

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 28th February, 2019

Present:

Shri Shambhu Dayal Meena	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri H.M. Manjunatha	..	Member

OP No.123/2017

BETWEEN:

P. Vengana Setty & Bros.,
Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203.

.. **PETITIONER**

[Represented by Argus Partners, Solicitors & Advocates]

AND:

Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

.. **RESPONDENT**

[Represented by Shri Shahbaaz Husain, Advocate]

OP No.124/2017

BETWEEN:

MSPL Limited,
Baldota, Bhavan,
117, Maharshi Karve Road,
Mumbai – 400 020.

..

PETITIONER

[Represented by Argus Partners, Solicitors & Advocates]

AND:

Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

..

RESPONDENT

[Represented by Shri Shahbaaz Husain, Advocate]

OP No.125/2017

BETWEEN:

P. Vengana Setty & Bros.,
Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203.

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PETITIONER

[Represented by Argus Partners, Solicitors & Advocates]

AND:

Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 101

..

RESPONDENT

[Represented by Shri Shahbaaz Husain, Advocate]

OP No.126/2017

BETWEEN:

Ramgad Minerals and Mining Limited,
Baldota Enclave,
Abheraj Baldota Road,
Hospet – 583 203.

..

PETITIONER

[Represented by Argus Partners, Solicitors & Advocates]

AND:

Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 101

..

RESPONDENT

[Represented by Shri G.S. Kannur, Advocate]

COMMON ORDER

- 1) In the above cases, the questions of facts and law in dispute are similar, therefore, this Common Order is being passed.
- 2) For a proper understanding of the controversies involved, the material facts, as pleaded by the Petitioners in these cases, may be stated as follows:
 - (A) The particulars of the PPAs and its relevant terms may be stated, as follows:
 - (a) The Petitioners in these case operate Wind Power Plants of different capacities, located at various places in the Davanagere District and have

entered into the Power Purchase Agreements (PPAs) with the Respondent-Electricity Supply Company (ESCOM), as detailed below:

Petitioner in OP No.	Capacity of the Plant (in MW)	Date of PPA	Tariff agreed (Rs.per unit)	Purchasing ESCOM
123/2017	0.6	26.07.2006	3.40	MESCOM
124/2017	6.00	26.07.2006	3.40	MESCOM
125/2017	1.25	25.08.2009	3.40	GESCOM
126/2017	2.5	22.03.2010	3.70	GESCOM

(b) In all the PPAs, the provisions in Article 6, dealing with 'Billing and Payment' are similar. Article 6.1 relates to raising of Monthly Invoice for each Billing Period, for the energy supplied. Articles 6.2 and 6.3, which are relevant in these cases, are as follows:

“6.2 Payment: *ESCOM shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated office of the Corporation.*

6.3 Late Payment: *If any payment from ESCOM is not paid when due, there shall be due and payable to the Company interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until such payment is made in full.”*

(c) Article 6.5(v) of the PPAs, dealing with the right of the purchasing ESCOM, to claim a rebate in the Monthly Tariff Invoices, for having opened the Letter of Credit, reads as follows:

“6.5 Letter of Credit: XXX

XXX

XXX

XXX

(v) *The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure / charges for the LC amount incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.”*

(B) The claims made by the Petitioners in different cases may be stated, as follows:

(a) In OP No.123/2017, the claims made by the Petitioner are, as follows:

(i) *Claim-1:*

This claim pertains to the accrued interest due to the delay in payment of the Monthly Invoices, as per Articles 6.2 and 6.3 of the PPA, as indicated in the following Table:

Sl.No.	Period	Amount (in Rs.)	Date of Demand
1	2006-07 to 2012-13 (Upto December, 2012)	4,05,317	10.12.2013
2	2013-14 (Upto March, 2014)	9,931	09.08.2016
	TOTAL	4,15,248	

(ii) *Claim-2:*

This claim pertains to the interest on the accrued interest, stated in Claim-1 above, from the respective dates of demand, till 30.06.2017, totally amounting to Rs.2,07,361/-.

(b) In OP No.124/2017, the claims made by the Petitioner are, as follows:

(i) *Claim-1:*

This claim pertains to the accrued interest due to the delay in payment of the Monthly Invoices, as per Articles 6.2 and 6.3 of the PPA, as indicated in the following Table:

Sl.No.	Period	Amount (in Rs.)	Date of Demand
1	2006-07 to 2012-13 (Upto December, 2012)	34,43,232	10.12.2013
2	2013-14 (Upto March, 2014)	86,089	09.08.2016
3	2015-16 (upto March, 2016)	3,297	09.08.2016
	TOTAL	35,32,618	

(ii) *Claim-2:*

This claim pertains to the interest on the accrued interest, stated in Claim-1 above, from the respective dates of demand, till 30.06.2017, totally amounting to Rs.17,62,183/-.

(c) In OP No.125/2017, the claims made by the Petitioner are, as follows:

(i) *Claim-1:*

This claim pertains to the accrued interest due to the delay in payment of the Monthly Invoices, as per Articles 6.2 and 6.3 of the PPA, as indicated in the following Table:

Sl.No.	Period	Amount (in Rs.)	Date of Demand
1	2009-10 to 2012-13 (Upto April, 2013)	9,34,402	10.12.2013
2	2014-15 to 2015-16 (Upto December, 2015)	42,910	09.08.2016
3	February, 2016 to July, 2016	15,176	28.11.2016
	TOTAL	9.92,488	

(ii) *Claim-2:*

This claim pertains to deduction of LC charges without furnishing the valid LC for the period from April, 2015 to June, 2016, amounting to Rs.1,67,337/-, and also the interest on it, amounting to Rs.24,112/- upto 31.12.2016. This total amount of Rs.1,91,448/- was demanded on 27.01.2017.

(iii) *Claim-3:*

This claim pertains to the interest, stated in Claims-1 and 2 above, from the respective dates of demand till 30.06.2017, totally amounting to Rs.4,92,929/-.

(d) In OP No.126/2017, the claims made by the Petitioner are, as follows:

(i) *Claim-1:*

This claim pertains to the accrued interest, due to the delay in payment of the Monthly Invoices, as per Articles 6.2 and 6.3 of the PPA, as indicated in the following Table:

Sl.No.	Period	Amount (in Rs.)	Date of Demand
1	2009-10 to 2012-13 (Upto April, 2013)	21,13,488	10.12.2013
2	April, 2015 to December, 2015	92,152	09.08.2016
3	January, 2016 to June, 2016	24,922	28.11.2016
	TOTAL	22,30,562	

(ii) *Claim-2:*

This claim pertains to deduction of LC charges without furnishing the valid LC for the period from April, 2015 to June, 2016, amounting to Rs.3,69,177/-, and also the interest on it, amounting to Rs.53,989/- upto 31.12.2016. This total amount of Rs.4,23,166/- was demanded on 27.01.2017.

(iii) *Claim-3:*

This claim pertains to the interest, stated in Claims-1 and 2 above, from the respective dates of demand till 30.06.2017, totally amounting to Rs.11,21,401/-.

(C) The Petitioners have pleaded the following facts, in order to establish that their claims are within the period of limitation.

(a) The claim in all the cases being one for interest, is a recurring claim and cannot be said to be barred by limitation.

(b) In OP No.123/2017 and OP No.124/2017, the Petitioners have stated that the Respondent (MESCOM), vide its letter dated 07.02.2014, E-mail dated

17.03.2016 and reply letter dated 05.04.2017, has acknowledged its liability to pay the debt, therefore, under Section 18 of the Limitation Act, 1963, the period of limitation is extended from 05.04.2017 to 04.04.2020.

- (c) In all the cases, it is stated that, in any event, assuming, but not admitting, that there are delays or laches in claiming the outstanding amounts, the same are completely *bonafide* and the Petitioners seek leave to separately make applications for condonation of the same. Subsequently, the Petitioners have made applications under Section 5 of the Limitation Act, 1963.
- (D) The alternative ground in all the cases is that, the Respondents have failed to establish the Letter of Credit within the time stipulated in the PPA, thereby the Petitioners could not recover the outstanding amounts, due to it, by encashment of the Letter of Credit, and because of such breach of obligation on the part of the Respondents, the Petitioners in all the cases are entitled to recover the outstanding amounts. Therefore, the Petitioners in all the cases have made an alternative prayer to direct the Respondents to pay the entire amounts claimed in the respective cases.
- 3) Upon Notices, the Respondent in each of the cases has appeared through its counsel and filed its Statement of Objections. The defence taken by the Respondents in OP No.123/2017, OP No.124/2017 and OP No.125/2017 may be stated as follows:

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- (a) The claim pertaining to the recovery of accrued interest, for the period prior to 22.07.2014, cannot be entertained, as the same is time barred.
- (b) In OP No.123/2017 and OP No.124/2017, the Respondent has not denied the issuance of the reply letters dated 07.02.2014, as stated by the Petitioners therein. The Respondent has also not denied the issuance of the E-mail dated 17.03.2016 and the reply letter dated 05.04.2017, as stated by the Petitioners.
- (c) The entitlement for the claim of interest on the accrued interest, made by the Petitioners, is denied by the Respondents, contending that there is no enabling provision in the PPA, to raise such a claim.
- (d) In OP No.125/2017, the Respondent has stated that the major portion of deduction of the Letter of Credit charges had taken place, when the Letter of Credit was alive and the deduction of the Letter of Credit charges, if any, during the period when there was no valid Letter of Credit, would be refunded.
- 4) The defence taken by the Respondent in OP No.126/2017 may be stated as follows:
- (a) The Respondent has contended that, the Letter of Credit was opened for Rs.8.95 Lakhs on 21.05.2014, in the name of the Petitioner, at the State Bank of Hyderabad (SBH), Supermarket, Kalaburagi, with the expiry date on 15.04.2015. Thereafter, another Letter of Credit was opened for Rs.17 Lakhs, vide Letter of Credit No.202231521LC0000031, dated 20.04.2015, in the name

of the Petitioner, at SBH, Kalaburagi, with the expiry date on 19.04.2016. Accordingly, the Respondent has contended that the Letter of Credit was active upto 19.04.2016 and action was taken with the SBH, Kalaburagi, for the renewal of the Letter of Credit, vide letters dated 26.05.2016 and 21.11.2017. It is contended that, the claim pertaining to deduction of the Letter of Credit charges, for the period from April, 2015 to June, 2016, amounting to Rs.1,67,337/-, as claimed by the Petitioner, was not true and that the rebate was deducted for this period, when the Letter of Credit was active. It is stated by the Respondent that, the rebate deducted after the expiry of the Letter of Credit, i.e., from 19.05.2016, would be reimbursed.

- (b) In reply to the claim of the Petitioner, regarding the delay in payment of the Monthly Invoices, it is stated that, the payment was made according to the invoices raised by the Petitioner, as per the fund availability.
- (c) It is stated by the Respondent that, long term PPA, entered into with the Petitioner, at the rate of Rs.3.47 / Rs.3.79 per unit, is a burden to the Respondent and now-a-days, the captive generation on a long term basis, with a tariff of Rs.1.5 per unit, is available. Here itself, it may be observed that, such a contention of the Respondent is irrelevant in the present case.
- (d) The Respondent has stated that, the Petitioner may be called upon for reconciliation of the interest for the delayed payments and the rebate deducted after the expiry of the Letter of Credit, for the period from 19.05.2016

to June, 2017, and that the Respondent would reimburse the amount, found due, if any, in the ensuing bills.

- (e) It may be noted that, this Respondent has not contended the bar of limitation for any claims. However, the bar of limitation being a legal issue, the same has to be considered, before granting any relief.
- 5) In all the cases, the Petitioner have filed Rejoinders, stating that, the Petitioners' account with the Respondent is a running account and that the dues pending from the Respondent to the Petitioner are united to form one continuous demand, since the commencement of the PPA, till date, and that the dealings between the Petitioners and the Respondents did not expire with one supply, but has been continuing, till date and, therefore, the deliveries have become united with one another and form one continuous demand, which has been carried forward from year-to-year, till date. Further that, in the case of a running account, the limitation for recovery of money due is to be computed from the date of the last payment, as per Article 14 read with Section 19 of the Limitation Act, 1963.
- 6) We have heard the learned counsel for both the sides and considered the respective pleadings and documents produced by the parties. The following issues would arise, for consideration:

- (1) Whether the claims made by the Petitioners for interest on the accrued interest, due to the delay in payment of the Monthly Tariff Invoices, are permitted under the terms of the PPA?
- (2) Whether any portion of the claim pertaining to the accrued interest, due to the delay in payment of the Monthly Tariff Invoice, is barred by time?
- (3) Whether any portion of the claim for interest on the accrued interest, is barred by time?
- (4) Whether in OP No.125/2017 and OP No.126/2017, the Petitioners are entitled to interest or compensation on the amount of illegal deductions of the Letter of Credit charges, from the respective dates of illegal deductions till the date of this Order?
- (5) Whether the Petitioners in OP No.123/2017 and OP No.124/2017 have proved the 'acknowledgment of debts' alleged in those cases, and if so, what are its effect?
- (6) Whether the Petitioners are entitled to appropriate the payments made by the Respondents, as being towards the entire outstanding amounts and could claim 'part-payment' towards the outstanding amounts, as required under Section 19 of the Limitation Act, 1963?
- (7) During which period the Respondents in OP No.125/2017 and OP No.126/2017 have illegally deducted the charges towards rebate of 1.8% of the Monthly Tariff Invoice, without keeping the Letter of Credit in force?
- (8) Whether the Petitioners are entitled to interest on the amounts legally found outstanding under Issues (2) and (3) above, from the date of filing of the Petitions to the date of realization, and if so, at what rate?

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- (9) Whether the Applications filed by the Petitioners under Section 5 of the Limitation Act, claiming condonation of delay, if any, in filing the Petitions, could be allowed or not?
- (10) Whether the Petitioners are entitled to claim the outstanding amounts, as claimed in the Petitions, on the ground of breach of obligation, on the part of the Respondents, in not opening the Letters of Credit soon after the execution of the PPAs?
- (11) What Order?
- 7) After considering the submissions of the learned counsel for the parties and the pleadings on record, our findings on the above Issues are as follows:
- 8) **ISSUE No.(1)**: *Whether the claims made by the Petitioners for interest on the accrued interest, due to the delay in payment of the Monthly Tariff Invoices, are permitted under the terms of the PPA?*
- (a) The learned counsel for the Petitioners submitted that Article 6.3 of the PPA, pertaining to payment of interest itself, would cover the right of the Petitioners to claim interest for the non-payment of accrued interest. On the other hand, the learned counsel for the Respondents submitted that, Article 6.3 of the PPA does not authorize to charge interest on the non-payment of accrued interest.
- (b) We shall now examine below the rival contentions on the above issue, keeping in mind the various terms of the PPA.
- (c) Article 6.1 of the PPA provides for issuance of a Monthly Tariff Invoice for each Billing Period to the 1st Respondent, setting forth the amounts payable by the Respondent for the Delivered Energy. Article 6.2 provides that the Respondent

shall make payment within fifteen days from the date of receipt of the Monthly Tariff Invoice. Article 6.3, which provides for Late Payment, states that, "*if any payment from ESCOM is not paid when due, there shall be due and payable to the Company interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until such payment is made in full.*" The 'Due Date of Payment' is defined in the PPA as, "*'Due Date of Payment' in respect of a Monthly Invoice means the date, which is 15 (fifteen) days from the date of receipt of such invoices by the designated official of ESCOM.*" The conjoint reading of Articles 6.1, 6.2 and 6.3 of the PPA, along with the definition of 'Due Date of Payment', would show that these provisions do not authorize the Petitioner (generator) to claim 'interest on interest'. Unless there is a specific provision in the PPA for charging of interest on interest, the Petitioner is not entitled to do so. The opening phrase in Article 6.3, "*If any payment from ESCOM is not paid when due*" clearly refers to the amount claimed in the Monthly Tariff Invoice. The further phrases, "*such payment*" used in Article 6.3 would also clearly refer to the amounts mentioned in the Monthly Tariff Invoices. Therefore, we are of the view that the claim of the Petitioner in all these Petitions regarding charging of interest on interest becoming due on the delayed payments of Tariff Invoices, is not sustainable.

- (d) Therefore, Issue No(1) is answered in the negative.

9) **ISSUE No.(2):** *Whether any portion of the claim pertaining to the accrued interest, due to the delay in payment of the Monthly Tariff Invoice, is barred by time?*

(a) At the outset, we note that the Hon'ble Supreme Court, in its recent decision dated 16.10.2015 in Civil Appeal No.6036/2012 (A.P. Power Co-ordination Committee & others –Vs- Lanco Kondapalli Power Ltd & others), has held that the provisions of the Limitation Act apply to the claims under Section 86(1)(f) of the Electricity Act, 2003.

The relevant portion of the Order reads thus:

“29.In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike Labour laws and Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.

30..... Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.....”

(b) All these Petitions have been filed before this Commission on 21.07.2017. In all these cases, *Claim-1* pertains to the accrued interest, due to the delay in payment of the Monthly Tariff Invoices, as per Articles 6.2 and 6.3 of the PPAs.

Article 25 of the Limitation Act, 1963 would apply for recovery of interest, which reads thus:

<i>“</i>	Description of of Suit	Period of limitation	Time from which period begins to run
<i>”</i>	25. <i>For money payable for interest upon money due from the defendant to the plaintiff.”</i>	<i>Three years</i>	<i>When the interest becomes due</i>

- (c) As per the said Article, the period of limitation prescribed is three years from the date when the interest becomes due. In the event the amount claimed in the Monthly Tariff Invoice is not paid within the due date, then, as per Articles 6.2 and 6.3 of the PPA, the interest becomes payable on the amounts stated in the Monthly Tariff Invoices, soon after fifteen days from the date of receipt of the Tariff Invoices by the Respondents. Therefore, any claim for the accrued interest, due to delay in payment of the Monthly Tariff Invoices, made after the period of three years, soon after fifteen days from the date of receipt of the Tariff Invoices by the Respondents, would be barred by limitation, unless it is established that the limitation for making the claim could be extended, as per the other provisions of the Limitation Act.
- (d) The Petitioners have contended that the claim for interest in all the cases being a recurring claim, the same cannot be said to be barred by limitation. This contention is not correct. The 'recurring claim for interest' means, so long as the principal sum is not barred by limitation, the claim for interest is also not barred by limitation. However, if the principal amount is paid, the claim for

interest should be within the period of limitation, from the date when the interest becomes due, under Article 25 of the Limitation Act. Therefore, this contention of the Petitioners is incorrect.

10) **ISSUE No.(3)**: *Whether any portion of the claim for interest on the accrued interest, is barred by time?*

(a) The other claim in all the cases pertains to interest payable for the non-payment of the accrued interest. This claim for interest on interest is also governed by Article 25 of the Limitation Act. The interest payable for non-payment of the accrued interest would become due from the date of non-payment of the accrued interest. However, as noted on Issue No.(1) above, the claim for interest on interest is not maintainable. Therefore, the claim for interest on interest in all the cases is to be rejected.

(b) Therefore, we answer Issue No.(3), accordingly.

11) **ISSUE No.(4)**: *Whether in OP No.125/2017 and OP No.126/2017, the Petitioners are entitled to interest or compensation on the amount of illegal deductions of the Letter of Credit charges, from the respective dates of illegal deductions till the date of this Order?*

(a) The claim pertaining to recovery of the illegal deduction of the Letter of Credit charges, without furnishing a valid Letter of Credit, is governed by the residuary Article 113 of the Limitation Act, which reads thus:

“ **PART X**
Suits for which there is no prescribed period

Description of of Suit	Period of limitation	Time from which period begins to run
113. <i>Any suit for which no period of limitation is provided elsewhere in this Schedule.”</i>	<i>Three years</i>	<i>When the right to sue accrues</i>

The limitation for such claims will start, when the 'right to sue' accrues, i.e., from the respective dates of illegal deduction. In OP No.125/2017 and OP No.126/2017, such claim is made for the period from April, 2015 to June, 2016. Therefore, the claim made in OP No.125/2017 and OP No.126/2017 is within the period of limitation, as stipulated in Article 113 of the Limitation Act.

(b) In these Petitions, the interest is also claimed on the outstanding amounts towards such illegal deduction, from the respective dates of illegal deduction till the date of this Order. The Petitioners can claim only compensation for such illegal deductions, but they cannot claim interest on it. However, Court can award compensation, by way of interest. As the money is wrongfully withheld, the Commission deems it fit to award compensation by way of interest, at the rate of 9% (nine percent) per annum, from the respective dates of illegal deductions, till the date of this Order.

(c) For the above reasons, we answer Issue No.(4), accordingly.

12) **ISSUE No.(5):** *Whether the Petitioners in OP No.123/2017 and OP No.124/2017 have proved the acknowledgments of debts, alleged in those cases, and if so, what are its effect?*

(a) The Respondent in OP No.123/2017 and OP No124/2017 has not denied the issuance of the letter dated 07.02.2014, E-mail dated 17.03.2016 and the reply letter dated 05.04.2017. According to the Respondent, these communications do not amount to acknowledgment of a liability, as per Section 18 of the Limitation Act. The relevant portion of the letter bearing No.SEE(C&RP)/EE-(EBC)/DCA(EBC)/F-47/13-14/44394, dated 07.02.2014 reads thus :

"... Adverting to the above, I wish to inform you that, during the initial stages of commissioning of the IPP's including yours, the tariff payments for the energy generated from those plants were paid out of the subsidy releases from the GoK. During this period, there were some delay in payment of energy charges of IPP's due to delay in the release of due subsidy amount to the MESCOM from the GoK.

However, by opening the LC on all the IPP's, MESCOM is now arranging payment regularly within due dates.

Vide your letter referred above, you have claimed the interest for the previous years which is not justifiable at this juncture. The claims now made are barred by limitation Act also, which may please be noted.

Yours faithfully,

Sd/-

Superintending Engineer (Ele) (C&RF)

MESCOM, Mangalore."

(b) A reading of the above-mentioned letter would show that, it would clearly amount to an 'acknowledgment of debt'. However, the E-mail dated 17.03.2016 and the reply letter dated 05.04.2017 do not amount to an

'acknowledgment of debt', as these communications merely confirm the earlier acknowledgment of debt dated 07.02.2014.

(c) The 'acknowledgment of debt' dated 07.02.2014 gives a fresh period of limitation, from the date when the acknowledgment was so made. However, any claim, which was barred by time as on the date of the 'acknowledgment of debt', is not saved. It may be noted that, the claims in OP No.123/2017 and OP No.124/2017 are governed by Article 25 of the Limitation Act and the period of limitation for recovery of such claim would be three years from the date when the claim for interest becomes due. Further, it may be noted that, all these cases are filed before this Commission on 02.07.2017, beyond three years from the 'acknowledgment of debt' dated 07.02.2014. Therefore, these Petitioners cannot take any advantage for extension of time, from out of the 'acknowledgment of debt' dated 07.02.2014.

(d) For the above reasons, we answer Issue No.(5), accordingly.

13) **ISSUE No.(6):** *Whether the Petitioners are entitled to appropriate the payments made by the Respondents, as being towards the entire outstanding amounts and could claim 'part-payment' towards the outstanding amounts, as required under Section 19 of the Limitation Act, 1963?*

(a) In the Rejoinders filed by the Petitioners, they have alleged that the Petitioners' account with the Respondents is a 'running account' and the dealings between the Petitioners and the Respondents do not expire with one supply, but has been continuing till date, therefore, the deliveries have become

united with one another and form one continuous demand, which has been carried forward from year-to-year, till date and that in the case of a 'running account', the limitation for recovery of money due is to be computed from the date of last payment, as per Article 14 read with Section 19 of the Limitation Act.

- (b) The plea of 'running account' or 'part-payment' is taken for the first time in the Rejoinders. The better course was to include such pleas in the Original Petitions itself, by way of an amendment. Without going into the technicalities, we may consider the validity of the said plea, in the light of the facts of these cases. The learned counsel for the Petitioners relied upon the decision reported in 2013 SCC Online Del 3129, in No.CS (OS) 2542/1997 of the Hon'ble High Court of Delhi, in the case of *Ashok Parshad –Vs- Mahalaxmi Sugar Mills Co. Ltd.*, to contend that the period of limitation commenced from the last payments made by the Respondents in the respective cases. The material facts in the *Ashok Parshad* case were that, the Defendant had been purchasing from the Plaintiff, various items of chemicals, from time to time, starting from 14.05.1982 to 31.03.1997 and the Plaintiff had maintained a 'Running Account' of the Defendant, in its Books of Accounts and the purchases, so made by the Defendant from the plaintiff, were duly and regularly debited to the said Account and similarly the payments received from the Defendant, from time-to-time, were duly and regularly credited to the said Account. The last payment of Rs.50,000/- was made on 11.07.1998. The Suit was filed in December, 1997. The Defendant contested the Suit, stating that each supply

made by the Plaintiff was an independent contract and was paid for, separately and that the Plaintiff's assertion that the payments were 'On Account' was incorrect. Therefore, it was contended by the Defendant that the Suit was hopelessly barred by time. Considering the facts of that case, the Hon'ble High Court of Delhi rejected the contention of the Defendant. The Hon'ble High Court relied upon the earlier precedents, in support of its conclusions, which are cited in Paragraphs 16 to 18 of the said Judgment and which read thus:

"16. *In Kedarnath v. Denabandhu Saha, AIR 1916 Cal. 580, Jenkins C.J. quoted with approval the following passage from the decision in Bonsey v. Wordsworth, (1856) 18 CB 325:*

'Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand the whole together forms but one cause of action and cannot be divided'.

17. *This was followed by the Rajasthan High Court in Chandra Nath v. Pahlad Narain, AIR 1961 Rajasthan 154 (V 48 C 43), wherein it was observed as under:*

'With all respect, I fail to understand why the plaintiff cannot appropriate a payment towards all the items outstanding on a particular date. Section 60 of the Contract Act provides that 'where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the

debtor, whether its recovery is or is not barred by law in force for the time being as to the limitation of suits. This right the creditor may exercise until the very last moment and need not declare his intention in express terms – see Cory Bros. and Co. v. Owners of the Mecca', 1897 AC 286 at p.289.'

18. In the above case, the reliance was also placed upon the earlier decision of Nagpur High Court in *Sukhdeo Prashad v. J. Michael*, AIR 1938 Nag. 266, wherein it was held as under:

'If more debts than one are due and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made. This appropriation need not be proved by any express declaration of the debtor at the time of the payment, but any expression used by him either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts or was made on account of all the debts collectively will be sufficient for the purpose. If the evidence shows that the payment was made on account of all, it will prevent any of the debts being barred by statute.'"

(c) After careful consideration of the law laid down in the earlier precedents cited in Paragraphs 16 to 18 of the said Judgment, as noted above, we are of the considered view that, in the present cases, the accounts relating to the PPA transactions with the Respondents, maintained by the Petitioners, are not 'Running Account' and that the payments made by the Respondents should be considered as 'payments made either with express intimations' or under the circumstances, implying that the 'payments are to be applied to the discharge of the Tariff Invoices' alone, but not 'payment on account'. The

'Payment On Account' means, any partial payment of amount that is owed, but not matched to a specific invoice and without referring to a specific debt. In the present cases, the payments made by the Respondents were specifically towards the Monthly Tariff Invoices raised by the Petitioners. This is also the pleading of the Petitioners in all these cases. Article 6.1 of the PPA pertains to the issuance of Tariff Invoices by the Generator, for the energy supplied, with the other required particulars. On receipt of the Tariff Invoices, the Respondent-Distribution Licensee scrutinises the Invoices and verifies the correctness of the contents of the Tariff Invoices and thereafter, the Invoices are passed for payments, as required in Article 6.2 of the PPA. These terms would indicate that the payments were made towards the Monthly Tariff Invoices alone. In such circumstances, it cannot be said that, it was 'Payment On Account', but 'Payment against Monthly Tariff Invoices'. In the presence of written terms regarding the supply of energy and the payment towards the price of energy, it cannot be said that, the Petitioners could maintain a 'Running Account', as understood in the business community. In the present cases, the appropriation of the payments made by the Respondents should be as per the provisions of Section 59, but not as per Section 60 of the Contract Act. Therefore, the Petitioners cannot claim it to be a 'Part Payment' of the outstanding dues, as per Section 19 of the Limitation Act. As already noted, in the present cases, the claims towards the Monthly Tariff Invoices have already been paid and the claims for accrued interest, for the delay in payment of the Monthly Tariff Invoices alone, were due. Therefore, the claim

for such interest, beyond three years from the date of filing of these Petitions, is barred by time.

(d) For the above reasons, we answer Issue No.(6), in the negative.

14) **ISSUE No.(7):** *During which period the Respondents in OP No.125/2017 and OP No.126/2017 have illegally deducted the charges towards rebate of 1.8% of the Monthly Tariff Invoice, without keeping the Letter of Credit in force?*

(a) In OP No.125/2017 and OP No.126/2017, the Petitioners have alleged that the Respondents have illegally deducted the charges towards the rebate of 1.8% on the Monthly Tariff Invoices, without keeping the Letters of Credit in force, for the period from April, 2015 to June, 2016. In OP No.125/2017, such amounts deducted is said to be Rs.1,67,337/- and the interest due on it, as on 31.12.2016, is said to be Rs.24,112/-. In OP No.126/2017, such amounts deducted is said to be Rs.3,69,177/- and the interest due on it, as on 31.12.2016, is said to be Rs.53,989/-. In the Statement of Objection filed by the Respondent in OP No.125/2017, it is contended that, the Letter of Credit was active upto 17.04.2016 and correspondence was done with the Respondent's Banker, SBH, Kalaburagi, for renewal of the Letter of Credit, vide letters dated 26.05.016 and 21.11.2017. This Respondent has further stated that, the major part of the rebate deducted occurred when the Letter of Credit was active and the rebate portion deducted after the expiry of the period of the Letter of Credit, i.e., from 19.05.2016 till June, 2017, works out to Rs.1,41,257/- and this

Respondent would undertake to reimburse the same. In OP No.126/2017, the Respondent, in its Statement of Objections, has contended that, the Letter of Credit was opened on 20.04.2015 and it expired on 19.4.2016. Further, this Respondent has stated that the rebate portion deducted after the expiry of the period of the Letter of Credit, i.e., from 19.05.2016 to June, 2017, would be reimbursed.

- (b) As could be seen from the above facts, according to the Petitioners in OP No.125/20127 and OP No.126.2017, the illegal deductions towards the rebate has taken place from April, 2015 to June, 2016. On the other hand, according to the Respondents, this period was from 19.05.2016 to June, 2017. Both the parties have not produced any reliable evidence to ascertain the truth or otherwise of their respective versions.
- (c) From the above facts, it is clear that, nearly for a year in both the cases, there were illegal deductions of the Letter of Credit charges, but the exact period cannot be ascertained. Therefore, while allowing this claim of the Petitioners for illegal deductions, the parties may be directed to produce a fresh Memorandum of Calculations, with supporting material.
- (d) We, therefore, answer Issue No.(7), accordingly.

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- 15) **ISSUE No.(8)**: *Whether the Petitioners are entitled to interest on the amounts legally found outstanding under Issues (2) and (3) above, from the date of filing of the Petitions to the date of realization, and if so, at what rate?*
- (a) These cases involve monetary claims, mainly relating to recovery of interest accrued, due to delay in payment of the Monthly Tariff Invoices and also for recovery of the amounts illegally deducted towards the Letter of Credit charges, without there being any Letter of Credit in force. We have found that there was no provision for recovery of interest on interest. Therefore, the Petitioners cannot be allowed any interest on the amounts outstanding towards the interest accrued due, from the date of filing of these Petitions till the date of passing of the Order. The subsequent interest, at the rate of 6% (six percent) per annum may be allowed on the total outstanding amounts, from the date of the Order till the date of realization.
- (b) For the above reasons, we answer Issue No.(8), accordingly.
- 16) **ISSUE No.(9)**: *Whether the Applications filed by the Petitioners under Section 5 of the Limitation Act, claiming condonation of delay, if any, in filing the Petitions, could be allowed or not?*
- (a) The Petitioners have filed the Applications under Section 5 of the Limitation Act, praying for condonation of delay, if any, in filing the present Petitions. In support of the Applications, it is stated that, non-opening of the Letter of Credit, soon after the execution of the PPAs, made the Petitioners not to recover the arrears and the assurances and representations of the

Respondents made the Petitioners not to take any legal recourse prior to filing of these Petitions. Therefore, they have prayed for condonation of delay, if any, in filing these Petitions. We are of the considered opinion that these are not sufficient grounds for condoning the delay in respect of the time-barred claims. It may also be noted that, Section 5 of the Limitation Act, 1963 would apply only to Appeals or Applications, but not to the Original Petitions.

(b) For the above reasons, we answer Issue No.(9), in the negative.

17) **ISSUE No.(10):** *Whether the Petitioners are entitled to claim the outstanding amounts, as claimed in the Petitions, on the ground of breach of obligation, on the part of the Respondents, in not opening the Letters of Credit soon after the execution of the PPAs?*

(a) The Petitioners have alternatively prayed for a direction to the Respondents to pay the entire outstanding amounts claimed in the Petitions, on the ground of breach of obligation on the part of the Respondents in not opening the Letter of Credit, soon after the execution of the PPAs. For the breach of contract or its covenant, compensation may be awarded, which naturally arises in the usual course of things from such breach or which the parties knew when they made the contract, to be likely to result from the breach of it and such compensation is not to be given for any remote and indirect loss or damage sustained by the reason of such breach, as stated in Section 73 of the Contract Act, 1872.

- (b) The claim of the Petitioners to direct the Respondents to pay the time-barred claims for breach of obligation in not opening of the Letter of Credit, soon after the execution of the PPAs, is a remote and indirect loss or damage, which cannot be allowed.
- (c) The claim for compensation on the grounds of breach of obligation in not opening the Letters of Credit is also barred by time, as per Article 55 of the Limitation Act, for the claims for compensation beyond three years from the date Of filing of the Petitions.
- (d) For the above reasons, we answer Issue No.(10), in the negative.

18) **ISSUE No.(11):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petitioners in all the above Petitions are entitled to the amounts towards the accrued interest, which became due, from 22.07.2014 till the date of filing of the Petitions (i.e., 21.07.2017), due to the delay in the payment of the Monthly Tariff Invoices. The Petitioners shall file a Memo of Calculations, in terms of the above, in order to ascertain the exact amounts due, on this count;
- (b) The Petitioners in OP No.125/2017 and OP No.126/2017 are entitled to recover the amounts illegally deducted by the Respondent-GESCOM towards the Letter of Credit charges, without there being any Letter of Credit in force, with interest at the rate of 9% (nine percent) per annum, from the respective dates of such illegal deductions till the

date of this Order. The parties shall file a Statement, showing the period during which the Letters of Credit were not in force and the amounts deducted, during such period, towards the Letter of Credit charges, in the said Petitions;

- (c) The parties shall comply with the directions given at Sl.Nos.(a) and (b) above, regarding filing of the Memo of Calculations and furnishing of the required details, within 03 (three) weeks from the date of this Order;
- (d) The amounts found due to the Petitioners, as stated at Sl.Nos.(a) and (b) above, shall be paid by the Respondents concerned, with interest at the rate of 6% (six percent) per annum, from the date of this Order till the date of realization;
- (e) All other reliefs, sought for by the Petitioners in these Petitions, are hereby rejected; and,
- (f) The original of this Order shall be kept in OP No.123/2017 and copies, thereof, in the other three connected cases.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(H.M. MANJUNATHA)
MEMBER