

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 17 OF 2014 & IA NO. 23 OF 2014
& IA Nos. 1207 of 2018 & 133 of 2019

APPEAL NO. 18 OF 2014 & IA NO. 24 OF 2014
& IA No. 1221 of 2018

APPEAL NO. 33 OF 2014 & IA NO. 51 OF 2014
& IA No. 1226 of 2018

APPEAL NO. 293 OF 2013 & IA NO. 390 OF 2013

APPEAL NO. 328 OF 2013 & IA NO. 432 OF 2013

APPEAL NO. 263 OF 2013 & IA NO. 353 OF 2013

Dated: 17th May, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S. D. Dubey, Technical Member

APPEAL NO. 17 OF 2014 & IA NO. 23 OF 2014
& IA Nos. 1207 of 2018 & 133 of 2019

IN THE MATTER OF :

Maithan Alloys Ltd.,
Ideal Centre, 4th Floor,
9, Acharya J.C. Bose Road,
Kolkatta-700017.

.....Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.

- (2) Damodar Valley Corportion,
DVC Towers, VIP Road,
Kolkatta-700054.
- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.
- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.Respondent(s)

APPEAL NO. 18 OF 2014 & IA NO. 24 OF 2014
& IA No. 1221 of 2018

IN THE MATTER OF :

Jai Balaji Industries Ltd.,
5, Bentick Street,
Kolkatta-700 001.Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.
- (2) Damodar Valley Corportion,
DVC Towers, VIP Road,
Kolkatta-700054.
- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.

- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.Respondent(s)

APPEAL NO. 33 OF 2014 & IA NO. 51 OF 2014
& IA No. 1226 of 2018

IN THE MATTER OF :

Impex Ferro Tech.Ltd.,
SKP House, 132 A,
S.P. Mukherjee Road,
Kolkatta-700026.Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.
- (2) Damodar Valley Corportion,
DVC Towers, VIP Road,
Kolkatta-700054.
- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.
- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.Respondent(s)

APPEAL NO. 293 OF 2013 & IA NO. 390 OF 2013

IN THE MATTER OF :

Bhaskar Shrachi Alloys Limited,
8/1, Middleton Row, 3rd Floor,
Kolkatta-700 071.

.....Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.
- (2) Damodar Valley Corportion,
DVC Towers, VIP Road,
Kolkatta-700054.
- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.
- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.

APPEAL NO. 328 OF 2013 & IA NO. 432 OF 2013

IN THE MATTER OF :

Shyam Ferro Alloys Limited,
"Vishwakarma", 86 C,
Topsia Road,
Kolkatta-700046..

.....Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.
- (2) Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkatta-700054.
- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.
- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.Respondent(s)

APPEAL NO. 263 OF 2013 & IA NO. 353 OF 2013

Bhaskar Shrachi Alloys Ltd.,
8/1, Middleton Row, 3rd Floor,
Kolkatta-700 071.Appellant

VERSUS

- (1) Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110 001.
- (2) Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkatta-700054.

- (3) West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan,
Bidhan Nagar,
Kolkatta-700 091.
- (4) Jharkhand State Electricity Board,
Engineering Building,
HEC Dhurwa,
Ranchi- 834 004.Respondent(s)

Counsel for the Appellant(s) : Mr. Rajiv Yadav
Mr. Rahul Chauhan

Counsel for the Respondent(s) : Mr. K. S. Dhingra for R-1

Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal for R-2

Mr. Himanshu Shekhar
Mr. Aabhas Parimal
Mr. Jannesh Kumar for R-3

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 17 OF 2014 & batch

1.1 The Appellant(s) herein questioning the legality, validity and propriety of the various Impugned Orders passed by the Central Electricity Regulatory Commission (**Central Commission**) determining generation tariff of various Thermal Power Stations of DVC, for the period 2009-14 have preferred these Appeals as

under:-

Sl.No.	Appeal No.	Impugned Order in Petition No.	Passed on
1.	17 of 2014	276/GT/2012	07.08.2013
2.	18 of 2014	275/GT/2012	07.08.2013
3.	33 of 2014	274/GT/2012	09.07.2013
4.	293 of 2013	269/GT/2012	09.07.2013
5.	328 of 2013	270/GT/2012	27.09.2013
6.	263 of 2013	268/GT/2012	27.09.2013

1.2 At the outset it has been submitted that the present Appeals when filed were limited to 3 aspects, being the arbitrary allowance of recovery for contributions under the Operation and Maintenance Expenses ("**O & M expenses**") towards the following heads:-

- (a) Contribution towards Pension and Gratuity Fund
- (b) Contribution towards Sinking Fund
- (c) Additional O & M expenses towards Ash Evacuation and Mega Insurance

1.3 However, subsequently most of the issues raised by the Appellants in this batch of appeals have been addressed by CERC in the true-up orders for FY 2009-14, that have been passed after the filing of these appeals. Therefore, the Appellants now seek to address submissions only with respect to "**Contribution to Sinking Fund for redemption of Bonds**" issued by DVC. Bonds were issued by DVC for collecting funds that were used for setting up power projects. The amounts realised through issuance of bonds has to be

repaid to the subscribers along with coupon rate of interest at the time of maturity.

- 1.4 The Appellants are now being aggrieved by the above cited impugned orders on the file of the first Respondent/Central Commission with specific reference to only sinking fund and double counting.

2. Brief Facts of the case(s):

The brief facts of the case(s) are as follows:-

- 2.1 Appeal No.17 of 2014 & batch has been filed by the Appellants who are companies incorporated under the Companies Act, 1956 and primarily engaged in ferro-alloy and/or iron & steel industry and are High Tension consumers of the Respondent No.2.
- 2.2 Respondent No.1, Central Electricity Regulatory Commission is a statutory body under Section 76 of the Electricity Act, 2003 and is *inter alia* entrusted with the function of determination of tariff for supply of electricity by Respondent No.2 under the Tariff Regulations.
- 2.3 Respondent No.2, Damodar Valley Corporation is a statutory corporation owned, controlled and managed by the Government of India (Ministry of Power), Government of Jharkhand and Government of West Bengal. It was constituted pursuant to Damodar Valley Corporation Act, 1948 ("**DVC Act**").
- 2.4 Respondent No.3, West Bengal State Electricity Distribution Company Limited, was established in 2007, is responsible for providing power to most of the areas of West Bengal.

2.5 Respondent No.4, Jharkhand State Electricity Board, is a Government of Jharkhand enterprise, entrusted with the generation and distribution of electrical power in the state of Jharkhand.

3. **The issues involved in all these appeals are common in nature, though arising from different impugned orders. Therefore, we decide to dispose of the batch of appeals by a common judgment.**

4. **Mr. Rajiv Yadav, the learned counsel appearing for the Appellant(s) in the batch of Appeals has filed the written submissions for our consideration as follows:-**

4.1 The Appellants are companies incorporated under the provisions of the Companies Act, 1956 that are primarily engaged in manufacture of ferro-alloy, and are HT consumers of Damodar Valley Corporation (DVC), the Respondent No.2 herein.

4.2 Prior to the enactment of Electricity Act, 2003, DVC was authorised to determine its own tariff pursuant to Section 20 of the DVC Act, 1948. The relevant extract from Section 20 of the DVC Act is reproduced hereunder for ready reference:

"20. Charges for supply of electrical energy - The Corporation shall fix the schedule of charges for the supply of electrical energy, including the rates for bulk supply and redistribution, and specify the manner of recovery of such charges.

4.3 Upon enactment of the Electricity Act, 2003, the above noted dispensation under DVC Act underwent a significant change. The 2003 Act, being a consolidating Act, prevailed over such provisions of the DVC Act as were inconsistent with its own provisions. In this

regard, it may be noted that Section 174 of the 2003 Act, specifically articulated its overriding effect in the following words:

"174. Act to have overriding effect. - Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

- 4.4** The CERC, vide impugned order dated 7.8.2013, determined tariff of certain TPS for the period 1.4.2009 to 31.3.2014. The said order has been impugned by the Appellants in the present proceedings before this Tribunal on the grounds of only Sinking Fund and double counting.
- 4.5** In light of the above factual background, the Appellant seeks to advance following submissions for kind consideration of this Tribunal:

Allowance of contribution to Sinking Fund is not sanctioned by Tariff Regulations, 2009.

The 2009 Regulations do not sanction an allowance of 'contribution to sinking fund', created for redemption of bonds, without adequate prudence check. In this regard, the Appellant seeks to highlight the following omissions by the Ld. CERC:

- i) Non-examination of the purpose of funds raised by DVC through issuance of bonds:** The impugned order, is bereft of any prudence check with respect to the amounts allowed on account of contribution to sinking fund.

4.6 In case the said funds have been utilised for meeting the working capital requirements of DVC, then allowing both sinking fund contributions and interest on working capital in terms of Regulation 18 for FY 2009-14 would amount to double allowance of the same item, resulting in an undue increase in tariff. On the other hand, if the sum of Rs. 640 crore has been utilised for capital expenditure by DVC, the impugned order ought to have considered that such capital expenditure has already been factored in the normative debt and equity allowed to DVC in terms of Regulations 16 and 15 respectively. In view thereof, the contribution towards sinking fund was liable to be disallowed by the Ld. CERC.

ii) *Unjustified loading on tariff of funds raised for execution of new projects earmarked for supplying power to licensees outside the command area* - The audited accounts for FY 2011-12 reveal that a sum of Rs. 1700 crore, raised by issuance of bonds on 30.3.2012, has been mobilised by DVC by way of hypothecation of fixed assets of specific thermal power plants.

iii) *Erroneous reliance upon this Tribunal's Judgment dated 23.11.2007:* For allowing impugned contribution to Sinking Fund, the CERC has erroneously relied upon the following extract from this Tribunal's Judgment dated 23.11.2007, passed in Appeal Nos. 271, 273, 273, 275 of 2006 and 8 of 2007 (2007) ELR 1677:

"E. 15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated 29th December, 1992 under the provision of Section 40 of the DVC Act is to be

taken as an item of expenditure to be recovered through Tariff, as brought out in para 82.”

4.7 The above quoted observation, applied only to old plants, whose cost was not being recovered through normative debt-equity ratio of 70:30. This Tribunal did not lay down that DVC would be allowed both *interest on loan* as well as *contribution to sinking fund*. Needless to add, a particular cost component cannot be allowed twice to a generating company.

iv) *Reliance upon Regulation 43 of CERC Tariff Regulations, 2009 is misplaced:* The impugned order has cited Regulation 43 (2) (iv) of the CERC Tariff Regulations, 2009 to justify allowance of contribution towards sinking fund for redemption of bonds. The said Regulation 43 provides-

“43. Special Provisions relating to Damodar Valley Corporation.

(1) Subject to clause (2), these regulations shall apply to determination of tariff of the projects owned by Damodar Valley Corporation (DVC).

(2) The following special provisions shall apply for determination of tariff of the projects owned by DVC:

(i) Capital Cost: The expenditure allocated to the object ‘power’, in terms of sections 32 and 33 of the Damodar Valley Corporation Act, 1948, to the extent of its apportionment to generation and inter-state transmission, shall form the basis of capital cost for the purpose of determination of tariff:

Provided that the capital expenditure incurred on head office, regional offices, administrative and technical centers of DVC, after due prudence check, shall also form part of the capital cost.

- (ii) *Debt Equity Ratio: The debt equity ratio of all projects of DVC commissioned prior to 01.01.1992 shall be 50:50 and that of the projects commissioned thereafter shall be 70:30.*
- (iii) *Depreciation: The depreciation rate stipulated by the Comptroller and Auditor General of India in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be applied for computation of depreciation of projects of DVC.*
- (iv) *Funds under section 40 of the Damodar Valley Corporation Act, 1948: The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff.*
- (3) *The provisions in clause (2) of this regulation shall be subject to the decision of the Hon'ble Supreme Court in Civil Appeal No 4289 of 2008 and other related appeals pending in the Hon'ble Court and shall stand modified to the extent they are inconsistent with the decision.*

4.8 The above quoted Regulation 43 (2) (iv) would apply as an exception to the general tariff principles by virtue of the expression “*subject to*” in Regulation 43 (1). In other words, the general tariff principle of cost recovery on the basis of normative debt-equity ratio shall yield to Regulation 43 (2) (iv) in case of DVC. However, DVC cannot claim allowance of capital cost both by means of ‘*debt-equity ratio*’ as well as ‘*contribution to sinking fund*’. Given the cost-plus regime, envisaged under Section 61 of the Act, DVC can claim a cost component only once; that is, either by way of interest on loan as per normative debt-equity ratio, or by way of contribution to sinking fund (for redemption of bonds) subject to fulfillment of conditions under Regulation 43 (2) (iv).

v) **Unjustifiable allocation of burden of contribution to sinking fund on old plants:** The impugned order has spread the burden of contribution to sinking fund on old plants even though the relevant bonds had been issued solely to meet the capital cost of new projects, namely Mejia TPS (Unit No. 5 & 6), Chandrapura TPS (Unit 7 & 8), Koderma Thermal Power Station (Unit 1 & 2), Durgapur Steel TPS (Unit 1 & 2) and Raghunathpur TPS (Unit 1 & 2). The relevant extract from the impugned order is reproduced hereunder for ready reference:

“90. Accordingly, the contribution to sinking fund created for redemption of bond is allowed. The total contribution allowed is allocated among all the generating stations of the petitioner based on the proportion of capital cost allowed as on 31.3.2009.....and the amount considered for this generating station is (Durgapur TPS Units III & IV) is as under:

(emphasis added)

(Rs.Lakh)

	2009-10	2010-11	2011-12	2012-13	2013-14
<i>Contribution to Sinking Fund</i>	440.76	465.41	1200.74	1284.79	1374.73

4.9 Without prejudice to the submissions in the preceding paragraphs hereinabove, the allocation of contribution to sinking fund is objectionable on the following grounds:

- a) Since bonds were issued for new projects of DVC, the contribution to sinking fund ought to have been allowed as a pass-through in tariff of such new stations alone.

b) The new projects have entered into bilateral PPAs with licensees outside DVC's command areas and are projected to supply only a fraction of their generation output to command area consumers. It is evident from the WBERC's Retail Tariff Order for supply of power by DVC to its command area within State of West Bengal, for FYs 2009-14.

4.10 Given the fact that only a miniscule percentage of DVC's new stations' capacity is committed to service the command area, there was apparently no rationale to spread the impact of contribution to sinking fund on DVC's old stations which are supplying power to consumers in command area.

4.11 Even if DVC is allowed contribution to sinking fund in terms of Regulation 43 (2) (iv) – and not interest on normative loan - it cannot be gainsaid that the command area consumers can be expected to bear only such proportion of contribution to sinking fund as is commensurate with the power supplied to them from new generating stations. However, by spreading the impact of 'contribution to sinking fund' on all old stations, the CERC has directed recovery of a cost from consumers who are not even beneficiary of such power to the extent they have been burdened with the cost.

4.12 The impugned finding is identical in all the Appeals and is extracted hereunder for ready reference:

“As per Judgment of the Tribunal dated 23.11.2007, sinking fund, established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act, 1948 is to be taken as an

item of expenditure to be recovered through tariff. Accordingly, the contribution towards sinking fund created for redemption of bond is allowed.”

1. **Double Allowance:** It is the appellant’s case that there has been double allowance of capital cost incurred by DVC by utilising Bonds’ amount as follows:

Allowance # 1:

- i) Interest on normative loan of at least 70 % or more of actual capital cost
- ii) Depreciation for payment of principal

Allowance # 2:

Contribution to Sinking Fund created for redemption of bonds, which factors in:

- i) Coupon rate of interest on relevant Bonds; and
- ii) Principal amount realised through Bonds’ issue.

4.13 The impugned orders, admittedly, do not deduct the Bonds’ amount from normative loan on which interest on loan and depreciation has been allowed by CERC. True-up orders clearly show that Bonds’ amount is being added to the loan portfolio for allowance of interest on loan.

4.14 APTEL’s Judgment dated 23.11.2007: As noted above, Sinking Fund Contribution has been allowed in view of APTEL’s Judgment dt. 23.11.2007, pertaining to previous tariff period FY 2004-09, wherein it was held as follows:

“E. 15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated 29th December, 1992 under the provision of Section 40 of the DVC Act is to be taken as an item of expenditure to be recovered through Tariff, as brought out in para 82.”

4.15 With respect to the above quoted extract, it is submitted as follows:

- i) This Hon'ble Tribunal did not sanction double allowance of capital cost (additional capitalisation)
- ii) Interpretation adopted by CERC is inconsistent with 4th proviso to Section 14, as such interpretation has rendered S. 40 of DVC Act inconsistent with EA, 2003, which mandates recovery of cost of supply in “reasonable manner”.
- iii) DVC’s following contention negated any claim of double allowance of capital cost:

“E. 14 The Appellant has submitted that certain provisions of the DVC Act, particularly under Part IV dealing with Finance, Accounts and Audit can always be read harmoniously with the provisions of the Act and both can be given effect to without there being any inconsistency or repugnancy” (emphasis added)

4.16 It is apparent that Section 40 of DVC Act, referred to in Regulation 43 can be consistent with EA, 2003 only if capital cost incurred by utilising Bonds’ amount is recovered through Sinking Fund Contribution, without any allowance thereof as part of interest on loan and depreciation allowed.

4.17 Regulation 43: In addition to the above, Regulation 43 contains “special provisions” and will override the general provisions for recovery of capital cost through interest on loan and depreciation to the extent such recovery is being allowed through allowance of sinking fund contribution. It cannot be DVC’s case that both general and special provisions will apply in a manner opposed to *cost plus* regime of tariff determination.

- **GUVNL v. Essar Power Ltd. (2008) 4 SCC 755**

“28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law.”

4.18 It is noteworthy that sub-regulation (1) makes the 2009 Tariff Regulations “**subject to**” the “**special provisions**” contained in sub-regulation (2). In other words, the general 2009 Regulations will yield to the special provisions under regulation 43 (2). It was observed in PNGRB v. Indraprastha Gas Ltd. (2015) 9 SCC 209 as follows:

“24. In South India Corpn (P) Ltd. v. Board of Revenue, the Constitution Bench has ruled that the expression “subject to” in the context convey the idea of a provision yielding to another provision or other provision to which it was made subject....”

Both the general and special provisions cannot simultaneously apply, as would be evident from the other special provisions related to depreciation, debt-equity ratio etc.

5. Ms. K.S. Dhingra, learned counsel appearing for the Respondent No.1 in Appeals No. 328 of 2013 has filed the written submissions for our consideration as follows:-

5.1 In the order dated 3.10.2006 in Petition No 66/2005, the Central Commission did not cater to the requirement of the Sinking Fund. The Appellate Tribunal in its judgment dated 23.11.2007 in Appeal No 273/2006, filed by DVC against the said order dated 3.10.2006 directed as under:

“E.15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act is to be taken as an item of expenditure to be recovered through tariff, as brought out in para 82 earlier.”

5.2 Accordingly, the Central Commission in its order dated 6.8.2009, allowed the contribution towards the Sinking Fund for the period 2006-09. The observation of the Central Commission in this regard is extracted below:

“76. It is noticed from the books of accounts of te petitioner that sinking fund has been created out of appropriation of profits and has not been considered as expenditure. However, in line with the decision of the Appellate Tribunal, tariff has been calculated considering sinking fund as expenditure.”

5.3 Based on the above directions, certain special provisions for determination of tariff in respect of DVC are made in Regulation 43 of the tariff regulations. These provisions contain creation of the funds under Section 40 of the DVC Act, which includes the Sinking Fund.

5.4 The provisions made in Regulation 43 of the Tariff Regulations are subject to final outcome of the appeals pending before the Hon'ble Supreme Court against the Appellate Tribunal's judgment dated 23.11.2007 in Appeal No 273/2006 ibid.

5.5 Relevant part of Regulation 43 is extracted hereunder:

“43. Special Provisions relating to Damodar Valley Corporation. (1) *Subject to clause (2), these regulations shall apply to determination of tariff of the projects owned by Damodar Valley Corporation (DVC).*

(2) *The following special provisions shall apply for determination of tariff of the projects owned by DVC:*

(i) to (iii)

(iv) *Funds under section 40 of the Damodar Valley Corporation Act, 1948:*

The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff.

(3) *The provisions in clause (2) of this regulation shall be subject to the decision of the Hon'ble Supreme Court in Civil Appeal No 4289 of 2008 and other related appeals pending in the Hon'ble Court and shall stand modified to the extent they are inconsistent with the decision.”*

5.6 DVC has established Sinking Fund and claimed contribution towards Sinking Fund for all its generating stations and transmission and distribution business as under:

(` In lakh)

2009-10	2010-11	2011-12	2012-13	2013-14
10091	18803	28293	29535	31602

5.7 The Central Commission after exercise of prudence check, allowed recovery of the following amounts:

(` In lakh)

2009-10	2010-11	2011-12	2012-13	2013-14
9894.59	10008.09	28955.52	28842.40	30861.37

5.8 The Central Commission, after exercise of prudence check, by the impugned order allowed recovery of the following amounts in respect of the transmission system :

(` In lakh)

2009-10	2010-11	2011-12	2012-13	2013-14
2001.15	2113.10	5451.68	5833.30	6241.63

5.9 In the objections filed by Jai Balaji Industries Ltd, on which reliance has been placed by the Appellants in the present appeals against the DVC's petition, the Appellants made the following general observations , without reference to Sinking Fund:

“Contribution to Subsidiary Fund: DVC has also claimed contribution to subsidiary funds. DVC has claimed the Return on Equity, Interest on Loan and Depreciation on the common assets namely Direction Office, Subsidiary Activities, Other Offices, R&D IT Centre and Central Office for the period 2009-14 and has claimed such expenses under the nomenclature “share of other office expenditure”. As such, the contribution to subsidiary fund is not allowable as the Return on Equity, Interest on Loan and Depreciation on the common assets are already claimed separately. Paragraph 3.9.6 of the Report annexed to this affidavit addresses the aforesaid issue in detail/”

5.10 From the above extracts it is seen that the appellant had objected to the creation of the subsidiary funds.

5.11 The objection is not valid for two reasons, as under:

(a) The Appellate Tribunal in its judgment dated 23.11.2007 in Appeal No 273/2006 had directed creation of subsidiary funds already approved under Section 40 of the DVC Act.

(b) In view of the directions of the Appellate Tribunal, provisions have been made in Regulation 43 of the Tariff Regulations, to which there is no challenge at any forum.

5.12 For the first time in the present appeal, the appellant in the Memo of Appeal has averred as under :

*“9.16 It is submitted that the claims towards sinking fund allowed for the period 2006-09 in order dated 06.08.2009 reflected a reducing trend. However, the claims allowed for the period 2009-14 reflect not just an increasing trend, but are significantly higher than the levels allowed in 2006-09.
.....”*

5.13 No such issue as aforesaid was raised by the Appellants in its objections and the appellant's objection on the contribution to subsidiary funds is already extracted.

5.14 It has been clarified in the reply already filed on behalf of the Central Commission in the present appeals that increase in contribution towards Sinking Fund during 2009-14 is because of issue of fresh bonds by DVC as detailed below:

(a) Rs.640 crore during 2009-10 floated on 26.2.2010

(b) Rs.1700 crore during 2011-12 floated on 30.3.2012

In view of the above facts, all issues stand clarified and the batch of Appeals do not deserve to be further considered.

6. Ms. M.G. Ramachandran, learned senior counsel appearing for the Respondent No.2 in the batch of Appeals has filed the written submissions for our consideration as follows:-

6.1 The matter in issue relates to the contribution to sinking fund allowed by the Central Commission in Petition No. 276/GT/2012 by the impugned order dated 7.8.2013.

Admissibility of Sinking Fund Contribution stands settled in favour of DVC and is no longer res integra.

6.2 The sinking fund contribution is admissible to DVC in terms of Section 40 of the Damodar Valley Corporation Act, 1948 which reads as under :-

“40. Provision for depreciation and reserve and other funds :

1) The Corporation shall make provision for depreciation and for reserve and other funds at such rates and on such terms as may be specified by the Auditor General of India in consultation with the Central Government.

2) The net profit for the purposes of section 37 shall be determined after such provision has been made.

6.3 The matter of sinking fund has been considered and decided by the Hon'ble Supreme Court in favour of DVC in the judgement dated 23.7.2018 passed in Civil Appeal no. 971-973 of 2008, reported as (2018) 8 SCC 281. The relevant part of the decision is para 50 which reads as under:-

50. Insofar as the questions under the last two issues at (g) and (h) above is concerned, the same have already been dealt with in the present order. Of the remaining heads of tariff fixation, it appears that so far as the 'depreciation rate' and 'sinking fund' is concerned it is

the provisions of Section 40 of the Act of 1948 which have been held to be determinative. We have gone through the reasoning adopted by the learned Appellate Tribunal in this regard. Having clarified the manner in which the fourth proviso to Section 14 of the 2003 Act has to be understood, we do not find the reasoning adopted by the learned Appellate Tribunal on the issues relating to 'depreciation' and 'sinking fund' to be fundamentally flawed in any manner so as to give rise to substantial question of law requiring our intervention/interference under Section 125 of the 2003 Act.

- 6.4** The above Civil Appeal no. 971-973 of 2008 arises out of the order dated 23.11.2007 passed by this Hon'ble Tribunal in Appeal no. 271 of 2006 and batch. The Hon'ble Tribunal has held as under allowing the sinking fund contribution:-

"E.14 The Appellant has submitted that certain provisions of the DVC Act, particularly under Part IV dealing with Finance, accounts and Audit can always be read harmoniously with the provisions of the Act and both can be given effect to without there being any inconsistency or repugnancy.

E.15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act is to be taken as an item of expenditure to be recovered through tariff, as brought out in para 82 earlier."

.....

"82. The Second set of the provisions namely Sections 12(b), 30, 31, 34, 35, 37 to 42 and 44 of the DVC Act, referred to before are the ones which can be read along with the Act without being inconsistent and repugnant to the Act and both can be given effect to. The Sections 30, 31, 34, 35, 37 to 42 and 44 are contained in Part IV of the DVC Act and are plenary in nature and not subject to framing of any rule or regulation by any authority except by the legislature."

6.5 In pursuance to the order dated 23.11.2007 of this Hon'ble Tribunal the Central Commission has been consistently allowing the contribution to sinking fund. (Reference order dated 20.4.2015 passed in Petition No. 66/GT/2012 at paras 73 to 75 and order dated 22.8.2016 passed in petition no. 295/GT/2015 at paras 53 to 57.

6.6 The Tariff Regulations, 2009 of the Central Commission provides in Regulation 43 (2) (iv) as under:-

“(iv) Funds under section 40 of the Damodar Valley Corporation Act, 1948: The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff.”

6.7 Similarly Regulation 53 (2) (iv) of Tariff Regulations, 2014 of the Central Commission provides as under:-

(iv) Funds under section 40 of the Damodar Valley Corporation Act, 1948: The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff.

6.8 In terms of the above, contribution to the sinking fund of an amount decided by the Comptroller And Auditor General Of India is to be considered as a tariff element and included for recovery of tariff of DVC.

There is no merit in the contention of alleged double counting.

- 6.9** At the outset it is submitted that the Appellant's allegation of double counting is based on the assumption that sinking fund has been used for payment for interest on loan or interest on working capital borrowed from banks and financial institutions. This assumption is fundamentally flawed and without any basis. The debt contracted by DVC from the Banks, Financial Institutions and other Lenders are serviced through interest on loan from the tariff and not by utilization of the Sinking Fund. The amount lying in the Sinking Fund is being utilized for repayment of the Bonds that may be raised by DVC from time to time to fund the assets of DVC.
- 6.10** The perusal of the orders dated 20.4.2015 and 22.8.2016 of the Central Commission referred to herein above explains the nature and purpose of sinking fund contribution namely redemption of bonds. It has nothing to do with servicing interest on loan or interest on working capital.
- 6.11** The Tariff Regulations of the Central Commission provides for the tariff elements of interest on loan and interest on working capital. The tariff elements under the Tariff Regulations of the Central Commission doesn't provide for repayment of loan capital as a tariff element to be serviced in the tariff. The redemption of bonds from contribution to sinking fund is a special tariff element provided for DVC under Section 40 of the DVC Act, 1948 in addition to tariff elements provided in the Tariff Regulations and this as mentioned above has been upheld in (2018) 8 SCC 281 (supra). There is

therefore no double counting or derivation of double benefit as alleged by the Appellant.

- 6.12** It is also pertinent to mention that this issue has been raised by the Appellant for the first time during the hearing. It was not raised before the Central Commission or even in the memorandum of appeal filed before the Hon'ble Tribunal.

Depreciation and interest on loan payable are two different aspects

- 6.13** The depreciation is admissible under the Tariff Regulations of the Central Commission independent of the interest on loan element. Similarly and for the reasons mentioned herein above, depreciation and sinking fund are two different aspects. Sinking fund contribution is an additional tariff element admissible to DVC under the DVC Act, 1948.
- 6.14** Depreciation as a tariff element is admissible irrespective of whether any loan is taken from the bank or financial institution or any debt is used for funding the capital assets. Even if an asset is funded with 100% equity, depreciation is admissible as a tariff element.
- 6.15** The fact that depreciation and repayment on loan are two different aspects is also a settled position in law by the judgements of the Hon'ble Supreme Court in Delhi Electricity Regulatory Commission v BSES Yamuna Power Limited (2007) 3 SCC 33 read with the Judgments in Ahmedabad Miscellaneous Industrial Workers Union v Ahmedabad Electricity Company Limited, (1962) 2 SCR 934 and Associated Cement Companies Limited v Workmen 1959 SCR

925. Further, the above submission is supported by financial accounting principles dealing with depreciation.

7. We have heard learned counsel appearing for the Appellants and the learned Counsel appearing for the Respondents at considerable length of time and gone through their written submissions carefully and after thorough critical evaluation of the relevant material available on records, the main issue that arises for our consideration is as follows:-

- Whether in the facts and circumstances of the case, the impugned order passed by the Central Commission has allowed double allowance of capital cost incurred by DVC?

Our Consideration & Analysis:-

8. Learned counsel for the Appellants at the outset submitted that most of the issues raised by the Appellants in this batch of Appeals have been duly addressed by the Central Commission in the true up orders for FY 2009-14 which have been passed after filing of these Appeals. He accordingly contended that his submissions and arguments are, therefore, confined to only one issue namely contribution of sinking fund and double counting on account of utilisation of sinking fund for payment of interest on loan or interest on working capital borrowed from banks and financial institutions. TO complete his narration on the issue, learned counsel indicted that 2009 Regulations do not sanction an allowance of contribution to sinking fund created for redemption of bonds whereas the impugned order is bereft of any prudence check with respect to the amounts allowed on account of contribution to sinking fund. He further submitted that in case the State funds have been utilised for meeting the working capital requirements of DVC then allowing both sinking fund contribution and interest on working capital in terms of

Regulation 18 for FY 2009-14 would amount to double allowance of the same item resulting into an undue increase in tariff. Learned counsel vehemently submitted that for allowing impugned contribution to sinking fund, the Central Commission has erroneously relied upon the judgment dated 23.11.2007 of this Tribunal.

- 8.1** Further, he was quick to point out that the impugned order has cited Regulation 43(20(iv) of the CERC Tariff Regulations, 2009 would apply as an exception to the general tariff principles by virtue of the expression “*subject to*” in Regulation 43 (1). Advancing his arguments further, learned counsel contended that under the cost-plus regime, envisaged under Section 61 of the Act, DVC can claim a cost component only once; that is, either by way of interest on loan as per normative debt-equity ratio, or by way of contribution to sinking fund (for redemption of bonds) subject to fulfilment of conditions under Regulation 43 (2) (iv). Quoting the impugned findings of the Central Commission, learned counsel submitted that the said finding is identical in all the Appeals and it is the Appellant’s case that there has been a double allowance of capital cost incurred by DVC by utilising bond amount as under:-

Allowance # 1:

- i) Interest on normative loan of at least 70 % or more of actual capital cost
- ii) Depreciation for payment of principal

Allowance # 2:

Contribution to Sinking Fund created for redemption of bonds, which factors in:

- i) Coupon rate of interest on relevant Bonds; and
- ii) Principal amount realised through Bonds' issue.

While referring to judgment of this Tribunal dated 23.11.2007, learned counsel pointed out that this Tribunal did not sanction double allowance of capital cost and Interpretation adopted by CERC is inconsistent with 4th proviso to Section 14, as such interpretation has rendered Section 40 of DVC Act inconsistent with Electricity Act, 2003, which mandates recovery of cost of supply in reasonable manner. He further contended that Regulation 43 contains "special provisions" and will override the general provisions for recovery of capital cost through interest on loan and depreciation to the extent such recovery is being allowed through allowance of sinking fund contribution. To substantiate his submissions, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in *GUVNL v. Essar Power Ltd. (2008) 4 SCC 755*. Learned counsel further submitted that both the general and special provisions cannot simultaneously apply, as would be evident from the other special provision related to depreciation, debt-equity ratio etc.. It cannot be DVC's case that both general and Special provisions will apply in a manner opposed to *cost plus* regime of tariff determination.

8.2 *Per contra*, learned counsel for the Respondent Nos.1 & 2 submitted that the Central Commission has passed the impugned

order strictly according to its Regulations and Rulings in various judgments of this Tribunal and the Apex court. Learned counsel for Respondent No.2 vehemently submitted that the admissibility of sinking fund contribution stands settled in favour of DVC and is no longer res integra. He further submitted that the sinking fund contribution is admissible to DVC in terms of Section 40 of the Damodar Valley Corporation Act, 1948. Further, this Tribunal in Appeal No.271 of 2006 & batch has categorically held the admissibility of sinking fund contribution which subsequently has been considered and decided by Hon'ble Supreme Court in favour of DVC in its judgement dated 23.7.2018 passed in Civil Appeal no. 971-973 of 2008, reported as (2018) 8 SCC 281. Learned counsel reiterated that in pursuance of the judgment of this Tribunal dated 23.11.2007, the Central Commission has been consistently allowing the contribution of sinking fund and has incorporated the same in the tariff regulation under 43(2)(iv) of Tariff Regulations, 2009 and Regulation 53(3)(iv) of Tariff Regulations, 2014. He was quick to submit that in terms of these provisions, the contributions to the sinking fund of an amount decided by the Comptroller and Auditor General of India is to be considered as a tariff element and included for the recovery of tariff of DVC.

- 8.3** Regarding the contentions of the learned counsel for the Appellants on the alleged double counting, learned counsel for Respondent No.2 submitted that the same has no basis and is rested entirely on assumptions. He contended that the assumption of the Appellants' counsel that sinking fund has been used for payment of interest on loan or interest on working capital borrowed from banks and

financial institutions are fundamentally flawed and without any basis. He emphasised that the debt taken by DVC from banks, financial institutions and other lenders are serviced through interest on loan from the tariff and not by utilisation of the sinking fund which is utilised for repayment of the bonds that may be raised by DVC from time to time to fund the assets of DVC. Learned counsel contended that the Tariff Regulations of the Central Commission provided for the tariff element of interest on loan and interest on working capital but does not provide for repayment of loan capital as a tariff element to be serviced through the tariff. He highlighted that the repayment of bonds from contribution to sinking fund is a special tariff element provided for DVC under Section 40 of DVC Act in addition to tariff elements provided in the Tariff Regulations of Central Commission.

8.4 Learned counsel for Respondent No.2 submitted that, therefore, there does not appear any possibility of double counting or derivation of double benefit as alleged by the learned counsel for the Appellants. Learned counsel for Respondent No.2 also clarified that depreciation and interest on loan payable are two different aspects and cannot be considered as any duplicate entitlement. He was quick to point out that depreciation as a tariff element is admissible irrespective of whether any loan is taken from the bank or financial institutions or any debt is used for funding the capital assessed. He further submitted that the depreciation and repayment of loan are two distinct elements is also a settled position in law by the judgments of Hon'ble Supreme Court i.e. *Delhi Electricity Regulatory Commission v BSES Yamuna Power Limited (2007) 3 SCC 33* read with the Judgments in *Ahmedabad*

Miscellaneous Industrial Workers Union v Ahmedabad Electricity Company Limited, (1962) 2 SCR 934 and Associated Cement Companies Limited v Workmen 1959 SCR 925. Learned counsel summed up his arguments and vehemently submitted that the Appeals filed by the Appellants are devoid of merits and accordingly need not be allowed.

Our findings :-

- 8.5** We have carefully considered the submissions of learned counsel for the Appellants and learned counsel for Respondent Nos.1 & 2 and also took note of the various judgments relied upon by the parties. While the main contentions of the learned counsel for the Appellants are against the allowance of contribution to sinking fund to DVC and its utilisation, on the other hand, learned counsel for the Respondents contend that the Central Commission is allowing the same as per settled position of law and its relevant regulations relating to the subject. Learned counsel for the Appellants contended that this Tribunal did not lay down that DVC could be allowed with both interest on loan as well as contribution to sinking fund which tantamount to a particular cost component being allowed twice to a generating company.
- 8.6** It is relevant to note that as per Section 40 of DVC Act, 1948, DVC is entitled for provision for depreciation, reserve and other fund. This Tribunal in its judgment dated 23.11.2007 in Appeal No.271 of 2006 & batch has held the admissibility of sinking fund in favour of DVC which has also been upheld by the Hon'ble Supreme Court in its judgment dated 23.7.2018 reported as 2018 (8) SCC 281. Regarding the contention of alleged double counting of learned

counsel for the Appellant, we find no such duplication in the considerations and findings of the Central Commission.

8.7 Further, from the Tariff Regulation of the Central Commission, it is noticed that interest on loan and interest on working capital are distinct elements of the tariff and at no point of time, the repayment of loan capital is considered as a tariff element to be serviced in the tariff. The redemption of bonds from contribution to sinking fund is a special tariff element provided for DVC under Section 40 of the DVC Act, 1948 in addition to tariff elements provided in the Tariff Regulations. This aspect has already been upheld by the Apex court vide its judgment dated 23.7.2018 (stated supra). It is also noted from the tariff regulations that depreciation and interest on loan payable are two different aspects while sinking fund contribution is an additional tariff element admissible only to DVC under the DVC Act. We, therefore, find no force in the contentions of the learned counsel for the Appellants that by allowing depreciation, interests on loan and sinking fund altogether, results into double counting and in turn yields into undue burden on consumers.

8.8 In view of above facts, we hold that the Central Commission has passed the impugned order in accordance with settled position of law and its Regulations. Thus, the instant case does not give in any manner rise to substantial question of law requiring our intervention / interference.

ORDER

For the forgoing reasons, as stated supra, we are of the considered view that the issues raised in the present appeal being Appeal No. 17 of 2014 & batch are devoid of merits. Hence the Appeals filed by the Appellants are not allowed.

The impugned orders passed by the Central Electricity Regulatory Commission dated 07.08.2013, 09.07.2013 & 27.09.2013 in Petition Nos. 17 & 18 of 2014, 33 & 293 of 2013, and 328 & 263 of 2013 respectively are hereby upheld.

No order as to costs.

Pronounced in the Open Court on this 17th day of May, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

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