invoice. Accordingly, while making the payment of the admitted amount under each invoice, the appellant deducted the 2.5% rebate, as payments were made within 5 days from the date of the receipt of the invoice. These payments were accepted by the appellants. On the other hand, respondent adjusted the amount received by it in the following month against the unpaid amount of the previous month. The balance was carried forward by the respondent. Since June, 2001, the appellant had been making payments as noticed above, and the respondent had been adjusting the same on a "FIFO" basis. The appellant claims that the monthly invoices raised by the respondent were only estimated invoices. On the other hand, the respondent claims that the appellant, from inception only made adhoc payments periodically against the monthly invoices raised. Therefore, each side is claiming that the other did not provide any details with regard to the amounts due and the amounts paid. It is also the claim of the respondent that the appellant had unilaterally made several disallowances without informing the respondent of the same.

4. It appears that both the parties were dissatisfied with accounting details provided by the other. Ultimately, the respondent issued a notice of dispute resolution on 26th April, 2007 and appointed its Vice President, Shri B. Sundaramurthy as the representative. Continuous correspondence was exchanged between the parties from August, 2007 to March, 2009. On 1st April, 2009, respondent sent a Notice to the appellant in terms of Article 16 of the PPA claiming amounts due/overdue from the appellant and interest on late payments. The Notice gives a summary of claims of the respondent till 30th March, 2009 other than towards specified taxes, which was stated to be subjudice, and, therefore, not included therein. The balance of amount payable, according to the respondent was Rs.1,787,272,534. The appellant in reply informed the respondent on 16th April, 2009 that the matter was under scrutiny and examination. Since, there was no response, the respondent sent a reminder. Instead of making the payment of the amounts claimed, the appellant issued letter dated 4/5th May, 2009 claiming that according to its accounts, sum of Rs.31.12 crores was due to the appellant. On 8th May, 2009, the respondent requested the appellant "to provide the particulars and details forming the basis of your claim before 15th May, 2009." The respondent also requested the appellant to fix a meeting on or before 19th May, 2009 to discuss the issues and resolve the same. A meeting took place on 19th May, 2009 but the dispute was not resolved.

5. Since the dispute was not resolved, the respondent filed the petition – D.R.P. No. 12 of 2009 before the State commission, seeking a direction to the appellant to make a payment of sum of Rs. 1,89,91,17,264 being a sum due as on 19th March, 2009, under the invoices raised under the PPA and interest thereon in terms of Article 10.6 of the PPA from the due date till the date of actual payment. After setting out the details of the amounts due as narrated above, the respondent claimed

that, under Article 10.2(b) of the PPA, in the event of any dispute as to all or any of the portion of an invoice, the appellant was required to pay the full amount of the disputed charges and thereafter serve a notice on the respondent indicating the amount in dispute. The dispute is to be resolved under Article 16, which provides for informal resolution of dispute. Firstly, under Article 16(1), by mutual discussions through the designated representatives of the parties. Secondly, in case the parties are unable to resolve the dispute pursuant to Article 16.1, it is to be resolved through finally by arbitration in accordance with Article 16.2.

6. Under Article 16.2, the arbitration has to be conduced in accordance with the rules of Conciliation and Arbitration of International Chamber of Commerce (ICC), in effect on the date of the agreement. The Arbitration Tribunal is to consist of three arbitrators, of whom each party should select one. The two arbitrators appointed by the parties shall select the third arbitrator, to act as the Chairman of the Tribunal. If the two arbitrators appointed by the parties, fail to agree on a third arbitrator, the ICC Court of Arbitration shall make the appointment. The arbitration shall be held in England. It is further provided that notwithstanding Article 16.8, the laws of England shall govern the validity, interpretation, construction, performance and enforcement of the provisions contained in Article 16.2. The arbitration proceedings shall be conducted and the award shall be rendered in English language. It is further provided that the rights and obligations of the parties shall remain in full force and effect pending the award in any arbitration proceedings. The costs of the arbitration shall be determined by the arbitral tribunal in accordance with the Rules. The arbitration clause specifically provides that the Indian Arbitration Act (Act No. X(10) of 1940/The Arbitration and Conciliation Act, 1996 shall not be applicable to this arbitration provision, to any arbitration proceedings or award rendered or any dispute or difference arising out of or in relation to the agreement. It is further provided that award rendered hereunder shall be a foreign award within the meaning of the Foreign Awards Act, 1961.

7. Clause 16.2(i) specifically provides that the parties hereby waive any rights of application or appeal to the Courts of India to the fullest extent permitted by law in connection with any question of law arising in the course of arbitration or with respect to any award made.

8. Clause 16.3 of the arbitration agreement provides that the award of the arbitrators shall be final and binding. The other provisions with regard to the arbitration clause are incidental and, therefore, not necessary to be mentioned. Article 17.8 of the PPA provides as under:-

“17.8 Governing Law: Subject to Sections 16.2(b) and 16.2(e) hereof, this agreement and the rights and obligations hereunder shall be interpreted, construed and governed by the substantive laws of India.”

9. As noticed above, Article 16.2(b) provides that the arbitration shall be conducted in accordance with the ICC Rules notwithstanding Article 17.8. Similarly, Article 16.2(e) provides for exclusion of Article 17.8.

10. Upon completion of the pleadings and after hearing the parties, the State Commission by an order dated 17th June, 2011, allowed the petition filed by the respondent for refund of the excess

rebate availed by the appellant contrary to the terms of PPA and also ordered the respondent to redraw the monthly invoices in accordance with the directions issued by the State Commission. The State Commission held that it is competent to adjudicate upon the dispute. The limitation period prescribed in the Limitation Act, 1963 would not apply to the proceeding before the Commission, delay and laches would apply. The appellant is liable to pay interest to the respondent in terms of Clause 10.6 of the PPA till payment. Conversely, if the appellant has made excess payment against each monthly invoice compared to the corresponding redrawn monthly invoice, the respondent is liable to pay interest in terms of Article 10.6 of the PPA. The rebate would be admissible to the appellant, if the redrawn monthly invoice and the original payment made by the appellant against the invoice of that month matches or if the appellant has made excess payment, the respondents were directed to redraw the annual invoice for 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007, as at September of each year to capture the gains to the appellant on account of lower interest rates and gains to the respondent on account of higher floating rate. Certain other directions were also issued. The petition was accordingly disposed of.

11. Aggrieved by the aforesaid directions, the appellant filed Appeal No. 176 of 2011before the APTEL. Before the APTEL, in the appeal, the appellant raised the following issues:-

(a) Entitlement of the Appellant to Rebate.

(b) Jurisdiction of the State Commission u/s 86(1)(f) of the Act, 2003;

(c) First in First Out method; for adjustment of payment.

(d) Limitation, delay and laches;

(e) Bar under Order 2 Rule 2 CPC;

(f) Non filing of Annual Invoices;

(g) Determination of capital cost;

(h) Deduction on the monthly invoices;

(i) Excess Claims in the monthly invoice – unjust enrichment;

(j) Interest on Late Payments.

12. After hearing the learned counsel for the parties, APTEL has held that under Article 10.2(a), 10.2(b)(i) and 10.2(e), the appellant is obliged to pay full amount of the invoice within the due date to be eligible for the rebate of 2.5% or 1% as the case may be. Admittedly, the appellant neither paid the full amount for every invoice nor raised the dispute within one year. The appellant was held to be not eligible for rebate for reduction of the invoice funds.

13. With regard to the second issue, i.e., jurisdiction and scope of Section 86(1)(f) of the Act, relying on the judgment of this Court in the case of Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.[1], it is held that the State Commission has the discretion to decide as to whether the dispute should be adjudicated by itself or it should be referred to an arbitrator. The appellant can not dictate that the State Commission ought to have referred the dispute to an arbitrator. It is further held that the State Commission can adjudicate all the disputes including the dispute on money claims between the Licensees and the Generating Companies. In coming to the aforesaid conclusion, APTEL relied on its earlier order rendered in Neyveli Ignite Corporation Vs. Tamil Nadu Electricity Board in Appeal No. 49 of 2010 dated 10th September, 2010.

14. On the third issue on the method adopted by the respondent for adjustment of the payment made by the appellant on the "FIFO" basis, APTEL has approved the decision of the State Commission that the respondent was justified in adopting the aforesaid method, in accordance with Section 60 of the Indian Contract Act, 1872.

15. On the fourth issue relating to the applicability of the limitation Act or delay and laches, it has been held that the Limitation Act would not apply to the proceedings under the Electricity Act. On facts, it has been held that the issue of limitation does not arise since Sections 60 and 61 of the Indian Contract Act would permit the creditor to adjust the amount on "FIFO" method. APTEL has also held that the bar under Order 2 Rule 2 of the CPC would not be applicable in the facts of this case. With regard to the non-filing of the annual invoices by the respondent, it has been held that the respondent should have filed the annual invoices in time. Therefore, the direction issued by the State Commission to the respondent to redraw the annual invoices has been affirmed. The seventh issue related to determination of capital costs, the State Commission in its order under appeal had directed the appellant to pay the invoice in full as claimed by the respondent without determining the capital costs by getting the petition for finalization of capital costs, which was pending in the State Commission finally adjudicated. APTEL has approved the findings of the State Commission that the appellant had adopted delaying tactics by not cooperating in the finalization of the capital costs.

16. On issue No. 9, it has been held that as the respondent has given up the claim on account of capital costs incurred on Gas Boosting Station and Conditioning System and that the Power Company has been directed to redraw the monthly invoices by the State Commission, the issue would not survive. Finally, on issue No. 10, which related to interest on late payments, it has been held that the respondent company is entitled to interest on late payment of dues under the provisions of the PPA.

17. The present appeal is directed against the aforesaid directions issued by APTEL.

18. We have heard learned counsel for the parties.

19. Mr. R.F.Nariman, learned senior counsel appearing for the appellant has submitted that the disputes raised in the present proceeding are not adjudicable by the State Commission. Mr. Nariman submitted that the primary functions of the State Commission being advisory, regulatory

and recommendatory, the adjudication permitted under Section 86(1)(f) is only restricted to the disputes which are fairly relatable to the primary functions. The cardinal issue, according to Mr. Nariman, which ought to have been decided by the State Commission, was with regard to the nature of a dispute. The State Commission has failed to address the issue whether the dispute is unconnected to advisory functions. This was necessary as the respondent had made only a pure money claim which could only be adjudicated either by the Civil Court or the Arbitral Tribunal upon a reference being made to that effect. Mr. Nariman submits that the State Commission illegally declined to exercise its discretion to refer the dispute to arbitration. The dispute between the parties being purely of civil nature required decision on complex issues of fact and law. Since the dispute arises out of the working and interpretation of the PPA, the State Commission would not have sufficient knowledge of law to adjudicate the issues involved.

20. The next submission of Mr. Nariman is that the State Commission cannot be an adjudicatory body, as it does not have the trappings of a court, which is normally manned exclusively by Judges. Under Section 84, there is no requirement for the Chairperson or member of the State Commission to be a Judge of a High Court. The Members are required to be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. Although sub-section (2) permits the State Commission to appoint any person as the Chairperson from amongst person who is or has been a Judge of a High Court, no appointment from the aforesaid category of persons has been made to the State Commission. Mr. Nariman pointed out that the State Commission which heard the petition filed by the respondent did not have a Judicial Member. He further submits that the State Commission functioning without a Judicial Member is contrary to the law laid down by this Court in Union of India vs. R.Gandhi, President, Madras Bar Association[2]. Learned senior counsel elaborated that by virtue of Section 94(1), the State Commission has been vested with the power of a Civil Court under the Code of Civil Procedure. Under sub-section (2) of Section 94, the State Commission has the power to issue interim orders. Section 55 provides that all proceedings before the State Commission shall be deemed to be judicial proceedings within Sections 193 and 228 of the IPC. It is further provided that appropriate commission shall be deemed to be a civil court for the purpose of Sections 345 and 346 of the Code of Criminal Procedure, 1903. (2 of 1974). By virtue of Section 146, the State Commission has been empowered to impose punishment including imprisonment, fine and additional fine. He further emphasized that the State Commission in deciding a lis, between the respondent and the appellant, discharged judicial functions and exercised judicial power of the State. Such exercise of judicial power can be either by the Civil Court or a Tribunal having atleast one Judicial Member. The State Commission exercises judicial functions of far reaching effect, therefore, it must have essential trappings of a court. In support of this submission, learned senior counsel relied on Kihoto Hollohan vs. Zachillhu[3]. Subsequently, the appellant has submitted additional written submission which can also be appropriately noticed at this stage. It is submitted that the aforesaid infirmity in the constitution of the State Commission can not be cured on the basis that the Appellate Tribunal would always be headed by either a sitting Judge/former Judge of the Supreme Court or Chief Justice/former Chief Justice of a High Court as well as having other Judicial Members. In support of this submission, learned senior counsel relied on Institute of Chartered Accountants of India vs. L.K.Ratna & Ors.[4] and Union Carbide Corporation & Ors. vs. Union of India & Ors.[5]. Learned senior counsel submitted that an

adjudication of a lis by a tribunal without a judicial member would be an anathema to judicial process. It would directly impinge on the impartiality and the independence of the Judiciary. It would also undermine the principle of separation of powers which is sought to be strictly maintained by the Constitution of India. Mr. Nariman emphasized that this Court carved out an exception to the rule of necessarily having a Judicial Member of a Tribunal, only, in the case of highly specialized fact - finding tribunals. In the written submissions, the appellant has also relied upon judgments of this Court in Brahm Dutt vs. Union of India[6], S.P. Sampath Kumar vs. Union of India & Ors.[7]. It is further submitted by Mr. Nariman that the disputes arising between the generating company and a licensee are decided by the Commission by holding meetings of the Members. In case the members of the Commission are equally divided, the Presiding Member would have the casting vote. Such procedure, submits Mr. R.F. Nariman, is unknown to judicial proceedings.

21. Mr. Nariman then submitted that the Chairman of APTEL is required under Section 113 of the Electricity Act to be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can also be appointed as a Member of the Appellate Tribunal who is or has been or is qualified to be a Judge of the High Court. This, according to him, clearly shows that the adjudicatory functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature and ought to be performed only by the tribunal which has either a Chairman or a Member(s) who are or were Judges of the Supreme Court or a High Court. Mr. Nariman submitted that since the State Commission was not constituted in accordance with law and the order having been passed without any judicial member, is a nullity non-est in law. He submitted that the proceedings of the Commission are coram non judice and, therefore, liable to be set aside.

22. The next submission of Mr. Nariman is that the claim of the respondent would have been held to be time barred on reference to arbitration. The respondent made a money claim in the year 2009 for the alleged dues starting from the year 2001 onwards. Therefore, had the dispute been referred to arbitration in terms of dispute resolution clause, contained in Article 16 of the PPA, the proceeding of the arbitral tribunal would be governed by the Limitation Act, 1963. The State Commission has erred in law in holding that by virtue of Section 2(4) of the Arbitration Act, 1996, the applicability of Section 43 would be excluded. This, according to Mr. Nariman, is one more reason why the State Government ought not to have entertained the money claim of the respondent and ought to have relegated the parties to arbitration. In any event, the claim of the respondent ought to have been dismissed for delay and laches. He submits that even if the Limitation Act was not applicable, the maximum period of time for filing a suit, in a Civil Court, ought to be taken as a reasonable standard by which the issues with regard to such delay and laches can be measured. In support of this submission learned counsel relied on the judgment of this Court in State of M.P. vs. Bhailal Bhai & Ors.[8]. He made a reference to the observations made by this Court at Para 273. Learned senior counsel also relied on Municipal Corporation of greater Bombay vs. Bombay Tyres International Ltd. & Ors.[9] and Corporation Bank & Anr. vs. Navin J. Shah[10].

23. Mr. Nariman then submits that the “FIFO” method of adjustment of payment was not available to the respondents. It is submitted that the reliance placed on Sections 60 and 61 of the Contract Act by the respondents is misconceived. He submits that the respondents have wrongly claimed that

they have been adjusting the monthly payment made by the appellant not against the monthly invoices but against the earlier pending bills. The respondents are also wrongly claiming that the appellant had been duly informed that the payments have been received on "FIFO" basis. Mr. Nariman points out that the respondents are wrongly relied on letters dated 25th June, 2001, 2nd December, 2003 and 10th September, 2001. According to Mr. Nariman, none of three letters support the case of the respondents that the appellant had either agreed to or acquiesced in the monthly payments made by him within 5 business days of the presentation of the monthly invoices being adjusted on the FIFO basis. Mr. Nariman points out that the respondent's own letter dated 20th November, 2006 demolishes the case of respondent based on FIFO. He further submits that if the parties are agreed to the FIFO and had been acting on the same, as claimed by the respondents, then there would have been no need for the respondents to write letters dated 20th November, 2006 and 23rd April, 2007 regarding their objections to the disallowance made by the appellant or seeking an explanation/clarification from the appellant with respect to the payments made by the appellant and referred to in the said letters. The respondent was well aware that the appellant had been making the monthly payments against the respective monthly invoices. Therefore, the respondents can take no benefit of Sections 60 and 61 of the Contract Act. Therefore, the impugned order passed by the State Commission as well as APTEL being based on these two sections are unsustainable.

24. It is further submitted by Mr. Nariman that the respondents have failed to file annual invoices at the end of each year for the years 2001-2006. The invoices for these years were filed only on 18th July, 2007. This is in breach of Clause 10.2(b)(ii) of the PPA which required the respondents to submit annual invoices setting of the details of the amounts owed under the tariff and reconciliation of the actual amounts receivable from the appellant for the prior year against the sum of monthly estimated payments made by the appellant. Similarly, if payments are due by the respondent to the appellant, the stated amount has to be paid to the appellant and vice versa. The State Commission rejected the explanation given by the respondent for failure to submit the annual invoices, but instead of dismissing the claim of the respondents, a direction has been made to redraw the annual invoices of each year as on 30th September of each year. Mr. Nariman further points out that the respondent, upon redrawal of the invoices, had agreed to refund/adjust a sum of Rs.45 crores, being the excess amount charged by the respondent from the appellant. The said amount has not been paid till date.

25. Mr. Nariman points out that the only dispute between the parties in the present litigation is only with regard to the question as to whether the appellant was entitled to avail rebate of 2.5 % on the part payment of the monthly invoice within 5 business days from the date of the presentation of the monthly invoice. It is submitted that in the initial petition filed by the State Commission it was not the claim of the respondent that the appellant wrongly availed rebate of 2.5%. There were no pleadings to that effect. Therefore, the findings and conclusions of the State Commission are liable to be set aside. Mr. Nariman submits that if one reads the PPA as a whole, it would become apparent that the payment of the full invoice amount within 5 days of the date of raising of invoice is not a pre-condition for seeking a rebate of 2.5% of the invoice amount. Clause 10.2(a) does not make it a pre-condition for payment of the full amount of invoice within 5 business days in order to avail the rebate of 2.5%. Clause 10.2(b)(i) indicates that the full amount is to be paid on the due date of an

invoice. Due date is defined in Article 10.2 (a) as 30 days from the date of handing over of the invoice. Mr. Nariman then submits that a conjoint reading of these clauses would show that in order to be eligible for a rebate, at the rate of 2.5%, the payment has to be made on the 30th day of the presentation of the invoice. Therefore, any payment made within 5 business days entitled the appellant to claim 2.5% rebate on such payment. It is further submitted by Mr. Nariman that rebate is nothing but refund of a part of the interest loaded upfront on the Working Capital. The estimated monthly tariff invoice has two components – (i) the fixed capacity charges (FCC) and (ii) variable fuel charges (VFC). The rebate of 2.5 % is allowed in view of the notification dated 30th March, 1992 issued by the Ministry of Power, Government of India, in exercise of powers under sub-section (2) of Section 43 of the Electricity Supply Act, 1948. The aforesaid notification has been made part of the PPA as Schedule U thereof. Schedule A of the PPA deals with Tariff. Interest on the receivable equivalent to 2 months' average billing for sale of electricity is loaded upfront on the monthly invoice. Part of this is refunded by way of rebate of 2.5 % if payment is made within 5 days and at 1% if it is made after 5 days but upto the 29th day from the presentation of the monthly invoice. Interest of the respondent upto the 30th day loaded upfront in the invoice. Thereafter the interest of the respondent is protected from the due date till payment is made in accordance with the Clause 10.6(e) of the PPA. Therefore, the appellant is entitled to rebate if payment is made within 5 days or within 29th day of the presentation of the invoice. Lastly, it is submitted by Mr. Nariman that the appellant has been made the payment within 5 days only to avail rebate of 2.5%. One such payment was made, the respondent had the use of money for a period of 25 days and correspondingly the appellant had been deprived of the use of such money for a period of 25 days every month. He submits that absent the contract between the parties, the appellant would have made the payment only on the 30th day and not within 5 days. In any event, 60 days of interest on the Working Capital had already been loaded upfront. Only 30 days interest was being returned in the form of rebate on the amount paid by the appellant within 5 days. In order to make the payment within 5 days, the appellant often had to avail the loan. Out of Rs.240 crores, which the appellant has already paid to the respondent under the Orders of the State Commission, almost Rs.235 crores is rebate. The respondent is now claiming more than Rs.500 crores towards interest at compound rate on Rs. 240 crores paid by the appellant, contrary to the provisions of the PPA. On the basis of the above, he submits that allowing the claim of the respondent for refund of the rebate amount would amount to unjust enrichment. Further, the award of interest on the aforesaid amount of rebate would amounts to double unjust enrichment.

26. On the other hand, it is submitted by Mr. Harish Salve and Mr. Jayant Bhushan learned senior counsel that orders passed by the State Commission as well as the Appellate Tribunal are just and proper and do not call for any interference. The appellant has been granted instalments to make the payment of Rs. 240 crores. It is also pointed out that the following order passed by the State Commission in the independent legal proceeding relating to fixation of capital cost on 15th July, 2013, the claim was updated upto 20th August, 2013 for invoices raised till 30th June, 2011, in a gross sum of Rs.695 crores. After giving credit of Rs.145 crores (including interest computed at the interest rates applicable to PPN) the net claim, subject-matter of the present appeal, stands at Rs.550 crores.

27. With regard to the submission of the appellant relating to Section 86(1)(f), it is submitted that the matter is no longer res integra as it is squarely covered by the judgment of this Court in Gujarat Urja Vikas Nigam Ltd. (supra). It is submitted by Mr. Salve and Mr. Bhushan learned senior counsel appearing for the respondent that Section 86(1)(f) gives the discretion the State Commission either to adjudicate the disputes itself or to refer the same to arbitration. By making detailed reference to the findings recorded by APTEL, Mr. Salve and Mr. Bhushan submit that all the issues raised by the appellant are without any merit as it cannot be supported either in facts or in law.

28. It is submitted by the learned senior counsel that even Article 16(2) provides for international arbitration under the ICC Rules. Article 16.2(h) specifically excludes the application of the Arbitration and Conciliation Act of 1996 and the Arbitration Act of 1940. Article 16.2(e) provides that the laws of England shall govern the arbitration agreement in contra- distinction to Indian law applying to the PPA. In any event, the appellant cannot be permitted to claim a reference of arbitration as a matter of right. He points out that at the initial stage, the appellant only referred to the existence of an informal dispute resolution provision and provision for arbitration under Article 16 of the PPA. Having taken such a preliminary objection, the appellant proceeded to subject itself to the jurisdiction of the State Commission. In fact the entire claim of the respondent was answered by the appellant on merit in the written statement, filed before the State Commission. Even if the written submissions before the State Commission, the appellant principally contended that the matter ought to be referred to the adjudication by a civil court. The appellant failed to make any application either under Section 8 or Section 45 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration. It is further pointed out that this Court in Gujarat Urja Vikas Nigam Ltd. (supra) has clearly laid down the law that the existence of an arbitration clause in a contract does not act as an ouster of jurisdiction of the jurisdictional forum. The appellant having submitted to the jurisdiction of the State Commission and having invited the findings cannot now seek to challenge the jurisdiction on the ground of existence of arbitration clause. Mr. Salve and Mr. Bhushan relied on the judgment of this Court in Svenska Handelsbanken vs. Indian Charge Chrome Ltd. [11] and Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. [12]. It is further submitted that the proceeding before the State Commission would not be vitiated on the ground that its constitution is contrary to the ratio of law laid down in the case of R. Gandhi (supra). The appellant has not even raised a single ground of any prejudice being caused by the absence of a judicial member before the State Commission. In any event, the aforesaid submission contradicts the appellant's other submission that the matter ought to have been referred to arbitration under the Arbitration Act. There is no requirement that the arbitrator should be a judicial person. Even in the absence of Electricity Act, 2003 and the regulatory bodies contemplated therein, the instant dispute would have been subject matter of an arbitration proceeding as per the provision of the PPA and not a civil suit in the civil court.

29. Answering the submission of the appellant that the respondent has illegally adjusted the payments on the concept of FIFO. It is submitted that the State Commission as well as the Appellate Tribunal have correctly held that the procedure adopted by the respondent is covered under Section 60 and 61 of the Contract Act. Mr. Salve and Mr. Bhushan submit that admittedly the appellant did not make full payment in relation to any of the invoices. The State Commission as well as the Appellate Tribunal have concurrent findings that the appellant was duly notified that the

payment/part payment made were being adjusted on FIFO basis. The appellant never refuted or rejected to such practice adopted by the respondent. The appellant submitted that it was undergoing temporary financial strain. It is also pointed out by Mr. Salve and Mr. Bhushan that the invoices were accepted in full. The statement was made by the appellant that part payment being made would not prejudice the right of respondent to receive the full payment against the invoices. The correspondence between the parties has been noticed by the APTEL in extenso. Coming to the legal position, Mr. Salve and Mr. Bhushan submit that APTEL having considered the statutory provisions as well as judicial precedents have come to the conclusion that the appellant was duly intimated that the payment made would be applied by the respondents on FIFO basis. Therefore, Section 59 of the Indian Contract Act would not be applicable. On the issue of limitation, it is submitted that neither the Limitation Act nor the principle of delay and laches would apply to the present case. It is submitted by Mr. Salve and Mr. Bhushan that the provision of Limitation Act, 1963 would not be applicable to the proceedings before the State Commission. The Electricity Act, 2003 being a complete code, which is self contained and comprehensive, the provision of Limitation Act, 1963 would not apply. Mr. Salve and Mr. Bhushan relied on the Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors.[13] In support of this submission, the Limitation Act would be inapplicable to Tribunals and quasi-judicial authorities. Replying to the submission of Mr. Nariman that in arbitration proceedings, the appellant would be entitled to the benefit of Limitation Act, 1963, Mr. Salve and Mr. Bhushan submit that in view of the specific provisions contained in Section 2(4) of the Arbitration and Conciliation Act, 1996, Section 43 of the Arbitration Act would not be applicable. In any event, the matter is squarely covered by the judgment in Gujarat Urja (supra). Mr. Salve and Mr. Bhushan reiterated that the issue of limitation does not even arise in the present dispute due to the FIFO adjustment effected by the respondent.

30. Addressing the issue of the rebate being available to the appellant, Mr. Salve and Mr. Bhushan submit that APTEL has rendered detailed findings on the issue. The submissions made before this Court is a repetition of the submissions made before the APTEL. They submit that such findings recorded by the APTEL can not be reopened in this Court except on the ground that such findings are either arbitrary or based on no evidence. In fact, the appellant has illegally arrogated to itself the right to adjudicate, by unilaterally assuming rights, which are not available to it. Rather than complying with the requirements of the PPA of making payment within due date, the appellant had disallowed certain payments on the ground that the claims of the appellant were doubted. These actions of the appellant were contrary to Articles 10.3 and 10.4 of the PPA which deals with Letter of Credit and Escrow. Even if the claim of the appellant is accepted that the invoices were only based on the estimates the appellant had no authority of making unilateral deductions in the monthly invoices and make only ad-hoc payments contrary to the provisions of PPA. It is submitted that the monthly invoices consists of both actual as also estimates in respect of certain items. The annual invoices raised on the basis of a reconciliation at the end of the year, since actuals become known in respect of such portions of monthly invoices, which were calculated on the basis of the estimates. Mr. Salve and Mr. Bhushan then submit that interest on late payments have been rightly granted both by the State Commission as well as the APTEL. The interest has been calculated on the basis of Article 10.6 of the PPA. Since the loans taken by the respondent are payable at compounded interest rates, the later payment interest payable by the appellant would also be at the compounded interest rate as per Article 10.6 of the PPA. Mr. Salve and Mr. Bhushan relied on the judgment of this Court

in Central Bank of India Vs. Ravindra & Ors.[14] and Indian Council for Legal Action Vs. Union of India[15]

31. During the course of hearing, the appellant had taken out I.A. No. 5 of 2013 and I.A. No. 6 of 2013. I.A. No. 6 is for the impleadment and I.A. No. 5 is for the direction.

I.A. Nos. 5 and 6 of 2013

32. It is submitted by Mr. Salve and Mr. Bhushan that in I.A. No. 6, the appellant has made a prayer to implead IOCL as the respondent. This application can not be allowed as IOCL is not a party to the contract. The attempt to implead third party is only an effort to delay the proceedings by the appellant. It is pointed out that IOCL is either necessary or a proper party for adjudication of the disputes arising between the appellant and the respondents.

33. I.A. No. 5 of 2013, according to Mr. Salve and Mr. Bhushan has been filed with the sole object of avoiding payments. The appellant has made wild allegations of fraud without any foundational facts being pleaded either before the State Commission or before the APTEL. The appellant ought not to be permitted to resolve such disputes. The application according to Mr. Salve and Mr. Bhushan deserves to be dismissed.

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

35. In the aforesaid judgment, the question that arose before this Court was whether the application for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 was maintainable in view of the statutory provisions contained in the Electricity Act, 2003.

36. It was submitted on behalf of the appellant (licensee) that by Virtue of Section 86(1)(f) of the Act of 2003, the dispute between the licensees and the generating companies can only be adjudicated upon by the State Commission either by itself or by an arbitrator to whom the Commission refers the dispute. Therefore, the High Court had no jurisdiction under Section 11(6) to refer the dispute

between the licensees and the generating company to an arbitrator, since such power of adjudication of reference has been specifically vested in the State Commission. Since the Electricity Act is a special law, dealing with arbitrations of dispute between the licensees and the generating companies, the provision of Section 11 of the Arbitration and Conciliation Act would be inapplicable. The High Court has, therefore, committed an error of jurisdiction in allowing the application under Section 11(6) and referring the matter to arbitration to a Former Chief Justice of India. On the other hand, it was submitted on behalf of the generating companies that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force. The provisions contained in Sections 173 and 174 would not affect the applicability of the Arbitration Act, 1996, in view of the provisions contained in Section 175 of the Electricity Act. Upon consideration of the aforesaid submission, this Court has held as follows:-

"26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in Section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).

27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(f) means "or".

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

37. This Court also negated the submission that the provision contained in Section 86(1)(f) would be violative of Article 14 (See Para 30-31).

38. Considering the provisions contained in Sections 173, 174 and 175 of the Electricity Act, this Court observed that since Section 86(1)(f) provides a special manner of making reference to an arbitrator in disputes between a licensee and a generating company, by implication all other methods are barred. Considering the applicability of Sections 174 and 175, this Court has held that Section 174 would prevail over Section 175 in matters where the where there is any conflict (but no further). In our opinion, the observations made by this Court in Paragraphs 59 and 60 are a complete answer to the submissions of Mr. Nariman that upon an application being made, the State Commission was bound to refer the matter to arbitration.

39. Section 86(1)(f) specifically confers jurisdiction on the State Commission to refer the dispute. Undoubtedly, the Commission is required to exercise its discretion reasonably and not arbitrarily. In the present case, the State Commission upon consideration of the entire matter has exercised its discretion. However, in our opinion, the APTEL ought not to have brushed aside the submissions of the appellant with the observation that the State Commission having exercised its discretion, the issue need not be investigated by the APTEL. It would always be open to APTEL to examine as to whether the State Commission has exercised the discretion with regard to the question whether the dispute ought to have been referred to arbitration, in accordance with the well known norms for exercising such discretion. APTEL exercises jurisdiction over the State Commission by way of a First Appeal. Therefore, it is the bounden duty of the Appellate Tribunal to examine as to whether all the decisions rendered by the State Commission suffer from the vice of arbitrariness, unreasonableness or perversity. This would be apart from examining as to whether the State Commission has exercised powers in accordance with the statutory provisions contained in Electricity Act, 2003. Having said this, we are not inclined to interfere with the conclusions reached by APTEL, as in our opinion, the jurisdiction has not been exercised by the State Commission arbitrarily, whimsically or against the statutory provisions.

40. We, however, find substance in the submission of Mr. Nariman that adjudicatory functions generally ought not to be conducted by the State Commission in the absence of a Judicial Member. Especially in relation to disputes which are not fairly relative to tariff fixation or the advisory and recommendatory functions of the State Commission.

41. A Constitution Bench of this Court in Kihoto Hollohan (supra) has examined the nature of the power of the Speaker or the Chairman under paragraph 6(1) of the Tenth Schedule of the Constitution of India which contains “PROVISIONS AS TO DISQUALIFICATION ON GROUND OF DEFECTION” of a Member of either House of Parliament. Upon consideration of the entire matter, it was observed as follows :

“95. In the present case, the power to decide disputed disqualification under Paragraph 6(1) is pre-eminently of a judicial complexion.”

42. The Constitution Bench relied on the earlier judgment of this Court in Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala[16]. In that case, Hidayatullah, J. said “... By ‘courts’ is meant courts of civil judicature and by ‘tribunals’, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have ‘an air of detachment’. But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient.” Again in para 99, it is observed as follows :

"99. Where there is a lis — an affirmation by one party and denial by another — and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In Associated Cement Companies Ltd. v. P.N. Sharma36 this Court said: (SCR pp. 386-

87) "... The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power.... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding."

43. 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.

44. As noticed earlier, Section 84(2) enables the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. Such appointment shall be made after consultation with the Chief Justice of the High Court. The provision contained in Section 84(2) is notwithstanding the provision contained in Section 84(1). In our opinion, the State Government ought to have exercised its power under sub-section (2) to appoint one or more Judicial Members on the State Commission especially when complicated issues are raised involving essentially civil and contractual matters. A Constitution Bench of this Court in the case of R.Gandhi (supra) recognized that :

> "87. .....that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals." "90. But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should

> possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members....."

45. Keeping in view the aforesaid observations of this Court, in our opinion, the State of Tamil Nadu ought to make necessary appointments in terms of Section 84(2) of the Act. We have been informed that till date no judicial Member has been appointed in the Tamil Nadu State Commission. We are of the opinion that the matter needs to be considered, with some urgency, by the appropriate State authorities about the desirability and feasibility for making appointments, of any person, as the Chairperson from amongst persons who is, or has been, a Judge of a High Court.

46. We have noticed earlier that Section 113 of the Act mandates that the Chairman of APTEL shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can be appointed as the Member of the Appellate Tribunal who is or has been or is qualified to be a Judge of a High Court. This would clearly show that the legislature was aware that the functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature. Necessary provision has been made in Section 113 to ensure that the APTEL has the trapping of a court. This essential feature has not been made mandatory under Section 84 although provision has been made in Section 84(2) for appointment of any person as the Chairperson from amongst persons who is or has been a Judge of a High Court. In our opinion, it would be advisable for the State Government to exercise the enabling power under Section 84(2) to make appointment of a person who is or has been a Judge of a High Court as Chairperson of the State Commission.

47. These observations, however, do not in any manner affect the jurisdiction exercised by the State Commission in the present matter. It has been rightly pointed out by the respondent that having filed the written statement in reply to the petition filed by the respondent, the appellant willingly participated in the proceedings and invited the findings recorded by the State Commission. It would be too late in the day, to interfere with the jurisdiction exercised by the State Commission in these proceedings.

48. The next submission of Mr. Nariman is that the claim of the respondents would have been held to be time barred on reference to arbitration. We are not able to accept the aforesaid submission of Mr. Nariman. On the facts of this case, in our opinion, the principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO basis. The procedure adopted by the respondent, as observed by the State Commission as well as by the APTEL, would be covered under Sections 60 and 61 of the Contract Act. APTEL, upon a detailed consideration of the correspondence between the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part payment of the invoices. During the course of the hearing, Mr. Salve has pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. Learned senior counsel also pointed out that there was no complaint or objection ever raised by the appellant. The objection to the method adopted by the respondents on the method of FIFO, was only raised in the counter affidavit to the petition filed by

the appellant before the State Commission. According to learned senior counsel, the plea is an afterthought and has been rightly rejected by the State Commission as well as the APTEL. We also have no hesitation in rejecting the submission of Mr. Nariman on this issue. In any event, the Limitation Act is inapplicable to proceeding before the State Commission.

49. The submission of the appellant that the Limitation Act would be available in case the reference was to be made to arbitration, in our opinion, is also without merit. Firstly, the State Commission exercised its jurisdiction to decide the dispute itself. The matter was not referred to arbitration, therefore, the Limitation act would not be applicable. Secondly, Section 43 of the Arbitration and Conciliation Act would not be applicable even if the matter was referred to arbitration by virtue of Section 2(4) of the Arbitration Act, 1996. Section 2(4) of the Arbitration Act reads as under :

> "This part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

50. By virtue of the aforesaid provision, the provision with regard to the Limitation Act under Section 43 would not be applicable, to statutory arbitrations conducted under the Electricity Act, 2003. We are unable to accept the submission of Mr. Nariman that the State Commission failed to exercise its discretion by not making a reference to arbitration and the request made by the appellant. Such a submission cannot be countenanced in the particular facts of this case. Having taken the plea that the matter ought to be referred to arbitration, the appellant chose to contest the claim of the respondent on merits and filed the written statement before the State Commission. Not only this, the appellant participated in the entire proceedings and invited the findings on merits. Therefore, the appellant cannot now be permitted to raise such a plea. This view of ours will find support in two earlier judgments of this Court. In Svenska Handelsbanken (supra) it has been observed as follows:

> "53. It may be that even after entering into an arbitration clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit……." Admittedly, in this case the appellant did not file any application under Section 8 or Section 45 of the Arbitration Act, 1996. No prayer for stay of the proceedings was filed.

51. In the case of Booz Allen & Hamilton Inc.(supra) this Court observed a follows:

> "29. Though Section 8 does not prescribe any time-limit for filing an application under that section, and only states that the application under Section 8 of the Act should be filed before submission of the first statement [pic]on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who

> willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn around and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit." These observations are squarely applicable to the facts in this case.

52. Even if the reference had been made under Article 16 of the PPA, the applicability of the Arbitration Act, 1996 and the Arbitration Act of 1940 have been specifically excepted under Article 16(2)(h). In the earlier part of the judgment, we have noticed that Article 16 indeed provides for informal resolution of disputes by way of arbitration. However, Article 16(2) mandates that the arbitration shall be conducted in accordance with the ICC Rules. Under those rules, ICC Court of arbitration is to make the appointment of the Arbitral Tribunal. To make the matters worst for the appellant, it has been provided in Article 16.2(e) that the seat of the arbitration shall be in London. This fact alone would make Part I of the Arbitration Act, 1996 inapplicable to the arbitration proceedings. There is a further provision that notwithstanding Article 17(8), the laws of England shall govern the validity, interpretation, construction, performance and the enforcement of the provision contained in Article 16(2). Clearly then, the applicability of Arbitration Act, 1996 is totally ruled out by the parties. This Court in Bhatia International vs. Bulk Trading S.A. & Anr.[17] has clearly held that the parties are at liberty by agreement to opt out of any or all the provisions of 1996 Act. It would be useful to make a reference to the observations made by this Court in paragraph 21 and 32 which are as follows:

> "21. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-

section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied." "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not

apply." The aforesaid observations will be fully applicable to the facts and circumstances of this case as the agreement is prior to 6th September, 2012. The declaration of law in Bharat Aluminium Company vs. Kaisar Aluminium Technical Services Inc.[18] that Part I of the arbitration would not be applicable to International Commercial Arbitration outside India applies to the Arbitration Agreements executed after 6th September, 2012. Though by virtue of the provisions contained in Article 16 of the PPA, the legal effect remains the same, that is applicability of 1996 Act is ruled out, therefore, the appellant cannot claim the benefit of Section 43 of the Arbitration Act, 1996.

53. We also do not find any merit in the submission of Mr. Nariman that the appellants have wrongly adopted the system of FIFO for adjustment of the payments made by the appellant. The State Commission as well as the APTEL having considered the matter in detail, we are inclined to accept the submission of Mr. Salve and Mr. Bhushan that it would not be appropriate to re-examine the issue in these proceedings. Under Section 125 of the Electricity Act, 2003, the appeal lies in the Supreme Court on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908. Therefore, unless the court is satisfied that the findings of fact recorded by the State Commission are perverse, irrational and based on no evidence, it would not interfere. The findings recorded by the State Commission and APTEL would not give rise to a substantial question of law. In any event, the appellant never refuted or rejected the practice adopted by the respondent. Rather the appellant claimed that it was under temporary financial strain and, therefore, requested to make only part payment. The invoices having been accepted in full, the appellant unilaterally withheld some of the payments on the ground that the claims were disputed. Under Article 10 of the PPA, the appellant was required to make the payment for the entire invoice and, thereafter, raise the dispute. The appellant had been duly informed that the part payments made would be adjusted by the respondents under the FIFO system. It has been correctly held that in such circumstances, Section 59 of the Contract Act would not be applicable. We see no reason to interfere with the conclusions reached by the APTEL.

54. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part payment of the monthly invoices within 5 business days. We have noticed earlier that it was a pre- condition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, APTEL has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by the APTEL. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Article 10.3(a) to (c) of the PPA, Letter of Credit is to be established covering three months estimated billing, one month prior to Commercial Operation Date. Under Article 10.3 (d) of the PPA, an Escrow Account is to be established by the appellant in favour of the Power Company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2 (e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the

dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of APTEL on this issue do not call for any interference.

55. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for Compensation Payment and Billing. We are also not able to accept the submission of Mr. Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra & Ors. [19]. In this judgment it has been held as follows:

> ".....The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd.All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in CIT v. Dr Sham Lal Narula thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money. ... In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation

> allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

56. Similar observations have been made by this Court in Indian Council of Enviro-Legal Action vs. Union of India & Ors. [20] wherein it has been held as follows:

> "178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above—or to simply levelise—a convenient approach is calculating interest. But here interest has to be calculated on compound basis—and not simple—for the latter leaves much uncalled for benefits in the hands of the wrongdoer.
>
> 179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.
>
> 180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, [pic]the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws."

57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It is submitted by Mr. Salve and Mr. Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This can not be said to be unfair as the same principle would also apply to the appellants.

58. This now bring us to applications for impleadment of IOCL and for direction. I.A.No.6 of 2013 is for the impleadment of IOCL. It is submitted that during the pendency of these proceedings, the respondents have received rebates, discounts, credits, refunds in the fuel price being extended by fuel supplier i.e. Indian Oil Corporation Ltd. (IOCL). Such benefits have been received by the respondent from January 2001 till date It is pleaded that the respondents have failed to give details about the discounts and credits received the benefit of which ought to have been passed on to the appellant. Therefore, IOCL be made parties to respondent No.2 to the present appeal. I.A.No.5 of 2013 seeks direction to IOCL to furnish details of all the documents of the matter. Further directions are also sought on the respondent to refund a sum of Rs.240 crores paid by the appellant under the order passed by the State Commission along with interest at the rate as mentioned in PPA.

59. The respondents in a common counter statement to the applications have submitted that the applications are not maintainable. The applications have been evidently preferred purely as dilatory tactics, to delay and deny substantial payments that are due and payable to the respondent pursuant to the orders passed by the State Commission which have been upheld by APTEL. We are not inclined to entertain either of the applications at this stage. The issue sought to be raised in both the applications ought to have been raised by the appellant at the relevant time. The applications are, therefore, accordingly dismissed.

60. For the foregoing reasons, we see no merit in the appeal and the same is accordingly dismissed.

.....J.

[Surinder Singh Nijjar]

.....J.
[A.K.Sikri]

New Delhi;
April 04, 2014.

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[1] (2008) 4 SCC 755
[2] (2010 (11) SCC 1)
[3] (1992 Supp.(2) SCC 651)
[4] (1986) 4 SCC 537
[5] (1991) 4 SCC 584
[6] (2005) (2) SCC 431
[7] (1987) (1) SCC 124
[8] (1964 (6) SCR 261
[9] 1998 (4) SCC 100 (at page 104 para 9)
[10] 2000 (2) SCC 628 (at page 635 para 12)

[11] 1994 (2) SCC 155
[12] 2011 (5) SCC 532
[13] (2008) 7 SCC 169
[14] (2002) 1 SCC 367
[15] (2011) 8 SCC 161
[16] 1962 (2) SCR 339
[17] 2002 (4) SCC 105
[18] 2012 (9) SCC 552
[19] 2002 (1) SCC 367
[20] 2011 (8) SCC 161
