Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.177 of 2010 &
IA No. 205 of 2011

Dated: 28th February, 2012

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Tamil Nadu Electricity Board,
144, Anna Salai, Chennai-600 002
(Represented by its Chief Engineer/PPP) ... Appellant

Versus

1. **M/s. GMR Power Corporation Pvt. Ltd.,**
   Registered Office: Skip House 25/1,
   Museum Road,
   Bangalore -560 025

2. **Tamil Nadu Electricity Regulatory Commission,**
   No. 19-A, Rukmini Lakshmipathy Salai,
   Egmore,
   Chennai-600 008 ...Respondents

3. **M/s. Hindustan Petroleum Corporation Limited,**
   No. 82, TTK Road,
   Alwarpet, Chennai-600 018 ...Impleaded Respondent

Counsel for the Appellant(s): Mr.R. Muthu Kumaraswamy, Sr. Advocate
Mr. H.S. Mohammad Rafi
Mr. Aadhi Kesavalu

Counsel for the Respondent (s): Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Gopal Jain
Mr. Kaushik Mishra
Mr. Ankur Sood
Mr. M.M. Sharma &
Mr. Vaibhav Choukse for R-3
Mr. G. Joshi, Mr. S. Saxena

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Tamil Nadu Electricity Board against the order dated 16.4.2010 passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as 'State Commission') in DPR no. 10 of 2008 filed by M/S. GMR Power Corporation, the first respondent herein. The State Commission is the second respondent. M/s. Hindustan Petroleum Corporation Ltd. , fuel supplier to the respondent no. 1, has also been impleaded as the respondent no.3.

2. The brief facts of the case are as under:

2.1. In 1994, the appellant invited bids for setting up diesel engine based power projects at various places in the State of Tamil Nadu, including the one in question

at Basin Bridge, Chennai. The 1st respondent being the successful bidder entered into a Memorandum of Understanding on 13.1.1995 with the appellant for setting up a diesel based power projects of 200 MW capacity at Basin Bridge. Following the same, Techno Economic Clearance for the power project was granted by the Central Electricity Authority on 10.7.1996 as required under the provisions of the 1948 Act. Thereafter, a Power Purchase Agreement ('PPA') was entered into between the appellant and the 1st respondent on 12.9.1996 for a period of 15 years. There were two addenda to the PPA, Addendum no. 1 on 26.2.1999 and Addendum no. 2 on 1.3.2000 which were made after the signing of the Land Lease Agreement.

2.2. In terms of the PPA, a Land Lease Agreement ('LLA') was entered into between the appellant and the 1st respondent on 26.3.1997 which provided for land belonging to the appellant to be leased to the 1st respondent on rental basis. The LLA, inter-alia, included the payment of rent that was fixed for the first three years and thereafter to be revised once in three years on the basis of the guidelines of the Government of Tamil Nadu.

2.3. The first and the second units at the power project of the appellant were commissioned on 31.12.1998, and the third and the fourth units on 15.12.1999. The 1st respondent had been generating and supplying energy to the appellant and had been raising invoices for payment of the said energy periodically. The appellant had been making payments after availing itself of the rebates as per the

PPA and after deducting the rentals for land leased to the first respondent. There were exchange of correspondences between the parties with reference to the quantum of lease rent and its pass through in tariff, interest on working capital, start-stop charges, refund of rebate and interest on delayed payment. Ultimately, the first respondent on 18.1.2008 raised demand under the various heads on the appellant. Thereafter, on 23.6.2008, the first respondent issued a notice to the appellant invoking the clause of PPA regarding arbitration, designating its representative to resolve the dispute.

2.4. On 25.7.2008 the 1st respondent filed a petition, being no. DPR 10 of 2008, before the State Commission for adjudication on its claims.

2.5. The State Commission passed an order on 16.4.2010 allowing the claims of the respondent no. 1 alongwith interest directing the appellant to make payment as per the said order.

2.6. Aggrieved by the order dated 16.4.2010 of the State Commission, the appellant has filed this appeal.

2.7. M/s. Hindustan Petroleum Corporation, the fuel supplier to the respondent no. 1 filed IA no. 19 of 2011 during the proceedings of the appeal before this Tribunal. The Tribunal by its order dated 1.2.2011 allowed the application and impleaded M/s. Hindustan Petroleum Corporation as the respondent no. 3.

3. The appellant has raised the following issues:-

I. **Land Lease rentals and pass through:**

(i) The claim of the respondent no. 1 before the State Commission was that the fixation and revision of

the rent was exorbitant and unreasonable that was required to be corrected and that the land lease rentals paid during the period 1997 to 2009 amounting to Rs. 89.81 Crores should be refunded treating it as an element of pass through with future interest. The State Commission incorrectly decided the liability of the respondent no.1 towards land lease rentals and held that the entire rentals have to be treated as 'pass through' in the tariff and to be paid with interest w.e.f. 17.4.1997. The State Commission also wrongly held that the claim was not hit by laches and delay.

(ii) According to the appellant, the original PPA and LLA were voluntarily executed and acted upon by the parties and there was no scope to amend the same unilaterally at the instance of one party to the detriment of the other.

(iii) Even before the signing of the PPA, the claim of the respondent no. 1 for pass through of land lease rental was rejected by the CEA at the time of according Techno Economic Clearance. The respondent no. 1 had also given an undertaking to pay the land lease rentals. After the Government of India notification dated 17.4.1997, a claim for pass through was raised by the respondent no. 1 which was rejected in December 1998 by the appellant and thus the issue was put to rest.

(iv) The direction to pay the lease rent at 2% for the period 19.12.1999 to 9.3.2005 based on GOM no. 460 dated 4.6.1998 was not sustainable as the GOM was applicable to lands situated in Panchayat areas where local cess and local surcharge are leviable and not to the land in question which is within the limits of Chennai City Corporation governed by the Corporation

Act. In fact this has been clarified by the Revenue Department of Government of Tamil Nadu in letter dated 10.3.2005 and after the date of this clarification the State Commission has by its order directed that the lease rent will be leviable at 14% of the market value. Thus, the ruling on lease rent fixing the lease rent at 2% for the period 19.12.1999 to 9.3.2005 is illegal.

(v) The finding of the State Commission for pass through of the lese rent which is based on clause 17.1 (b) of the PPA is wrong in view of the provision of clause 17.1(a) which does not allow amendment of the agreement except by prior written agreement between the parties. Assuming that clause 17 would entitle the respondent no. 1 for an amendment of PPA on the basis of Government of India ("GOI") notification dated 17.4.1997, the same would be applicable after the

amendment of the agreement in terms of clause 17 and not the date of GOI notification.

(vi) There is also no justification in the State Commission's order regarding payment of interest w.e.f. 17.4.1997 in view of delay in raising of claim by the respondent no. 1 from the year 1998 till the year 2008.

II. **Interest on Working capital**

(i) The appellant had by sheer mistake paid interest on working capital computed at 85% Plant Load Factor (PLF), despite the fact that the average of actual PLF for last three years was far lesser. When this mistake came to be noticed in March, 2005 deductions were made for retrieving the excess payment in consonance with Section 72 of the Indian Contract Act, 1872. The conclusion of the State

Commission that actual PLF should be interpreted with reference to the definition of the PLF and deemed generation for addition to physical generation for the purpose of interest on working capital is contrary to the PPA as well as known principles of interpretation.

III. **Start Stop Charges:**

(i) The respondent no. 1 had forwarded the claim for the first time in the petition. Even in the year 2005 when the appellant had sought to deduct the excessive amounts claimed towards interest on working capital, the respondent no. 1 had sought to justify the claim for interest on working capital at 85% PLF as a set off for expenses incurred towards excessive dispatch instructions resulting in more numbers of start and stop. The State Commission has since allowed both the claims i.e. interest on working capital computed at 85% PLF and cost of excessive

start stop. The respondent no. 1 is not entitled to both the claims. Hence, it is only in the event of rejecting the claim of the respondent no. 1 in respect of interest on working capital at 85% PLF that the claim for payment of start stop charges would fall for consideration.

(ii) Though there is not much dispute regarding the actual number of start stop effected, the claim of the respondent no. 1 for Rs. 76,000/- per start is exaggerated. According to the Committee constituted by the appellant to enquire into the cost, the cost per start up was only around Rs. 9,000/-. The State Commission had refused to take that enquiry report on the ground that it had been produced after reserving orders in the matter and proceeded to qualify at the rate of Rs. 76,000/- per start up as claimed by

the respondent no. 1. The State Commission should have considered the contentions of the appellant.

IV. **Payment of rebate deducted:**

(i) In terms of clause 8.3 of PPA, the appellant is eligible for rebate of 2.5% of the invoice amount, if full payment is made within 5 working days of its receipt.

(ii) For the period from 1999 to 2001, the appellant paid to the respondent no.1 at the agreed rate of Rs. 3/- per unit within time and thereafter a sum of Rs. 0.15 per unit was deducted from the sum of Rs. 3/- per unit as agreed to by the respondent no. 1.

(iii) For the period from 2001 to 2005, the respondent no. 1 was fully conscious of the financial position of the appellant and by 41 separate but similar letters spread over that period had agreed to

accept payments against the invoices with deduction of rebate, thus waiving the conditions during the said period.

(iv) For the period from 2005 to 2008, the respondent no. 1 had submitted the invoices for amounts that had not been strictly in accordance with PPA and the appellant had made payments within 5 working days to the extent of the amounts that the respondent no. 1 was entitled to in terms of the PPA.

(v) The claim of payment of rebate deducted by the appellant had never been raised by the respondent no. 1 at any time prior to the filing of the petition in the year 2008. Thus, this claim is hit by the doctrine of acquiescence and laches apart from being barred by the law of limitation.

V. **Payment of interest for delayed settlement of invoice:**

(i) The PPA provided for timely payment of invoice amount and if not paid within 30 days, payment of interest on delayed payments.

(ii) Interest is agreed to be paid to compensate for loss occasioned due to breach of contract by delayed payment. It, therefore, pre-supposes that the party claiming interest has suffered a loss which is to be compensated for by interest. In the present case the respondent no. 1 has not suffered any loss and, consequently, is not entitled to payment of interest for the delayed payment.

(iii) It has now come to be known that the respondent no. 3 has been giving credit periods to the respondent no. 1 varying from 25 days to 90 days

whereas, according to the Fuel Supply Agreement, the appellant was required to make advance payments on 11th, 21st and 1st of every month for the fuel supplied by the third respondent. Therefore, the respondent no. 1 has not suffered any loss for the delayed payments made by the appellant.

VI. **Refund of Entry Tax**

(i) The appellant had been reimbursing the respondents with the entry tax remitted by them for the fuel purchased at Vizag and brought to Tamil Nadu. However, the 3rd respondent had given certain credits based on which the appellant had deducted about Rs. 10 Crores. However, later, the 3rd respondent reversed the credit entry. The State Commission in the impugned order has wrongly issued direction that the appellant should pay the amount of

Rs. 10 Crores directly to the 3rd respondent on account of reversal of entry.

(ii) In this appeal, the 3rd respondent has stated that the credit to the extent of Rs. 29 Crores was extended under clause 6.2(e) of the Fuel Supply Agreement and later the audit had raised objections to the effect that the respondent no. 1 had claimed reimbursement of the entry tax from the appellant and, therefore, the credit given by the 3rd respondent amounted to double benefit. Based on the audit objections, the 3rd respondent had reversed all the credit entries. After such reversal, the respondent no. 1 paid bill of Rs. 19 Crores leaving a balance of about Rs. 10 Crores.

(iii) According to clause 6.2 (e) of the FSA, the credits had been voluntarily given, treating the sale to

had taken place in Tamil Nadu. It is, therefore, not open for the 3rd respondent to reverse the entries based only on audit objections. Therefore, the claim of this amount is illegal and not in order.

VII. **Minimum Alternte Tax (MAT)**

(i) The appellant has accepted the MAT and had already made part payments thereof. The dispute pending would only be in respect of the interest claimed on this amount. As the appellant has agreed to reimburse the amount of MAT, it is reasonable for the first respondent to give up its claim for interest.

4. On the above issues the learned Sr. counsel for the appellant made detailed submissions assailing the findings of the State Commission in the impugned order.

5. Learned Sr. counsel for the respondent no. 1 made detailed submissions supporting the findings of the State Commission. He argued that the appellant committed material breach of the PPA as:

a) *It had failed to pay Tariff invoice in full & on time in accordance with the terms of PPA;*

b) *It had fixed exorbitant Land Lease Rent ("LLR"), though, contractually, LLR had to be fixed to the satisfaction of this Respondent;*

c) *It had not allowed LLR as a pass through, though this Respondent was contractually/legally entitled to the same;*

d) *It had wrongly/forcibly deducted rebate, contrary to the provisions of PPA;*

e) *It had wrongfully deducted/disallowed certain portion of Interest on Working Capital, which is a component of Tariff Invoice;*

f) It failed to pay Start-Stop expenses incurred by this Respondent for backing down and resuming generation of electricity based on Dispatch Instructions;

g) Late payment of Tariff Invoices attracted interest on outstanding/overdue amounts under the provisions of PPA."

In view of the aforesaid breaches, the appellant was liable to and owed various amounts to the respondent no. 1. Learned Senior counsel for the respondent no. 1 made detailed submission on each item of dispute raised by the appellant, supporting the findings of the State Commission.

6. Learned counsel for the respondent no. 3 made detailed submissions in respect of entry tax payable to the respondent no. 3 by the appellant as per the directions of the State Commission. He also raised a

claim for recovery of LLR paid towards the sub-lease as a "pass through" item in terms of the Land Sub-Lease Agreement (LSLA) dated 1.12.1997. He argued that the respondent no. 3 could not seek relief from the State Commission in view of the pendency of the present appeal in which stay was granted. He also argued that the respondent no. 3 was also entitled to interest on its claim of arrears of entry tax and LLR.

7. After taking into account the rival contentions of the parties, the following question would arise for our consideration:

i) Whether the claim of the respondent no. 1 regarding land lease rentals is hit by laches and delay?

ii) Whether the State Commission was correct in ruling that the lease rent is payable at 2% of the land cost for the period from 19.12.1999 to 09.03.2005 on the basis of State Government order dated 4.6.1998 which prescribed formula for fixation of lease amount in respect of Government Poromboke lands?

iii) Whether the State Commission was correct in treating the entire land lease rentals as "pass through" in tariff and the first respondent be entitled to the refund of all the amounts paid as rental with interest w.e.f. 17.4.1997?

iv) Whether the State Commission was correct in allowing interest on working capital computed at 85% Plant Load Factor without considering that the actual PLF was much

lower? Whether the claim of the respondent no. 1 in this regard was hit by delay and laches?

v) Whether the State Commission was correct in allowing start stop charges as claimed by the respondent no. 1?

vi) Whether the State Commission was correct in allowing payment of rebate deducted by the appellant?

vii) Whether the State Commission was correct in allowing payment of interest for delayed settlement of invoices?

viii) Whether the State Commission was correct in directing the appellant to refund the amount of entry tax deducted by the appellant from the bills of the respondent no. 1 on account of the reversal of the credit entry for the

Entry Tax even though the respondent no. 3 had earlier given the credit to the respondent no. 1? Whether the amount is payable by the appellant with interest?

ix) Whether the respondent no. 1 is entitled to interest on account of delay in payment of Minimum Alternate Tax?

x) Whether the respondent no. 3 is entitled to seek relief on account of refund of land lease rentals through the present appeal?

8. Before we take up the above questions for consideration we shall discuss the issue of jurisdiction of the State Commission and bar of limitations under the Limitation Act, 1963 which were considered by the State Commission. During the course of the arguments, the learned senior counsel for the appellant submitted that he would not urge before the

Tribunal the fundamental issue of lack of jurisdiction of the State Commission to entertain the claim as well as the bar of limitation under the provisions of the Limitation Act, 1963, in the present appeal as the Tribunal in earlier judgments had decided that the State Commissions possess jurisdiction to entertain all claims and disputes between generators and licensees and the provisions of Limitation Act, 1963 would not be applicable on such claims. The learned Sr. counsel, therefore, proceeded to make submissions on the merits of the individual claims including the ground of delay and laches without prejudice to the rights of the appellant to raise the aforesaid ground of jurisdiction and limitation in appropriate further proceedings before the higher forum, since the said issues were pending before the Hon'ble Supreme Court.

9. Let us now take up the first three inter-connected issues relating to Land Lease Rentals ('LLR').

9.1. According to learned senior counsel for the appellant, the claim for pass through of the land lease rent was rejected in December 1998 and was not allowed in the two addendum which came on 26.2.1999 and 1.3.2000. The claim was thus put to rest. The pass through of LLR could not be allowed as a matter of right following the Government of India notification dated 17.4.1997 as the agreement could not be amended except by prior written agreement between the parties under clause 17.1 (a) of the PPA. Further the ruling of the State Commission on lease rent fixing the same at 2% of the land cost from 19.12.1999 to 9.3.2005 is illegal.

9.2. Learned senior counsel for the respondent no. 1 has submitted as under:

i) Under the two part tariff structure all costs incurred by the generator in connection with generation and supply of power would have to be compensated for within the tariff structure. Lease rent was excluded for the computation of capital cost by the CEA on the ground that the respondent would derive double benefit, if both capitalization of lease rent and pass through of lease rent were allowed.

ii) The communications from the respondent dated 7.8.1999, 13.3.2002 and 6.5.2003 will show that the respondent was continuously representing that the lease rental should be allowed as pass through.

iii) The appellant communicated to the IPPs that if any amendment was made as regards lease rentals by CEA, the same could be treated as pass through. Based on the assurance, the respondent no. 1 entered into the Land Lease Agreement on 26.3.1997. The amendment to the CEA guidelines came about 21 days later on 17.4.1997.

iv) The parties in their wisdom agreed to proceed with signing of the PPA by incorporating a specific provision i.e. clause 17.1 (b) in the PPA that would entitle the respondent, at its option, to the benefit of any amendment to Government of India notification dated 30.3.1992 which was the basis of the PPA.

v) The appellant had allowed the benefit of pass through to the IPPs who waited to sign PPA after the said amendment was issued but denied the same to the respondent no. 1.

vi) The LLR and pass through are inter-linked. The lease granted to the respondent no. 1 was for utility and there is no question of the appellant recovering from the consuming public exorbitant market value based rent.

vii) The contention of the appellant that GOM no. 460 dated 4.6.1998 does not apply to the land owned by it as it related to Panchayat lands is untenable. There are no separate guidelines issued by the State Government for the appellant's lands. Therefore, the parties agreed to follow the extant guidelines of the State Government for arriving the initial LLR and its subsequent revision from time to time. The appellant took recourse to the Government guidelines when it came to initial LLR and revising the same but disallowed the same when the respondent no. 1

claimed reduction in LLR based on amendment to the guidelines effected by the said G.O. dated 4.6.1998.

9.3. Let us first examine the sequence of events related to LLR.

i) On 10.10.1995 the Commissioner of Land Administration, Government of Tamil Nadu recommended fixation of lease rent @ 7% of double market value of land.

ii) The respondent no. 1 after signing of the PPA addressed a communication on 11.12.1996 which was followed by several other communications to the Government of Tamil Nadu and the appellant to reduce the high LLR proposed by the appellant based on the letter dated 10.10.1995 from Commissioner of Land Administration. The respondent no. 1 also made a request for 'pass through' of LLA in tariff.

iii) On 19.12.1996 the respondent no. 1 received the possession of land. The appellant's Board considered the representations in the 761st meeting held on 11.1.1997. The appellant assured the respondent no. 1 on 28.1.1997 through a letter that land lease may be treated as 'pass through' subject to provision contained in the guidelines of Government of India in respect of O&M charges.

iv) On 26.3.1997 the Land Lease Agreement (LLA) was entered into between the appellant and the first respondent according to which the LLR of Rs. 30,73,943/- per month was fixed for three year period from 19.12.1996 to 18.12.1999. The LLA empowered the appellant to revise the rent not more than once in 3 years according to Government notification/guidelines.

v) On 17.4.1997 Government of India notification permitting LLR to be a 'pass through' element in the generation tariff was issued.

vi) On 30.4.1998 the respondent no. 1 approached the appellant to allow LLR as pass through in tariff in view of the above notification of the Government of India.

vii) Revenue Department, Government of Tamil Nadu by GOM no. 460 dated 4.6.1998 prescribed 2% lease rent, 2% local cess and 10% local cess surcharge for Lease of Paramboke land for commercial purpose.

viii) On 10.11.1998, the respondent no. 1 sent a draft amendment to the appellant regarding pass through of LLR in tariff.

ix) On 26.1.1998, the appellant rejected the plea of the respondent no. 1.

x) On 15.11.2000 LLR for the period 19.12.1999 to 18.12.2002 was enhanced by the appellant to Rs. 41,39,092/- per month. The respondent no. 1 represented to the appellant on 13.3.2002 seeking reduction of lease rent.

xi) On 17.4.2003 the appellant raised the LLR for the period 19.12.2002 to 18.12.2005 to Rs. 81,18,452/- per month. However, the rent was revised by the appellant to Rs. 49,57,655/- per month after representation by the respondent no. 1.

xii) On 29.4.2003, Secretary, Energy Deptt., Government of Tamil Nadu clarified that for commercial purposes lease rent should be charged at

2% of land cost plus surcharge @ 23% of lease rent w.e.f. 04.06.1998.

xiii) The appellant did not accept the clarification issued by Secretary (Energy), Government of Tamil Nadu and referred the matter to Revenue Secretary, Government of Tamil Nadu. On 10.3.2005 Revenue Secretary, Govt. of Tamil Nadu clarified that lease rent should be computed at 14% of land cost.

xiv) On 21.3.2005 the Expert Committee constituted by the appellant to study reasonableness of LLR recommended reduction of LLR.

xv) The Board of the appellant deliberated on the recommendations of the Expert Committee in June 2007. However, the Board did not accept the recommendations of the Expert Committee. Finally, the Board Level Tender Committee of the appellant

took consideration of the issue on 28.3.2008 and recommended reduction of lease rent and refund of Rs. 38,09,16,465/-. The matter was taken up in the Board meeting on 29.3.2008, but the proposal was deferred.

xvi) On 25.7.2008, the respondent no. 2 filed a petition before the State Commission.

xvii) Impugned order dated 16.04.2010 was passed by the State Commission.

9.4. In the above background let us now examine the findings of the State Commission regarding delay and laches. The relevant paragraphs of the impugned order of the State Commission are reproduced below:

> *"(5) It emerges from a perusal of the case that the issues of "pass through" of lease rent and determination of the quantum of lease rent are*

inter-linked. Determination of the quantum of lease rent precedes "pass through". "Pass through" enables the Petitioner to secure reimbursement for whatever lease rent is paid by him, which, otherwise, should have been accommodated within the stipulated O & M expenses. The "pass through" of lease rent de-links the lease rent from O & M expenses and is eligible to be considered as a component of fixed cost distinct from O & M expenses.

(6) The lease rent of the Petitioner was specified in the Land Lease Agreement executed on 26-3-1997. This rent was valid upto 18-12-1999, that is three years from the date of taking over possession of the land on 19-12-1996. The Government of India effected the Notification of "pass through" on 17-4-1997, 21 days after the execution of the Land Lease Agreement. The Petitioner pursued the issue of "pass through" with the Respondent till 26-11-1998, when it was rejected by the Respondent.

(7) Thereafter, the Petitioner concentrated on securing for concessional lease rent, facilitated by the Government Order dated 4-6-1998. This issue shuttled between the TNEB, the Energy department and the Revenue department till March 2005. The Respondent thought it fit to constitute an Expert Committee in February 2005 to suggest reasonable lease rent. Although the Committee submitted the report promptly in March 2005, the TNEB has not been able to take a final decision till date on the recommendation of the Committee. The revision of lease rent which was due on 19-12-2005 and 19-12-2008 are yet to be effected. All these factors establish that the issue is very much alive.

(9) If a view is taken that the petitioner should have sought appropriate legal remedy, either when "pass through" was denied or whenever the determination of lease rent was detrimental to him, the power project could not have been commissioned on 15-2-1999 ahead of schedule. The parties would have got involved in endless

litigation on a variety of issues and the project would not have progressed.

(10) The Power Purchase Agreement between the two parties executed on 12-9-1996 is valid upto 14-2-2014. The petitioner has chosen to file the dispute resolution petition before this Commission on 25-7-2008.

(G) <u>Ruling on delay and laches</u>

On a holistic and pragmatic view, we hold that delay and laches would not be attracted in this case".

9.5. Learned counsel for the respondent no. 1 has relied on the decision in L. Balakrishnan Vs. M. Krishnamurthy, 1998(7) SCC 123 on the issue of delay and laches. In this matter the Hon'ble Supreme Court has held that once the court accepts the explanation for condonation of delay as sufficient, normally the Superior court should not disturb such finding unless

the exercise of discretion was wholly on untenable grounds or arbitrary or perverse.

9.6. We notice from the sequence of events and that the issue of land lease was alive and under continuous correspondences and consideration of the appellant till the year 2008. The respondent no.1 pursued the "pass through" of LLR in tariff with the appellant but having failed to make the appellant agree for pass through, pursued for reduction in LLR. We do not find any infirmity with the above findings of the State Commission that the delay and laches would not be attracted in this case.

9.7. Regarding pass through of land lease rent, two documents issued by the appellant before signing of the land lease agreement dated 26.3.1997 are

important. The excerpts of these documents as reproduced in the impugned order are as under:

Appellant's Board No. BP(FB) no.9 (Technical Branch) dated 24.1.1997

> *"The Land lease rent can be treated as a "pass thorough" item to the TNEB, subject to the Provisions contained in the GOI guidelines in respect of O & M charges. The Independent Power Promoter may be informed accordingly."*

Chief Engineer (IPP), TNEB's letter no. SE/IPP/EMC/AEE/FBBDEPP/D.89 197 dt. 28.1.1977 to the respondent no. 1

> *"With reference to your request to reduce land lease rent, vide your letter cited, you are informed that the same is not feasible of compliance. However, the land lease rent may be treated as a "pass through" item subject to the provisions contained in the GOI guidelines in respect of O & M charges."*

9.8. Admittedly, subsequent to the signing of the Land Lease Agreement dated 26.3.1997, the Government of India by a notification dated 17.4.1997 amended its earlier notification dated 30.3.1992 by permitting the land lease charges as pass through in tariff.

9.9. Let us now examine the relevant clause 17.1 of the PPA and clause 6.1 of Land Lease Agreement which are reproduced below:

> *"17.1. Amendment*
> *(a) This agreement cannot be amended except by prior written agreement between the parties.*
>
> *(b) This agreement, including the provisions set forth in Appendix – D, is based upon the Government of India, Department of Power Notification dated March 30, 1992, as amended as of January 17, 1994, August 22, 1994, January 13, 1995 and as of December 14, 1995 (the "Notification"). To the extent there are any amendments or modifications to the Notification*

which come into effect after the date of this agreement and which, if incorporated into this agreement would result in terms more favourable to the Company and / or TNEB, then this agreement shall be amended at the option of the Company to reflect such change and until such time, the prior terms of this agreement shall continue to bind the parties. The amended terms of this agreement will be deemed to be favourable to TNEB if the Company can demonstrate to the reasonable satisfaction of TNEB that such amended terms result in a lower tariff."

Clause 6.1 of the Land Lease Agreement dated 26.3.1997 reads as follows:

"This agreement cannot be amended except by prior mutual consent of the parties and in the event the provisions in this agreement are in conflict with the PPA, the provisions in the PPA prevail."

9.10. According to clause 17.1(b), the PPA shall be amended at the option of the respondent no. 1 in the

event of any amendment to Government of India notification dated 30.3.1992. Thus, the appellant should have accepted the proposal of the respondent no. 1 for amendment to the PPA immediately after the amendment notified by the Government of India notification on 17.4.1997 for pass through of the land lease charges. The respondent no. 1 can not take shelter under clause 17.1 (a) of the PPA and clause 6.1 of the Land Lease Agreement to deny a legitimate amendment to the PPA which was required to be carried out according to clause 17.1(b) of the PPA.

9.11. It is also noticed that the appellant allowed the "pass through" of the Land Lease Rent to other Independent Power Producers in the State who had executed the PPAs after issuance of GOI notification dated 17.4.1997.

9.12. The State Commission in the impugned order has given detailed analysis and findings on the issue of "pass through of LLR" and has summarized the findings as under:

> *"J. Ruling on "pass through"*
>
> *We hold that the summary rejection of the plea of the Petitioner for "pass through" of lease rent on 26-11-1998 by the TNEB is violative of clause 17(1) of the PPA and the GOI Notification dated 17-4-1997 issued under the authority of Section 43 A (2) of Electricity (Supply) Act, 1948. We hold that the Petitioner is entitled to pass through of the lease rent with effect from 17-4-1997, the date on which the notification of the Government of India came into effect".*

We are in complete agreement with the above findings of the State Commission.

9.13. The appellant did not allow the LLR to be "passed through" and the land cost was also not a part of the project cost. We notice that while the basis adopted in the tariff determination was cost plus, the cost incurred by the respondent no. 1 in the form of Land Lease Rent was not taken into account. The Central Government also amended its Tariff Notification w.e.f. 17.4.1997 to allow the Land Lease Rent as pass through in tariff. Thus, there was no reason for the appellant not to allow the LLR as pass through in terms of clause 17.1 (b) of the PPA with effect from 17.04.1997. This issue is, therefore, decided against the appellant.

9.14. Let us now examine the quantum of LLR determined by the State Commission. Admittedly, the Commissioner of Land Administration vide letter dated 10.10.1995 addressed to the Secretary, Government of

Tamil Nadu, Energy Department stated that the lease rent has to be fixed at 7% of the double the market value of the land based on the sales statistics in the recent past in the vicinity, and accordingly the lease rent was fixed at Rs. 30,73,943/- per month in clause 3.1 of the Land Lease Agreement for a period of 3 years effective from 19.12.1996, the date on which the land was handed over to the respondent no. 1. The land lease rent was enhanced to Rs. 41,39,39,092/- per month as per the above formula of double of 7% of market value of land from 19.12.1999. Applying the same formula the lease rent was raised to Rs. 81,18,452/- per month w.e.f. 19.12.2002. On the representation of the respondent no. 1 against the steep increase in the lease rent and on a report from the District Collector, the lease rent was reduced to Rs. 49,57,655/- per month w.e.f. 19.12.2002 which

has been continuing till date, although revision fell due on 19.12.2005 and 19.12.2008 in terms of the Land Lease Agreement.

9.15. Admittedly, the Revenue Department issued a Government Order dated 4.6.1998 prescribing a formula for lease of Govt. poramboke land for commercial purpose @ 2% of lease rent plus local cess and surcharge. Accordingly, the Secretary (Energy), Government of Tamil Nadu by letter dated 29.4.2003 issued the following clarification to the Chairman, Tamil Nadu Electricity Board in regard to collection of lease rent from the respondent no. 1.

> *"Collection of Land Lease Rent with effect from 4.6.98 on Commercial purpose*
>
> *(a) Land Lease Rent :: 2% of land cost*
>
> *(b) Additional surcharge :: 23% of land lease rent*

<u>Collection of land lease rent prior to 4-6-98 on Commercial purpose</u>

(a) Land Lease Rent :: 14%of land cost

(b) Additional surcharge :: 23% of land lease rent

I am therefore to request you to revise the Land Lease Agreement entered into with the GMR Power Corporation Private Limited accordingly."

9.16. The appellant did not accept the clarification issued by the Secretary, Energy Department on the advice of the Revenue Department but referred the matter again to the Revenue Secretary. The Revenue Secretary vide his letter dated 10.3.2005 stated that pending issue of amendment to the Government order dated 4.6.1998 of Revenue Department, 14% of land cost including additional surcharge may be collected as lease rent for commercial purposes in respect of leases in municipal area and Corporation limits.

9.17. In this regard we reproduce findings of the State Commission:

"(8) The Revenue Secretary admitted that there was confusion in the implementation of G.O. Ms. No.460 dated 4-6- 1998 and clarified that a total of 14% of land cost is to be realised towards lease rent, local cess and local cess surcharge. He clarified that local cess and local cess surcharge are not leviable in areas falling under municipalities and corporations. But, additional surcharge of 13% on lease rent in municipalities and 23% of lease rent in corporation areas are leviable in addition to lease rent. Therefore, the Revenue Secretary directed that pending amendment to G.O. Ms. No.460 dated 4-6-1988, 14% of land cost including additional surcharge may be collected as lease rent for commercial purposes in respect of municipal areas and corporation limits for Government poramboke land. As the letter did not talk of retrospective effect, it is reasonable to assume that 14% land cost should be

applied prospectively. The letter of the Revenue Secretary dated 10-3-2005 appears to hold good even today, as the promised amendment to G.O. Ms.No.460 dated 4-6-1998 has not come at all.

(9) The Chairman, TNEB addressed the Revenue Secretary on 14-5-2004 in D.O. Letter No. CE/ GTP&IPP/ Aee2/ F.GMR/D.523/04 to enquire whether the lease rent of 2% indicated by the Secretary, Energy Department in the letter dated 29-4-2003 (which was issued in consultation with the Revenue Secretary) would apply to the lands of TNEB. The Chairman, TNEB stated that the lease rent indicated in G.O. Ms. No.460 dated 4-6-1998 related to poramboke land. It is interesting here to note that while the TNEB accepted the rates applicable for poramboke land contained in the letter of Commissioner of Land Administration dated 10-10-1995, the lease rent indicated for poramboke land in G.O. Ms. No.460 dated 4-6-1998 and in the letter of Secretary, Energy Department dated 29-4-2003 were questioned by the TNEB, probably because the rates were not

favourable to them. The TNEB argued that the poramboke land rates were not applicable to lands owned by TNEB. This, again, is a case of double standard.

(10) Another relevant point to be considered here is that clause 3(1) of the LLA stipulates that Lease Rent is to determined based on Government notification / guidelines. While the TNEB gladly accepted the rate recommended by the Commissioner of Land Administration in letter dated 10-10-1995, it refused to accept the rate prescribed in G.O. Ms.460 dated 4-6-1998 and the clarification furnished by the Energy Secretary on 29-4-2003 because the latter advice was adverse to TNEB. We must note that on both occasions the advice/recommendation came from the Government. Clearly, the TNEB adopted double standard.

(11) Piecing together the letter of the Commissioner of Land Administration dated 10-10-1995, the G.O. Ms. No.460 dated 4-6-1998 of the Revenue Department, the letter of the Secretary, Energy

Department dated 29-4-2003 and the letter of the Secretary of the Revenue Department dated 10-3-2005, we determine the lease rent as below:-

From 19-12-1996 to 18-12-1999 (as per LLA)	*Rs.30,73,943 per month*
From 19-12-1999 to 9-3-2005 (in terms of the letter of the Secretary, Energy Department dated 29-4-2003) *From 10.3.2005 (in terms of the letter of the Revenue Secretary, dated 10-3-2005)*	*Lease rent of 2% of land cost and an additional surcharge of 23% of the lease rent (additional surcharge of 23% has to be borne by the TNEB)* *14% of the land cost per month*
From 19-12-2005 onwards	*14% of land cost per month"*

9.18. We find that the State Commission has thoroughly analysed the issue before reaching the conclusion on the quantum of lease rent applicable from different dates. We do not find any infirmity with the findings of the State Commission.

9.19. The main grievance of the appellant is with regard to the rent determined by the State Commission for the period from 19.12.1999 to 9.3.2005. We find that during this period the rent is to be treated as "pass through" as decided above. Therefore, even if, for the sake of argument the contention of the appellant for higher lease rent is accepted, it would not make any material difference to the result as the lease rent is a "pass through".

9.20. Learned senior counsel for the appellant has also contested that payment of interest w.e.f. 17.4.1997 in view of delay in claim by the respondent no. 1 from the year 1998 till the year 2008. There is no substance in the argument of the learned Senior counsel for the appellant. As the issue regarding delay and laches has been decided in favour of the respondent no. 1, the respondent no. 1 is also entitled

to interest at the rates prescribed under the provisions of the clause 8.7 of the PPA for the period upto 29.2.2000 and clause 8.6 of Addendum-II of the PPA with effect from 1.3.2000 on the LLR paid by or recovered from the respondent no. 1 from 17.4.1997 till date. Thus the allowance of interest by the State Commission is perfectly justified.

9.21. In view of above the first to three issues regarding the land lease rent are decided against the appellant.

10. The fourth issue is regarding interest on working capital.

10.1. According to learned senior counsel for the appellant, interest on working capital computed at 85% PLF was paid by mistake and when the mistake

was noticed the deductions were made. This is in consonance with the provisions of the PPA.

10.2. According to learned Sr. counsel for the respondent no. 2, the appellant was paying Interest on Working Capital at 85% PLF till March 2005 in discharge of its obligation as per the PPA. Apparently on some remarks of the Auditor General, the appellant started making deductions in the tariff invoice, contrary to the terms of the PPA. The Gross Actual Energy is one of the components of PLF, the other component being Deemed Generation which is distinct and separately defined in the PPA. As per the provisions of the PPA, PLF includes Deemed Generation in all circumstances. The only exception is for the purpose of computation of incentive payment. There is no room for any extraneous or ingenuous interpretation to understand the meaning of 'actual

PLF achieved'. The expression 'actual PLF achieved', though not defined separately, has a definite meaning and connotation. Neither the word 'actual' nor the word 'achieved' is redundant or otiose as the actual PLF achieved is the PLF (being the Gross Actual Energy plus Deemed Generation) actually achieved. The actual PLF could be higher or lower than 85% depending on the availability declared by the respondent no. 1. Actual PLF achieved would be lower than 85% only when the availability declared by the respondent no. 1 is less than 85% of the rated capacity. It is not disputed that the availability declared by the respondent no. 1 has always been higher than 85% and as such there was no occasion for the actual PLF achieved to fall below 85%.

10.3. Regarding delay and laches, admittedly, the cause of action arose in February 2006 when the

appellant deducted an amount of Rs. 9.05 crores from the monthly invoice of January, 2006 paid during February, 2006. The respondent no. 2 filed its claim for Interest on Working Capital on 25.7.2008. Thus the claim does not suffer from delay and laches.

10.4. The only issue now requiring consideration is whether the deemed generation should be added to the generation physically achieved by the power plant of the respondent no. 1 for the purpose of calculation of the components of working capital.

10.5. Interest on working capital is a component of Estimated Annual Costs which is the fixed cost component of the tariff.

10.6. According to Appendix D to the PPA, the working capital requirement covers the following costs:

(i) Fuel stocks as are actually maintained but limited to 30 days consumption;

ii) Sixty days consumption of stocks of lubricating oil;

iii) O&M and insurance expenses for one month;

iv) An allowance for maintenance spares.

v) Receivables equivalent to two months' average billing for sale of electricity produced by the project.

However, the above components of working capital have to be limited to lower of (i) amounts associated with generation of electricity not more than 7446 hours times Dependable capacity i.e. at 85% PLF (ii) preceding three Tariff Year average of actual PLF achieved (excluding initial Tariff Year and Stub Tariff Year). Further, for the Initial Tariff Year, Stub Tariff

Year and succeeding two Tariff Years (i) above, i.e. 85% PLF, will be applicable.

10.7. Clause 6.3 of the PPA stipulates the dispatch instructions to be followed by the respondent no.1. The relevant clauses are reproduced below:

> ***"6.3. Dispatch***
>
> *(a) The Company shall follow the Disptach Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch Instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Disptach Instructions to the Company other than those expressly provided for in Section 6.3(b). Deemed Generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions.*

(b) Except in the event of an Emergency affecting the Grid System:

(i) no Dispatch Instructions shall require the Company to operate the Project:

(1) during the Initial Tariff Year, Stub Year and during the first five (5) Tariff Years, at a load below ninety per cent (90%) of Rated Capacity;

(2) during the next succeeding five (5) Tariff Years, at a load below eighty seven point five per cent (87.5%) of Rated Capacity; and

(3) during the next succeeding five (5) Tariff Years, at a load below eighty five per cent (85%) of Rate Capacity;

(ii) there shall be no more than 50 off line Dispatch Instructions per Unit per Tariff Year which require the Company to re-start a Unit after it has been backed-down. TNEB shall pay the Company, under a Supplementary Invoice,

the Company's reasonable start-up costs for each start-up in excess of ten (10) start-ups per Unit, at a start-up charge calculated in according with Appendix M; this clause will have an overriding effect over the Dispatch Instructions specified in 6.3(b)(i) subject however to TNEB allowing the Project to achieve PLF of 85%".

According to the above clause the appellant is expected not to give dispatch instructions at load below 90% of rated capacity during Initial Tariff Year and stub Year and during first 5 Tariff Years, not below 87.5% of rated capacity during next succeeding Five Tariff Years, and not below 85% of rated capacity during the next succeeding Five Tariff Years.

Clause 6.3(b) (ii) provides for not more than 50 off line dispatch instructions per unit per Tariff Year and compensation for start up cost, for start up exceeding 10 nos. per unit. However, instructions for stop/start

will have overriding effect over the dispatch instructions specified in 6.3(b)(i) subject to the appellant allowing the project to achieve PLF of 85%.

10.8. Now, we will examine the definitions according to the PPA relevant to this issue.

Actual Energy has been defined as under:

"Actual Energy" or "AE" shall mean, with respect to a Unit or the Project for any period, the amount of energy, measured in Kwh by the Metering System in accordance with Section 9.1 of the Agreement at the Interconnection Point during such period. "$AE_{M1,m}$" shall mean Actual Energy in Billing Period $_{m1}$ produced by Unit$_m$ or the Project."

In other words, the Actual Energy is the energy sent out by the project.

The Deemed Generation has been defined as under:

*"Deemed Generation" and "DG" shall mean, with respect to the Project during a Deemed Generation Period, the difference, in Kwh, between (x) the product of (i) the lower of (x) Declared Availability of the Project (in MW) in the Deemed Generation Period, (y) Rated Capacity (unless it cannot be determined, for example, due to the occurrence of an event of Force Majeure), and (z) Observed Capacity, (ii) the number of Period Hours in the Deemed Generation Period, and (iii) one thousand (1,000) and (y) Gross Actual Energy produced by the Project during such Deemed Generation Period. "DG_t" shall mean the Deemed Generation for t Period Hours; accordingly, DG_t = (D_t*PH,*1,000) – (Gross Actual Energy), where D = the lower of (x) Declared Availability of the Project (in MW) in such period, (y) Rated Capacity (unless it cannot be determined, for example, due to the occurrence of an event of Force Majeure); and (z) Observed Capacity; provided that, in accordance with existing Electricity Notification-Tariff, for the time being, no Incentive Payment shall be payable by TNEB to the Company in respect of Deemed*

Generation, provided, further, that, Incentive Payment shall be payable by TNEB to the Company in respect of Deemed Generation, if permitted after the date hereof by Indian Legal Requirements. So long as no Incentive Payment is payable by TNEB for Deemed Generation, for PLF computation, Deemed Generation to the extent required to enable the Company to achieve NPLF in a Tariff Year would be taken".

In other words, the deemed energy is the difference between the energy that the project is capable of generating during a specified period and the gross energy produced by the project during that period.

Declared Availability is defined as under:

"Declared Availability" and "DA" shall mean, for any Settlement Period, the aggregate amount of gross electrical capacity of all Units, expressed in MW, measured at Rated Grid Conditions at the generator terminals of the Units, which the Company has most recently declared in an

Availability Notice or a Revised Availability Notice for that Settlement Period, to represent the amount of grow electrical capacity the Company expects could be delivered to TNEB if all Units were fully loaded.

No incentive is payable to the respondent no.1 for the deemed generation as existing Indian laws did not permit so but the deemed generation would be considered for PLF computation to the extent required to enable the respondent no.1 to achieve normative PLF of 68.49% to enable it to receive full fixed charge payment in a tariff year.

Gross Actual Energy has been defined as under:

"Gross Actual Energy shall ……i.e.

$$\text{Gross Actual Energy} = \frac{\text{Actual Energy}}{\text{I - APCF}}$$

Whereas APCF is auxiliary power consumption factor for the billing period which shall be 0.030.

Plant Load Factor has been defined as under:

"Plant Load Factor" or "PLF", shall mean the ratio expressed as a percentage, for a Billing Period or a Tariff Year, with respect to a Unit (during the Initial Year only) or the Project, of (A) the sum of (i) Gross Actual Energy, plus (ii) all Deemed Generation during such period; plus (iii) for the purposes only of Paragraph 5(b)(ii) of Appendix D, all Gross Actual Energy which would have been generated by the Project but was not generated, during any time the Project was not or was generating at less than NPLF due to any event of Force Majeure (except an event of Force Majeure described in Section 12.1(b)(1)(i) and (ii) calculated as the product of (u) the number of hours the event of Force Majeure was in effect, and (v) the average of the Declared Availability during such period, to (B) the product of (x) the Period Hours in such period, and (y) Rated Capacity (in Kw). All references to Rated Capacity shall be to Rated Capacity after all re-performances of the Rated Capacity Test permitted under the provisions of this Agreement".

Thus, the PLF has been defined to include the Deemed Generation with the Gross Actual Energy. However, for the incentive payments it is specifically mentioned in the PPA that the *"PLF shall be reduced to the extent of Deemed Generation included in the computation of PLF"*. Thus the Deemed Generation has only to be reduced from the PLF for the purpose of incentive only.

10.9. Conjoint reading of all the above definitions, will indicate that the 'actual PLF achieved' as indicated under the proviso to the definition of the working capital will include the deemed generation.

10.10. The respondent no.1 was also expected to be prepared in terms of the fuel stocks to meet the dispatch schedule corresponding to 85% PLF. In any case, the fuel stocks are on the basis of as actually

maintained limited to 30 days consumption. Thus, if the respondent no.1 had recorded PLF of over 85% including the 'Deemed Generation' then it is entitled to claim of 30 days fuel consumption worked out at 85% PLF subject to actual fuel stocks maintained in terms of the PPA.

10.11. Ld. Sr. Counsel for the appellant has submitted various letters from the respondent no.1 wherein they had suggested adoption of 68.5% PLF for computing the working capital from 4th year onwards in line with the PPA with other IPPs in the state instead of the PLF based on the Gross Actual Energy. At the same time the respondent no.1 had been bringing to the notice of the appellant increase in costs as a result of low dispatch due to increase in auxiliary consumption, determination of heat rate, increased start/stop costs, plant maintenance, increase in fuel and lube

consumption, etc., for which it was entitled to compensation as per the PPA. However, we find that the appellant did not consider the proposal of the respondent no.1 and continued to make deductions from the bills unilaterally. The appellant after the findings of the State Commission as per the provisions of the PPA entered into between the parties can not claim the relief against the earlier proposal made by the respondent no.1 to resolve the pending issues, which was not accepted by the appellant.

10.12. Thus, we decide the fourth issue also against the appellant.

11. The fifth issue is regarding start up charges.

11.1. According to Ld. Sr. Counsel for the appellant, the respondent no.1 never claimed the start stop charges before May, 2008 and the claim under

this head was made only after the appellant made deductions towards Interest on Working Capital. Thus the appellant's claim for start stop charges could be considered only in case of the rejection of the claim for interest on working capital. Further, the claim of start stop charges at Rs.76000/- for each start is excessive. According to the appellant, the start up cost is Rs.9170/- for each start-up.

11.2. According to learned Sr. counsel for the respondent no.1, there is no linkage between start stop charges and Interest on Working Capital. In terms of the PPA the appellant could not have given more than 50 offline dispatch instructions per unit per Tariff Year. However, the appellant resorted to giving instructions without any regard whatsoever to the provisions of the PPA and also safety of the engine operations. The instructions so issued averaged

around 600 per Tariff Year as against permissible 200 instructions.

11.3. Regarding the cost of start up, the Ld. Sr. Counsel for the respondent no.1 stated that they had provided the particulars of the start up cost to the appellant as for back as 13.03.2000 but the appellant slept over the same all along until the final hearing of the respondent 1's claim before the State Commission. Though the start up cost has gone up considerably since the year 2000, the State Commission has pegged the claim of the respondent no.1 at the year 2000 level and also limited the claim only to a period of 3 years prior to filing the claim petition.

11.4. We find that Clause 6.3(b)(ii) of the PPA stipulates that the appellant shall pay the respondent no.1, under supplementary invoice, the reasonable

start-up costs for each start-up in excess of ten start-ups per unit at a start-up charge calculated in accordance with the Appendix M. Appendix M of the PPA regarding computation of start-up charges has been left blank with the remarks that the details would be worked out as per the Detailed Design and Engineering and to be furnished later.

11.5. Learned Senior Counsel for the appellant has argued that the State Commission was not justified in entertaining the claim for start up cost when the PPA had not been amended providing for the details in Appendix M. However, we notice that the respondent no.1 as far back as 13.03.2000 furnished the computation to the appellant but the appellant did not take any action nor raised any objection to the same. Only after closing of arguments and reserving of orders by the State Commission in the petition filed by the

respondent no.1, did the appellant informed the State Commission that they had constituted a committee to determine the start up charges for the purpose of adducting further evidence in the case. This was not accepted by the State Commission. The observations of the State Commission in this regard in the impugned order are reproduced below:-

> *"(7) Arguments on DRP.No.10 of 2008 were closed on 16th November 2009 and Orders were reserved by the Commission. Thereafter, the Respondent informed the Commission that he had constituted a committee to determine the start-up charges for the purpose of adducing further evidence in this case. The Commission informed the Respondent on 17th December 2009 that arguments were over and Orders have been reserved and no further evidence would be admissible".*

11.6. After considering the claim of the respondent no.1, the State Commission has held as under:-

"(9) As submitted on behalf of the Respondent during the course of arguments, there is no serious dispute with regard to the number of off line Dispatch Instructions given by the Respondent to the Petitioner and Petitioner's entitlement to be indemnified for the additional costs incurred in giving effect to the same. The Petitioner has provided to the Respondent and to this Hon'ble Commission, the full particulars of its claim. The Petitioner is therefore entitled to the amount as claimed".

"(2) As regards the quantum of start up charges, it is pertinent that although the petitioner notified the Respondent in March 2000 about the quantum of start up charges as Rs.76,677 per start up, the Respondent did not react nor did he suggest an alternative figure. The PPA provides for consultation between the Petitioner and the Respondent for determining start up charges. The

Respondent, having chosen to forego this opportunity, is bound by the figure of Rs.76,677 per start up. This figure should be applicable for the chargeable start ups for the period from 1st April 2005 till date, although the Petitioner has raised invoices at higher rates of Rs.95,122 for 2005-06, Rs.1,09,158 for 2006-07, Rs.1,13,115 for 2007-08 and Rs.3,04,444 for 2008-09. As regards the number of start ups, there is no serious disagreement between the Petitioner and the Respondent. By and large, the figures tally. The Petitioner and Respondent are at liberty to prescribe the charges under Appendix 'M' after mutual discussion prospectively".

11.7. We are in agreement with the findings of the State Commission regarding Start-up Cost. We also do not agree with the contention of the appellant that if the claim of the respondent no.1 regarding Interest on Working Capital has been allowed then the respondent no.1 is not entitled to start-up costs. Interest on

Working Capital and Start-up Costs are two distinctly different issues and operate independently under the different clauses of the PPA. There is no linkage between the two.

11.8. We also find from the impugned order that the State Commission had considered the start-up process and the computation of the start-up cost as furnished by the respondent no.1 and then decided to allow the start up cost of Rs.76000/- for each start-up. On the other hand the appellant has failed to pinpoint any flaw in the computation of start-up cost as submitted by the respondent no.1 except to say that the cost is excessive.

11.9. In view of above, this issue is also decided against the appellant.

12. The sixth issue is regarding payment of rebate deducted by the appellant.

12.1. According to learned senior counsel for the appellant, the claim of the respondent no.1 is hit by the doctrine of acquiescence and laches. Further the rebate has been availed all through without any objection by the respondent no.1 and in fact, by consent, till 2005. The claim for refund of such amounts made for the first time after 10 years is liable to be rejected on the ground of delay and laches. The findings of the State Commission with regard to rebate availed during the period 2005 to 2008 is also erroneous since the appellant paid actual admissible amount in full and on time.

12.2. According to Ld. Sr. Counsel for the respondent no. 1, the letters dated 10.09.2011,

17.09.2003 and 08.01.2004 by the appellant to the respondent no.1 and the part payments made by the appellant from time to time, establish the fact that appellant clearly had failed to make full and timely payments of tariff invoices resulting in significant overdue amounts. The appellant had also been seeking the indulgence of the respondent no.1 in view of its precarious financial position.

12.3. Let us first examine the facts and sequence of events relating to the issue of rebate which are as under:-

(i) According to the PPA dated 12.09.1996, the respondent no.1 has to submit the invoice to the appellant at the beginning of the month for the energy supplied during the previous month. If the payment of tariff invoice and all other amounts due in respect

thereof is made in full by the appellant on or prior to the fifth Business Day after the date of presentation the tariff invoice, then the appellant is allowed a rebate equal to 2.5% of the invoice amount. However, the appellant is not entitled to the rebate if letter of credit and collateral arrangements as specified in the PPA are not maintained in favour of the respondent no.1

(ii) The PPA was amended with effect from 01.03.2000 to provide additionally for a rebate of 1% for settlement of tariff invoice between the 6th and the 30th day. The amendment also did away with letter of credit as a pre-condition for availing rebate.

(iii) On 31.12.1998, the first and the second units were commissioned and their tariff invoice became due in February, 1999. On 15.02.1999 the third and the

fourth units were commissioned and their tariff invoice became due in March, 1999.

(iv) The respondent no.1 vide its letter dated 18.12.1999 to the appellant consented for deduction of 15 paise per unit pending finalization of capital cost by the Central Electricity Authority ("CEA"). The CEA determined the capital cost on 23.02.2001. However, the appellant continued to deduct 15 paise per kwh from the bills of the respondent no.1 till March, 2005.

(v) The respondent no.1 submitted a number of letters (41 nos.) between 28.12.2001 to 28.03.2005 consenting to deduction of rebate in regard to ad-hoc payments.

(vi) On 29.06.2001, the appellant unilaterally decided to limit the settlement of invoice @ Rs.2.25 per unit. This rate was enhanced to Rs. 2.50 per unit by

the appellant on 08.01.2005. However, the arbitrary limit of Rs.2.50 per unit was withdrawn by the appellant w.e.f. 01.04.2005.

(vii) On 10.09.2001, the appellant intimated to the respondent no.1 that the Electricity Board was undergoing temporary financial strain due to which they were unable to make full payment against the tariff invoices. An assurance was given to the respondent no.1 that the payments in full would be made effective from January, 2002.

(viii) On 17.09.2003, the appellant in its letter to the respondent no.1 admitted that as on 16.09.2003, a sum of Rs.99.75 crore was due to the respondent no.1, against which Rs.32.61 crore was released.

(ix) In its letter dated 31.12.2003, the appellant confirmed that payment of Rs.55.35 crore was due to the respondent no.1.

12.4. The State Commission has analyzed the issue in details. The relevant paragraphs are reproduced below:

> *"(2) The PPA for the period from 12-9-1996 to 1-3-2000 stipulates that rebate is admissible to the Respondent, only if he establishes a Letter of Credit. The second addendum to the PPA, which came into effect from 1-3-2000, did away with this requirement. The Respondent asserts that while the Petitioner had been questioning the rebate availed of by the Respondent during this period on grounds of delayed payment, he did not raise the question of Letter of Credit. The letter of the Petitioner dated 23-2-1999 addressed to the Respondent has been cited as an instance, which does not talk about Letter of Credit. On the other hand, the Respondent in his letter dated 19-8-*

1997, almost a year after the execution of the PPA, addressed to the Petitioner insisted on doing away with the Letter of Credit. We have perused the correspondence of the Petitioner between January 1999 upto March 2000, that is between the date of commercial operation and the date of amendment to the PPA. He has not questioned the rebate by linking it to the Letter of Credit. The Petitioner raised this issue of Letter of Credit on 1-6-2001, more than a year after the amendment to the PPA. Therefore, we conclude that the Petitioner by his conduct has acquiesced in the practice of the Respondent not opening the Letter of Credit. This disentitles him from linking rebate with Letter of Credit. In the result, rebate has to be related to timely payment and full payment by the Respondent.

(3) The Petitioner in his letter dated 18-12-1999 addressed to the Respondent consented for deduction of 15 paise per unit pending capital cost finalization by the CEA. The CEA determined the capital cost of the project of the Petitioner on

23-2-2001 and therefore the letter of the Petitioner entitled the Respondent to retain 15 paise per unit for the period upto February 2001. That is, the invoice from March 2001 onwards should be based on the cost approved by the CEA. But, the Respondent continued the 15 paise per unit deduction upto March 2005. This is contrary to the consent of the Petitioner and therefore we hold that the TNEB was in the wrong in deducting 15 paise per unit beyond March 2001 upto March 2005".

"(7) The consent letters were given by the Petitioner between 28-12-2001 and 28-3-2005. The Petitioner argues that the Respondent was in a position to dominate the will of the Petitioner and use that position to obtain an unfair advantage. We need to observe here that the contract between the TNEB and the Petitioner is not a contract between equals. The TNEB is undoubtedly in a dominant position, being a large Public Sector Enterprise, with State-wide jurisdiction commanding enormous resources. The inequality is inherent in the contract. The Petitioner was well aware of this reality, when the

contract was executed. The moot question is whether the Petitioner has been able to prove coercion or dominant influence excepting the assertion in the present petition before the Commission. The consent letters were delivered between 28-12-2001 and 28-3-2005, more than 3 years before the present petition was filed. There was adequate time during this interregnum of 3 years to retract the consent alleging coercion or dominant influence. The Petitioner did not choose to do that. Therefore, we tend to support the contention of the Respondent that Petitioner has not chosen to retract the consent letters at the earliest opportunity. In the result, we hold that the Petitioner's claim of coercion or dominant influence fails.

(8) A fundamental issue missed by both the Respondent and the Petitioner herein is the admissibility of rebate in the case of ad-hoc payments covered by the 41 consent letters. There are two types of invoices prescribed by the PPA. The first one is the tariff invoice defined in Clause

8.2./ Clause 8.3 of the PPA, which covers all the payments accrued in the preceding month under tariff as per Appendix D of the PPA. Typically, the components of a tariff invoice are fixed charges, variable charges and incentives. The other type of invoice is the supplementary invoice defined in Clause 8.6 /Clause 8.7 of the PPA. Foreign exchange adjustment, change-in-law adjustment, year-end estimated cost adjustment etc. are typically the components accommodated in a supplementary invoice. Clause 8.6 / Clause 8.7 of the PPA states that rebate available in respect of a tariff invoice shall not be available in case of a supplementary invoice, unless such supplementary invoice relates exclusively to sale of electricity.

(9) Payments are due either against a tariff invoice or a supplementary invoice. There is nothing like an ad-hoc invoice or an ad-hoc payment contemplated in the PPA. As a matter of fact, these adhoc payments effected by the Respondent are nothing but releases of funds, withheld against previous tariff invoices / supplementary invoices

raised by the Petitioner. These funds legitimately belong to the Petitioner, unless they had been disputed by the Respondent. Theoretically, the Respondent can hold up payment due against a tariff invoice / supplementary invoice and release it in several ad-hoc doses, appropriating rebate against each such release, apart from claiming rebate against the main tariff invoice. This is what the Respondent did in the case of a few tariff / supplementary invoices. The 41 ad-hoc payments effected by the TNEB are not against any invoice submitted by the Petitioner and therefore the question of rebate does not apply to these 41 ad-hoc payments. The very foundation of rebate availed of by the TNEB being non existent, we have no hesitation in setting aside the rebate availed of by the TNEB in the 41 ad-hoc payments.

(10) The Respondent submits that he is bound to make full payment against an invoice, only if the invoice conforms to the PPA. This is a dangerous proposition, because the Respondent wants to arrogate to himself the authority to determine what

constitutes a legitimate claim under the PPA. He wants to exercise the powers of an adjudicator. Dispute Redressal Mechanism is available to the Respondent under the PPA, which is meant to tackle such eventualities. He never exercised this option. The PPA is emphatic that the invoice shall be paid in full before raising a dispute. Therefore, we have no hesitation in dismissing the plea of the Respondent to decide what constitutes a legitimate component of an invoice".

"These Board notes throw ample light on the part-payment of invoices and predetermined claim of rebate of 2.5% on all invoices. It is evident from the notes of the Board Meetings that the contractual obligation between the various IPPs and the TNEB have not been brought out nor has the legal implication of violating the contract been spelt out in the Board notes. It is amazing that there has been absolutely no legal input in the various Board notes. The result was total disregard for contractual obligations and the ignorance of consequences of such defaults".

"(14) It is crystal clear from the proceedings of the above Board meetings that the TNEB availed of 2.5% rebate in a routine, pre-determined manner. There was no application of mind. Rebate was not related to tariff invoices. As per the decision of the Board, 2.5% rebate has to be availed of against all invoices, come what may. This was the tone and tenor of the Board notes. The Petitioner, therefore was helpless and confronted with the mechanical claim of 2.5% rebate in all tariff invoices by the TNEB. We do not have to go far to establish that the claim of 2.5% rebate of the TNEB is arbitrary, unfair and unjust. It is a total disregard of and contempt for law.

(15) Yet another point that emerges from the Board notes of the above meetings is that the officials of the TNEB went far beyond the mandate of the Board in continuing the 15 paise per unit deduction beyond the date of capital cost determination by the CEA. This is a clear violation of the directive of

the Board. We have referred to this earlier in para F (3)".

"(G) Ruling on Rebate

(1) As lease rent was recovered from monthly tariff invoices by the TNEB with the consent of the Petitioner, the Respondent will be deemed to have made full payment, if he had retained 15 paise per unit between 18-12-1999 and 23-2-2001 and if he had recovered lease rent along with applicable penalty for the period (as and when the Petitioner failed to make advance payment of lease rent as stipulated in Clause 3.1 of LLA).

(2) The Petitioner is directed to rework the monthly invoices for the period covered by this Petition as per the direction in (1) above and submit them to the Respondent within two months of the order.

(3) If the Respondent had made full and timely payment against the reworked monthly invoices, he would be deemed to have been eligible for rebate.

(4) If the Respondent has availed of rebate for any payment less than full payment as defined in (1) above, he is liable to refund the rebate along with interest at the rate prescribed in Clause 8.7/ Clause 8.6 of the PPA from the date of deduction till the date of refund.

(5) The Respondent is not entitled for rebate in the case of 41 ad-hoc payments effected between 28-12-2001 and 28-3-2005; he is directed to refund the rebate with interest at the rate prescribed in Clause 8.7 / Clause 8.6 of the PPA from the date of deduction till the date of refund.

(6) The Respondent is directed to make payment within six months of receipt of the claim from the Petitioner in six equal monthly instalments".

12.5. We do not find any infirmity with the findings of the State Commission and accordingly confirm the same.

12.6. Regarding delay and laches, the State Commission in the impugned order has given reference to the various letters dated 10.09.2001, dated 17.09.2003 and 18.01.2004 from the appellant to the respondent no.1 indicating inability to make full payment due to temporary financial strain and accepting balance payment to be made to the respondent no.1 as per the terms and conditions of the PPA. The State Commission has also referred to a note for the 879th Board meeting of the appellant held on 24.03.2005 indicating the outstanding claim of the appellant of Rs.42.13 crores. The entire arrear was liquidated on 17.02.2006. The respondent no.1 filed the claim petition for rebate on 25.07.2008. The State Commission has, therefore, decided that the claim does not suffer from delay and laches. We are in

agreement with the findings of the State Commission that the claim does not suffer from delay and laches.

13. The seventh issue is regarding interest on delayed settlement of invoices.

13.1. According to the learned senior counsel for the appellant, the interest on late payment provided in the PPA is a measure of compensation occasioned by the breach of contract due to delayed payment and since the respondent no.1 has not suffered any loss it is not entitled to payment of interest for the delayed payment. Further subsequent to the impugned order the appellant has also come to know that the respondent no.3 had been giving credit periods to the respondent no.1 varying from 25 days to 90 days. The appellant has also filed an additional affidavit in this regard. Also since the respondent no.1 received

payments without any protest it is estopped from claiming any interest.

13.2. According to learned senior counsel for the respondent no.1, the interest on delayed payment provided for under clause 8 of the PPA is not a measure of compensation for the loss occasioned for any breach of contract and there is no scope and it is not open for the appellant, to read any such hypothesis into the said provision. The interest is for the delayed payment as while the party who owes the amount continues to hold back and enjoy the benefit of the money, the party to whom the money is due is deprived of such money. There is no question of a party suffering or establishing a loss before it could claim interest on late payment. Further the IA filed by the appellant based on certain purported information provided by the respondent no.3 is not maintainable.

The PPA clause 17.4 does not recognize any implied waiver. Accordingly, the State Commission has correctly awarded interest on late payment.

13.3. The State Commission in the impugned order has recorded that the respondent no.1 had submitted claims for interest on delayed payment on various dates from 16.04.2001 to 22.07.2008 for the respective years. The relevant extracts are reproduced below:

> *"(4) The significant point to be noted here is that the Petitioner had submitted the claims for interest on delayed payment on 16-4-2001, 9-4-2002, 9-4-2003, 23-12-2004, 9-9-2005, 14-8-2007, 14-8-2007, 17-6-2008 and 22-7-2008 for the respective years. These claims bear the acknowledgement seals of the TNEB. The Respondent in his counter has not disputed the receipt of these claims".*

Thus, the respondent no.1 had been filing the claims on the appellant for interest on delayed payments and

thus the Sate Commission has correctly decided that delay and laches are not attracted in this case.

13.4. The PPA stipulates interest on delayed payment if any amount is due to a party. The relevant clause 8.7 of the PPA is reproduced below:

> *"8.7 Late Payments – If any amount due hereunder from one party (the 'payer') to another party (the 'payee') is not paid when due, there shall be due and payable to the Payee interest at the rate which is one half cent (0.5%) above the cash credit rate, from and including the date on which such payments was due to but excluding the date on which such payment is paid in full with interest. All such interest shall accrue from day today and shall be calculated on the basis of a 365 day year, compounded monthly, and paid on demand. If no due date is specified under this agreement with respect to any amount due under this agreement, the due date thereof shall be fifteen (15) days after demand is made therefor by the Payee"*

The above clause was substituted by clause 8.6 by Addendum 2 w.e.f. 01.04.2000 as under:

> *"8.6 Late Payments - Late payments shall bear interest accrued from the date they became over due at a rate equal to the prime lending rate charged by the working capital bankers from time to time on cash credits extended to the party to whom such payment is owed, to the extent permitted by law."*

13.5. The PPA clearly provides for interest for late payments. Thus, we feel that there is no infirmity in the findings of the State Commission in this regard.

13.6. Learned counsel for the respondent no. 1 has referred to the judgment of this Tribunal dated 5.8.2010 in Appeal nos. 70 & 110 of 2008 in the matter of Ispat Industries Ltd. vs. MERC. In this judgment this Tribunal has held as under:

"A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for such a deprivation through interest. In an action by way of restitution, it is the duty of the court to give full and complete relief to the party by ordering for interest as well".

In view of the above findings of the Tribunal, interest on delayed payments is required to be paid by the appellant.

13.7. We do not agree with the contention of the appellant that the respondent no.1 has to establish incurring of any loss before claiming the interest on late payment. The respondent no.1 is entitled for interest for the money due to it on a particular date but illegally held back by the appellant. Further, the PPA also stipulated payment of interest on late payments from the date they become due.

13.8. We also do not agree with the contention of the appellant that since the respondent no.1 accepted the payments without protest it would be estopped from claiming any interest. In this regard the relevant provisions of the PPA are reproduced below:

"17.4. No Waiver

(a) No waiver by either Party of any default or defaults by the other Party in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults whether of a like or different character, or shall be effective unless in writing duly executed by a duly authorized representative of such Party.

(b) Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by one Party to the other shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such

right or any other right hereunder, which shall remain in full force and effect".

13.9 The seventh issue regarding interest on delayed settlement of invoices is also decided against the appellant.

14. The eighth issue is regarding Entry Tax payable by the appellant to the respondent no.1.

14.1. According to learned senior counsel for the appellant, the credits had been voluntarily given treating the sale to have taken place in Tamil Nadu. It is not open to the respondent no. 3 to reverse the entries based only on audit objection. Thus, the findings of the State Commission are illegal.

14.2. According to learned senior counsel for the respondent no. 1, this is a matter to be settled between the appellant and the respondent no. 3 and outside

the purview of this appeal. However, the respondent no. 3 and the appellant cannot claim the same amount from the respondent no. 1 so as to subject it to double payment. In view of the same, the findings and directions issued by the State Commission are just, fair and equitable.

14.3. Learned counsel for the respondent no. 3 has argued that respondent no. 3 was not aware that the respondent no. 1 was taking reimbursement from the respondent no. 3 as well as appellant on Entry Tax element. This came to notice of the respondent no. 3 through the Audit Report of CAG upon which the respondent no. 3 insisted and demanded the respondent no. 1 to refund the entire Rs. 29.26 Crores taken on account of Entry Tax reimbursement. Since Rs. 19.22 Crores have been reimbursed by the respondent no. 1 to respondent no. 3, the balance

Rs. 10.04 Crores with interest are to be recovered by the respondent no. 3 from the appellant as per the directions of the State Commission.

14.4. Let us first examine the issue of delay and laches. The appellant had recovered Rs. 11.71 Crores from the respondent no. 1 in December 2007, while the respondent no. 1 filed the petition before the State Commission in July, 2008. Thus, the State Commission has correctly held that the recovery of entry tax would not suffer from delay and laches.

14.5. The State Commission has analyzed the issue regarding reimbursement of the entry tax in details referring to the clauses 16(3) and clauses 3 and 4 (c) of Appendix D of the PPA relating to 'change-in-law', 'Estimated Annual costs' and 'Total Fuel Cost' respectively. The relevant paragraphs of the findings of the State Commission are reproduced below:

"(4) Clause 16(3) of the PPA makes it clear that since the Entry Tax was imposed after the execution of the PPA by a change in law, the Petitioner is protected against the levy. As the Entry Tax is directly payable by the Petitioner, it will not form a part of the bill of HPCL in terms of Clause 4(c). On the other hand, Entry Tax will be covered in "Other Taxes" appearing in Clause 3(vii) of Estimated Annual Cost. Thus, under the scheme of things Entry Tax is to be claimed directly by the Petitioner from the Respondent".

"(6) It is evident from the above letter of HPCL that they extended reimbursement to the Petitioner at the rate of 3% of the sale value, equivalent to the Entry Tax.

(7) It now transpires that the Petitioner secured reimbursement of entry tax from two sources namely HPCL and TNEB. Legally he is entitled to claim reimbursement from the TNEB. As such, he should not have drawn the reimbursement from HPCL. The Commission deprecates this irregularity, which finally led to double recovery both by HPCL

and TNEB. We are constrained to observe that recovery of Rs.11.71 crores from the Tariff Invoice of the Petitioner by the TNEB is a clear violation of the PPA, which is matched by the irregularity of the Petitioner in claiming the Entry Tax reimbursement from two sources. It is clear that both the Public Sector Undertakings HPCL and TNEB vied with one another in recovering the reimbursement offered by HPCL resulting in the confusion.

(G) Ruling on Entry Tax

The Respondent is directed to refund Rs.10.04 crores directly to HPCL, since the money legitimately belongs to HPCL and Rs.1.67 crores to the Petitioner being interest recovered from him within a period of 2 months of the Order".

14.6. We are in agreement with the findings of the State Commission. Accordingly, the appellant is directed to refund the amount of Rs. 10.04 Crores to the respondent no. 3 and Rs. 1.67 Cores to the respondent no. 1. As the amount was to be paid

within 2 months of the order of the State Commission as per the impugned order, the respondents are also entitled to interest at the rate stipulated in the PPA beyond the time limit set up by the State Commission.

15. The ninth issue is regarding Minimum Alternate Tax.

15.1. The appellant has accepted the reimbursement of the MAT to the respondent no. 1 and has already made part payments thereof. According to the learned senior counsel for the appellant, the MAT is part of the income tax which normally is to be borne by the company earning the income. However, since the appellant after negotiations has agreed to reimburse the amounts, it is reasonable that the respondent no. 1 gives up the claim for interest.

15.2. According to the learned senior counsel for the respondent no. 1, the reimbursement of MAT is a contractual obligation on the part of the appellant. Thus, delay in reimbursement of MAT clearly attracts interest on late payment as specifically provided in the PPA.

15.3. We notice that the Income tax is required to be reimbursed by the appellant according to Appendix-D of the PPA. The relevant clause is reproduced below:

> *"Income Taxes" shall mean that all taxes on net income levied by any Government Agency and paid by the Company with respect to its business of providing TNEB with capacity and Electricity under the terms of this Agreement and any other activities……".*

The Estimated Annual costs given in clause-3 includes Income Tax and other Taxes as a component of Annual costs:

"7. Payment of Income Taxes

(a) The tariff invoice of each Billing Period shall include an amount for projected Income Tax……."

In view of above, the appellant is liable to reimburse the MAT in terms of the PPA.

15.4. Thus, we do not find any substance of the argument of the learned counsel for the appellant that the appellant has agreed to reimburse the MAT as a result of negotiations and, therefore, the respondent no. 1 should give up the claim of interest on delayed payment of MAT. The fact is that the MAT has to be reimbursed as per the terms of the PPA. Thus, the respondent no. 1 is also entitled to payment of interest according to the PPA.

15.5. This issue is also decided against the appellant and the findings of the State Commission are upheld.

16. The tenth issue is the claim of the respondent no. 3 regarding reimbursement of Land Lease Rentals in view of its being a pass through in the tariff of the respondent no. 1.

16.1. According to learned counsel for the respondent no. 3, in terms of Article 3 of the Land Sub-Lease Agreement entered into between the respondents 1 and 3, the benefit of "pass through" of land lease rent has to be applicable to the respondent no. 3. He has also claimed interest on the excess amount of land lease rent paid to the respondent no. 3 with effect from 1.8.1997.

16.2. According to the learned senior counsel for the appellant and the respondent no. 1 the respondent no. 3 could not make a claim for LLR in the present appeal.

16.3. We notice that this issue was not dealt with by the State Commission. The respondent no. 3 was also not a party before the State Commission. The respondent no. 3 was impleaded as a party to this appeal due to finding of the State Commission regarding reimbursement of the entry tax of Rs. 10.04 crores by the appellant directly to the respondent no. 3. We feel that the claim of the respondent no. 3 has to be dealt with in terms of the Land Sub-Lease Agreement dated 1.12.1997 entered into between the respondents 1 and 3. The respondent no. 3 may raise its claim on the respondent no. 1 and in case of any dispute the

parties are at liberty to settle the dispute in terms of the arbitration clause of the Land Sub-Lease Agreement/FSA. We do not think that this Tribunal should arbitrate on the issues related to the Fuel Supply Agreement and Land Sub Lease Agreement entered into between the respondent no. 1 and its fuel supplier i.e. the respondent no. 3 and which has not been dealt with by the State Commission in the impugned order.

17. Now let us examine the IA no.205 of 2011 filed by the appellant on 5.9.2011.

17.1. The appellant in the above IA has submitted as under:

(i) According to the Fuel Supply Agreement entered into between the respondent no.1 and the

respondent no.3, the payment has to be made during the month on 1st, 11th and 21st of the month.

(ii) According to clause 3.1(xiii) of the PPA dated 12.09.1996 between the appellant and the respondent no.1, any amendment to the FSA shall be made only with the prior approval of the appellant.

(iii) The Government of India Central Vigilance Commission in the letter dated 22.01.2010 addressed to the Chief Secretary, Government of Tamil Nadu referred to the representation received from some persons and requested their reply regarding various credit availed by the respondent no.1 from the respondent no.3

(iv) The appellant made a request to both the respondent no.1 and the respondent no.3 for providing the details. Even though the respondent no.1 did not provide the details, the respondent no.3 by its letter

dated 29.07.2011 has furnished the credit given to the respondent no.1 for fuel supplied to them from December, 1998 till date.

(v) The details of credit given by the respondent no.3 to the respondent no.1 as submitted by the appellant are as *under:*

"	*Period*	*No. of days*
a.	*From December 1998 to April 1999*	*25 days*
b.	*From May 1999 to August 1999*	*30 days*
c.	*From Sept. 1999 to March 2001*	*45 days*
d.	*From April 2001 to December 2001*	*60 days*
e.	*From January 2002 to Feb. 2002*	*75 days*
f.	*From March 2002 to March 2007*	*90 days*
g.	*From April 2007 onwards*	*75 days"*

(vi) The respondent no.1 should have informed the appellant and should have got the FSA amended with the approval of the appellant. Had these facts been brought to the notice of the appellant they would have got the PPA suitably amended or modified to entitle the appellant for appropriate extension of time for availing the rebate and/or relating to the clause on

delayed payment. This is important as major portion of invoice covers only the variable charge payments.

(vii) In addition, the respondent no.3 has also disclosed the other credits passed on to the respondent no.1 as under:

"a.	*Reimbursement of Sales Tax difference for the period December 1999 to July 2002*	*-Rs. 8,01,63,792/-*
b.	*Reimbursement of Sales Tax difference for the period August 2002 to December 2006*	*-Rs. 9,25,59,416/-*
c.	*Freight subsidy/discount*	*-Rs.2,66,07,599/-*
d.	*Price discount*	*-Rs.2,64,98,745/-*
e.	*Entry tax*	*-Rs. 13.6 Crores".*

Out of above credits, credits have been passed on by the respondent no.1 or recovered by the appellant in respect of items (a) & (d). However, other discounts have not been passed on to the appellant. Further, the respondent no.1 has also not provided the dates on what the credit was given by the respondent no.1 to

work out the interest due to the appellant for holding back the payments.

17.2. The respondent no.1 in its reply to the above application has submitted that the appellant had sought to introduce altogether new claim and expand the ambit and scope of the appeal which was impermissible. Any such claim would call for a separate proceedings and the same could not be entertained in these appeal proceedings. The respondent no.1 has also made the following submissions on merits, without prejudice to its submission on maintainability of the application:-

(i) FSA has not been amended by the respondent no.1 and the respondent no.3. Further the approval of the appellant was necessary if and only if an amendment, modification or supplement made by

the parties to the FSA would have had a material economic impact on variable charges payable under the PPA, and not otherwise.

(ii) The payment terms under FSA are matters of contract between the respondents 2 and 3 and there is no co-relation between the said terms and the payment of interest on working capital or variable charges under the PPA. The respondent 1's claim for interest against the appellant was based entirely on the provisions of the PPA and the same has been upheld by the State Commission.

(iii) There was no requirement of reporting to the appellant any delay in payment to the respondent no.3. The respondent no.1 was subjected to extreme financial distress due to delay in payments by the appellant. Till July, 2008, out of 191 tariff invoices, at

best, the appellant could be regarded as having paid only 7 tariff invoices on time as per the terms of PPA. The respondent no.1 had to manage its resources and contractual obligations and at the same time operate the power plant and meet its obligation to supply power under the PPA. Thus, the delayed payments to the respondent no.3 were due to actual financial distress caused by the appellant's violation of the provisions of the PPA.

(iv) Regarding other credits passed on by the respondent no.3, the appellant has admitted having received the amounts relating to reimbursement of sales tax difference for the period December, 1999 to July, 2002 (item 'a') and price discount (item 'd') long back and there was no need to bring up the same in the instant application.

(v) It is denied that any freight subsidy/discount referred to in item 'c' was received. Thus, there is no liability in respect there of.

(vi) Entry tax issue (item 'e') has already been adjudicated by the State Commission and the appellant has been directed to pay to the respondent no.3 about Rs.10 crores.

(vii) As regards, sales tax difference, the respondent no.1 has in fact passed on the same albeit in excess. The sales tax difference was not Rs.17,27,23,208 (summation of items 'a' and 'b') but Rs.17,12,38,857/- only but the respondent no.1 actually passed on a sum of Rs.17,15,35,722/- to the appellant, which has resulted in an excess payment of Rs.2,96,866/-.

(viii) The sales tax difference was adjusted by the respondent no.1 in the payment of fuel oil to the respondent no.3 and the difference of invoice value at 4% and the payment made to the respondent no.3 by reworking the invoice at a sales tax rate of 3% or 3.15% was passed on to the appellant through tariff invoices by reducing the fuel cost.

17.3. Admittedly, the issues raised in the IA 205 of 2011 were not raised before the State Commission. However, we find that the appellant received the information regarding the credit extended to the respondent no.1 and other credit notes from the respondent no.3 only by letter dated 29.07.2011 which was subsequent to the date of the impugned order.

17.4. Let us now examine whether the new facts which came to the notice of the Appellant subsequent to the date of the impugned order, have impact on the

outcome of the present appeal. We notice that the subsequent events may have an impact on the amount payable to the respondent no.1 from the outcome of this appeal. Thus, we deem it fit to examine the application filed by the appellant.

17.5. Clause 5.3 of the PPA defines the Fuel Supply Agreement. The relevant paragraph is reproduced below:

> *"Fuel Supply Agreement" shall mean any contract for the supply or transportation of Fuel to the Project, entered into between the Company and any entity, as any such contract may be amended, modified and supplemented from time to time in accordance with its terms, subject to TNEB approval, provided that TNEB approval for any amendment, modification or supplement shall be required only if such amendment, modification or supplement would have a material economic impact on Variable Charge Payments".*

Thus any amendment, modification or supplement to the Fuel Supply Agreement ("FSA") was required to be approved by the appellant, provided it would have a natural economic impact on variable charges payment.

17.6. The variable charges have been defined as under in the PPA:

> *"The variable charges payment for each Billing Period shall include the cost of fuel and the cost of lubricating oil, as follows:"*
>
> The cost of fuel is the *"Fuel cost per kilogram calculated in Rupees for fuel delivered to the Project during Billing Period in pursuant to the Fuel Supply Agreements and……"*

17.7. The total fuel cost would include all fixed and variable payments made pursuant to the FSA or agreement for the supply of lubricating toil including

charges with request to “take or pay” and any taxes, duties, royalties, cess, etc. Thus, the costs on account of fuel and lubricating oils is a pass through in the tariff.

17.8. As already discussed in the earlier paragraphs the working capital will include *inter alia* the cost of fuel stocks and lubricates and receivable for 2 months which also includes the variable charges.

17.9. We notice that the respondent no.3 allowed some grace period for payment of fuel bills by the respondent no.1 in relaxation to the terms and conditions of the FSA. Admittedly no amendment was signed between the respondent no.1 and 3 which necessitated the approval of the appellant. The invoice on account of Interest on Working Capital or Variable Charges were not impacted by the grace period for

payment allowed by the respondent no.3 to the respondent no.1 in terms of the PPA. However, when the appellant's claim for interest on delayed payment of invoice which included the components of Interest on Working Capital and Variable Charges has been allowed, the grace period allowed to the respondent no.1 by the respondent no.3 will result in unjust enrichment of the appellant in respect of the interest on delayed payments. When the fuel price is a pass through in the tariff, it is logical that the impact of credit on account of grace period for payment allowed by the respondent no. 3 should also be passed on to the appellant in setting off the interest on account of the delayed payments due to the respondent no. 1 from the appellant.

17.10 Accordingly, the interest to be computed on the amount of fuel invoices payable by the respondent no. 1 to the respondent no.3 for the period of no. of days of credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the respondent no. 3 should be set off against the interest on delayed payment due to the respondent no.1 from the appellant in terms of the order of the State Commission. The amount shall be reconciled by the appellant and the respondent no. 1 within 30 days of this judgment. The rate of interest shall be the same as stipulated in the PPA. The amount of interest calculated on the various fuel invoices of the respondent no. 3 for the grace period shall be paid by the respondent no. 1 to the appellant within 30 days of reconciliation of the accounts or adjusted in the

amount payable by the appellant to the respondent no.1.

17.11. As regards the credit passed on to the respondent no.1 by the respondent no.3 for sales tax, etc., we find that the entry tax is an issue which has been decided by the State Commission in its impugned order and has to be dealt with in terms of findings of the Tribunal in this judgment. In view of the explanation given by the respondent no.1 for sales tax that the amount has already been adjusted in the tariff invoices raised by the respondent no.1 on the appellant, the two parties will reconcile the same within 30 days of the date of this order. The excess amount paid by the respondent no.1 or to be paid as a result of the reconciliation shall be made good by the concerned party within 30 days of the reconciliation of the accounts.

17.12. The respondent no.1 has denied that any credit on account of freight subsidy/discount had been given by the respondent no.3. However, we notice that the respondent no.3 in its letter dated 29.07.2011 to the appellant has indicated freight subsidy/discount for the period April, 2001 to August, 2001 amounting to Rs.2,66,07,599/-. Accordingly, we direct the respondent no.1 and respondent no.3 to reconcile the same within a period of 30 days of the date of this judgment. In case any freight subsidy/discount was given, the same with interest calculated at the rate agreed in the PPA shall be paid by the respondent no. 1 to the appellant within 30 days of the date of reconciliation or adjusted in the amount payable by the appellant to the respondent no.1.

18. The appellant does not succeed in any of the issues raised in the main appeal. However, IA no. 205 of 2011 is allowed to the extent indicated in paragraph 17 above. We have also decided not to arbitrate on the claim of the respondent no. 3 relating to Land Lease Rentals which has to be dealt with in terms of the Land Sub-Lease Agreement entered into between the respondent no. 1 and 3.

19. In view of the above, the main appeal is dismissed but IA no. 205 of 2011 is allowed to the extent indicated above. No order as to costs.

20. Pronounced in the open court on this **28th day of February, 2012.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs