

Mr. Varun Pathak
Mr. Raheel Kohli
Mr. Mukund P. Unny

JUDGMENT

Per Hon'ble Mr. T. Munikrishnaiah, Technical Member

1. The present Appeal being Appeal No. 154 of 2015 has been filed by the Appellant i.e. The Electricity Department A&N Administration, under Section 111 of the Electricity Act, 2003, against the impugned order dated 29.04.2015 passed by the Joint Electricity Regulatory Commission in Petition No. 89 of 2012.
2. The contention of the Appellant is that the Respondent Suryachakra Power Corporation Limited was claiming a huge deviation of Rs.21.96 crores over and above the agreed cost of Rs.63.14 crores. The respondents are currently being paid at the provisional completed cost of Rs.77.595 crores (as recommended by the CEA) since 2012. The Joint Electricity Regulatory Commission (Joint Commission) computed the computation cost of the 20 MW Power Project as Rs. 77.64 crores as per the guidelines issued by this Tribunal in the Judgment dated 28.11.2014. The Joint Commission arrived at the computed cost of the project duly adding the foreign exchange rate variation, additional interest during construction, financing cost and incidental expenses during construction (IEDC) and expenditure incurred by the Respondent for efficient operation of the plant with the project cost specified in the PPA i.e. 63.14 crores.

3. **BRIEF FACTS OF THE CASE:-**

- 3.1 In the year 1995, the Electricity Department of Andaman & Nicobar Islands invited bids for setting up of a 20 MW DG Power Plant in Bamboo flat, South Andaman. Respondent No.1 Suryachakra Power was selected as the lowest bidder with a project cost of Rs.52.25 crores. However, due to delay in obtaining approval from Government of India, Suryachakra Power in September, 1997 submitted a revised proposal with a project cost of Rs.63.14 crores. The Central Electricity Authority (CEA) after scrutinizing the proposal worked out the project cost as Rs.63.14 crores. The Electricity Department, A&N Administration agreed the said cost vide letter dated 10.09.1997.
- 3.2 On 20.11.1997, the A&N Administration issued techno economic clearance at a cost of Rs. 63.14 crores and a Power Purchase Agreement (“PPA”) was entered into between Suryachakra Power Corporation Ltd. and A&N Administration for purchase of 20 MW power using 4 diesel generators (DG sets) of 5 MW each on BOOT basis on the same day i.e. on 20.11.1997. The PPA was followed by an Addendum-1 to the PPA signed on 30.03.1999.
- 3.3 In November 2003, the Respondent, Suryachakra Power Corporation Ltd. furnished relevant records to the A&N Administration for approving the capital cost of the project as Rs. 85.10 crore, the claim was reduced to 83.67 crores as per Auditor’s Report as against the agreed cost of Rs.63.14 crores and hence the capital cost has not been finalized by the Appellant.
- 3.4 The Respondents are currently being paid at the provisional completed cost of Rs.77.595 crores (as recommended by the CEA) since 2012. Further arrears were also paid to the respondent on provisional basis as recommended by the CEA.

- 3.5 The Respondent Suryachakra Power Corporation filed a petition before Joint Electricity Regulatory Commission (JERC) for fixation of the completed capital cost of project on 29.11.2012. The JERC by an order dated 03.07.2013 fixed the completed cost of the project at Rs.78.2965 crores.
- 3.6 The Appellant, aggrieved by the order of the JERC filed an Appeal before this Tribunal being Appeal No. 268 of 2013 claiming that the JERC had calculated the completed cost on the basis of funds tied up and not as per the formula given in the PPA.
- 3.7 The Respondent, Suryachakra Power Corporation also filed an appeal before this Tribunal being Appeal No. 200 of 2013, challenging the order of the JERC inter-alia on the grounds w.r.t. completed cost of the project.
- 3.8 Both the appeals were heard together and Appeal No. 200 of 2013 filed by the Respondent was dismissed and this Tribunal allowed Appeal No. 268 of 2013 filed by the Appellant and upheld the contention of the Appellant in its judgment dated 28.11.2014 and directed the JERC to re-determine the capital cost as per the terms of the PPA and as per paragraphs 25 and 36 of the judgment of this Tribunal dated 28.11.2014.
- 3.9 The Appellant aggrieved by certain directions in this tribunal's judgment dated 28.11.2014 filed an appeal before the Hon'ble Supreme Court of India being Civil Appeal No. 1652 of 2015 titled: Electricity Department Versus Suryachakra Power Corporation Ltd., challenging the following issues:-
- That Rs.4.53 crores paid as custom duty by the Respondent, will be converted in US Dollars and subjected to Foreign Exchange Rate Variation (FERV);
 - Modifications made by the Respondent to the specifications provided in the Power Purchase Agreement (PPA), can be approved by the Joint

Electricity Regulatory Commission (JERC) instead of the Administration and the Central Electricity Authority (CEA) (as provided in the PPA).

- Granting Deemed Generation Charges from 10.12.2002 to 01.04.2003;
- Denying liquidated damages to the Appellant;
- Granting additional interest during construction (IDC), Financing Cost and incidental expenses; and
- Payment of interest to the respondent on the amounts payable due to increase in Capital Cost.

3.10 The Respondent has also filed Civil Appeal No. 5958 of 2015 challenging the order dated 28.11.2014 inter-alia on the ground of Rebate and HSD density. The said appeal is also pending. Both civil appeals filed by the Appellant and also respondent are pending in the Hon'ble Supreme Court and no stay was granted.

3.11 As per the directions of this Tribunal's judgment dated 28.11.2014, the JERC passed a final order dated 29.04.2015, re-computing the capital cost of the project at Rs.77.64 crores.

3.12 Aggrieved by the order of the JERC dated 29.04.2015, passed in Petition No. 89 of 2012 filed this Appeal being No. 154 of 2015 and prayed for following reliefs:-

Quashing the order dated 29.04.2015 passed by the JERC inter-alia w.r.t.

- i) Completed cost of the project fixed at Rs.77.64 crores.
- ii) Payment of Foreign Exchange Rate Variation amounting to Rs.5.66 crores for import of equipments and Rs.1.35 crores for custom duty.
- iii) Extension of unlawful benefit of Rs.4.81 crores towards additional expenditure incurred by the respondent allegedly necessary for efficient operation of the plant allowed by the Commission.
- iv) Denial of deduction on account of cost under-run.

- v) Denial of deduction of 4.149 MUSD towards cost under-run on imported equipment.
 - vi) Denial of deduction on account of concession in custom duty and land registration charges amounting to Rs.3.12 crores from the completed cost of the project.
 - a) Cost under-run to the extent of 4.149 MUSD on imported equipments as well as Rs.3.12 crores on account of concession in custom duty and land registration charges be deducted from the capital cost.
 - b) Cost of completion of the project may be fixed on the basis of actual expenditure incurred by the respondent strictly in accordance with provisions of Power Purchase Agreement (PPA)/Techno-Economic Clearance (Tec) issued by the Appellants.
- 4 We have heard Mr. Rakesh Khanna, Learned Senior Counsel for the Appellant and Mr. M.G. Ramachandran, Learned Counsel for the Respondent. We have gone through the written submissions filed by the rival parties and perused the material available on record including Impugned Order.
- 5 The following issues arise for our consideration:
- Issue No. 1: Whether the Joint Electricity Regulatory Commission erred in determining the completed project cost contrary to Para 25 & 36 of this Tribunal's Order dated 28.11.2014 and without actually going through the various expenditures claimed by the Respondent Suryachakra Power Corporation Ltd.?**
- Issue No. 2: Whether the Joint Commission erred in not deducting the unutilized Rs. 4.149 MUSD from the capital cost specified in the PPA?**
- Issue No. 3: Whether the Joint Commission erred in allowing Rs. 4.81 crores towards additional expenditure spent on improvement of performance of the generation station?**
- Issue No. 4: Whether the Joint Commission erred in not disallowing the concession provided towards custom duty and in land registration charges?**
6. **Since all these issues are interwoven, we are taking and deciding them together.**
7. **The following contentions have been raised on behalf of the Appellant on the said issues.**

- 7.1 that the Commission was required to recalculate the completed cost of the project. The approach/methodology adopted for arriving at the completed cost is wrong and contrary to the PPA and the order of the Hon'ble Tribunal.
- 7.2 that the Commission ignoring Para 25 and 36 of the tribunal's judgment dated 28.11.2014, the Commission did not reduce the amount of cost under-run. Though the Commission has held that 5.13 MUSD was utilized by the Respondent for the purchase of foreign equipment and Rs.4.49 crores (1.25 MUSD) was paid as custom duty for the foreign equipment and have given FERV on the same, but it has erred in not deducting the unutilized 4.149 MUSD from the capital cost.
- 7.3 that the completed cost was not reduced despite the fact that the amount actually spent (5.13 MUSD) is admitted by the Respondents and in fact the Commission has given Foreign Exchange Rate Variation only on the said amount and on the amount of Rs.4.49 crores spent on custom duty.
- 7.4 that the Commission has erred in only allowing addition of cost over and above the PPA ceiling cost and had ignored the vital provision of clause (xxii) and (vii) of Article 1 of PPA & directions of this Tribunal sets out in Para 25.
- 7.5 that the Commission has erred in not verifying item-wise work done and the work required to be done as per TEC.
- 7.6 that the Joint Commission once again ignored verification of actual expenditure and has not reduced the cost under-run on Start-up fuel and lub oil trail and test run.
- 7.7 that the Commission has erred in not reducing the capital cost equivalent to the amount of concession in the custom duty. The custom duty provided in the PPA was Rs.7.29 crores and actual custom duty paid (as ascertained by

Commission) was Rs.4.49 crores. Therefore the Commission was required to reduce the capital cost by Rs.2.80 crores.

- 7.8 that the Commission has not reduced the capital cost equivalent to the amount of the concession in land registration charges amounting to Rs.32.34 lakhs.
- 7.9 that the Commission has erred in relying upon the minutes of the joint exercise held on 15-17.04.2010, which minutes were never approved and in fact were specifically rejected by CEA.
- 7.10 that the Commission has erred by assuming that the figure of Rs.76.14 crores was approved and recorded in the minutes. The minutes were in fact never approved.
- 7.11 that for approving a modification, the Commission was required to examine the modification and to see whether it was in addition or substitution of a work prescribed by the TEC. However, the Commission has totally abdicated their function and relied upon previous reports only.
- 7.12 that the Commission has on a wrong premise that the Power Plant was running for more than a decade without any major technical problem, approved additional expenditure/modifications for efficient operation of the plant, ignoring the fact that one of the four DG sets had suffered a major breakdown and is under shut down since the year 2012 i.e. within only 9 years of its operation.
- 7.13 that the Joint Commission has failed to comply with the directions of this tribunal by not verifying the actual cost incurred by the respondent and relying upon the reports of the various consultants.

8. **Per Contra**, The followings are the submissions made by the counsel for the Respondent No.1 (Suryachakra Power Corporation Ltd. & Anr.):-
- 8.1 that the Appellant is seeking to challenge the aspects which stands concluded. The Appellant has not shown either in the Appeal or in the oral arguments as to how the impugned order of the Joint Commission is not consistent with the direction contained in the order dated 28.11.2014 passed by this Hon'ble Tribunal. According to the same, the appeal is filed without any merit.
- 8.2 that the Joint Commission while computing the capital cost, considered the directions of this Tribunal vides its order dated 28.11.2014 in Appeal Nos. 200 and 268 of 2013 while determining the actual cost incurred for completing the project. That the Appellant wrongly contends that the Joint Commission has not deducted from the provisional cost, the cost under-run/ not incurred by the Respondent No.1, while determining the completed cost of the project.
- 8.3 that while verifying the cost of the project over-run/under-run from the provisional cost of Rs.63.14 crores, the Joint Commission has taken into account the following aspects:
- (a) Out of the dollar component of 10.53 Million USD, the Respondent No.1 has utilized 5.131 USD for importing equipment and 1.24 MUSD towards taxes and import duties. The taxes and duties on the imported equipment have been funded by the foreign currency component and not by Indian Rupee and therefore the amount expended in foreign currency is subject to exchange rate variation.
 - (b) Under Rupee component, the Respondent has incurred expenditure over and above the estimated provisional cost of Rs.252.32 Lakhs, in purchasing indigenous equipment along with Mechanical Electrical and Civil and sub-station equipment.
 - (c) To ascertain the amount of cost over-run under the rupee component, the Joint Commission has considered the actual cost verification conducted by the Appellant itself. The said cost

over-run verification forms a part of the Joint Exercise dated 15-17/04/2010 and has been approved by the highest technical officials/authorities of the Appellant.

8.4 The Appellant is seeking to create an impression that the Joint Commission has erroneously permitted into the capital cost an amount of 5.399 MUSD.

They are basing this argument in the following manner:

- The PPA provides for dollar expenditure up to 10.53 MUSD.
- The Joint Commission has permitted foreign exchange rate variation on 5.131 MUSD and 1.24 MUSD towards taxes.
- The Respondent No.1 has paid taxes and duty of Rs.4.53 crores in India rupee and not in US dollars and as such, foreign exchange rate variation cannot be granted for such expenditure.
- Thus the Respondent No.1 has incurred only 5.131 MUSD expenditure under the dollar component.
- Therefore the Joint Commission ought to have put back 5.399 MUSD (10.53 MUSD minus 5.131 MUSD) to the provisional cost provided in the PPA.

8.5 that the Joint Commission after detailed consideration, prudence checks, and calculation, determined the capital cost of the project at Rs.77.64 Crores.

8.6 that the Appellants' claim that out of a sum of 10.53 MUSD provided in the PPA only 5.131 MUSD was spent and the remaining amount of 5.399 MUSD (10.53 MUSD minus 5.131 MUSD) needs to be reduced is therefore wrong, as what has been allowed in the project cost is only 5.131 MUSD and 1.24 MUSD.

8.7 that in allowing into the project cost, the expenditure of 1.24 MUSD and foreign exchange rate variation on the same, the Joint Commission was guided by the direction of this Hon'ble Tribunal passed in the order dated 28.11.2014.

- 8.8 that this Tribunal has already decided on the requirement to convert custom duty paid in Indian currency to foreign currency (US Dollar) and the matter cannot be re-agitated in these proceedings. Thus there is no necessity to deduct 5.339 MUSD from the capital cost of the project as the said amount was never allowed into the project cost.
- 8.9 that the Appellant has further alleged that the CEA did not approve the Joint Exercise Meeting dated 15-17.04.2010. This is incorrect. Moreover, the joint exercise was conducted as a part of the verification process required for ascertaining the cost incurred for completing the project. The said exercise is in terms of and in furtherance of the PPA. As such, irrespective of whether the CEA has approved the joint exercise or not, the cost verification conducted by the Appellant in presence of its highest technical officials, would be binding on the Appellant. Therefore the Appellants cannot raise objections regarding the joint exercise by selective references to the comments of the CEA on the joint exercise.
- 8.10 that the Appellant has also alleged that the Respondent No.1 incurred custom duty to the tune of only Rs.4.49 crores and as the PPA provided for custom duty expenses of Rs.7.29 Crores, the Joint Commission ought to have deducted Rs.2.80 Crores (Rs.7.29 crores minus Rs.4.49 Crores) from the completed cost of the project. The Appellant has further alleged that the PPA had provided the cost of land registration of Rs.35 Lakhs and as the Respondent No.1 had incurred only Rs.2.63 lakhs, the Joint Commission ought to have deducted Rs.32.37 lakhs (Rs.35 lakhs minus Rs.2.63 lakhs) from the completed cost of the project. The Respondent has claimed only Rs.4.49 crores and Rs.2.63 lakhs towards custom duty and registration fee

respectively. Even the Joint commission has allowed only these amounts in the completed cost. As such, there is no necessity of again deducting the amounts from the completed cost.

8.11 that during the joint exercise of 15-17/04/2010, the Appellant has categorically and after going through each and every work executed by the Respondent No.1, approved the additional works/modifications undertaken by the Respondent No.1. On the basis of this, the Joint commission approved the additional works/modifications. The allegation of the Appellant that the CEA did not approve the joint exercise and that it categorically rejected the same, is incorrect.

8.12 The Joint Commission has independent of the view of the CEA on the joint exercise, found the joint exercise to be acceptable and relied upon the same.

8.13 As such, in compliance of the directions of this Hon'ble Tribunal, the Joint Commission accepted the approvals given by the Appellant. The Appellant is confusing the issue by erroneously and selectively referring to certain comments of the CEA.

“Issue of Foreign Exchange Rate Variation:

- i) The PPA provides that the foreign exchange currency would be US Dollars. The Respondent No.1 has also serviced the payments through its foreign currency bank account in US Dollars. It is pertinent to note that in the interest of keeping the project cost lower, the Respondent No.1 had suggested that the currency be taken as Deutche Marks (DM). However, the Appellant did not accept this. Further, changing the currency could be done only after amending the PPA. However, there has been no amendment to the PPA.
- ii) Now the Appellant is seeking to allege that if the expenditure is calculated at DM and not USD then the expenditure would Rs.2.6858 Crores and not Rs.5.66 Crores. This argument erroneous and cannot be accepted. As has been ascertained by the Commission by looking into the bank account statements of the Respondent No.1, the amounts have been serviced through US dollars. As such, it is completely

incorrect to allege that the Respondent No.1 has incurred only Rs.2.6858 and not Rs.5.66 Crores.

- iii) The directions contained in paragraph 19, 20, 21, 22, 23 and 36 of the order dated 28.11.2014 passed by this Hon'ble Tribunal specifically directs that the foreign exchange currency shall be US dollars."

9. **Our Consideration and Conclusion on these Issues**

We have in the upper part of the Judgment given the details of the facts of the Appeal before us, rival submissions made by the parties on the issues involved in this Appeal. Hence, we do not feel any need to reproduce the same here again. We directly proceed towards our consideration and conclusion on the said aspects of the order.

- 9.1 The main contention of the Appellant/Petitioner is that the Joint Electricity Regulatory Commission determined the capital cost of the project as Rs. 77.64 crores in the Impugned Order dated 29.04.2015 duly ignoring the direction of this Tribunal in Para 25 of the Judgment dated 28.11.2014, which provides if the actually incurred cost is less than the ceiling cost agreed in the PPA, the lesser cost has to be considered. In the present case, the Respondent, Suryachakra Power Corporation Ltd. utilized only 5.13 MUSD for import equipment, whereas the PPA provides 10.53 MUSD for import of equipment. JERC in the Impugned Order determined the project cost as Rs. 77.64 crores without reducing the cost under run on imported equipment i.e. $10.53 \text{ MUSD} - 5.13 \text{ MUSD} = 5.40 \text{ MUSD}$ and concession in custom duty and land registration charges. Further, the Commission erred in awarding Rs. 4.81 crore towards additional expenditure incurred by the Respondent without examining whether such addition is necessary for efficient operation of the plant or not.

- 9.2 The Appellant/Petitioner is Electricity Department, A&N Administration awarded the work of installation of 20 MW DG Power Plant in Bamboo Flat, South Andaman to the Respondent, Suryachakra Power Corporation Limited, for installation of the power plant consisting of four units each 5 MW and both the parties entered into Power Purchase Agreement on 30.03.1999. As per the PPA, the first two units have to be commissioned within 19 months of date of achieving financial closure and the remaining two units within 24 months from the date of financial closure. The date of financial closure is 01.08.2000. Accordingly, the first two units have to be commissioned on 01.03.2002 and remaining two units by 01.08.2002. The Respondent entered into a Power Purchase Agreement (PPA) with the Appellant at a cost of Rs. 63.14 crores. The dispute in the present appeal is towards capital cost determined by JERC in the Impugned Order dated 29.04.2015 in Petition No. 89 of 2012 filed by the Respondent before the Joint Commission.
- 9.3 In November 2003, Suryachakra Power Corporation Ltd. furnished the relevant records to the Administration for approving capital cost of the project. The Respondent Suryachakra Power Corporation Ltd. had claimed capital cost of Rs. 85.10 crores, the claim was reduced to 83.67 crore as per the Auditors' Report. The Administration appointed numerous Consultants between June 2004 to October 2012 for determination of capital cost. However, the capital cost was not approved by the A&N Administration. Finally, the Respondent M/s Suryachakra Power Corporation Ltd. filed a Petition before the Joint Commission for determination and approval of the capital cost of the 20 MW power project.

The Joint Commission appointed an Independent Expert to consider the documents and give his recommendations. The Independent Expert Committee gave its recommendations to the Joint Commission on capital cost and other issues.

The Commission after going through all the submissions, passed the Impugned Order dated 03.07.2013 and arrived the capital cost of Rs. 78.2985 crore as against Rs. 63.14 crores specified in the PPA.

9.4 Aggrieved by the Impugned Order dated 03.07.2013, both the parties M/s. Suryachakra Power Corporation Ltd. and A&N Administration filed Appeals before this Tribunal being Appeal No. 200 of 2013 & IA Nos. 279 of 2013 & 94 of 2014 and Appeal No. 268 of 2013 & IA No. 359 of 2013. These Appeals were cross appeals filed by M/s Suryachakra Power Corporation Limited and Electricity Department, Andaman & Nicobar Administration, against the JERC Order dated 03.07.2013. The Tribunal passed a Judgment in these Appeals on 28.11.2014. The Appellant filed a Civil Appeal No. 1652 of 2015, titled Electricity Department, A&N Administration vs. Suryachakra Power before the Hon'ble Supreme Court. Further, the Respondent also filed a Civil Appeal No. 5958 of 2015 before the Hon'ble Supreme Court. Both the Appeals are against this Tribunal's Judgment dated 28.11.2014 captioned M/s Suryachakra Power Corporation Ltd. Vs. Electricity Department, A&N Administration.

9.5 In the Judgment dated 28.11.2014, this Tribunal directed Joint Electricity Regulatory Commission to re-determine the capital cost of the 20 MW DG Power Plant duly considering the following expenditures along with the project

cost of Rs. 63.14 crores as per the PPA, which was decided by the Techno-Economic Committee (TEC):

- a) Foreign exchange rate variation on 5.131 MUSD incurred on foreign equipment including their transportation cost.
- b) FERV on the customs duty/taxes incurred on foreign equipment applied on equivalent to US dollars.
- c) Changes necessary for efficient operation of the plant as approved by the administration or joint commission.
- d) Additional Interest During Construction (IDC) and Financing Cost and Incidental (IEDC) expenses during construction for the period of delay in achieving the COD for reasons attributable to administration and beyond the reasonable control of Suryachakra Power from the scheduled COD to the actual COD.
- e) Change in cost due to change in law and taxes and duties on domestic component as per actual.

The Joint Commission has been directed to verify the actual payment of custom duty and remittance of foreign Loan. This will be subject to ceiling of actual funds tied up by Suryachakra Power Project and the actual cost incurred.

Further, this Tribunal observed certain deviations committed by the Joint Commission while determining the capital cost of the project in its Order dated 03.07.2013. The following are the deviations observed by this Tribunal and noted in the Judgment dated 28.11.2014 and the relevant part is as under:

“The Joint Commission erred in allowing additional expenditure of Rs. 2.8915 crore out of Citi Bank loans for punch items contrary to the provisions of PPA. The Joint Commission also wrongly allowed additional expenditure of Rs. 0.65 crore out of unsecured loans towards portion of outstanding liability to EPC contractor contrary to the terms of the PPA”.

- 9.6 The Joint Commission after going through the submissions and considering the directions of the Appellate Tribunal determined the completion cost of the project as Rs. 77.64 crores in the Impugned Order dated 29.04.2015.

We have to examine now, whether the Joint Commission followed directions as per the orders of this Tribunal and as per the relevant articles specified in the PPA etc. while determining the capital cost of Rs. 77.64 crores in the Impugned Order dated 29.04.2015.

- 9.7 Let us examine the relevant articles of the PPA deal with determination of capital cost of the project up to actual COD of the power project. Capital cost as defined under Clause (xvi) of Article-I of the Power Purchase Agreement:

11.1 Capital cost as defined under clause (xvi) of Article-I of the Power Purchase Agreement:

“Capital Cost” means, subject to Article 3.11 and Article 3.10 (d) of the Agreement, the cost (expressed in rupees) actually incurred by the Company in completing the Project will be as follows:

Sl. No.	Item	Cost in MINR	Cost in MUS Dollar Price at Rs. 36.00
1.	Imported eq.	379.08	10.53
2.	Indigenous eq.	252.32	
3.	Mec. Elec. Civ. and sub-station	-	-
Total		631.40	10.53

which is as per foreign exchange rates assumed as in June 1997 and shall be included as “CAPITAL COST” except to the extent that the THE ADMINISTRATION approves such excess costs as not having been attributable to THE COMPANY to the Company’s suppliers or contractors. In determining the amount of costs actually incurred in completing the project, account shall be taken of (i) any increase or decrease in capital cost resulting from changes in the rates of exchange of the foreign currencies in which project expenditures are authorized to be incurred from the level set forth in A&N TEC (ii) (A) any reduction in interest during construction and principal amount of loans through the application of delay liquidated damages received under the Construction Contractor other compensation paid by the EPC Contractor other compensation to the Company and applied to reduce capital Cost as provided in Article 3.11. (iii) any change to the debt equity ratio from the ratio assumed in the Approved Capital Schedule, and (iv) any excess insurance proceeds paid to the Company (after adjustment for the loss or damage to the Project and, to the extent not included in actual project cost, the cost of repaid and replacement attributable to such loss or damage) in

respect of any claims for loss or damage to the Project incurred prior to the Commercial Operation Date to this Appendix D. For purposes of determining the Capital Cost, all foreign currency loans and all foreign currency equity sources shall be converted into Rupees at the applicable Base Foreign Exchange Rate. It is understood and agreed that any increase or decrease in Capital cost due to changes in foreign currency exchange rates shall be reflected in the amount of actual capital cost. In case the actually incurred cost is less than the ceiling cost as mentioned in table, the lesser cost shall be taken as the capital cost. Capital cost includes interest during construction limited to a construction period of nineteen months for the first and second unit and twenty four months for Third and Fourth Units, and shall not include any additional amounts for a longer construction period, except with the approval of the THE ADMINISTRATION due to delays not attributable to the Company or the Company's suppliers or contractors. Further for estimating Interest During Construction 37.5% of the capital cost is allocated for the first unit, 23.5% of the capital cost allocated to the second unit, 21% of the capital cost allocated to the third unit and 18% of the capital cost allocated to the fourth unit".

According to above Clause, the capital cost has to be arrived at by considering project cost specified in the PPA i.e. Rs. 63.14 crores except to the extent that the administration approves such excess costs as not having been attributable to the company's suppliers or contractors. Further, while determining the amount of costs actually incurred in completing the project, the following expenditures shall be taken of –

- i) Increase or decrease in capital cost due to changes in the rates of exchange of foreign currencies in which project expenditure are authorized to be incurred from the level set forth in the TEC.
- ii) (ii) Any reduction in IDC and principal amount of loans through the application of liquidated damages/ compensation received from the contractors.
- iii) Change in debt equity ratio.
- iv) Any excess insurance proceeds paid to the company prior to CoD.
- v) The capital cost included the IDC for the specified completion period and any additional amounts for longer construction period would be permissible only with the approval of the Administration due to delays not attributable to the Company or the Company's suppliers or contractors.
- vi) Excess costs not attributable to the company, its suppliers or contractors as approved by the Administration.

9.8 The original estimate of the project at the time of bidding was Rs. 52.25 crores including interest during construction. The project cost subsequently revised

as per the recommendation of the Techno Economic Committee (TEC) after the bidding and arrived at 63.14 crores and both the parties signed PPA to Rs. 63.14 crores. Before going into the details of determination of project cost in the Impugned Order dated 29.04.2015.

9.9 Let us examine the submission of statements of cost of the completed project by the five-member Committee constituted by the Chief Secretary, A&N Administration. The relevant part is as under:

4.3.1 "Chief Secretary, A&N Administration vide Order No. 217 dated 21.01.2013 constituted a five member committee for examining the issue of cost of construction of 20MW Bambooflat Power House in the light of order dated 15.01.13 of the Hon'ble Commission. The Committee is said to have examined the legal framework of all claims with reference to PPA, Techno Economic Clearance (TEC), Report of the Karnataka Power Corporation (KPCL), advice tendered by Central Electricity Authority (CEA), reports of the Tamil Nadu Electricity Generation and Distribution Corporation Ltd. (TANGEDCO) etc. and submitted their report to A&N Administration on 25.01.2013. The Statement of cost arrived at in respect of the construction of the project is as below:

Table - 1

Description of items		Quantum Expenditure Rs. Crores	Para Ref. of Committee Report
Approved Cost		63.14	15,17,29 & 30
IDC	(-)	3.00	
Cost excluding IDC	(+)	60.14	
Increase in cost of Establishment due to extended gestation period	(+)	3.30	17
Increase due to Exchange Rate variation considering only 5.13 MUS\$ Rs. 11.0445 per dollar	(+)	5.67	Allowed as per actual utilization
Additional Transformer and Black Start DG Set – Work done after COD	(+)	0.31	22
Hard Cost excl. IDC		69.42	
Proportionate IDC on the hard cost of Rs. 69.11 cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC/Project Cost		74.33	
Liquidated damage @ 5% on Rs. 74.33 crores	(-)	3.72	

Project		70.61	
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The Respondent has stated that the said report of the five member committee has been accepted by the Administration. The Respondent had prayed that the Hon'ble Commission may determine the project cost and tariff thereon in accordance with the provisions of PPA/Techno Economic Clearance issued by A&N Administration and the report of the five members committee constituted by the A&N Administration for the purpose of determination of the cost of the project as Rs. 70.61”

The said report indicated the financial deviation in approved items/works against TEC in a tabular form as under:

Table-II

Sl. No.	Description	TEC Cost (Rs. Crs)	As SPCL (Rs. Crs.)	Deviations (Rs. Crs.)	M/s. SPCL Auditor Certified only (Rs. Crs)
1	2	3	4	5	6
1.	Land & Site Development	0.630	6.253	5.62	6.250
2.	Building & Civil Cons.	5.490	10.860	5.37	10.860
3.	Works Cost including Taxes & duties	45.070	48.567	3.49	47.982
4.	(b) Electricals	3.900	6.543	2.64	6.281
	Misc. Project Cost				
5.	IDC	3.000	6.300	3.30	5.841
6.	Preliminary & Capital issue expenses	1.850	6.210	4.36	6.200
7.	Contingencies				
8.	Start up fuel for testing & commissioning	3.200	0.375	(-)22.82	0.253
Total Cost		63.14	85.10	21.96	83.667

Thus, according to five-member Committee constituted by Chief Secretary, A&N Administration, the completion cost of the project including IDC was arrived at Rs. 74.33 crores. The Committee calculated the net project cost after deducting liquidated damages @ 5% on Rs. 74.33 crores i.e. Rs. 3.72 crores and final cost as Rs. 70.61 crores. Thus, the Committee has arrived the project cost as Rs. 74.33 crores without liquidated damages.

9.10 This Tribunal in Appeal No. 200 of 2013 vide Judgment dated 28.11.2014 supported the Commission's decision regarding liquidated damages, the relevant part is as under:

52. *“Clause 3.3.0 (i) (ii) and (v) of the PPA stipulates that the Administration is obliged to cause the transmission facilities by laying and rerouting new transmission line etc., for drawing and receiving electricity produced by IPP 120 days before COD of the first engine/power station. Accordingly, the line should have been ready by 1.4.2002 to meet the revised schedule of 31.8.2002 for the first two units. A&N Admn. informed on 20.5.2002 that existing transmission line was strengthened to receive 6 MW to 7 MW of power. But SPCL informed A&N Admn. that the existing 53 km. line was not reliable and requested for new 33 kV. transmission line as per the provisions of PPA. However, the A&N Administration completed the double circuit Panther transmission line on 10.12.2002. M/s. SPCL sent a letter to A&N Administration on 09.12.2002 regarding readiness to conduct acceptance test of all four units.*

The process of organizing for testing, actual conducting of acceptance tests and final approval took its time and COD could be declared only on 2.4.2003. The provision of 120 days of readiness of the Transmission line is kept to take care of such commissioning procedures and their party inspection. Further, Administration opened the letter of Credit on 1.4.2003 which as per PPA should have been opened one month before COD. Thus, the Commission observes that imposition of liquidated damages as per clause 3.10 of Power Purchase Agreement (PPA) on M/s. SPCL for delay in achieving COD is not justifiable”.

53. We agree with the findings of the Joint Commission. We have already held in earlier paragraph the delay in COD of the plant was not attributable to Suryachakra Power but it was due to delay in commissioning of the transmission line by the Administration. We have also accepted the findings of the Joint Commission regarding allowing deemed generation from the commissioning of the transmission line till the actual COD. Therefore, for the same reasoning there is no justification in deduction of the liquidity Damages for the capital cost of the project”.

Thus, the Joint Commission did not allow liquidated damages while working out the capital cost of the project.

- 9.11 The Respondent filed a Petition being Petition No. 89 of 2012 before the Joint Commission and prayed for determination of completed project cost and for determination of Tariff.

The Joint Commission after going through the submission and after incorporating the directions of this Tribunal arrived the project cost in the

Impugned Order dated 29.04.2015. Aggrieved by this order, the Appellant filed this Appeal being Appeal No. 154 of 2015.

- 9.12 Let us examine the various items considered by the Joint Commission while arriving at the project cost.

This Tribunal in Para 36 of the Judgment stated that the completed capital cost of the project will be sum of capital cost of Rs. 63.4 crores indicated in the PPA and charges of FERV on 5.131 MUSD incurred on foreign equipment including their transportation cost, FERV on the custom duty/taxes on imported equipment applied on equivalent US dollars, changes necessary for efficient operation of the plant as approved by the Administration or the Joint Commission, additional IDC, financing cost and incidental expenses during construction for the period of delay in achieving the COD for reasons attributable to the administration and beyond reasonable control of Suryachakra Power Corporation Ltd., from the scheduled COD to the actual COD, change in cost due to change in law, taxes and duties on domestic component as per actual and directed Joint Commission to determine completed cost accordingly. This will be subject to ceiling of actual funds tied up by Suryachakra power for the projected and the actual cost incurred. Further, this Tribunal directed Joint Commission to verify the actual payment of custom duty and remittances of foreign loan.

- 9.13 We have gone through the computation of project cost worked out by the Joint Commission with respect to FERV on import equipment and custom duty/taxes paid by the Respondent; additional expenditure incurred by the Petitioner necessary for efficient operation of the plant and additional IDC and

IEDC. The total cost approved by the Joint Commission subject to ceiling of actual funds tied up by Suryachakra Power for the project and the actual cost incurred as shown in the Impugned Order dated 29.04.2015.

Sl. No.	Particulars	Amount (Rs. Crores)
1.	Capital cost of the project as per PPA	63.14
2.	Add: Foreign Exchange Rate Variation on 5.131m USD incurred on import of equipment	5.66
3.	Add: Foreign Exchange Rate Variation on customs duty paid on imported equipment applied on equivalent US Dollars	1.35
4.	Add: Net additional expenditure incurred by the Petitioner necessary for efficient operation of the plant allowed by the Commission	4.81
5.	Add: Additional Interest During Construction (IDC) Financing cost and Incidental Expenses During Construction (IEDC) as allowed by the Commission	
	(i) Additional IDC	1.84
	(ii) Additional IEDC	0.84
6.	Total project cost approved by the Commission	77.64

Thus, the Commission arrived at the project cost at Rs. 77.64 crores subject to limitation ceiling of actual funds tied up by Suryachakra Power for the project and the actual cost incurred.

9.14 Let us examine the issues raised by the Appellant/Petitioner in the present Appeal regarding the project cost determined by the Joint Commission, which is as under:

- a) The contention of the Appellant/Petitioner is that the Respondent has spent foreign currency of 5.13 MUSD towards import equipment and 1.25 MUSD towards custom duty equivalent to Indian Rs. 4.49 crore as per the payment receipts of the custom department.

The actual foreign currency limitations specified in the PPA is 10.53 MUSD towards imported equipment plus custom duty etc. which is the maximum ceiling provided in the PPA in arriving the project cost of 63.14 crores. Out of this, M/s. Suryachakra Power Corporation Ltd. utilized 5.13 MUSD + 1.25 MUSD. Though, the Respondent as per PPA permitted to utilize 10.53 MUSD for procuring import equipment, the Respondent has utilized lesser foreign currency than the allotted 10.53 MUSD that does not mean that the project cost is under run and the difference amount of 4.149 MUSD has to be reduced from the project cost of Rs. 63.14 crores. The five-member Committee also considered foreign currency variation on 5.131 MUSD in their report for arriving the project cost and the Committee did not pointed out that the difference amount of allotted foreign currency has to reduce from the PPA cost of Rs. 63.14 crores as contested by the Appellant in this Appeal.

Similarly, the five-member Committee did not raise the issue regarding reduction of project cost with respect to concession on custom duty and land registration charges.

This Tribunal clearly directed the Joint Commission to verify the certificate of customs department regarding custom duty etc. Accordingly, the Joint Commission worked out the FERV while determining the project cost in the Impugned Order dated 29.04.2015 duly considering the rate of foreign currency exchange as per RBI rates.

Further, utilizing less foreign currency for import equipment and higher expenditure on indigenous equipment is benefit to the Appellant, A&N

Administration towards foreign exchange rate variation and thereby reduction in project cost.

Thus, we do not find any irregularity committed by the Joint Commission in the Impugned Order and the argument of the Appellant is legally not justifiable.

- b) The contention of the Appellant regarding the expenditure incurred for efficient operation of the power plant i.e. Rs. 4.81 crores was wrongly allowed by the Joint Commission while arriving the project cost. We have gone through the submission of the Appeal and noticed that the Technical Committee of the A&N Administration physically verified the various works executed for efficient operation of the plant. The Joint Commission after going through all the item works admitted the expenditure of Rs. 4.81 crores towards efficient operation of the plant. The views of the Commission are as under:

***“The Commission has examined the various statements, documents and the written submissions submitted by both the Petitioner and the Respondents. The Commission observes that the actual cost incurred in the project by the Petitioner was verified by various consultants appointed by A&N Administration on different occasions which was subsequently examined by CEA, the Expert appointed by the Commission and the Commission itself. The Commission takes note of the disallowances of some of the items of expenditure in its order dated 03.07.2013. There was a disallowance of Rs. 57.20 lakhs incurred as extra expenditure on the head “construction of Jetty” and Rs. 39.85 lakhs towards the cost of “centrifugal Separator” from the cost incurred by the Petitioner as the same were not approved by the Five Member Committee of A&N Administration which was also not considered by the Expert appointed by the Commission. The Commission also finds that the additions, deletions and increase in quantities of some areas of supply and works were discussed in depth in the joint exercise meeting held on 15-17 April 2010 which was represented by the entire hierarchy of the technical team of the Electricity Department and the representatives of the Petitioner. The relevant portion of the views of the Electricity Department in the Joint Exercise Report is reproduced below:*”**

The submission of M/s SPCL and the suggested proportionate reduction of the cost due to deviations in the works executed by them can be dropped since they have executed many other additional works over and above the TEC provisions which are technically required for improved performance of the power plant, by them”.

Thus, we do not find any deviation in approving the expenditure incurred on works towards efficient operation of the power plant.

- c) The other contention of the Appellant is that the Respondent executed various works without the Approval of the Administration, A&N Department.

The various works executed by the Respondent were kept before the Representatives of the A&N Administration and a joint meeting was held on 15-17 April 2010. The high-level authority of Technical and Accounts Department were participated in the meeting. The Minutes of the Meeting were recorded and signed by both the parties. The officers of the A&N Administration have recommended the proposal with their suggestions to the Administration for consideration.

The list of participants attended in the Joint Meeting is as follows:

List of Participants

Suryachakra Power Corporation of India Ltd.

Sl. No.	Name	Designation
1.	Shri Vijay Kumar	General Manager
2.	Sri Krishna Rao	Addl. General Manager

Sl. No.	Name	Designation
1.	Shri Y.M. Murtaza	Superintending Engineer (Elec.)
2.	Shri R.P. Singh	Executive Engineer (HQ)
3.	Shri P.K. Kapoor	Executive Engineer (PG)
4.	Smti. Santa Devi	Sr. Accounts Officer (C)
5.	Shri M. Jagannathan	Assistant Engineer (IPP)
6.	Shri U.K. Paul	Assistant Engineer
7.	Shri Karuna Joydhar	Assistant Engineer
8.	Shri M. Eappan	Assistant Engineer (PL)
9.	Smti. Usha Kumari	Junior Engineer (PL)

A joint exercise was taken up on the computed cost submitted by M/s SCPCL and analyzed on the basis of the documents of M/s SCPCL, A&N Administration and observation of the Consultant (KPCL) and arrived the computed cost works out to Rs. 7614.52 lakhs as per details below:

S. No.	Description	Cost (Rs. Lakhs)
1.	Completion cost as per M/s. SPCL	8510.41
2.	Vouchers not certified by the Auditors of SPCL	(-) 118.64
3.	Actual Expenditure incurred as per Auditor's certificate	8391.77
4.	Consultant (KPCL) not allowed the excess expenditure incurred on preliminary & capital issue expenses, IDC and audit & accounts totalling to Rs. 882.40 lakhs. An amount of Rs. 105.15 lakhs (Rs. 58.44 + 45.72 + 1.00 lakhs) was reduced by the Auditor of SPCL and accounted at S. No. 2 above. (subject to Commercial expert opinion).	(-) 777.25
5.	Net Total	7614.52

9.15 The representatives of the Electricity Department, A&N Administration and M/s Suryachakra Power Corporation agreed and signed the documents by both the parties. The incriminating points of the meeting are as follow:

- a) The works cost of Rs. 76.14 crores is broadly acceptable to both the parties and can be considered and recommended to the competent authority for further scrutiny & acceptance.
- b) As regards, increased expenditure on account of Audit & Accounts, IDC and Preliminary & Capital issue expenses, totaling to Rs. 8.82 crores needs commercial expert opinion to arrive at the extent of admissibility for inclusion in the Completed Cost over and above Rs. 76.14 crores.
- c) However, the Completion Cost should not exceed more than the expenditure certified by the Auditor of SPCL.
- d) M/s. SPCL in their Completed Cost increased the equity component to 31.09% as against the approved TEC provision of 30%. M/s. SCPCL to

restrict ROE on 30% of the investment and the balance to be treated as term loan for the tariff calculation.

- e) The foreign currency i.e. 94,72,653 DEM (equivalent US \$ 51,31,020.38) equivalent INR Rs. 2,227.70 lakhs which is utilized is frozen.

9.16. Further, The Committee formed by Chief Secretary, A&N Administration constituted a five-member Committee for examining the issue of cost of construction of 20 MW power project. The Committee did not raise these issues regarding less utilization of foreign exchange amount and regarding concession given with respect to custom duty/taxes and regarding registration charges of the land and they arrived the completed cost of the project including IDC as Rs. 74.33 crores.

9.17 Let us examine, the project cost determined by various agencies, which is as under:

i)	Project cost at the time of bidding	Rs. 52.55 crores
ii)	Due to delay in implementation of project The techno economic committee with the guidance of CEA decided the project cost (as per PPA)	Rs. 63.14 crores
iii)	Project cost submitted by SCPCL	Rs. 85.10 crores
iv)	Project cost arrived by Auditors of SCPCL	Rs. 83.667 crores
v)	Project cost recommended by five-member committee constituted by Chief Secretary, A&N Administration	Rs. 74.33 crore (without L.D. charges)
vi)	Project cost recommended during the joint meeting held on 15-17 April 2010	Rs. 76.1452 crores

Thus, the contention of the Appellant that as per Para 25 of this Tribunal's Judgment dated 28.11.2014 the project cost has to be reduced from the PPA cost of Rs. 63.14 crores after considering the less utilization of foreign exchange for imported equipment, concession with respect to custom duty and land registration charges is not justifiable.

9.18 After going through the above submissions, we do not find any force in the arguments of the Appellant towards less utilization of foreign exchange, concession on custom duty and registration charges, etc.

Further, the High Power Technical Committee participated in the Joint Meeting held on 15-17 April 2010 stated that the Respondent Suryachakra Power Corporation has done various works over and above the estimated works specified in the PPA and the Technical Committee has done physical verification of the various works executed by the SCPCL and recommended to the Administration for the project cost and the cost is more than the project cost specified in the PPA.

9.19 In view of the enactment of the Electricity Act, 2003, the Joint Commission is having powers to review and finalize expenditure spent by the Respondent on various works of the project. Further, the Joint Commission is responsible as per the directions of this Tribunal's Judgment to verify and for finalization of project cost.

9.20 Thus, we do not find any perversity or infirmity in determination of project cost by the Joint Commission and accordingly we confirm the order of the Joint Commission in deciding the project cost at Rs. 77.64 crores subject to limitation ceiling of actual funds tied up by Suryachakra Power for the project and the actual cost incurred. Thus, we affirm the Impugned Order of the Joint Commission and the Appeal is liable to be dismissed.

ORDER

The Impugned Order dated 29.04.2015 is hereby upheld. No order as to cost.

Pronounced in the open Court on this **14th day of March, 2016.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~