

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad-500 004

O.P.No. 18 of 2009

Dated: 13.06.2011

Present

Sri A. Raghotham Rao, Chairman
Sri R.Radha Kishen, Member
Sri C.R.Sekhar Reddy, Member

Between

M/s. Lanco Kondapalli Power Ltd
Plot No. 4, Softsol Building, Software Units Layout,
HITEC City, Madhapur, Hyderabad – 500 081.

.... Petitioner

And

1. Andhra Pradesh Power coordination Committee
2. Transmission Corporation of Andhra Pradesh Ltd
3. Central Power Distribution Company of A.P.Limited
4. Southern Power Distribution Company of A.P.Limited
5. Northern Power Distribution Company of A.P.Limited
6. Eastern Power Distribution Company of A.P.Limited

... Respondents

This petition coming up for hearing on 26.11.1009 and 05.03.2010 in the presence of Sri. C. Kodanda Ram, Sr. Advocate and C. Gunaranjan, Advocate for the petitioner and Sri. P. Shiva Rao, Advocate for the respondents, the Commission passed the following:

ORDER

On 03.03.2009 petitioner filed the petition u/s 62 and 86 (1) (f) of the Electricity Act, 2003 (for short 'the Act') claiming reimbursement of Advance Income Tax / Minimum Alternate Tax (MAT) as per Article 3.8 of the Power Purchase Agreement dated 31.03.1997 (for short 'PPA').

2. The averments mentioned in the petition filed by the petitioner, in brief, are as follows:

i) Petitioner is engaged in the business of generation and sale of electricity. It set up 368.144 MW Combined Cycle Power Project. It entered into PPA with A.P. State Electricity Board on 31.03.21997 to purchase such capacity and energy in accordance with terms and conditions of the said PPA. The petitioner implemented the project and declared Commercial Operations Date (for short 'COD') of the project as 25.10.2000.

ii) Article 3.8 of the PPA provides that any advance income tax payable for the project covered by the contract shall be reimbursed. The said Article further provides that if the tax assessment is completed for any year and the liability thereof is determined by the taxing authorities in India, the excess or shortfall in the tax liability so determined will be adjusted in the supplementary bill for the succeeding months or on the due date of payment thereof. In other words, the petitioner is entitled to claim reimbursement of the entire amount of tax assessed in respect of the project for each year which is covered by the contract.

iii) Article 3.9 of the PPA casts on the petitioner a duty and responsibility to take all reasonable steps in order to ensure that the petitioner's tax liability on its income from the project is minimized by obtaining all permissible benefits, rebates, concessions and the like in accordance with "Law". On a reading of Article 3.8 in conjunction with Article 3.9, it becomes absolutely clear that the entire amount of income tax liability which is assessed in respect of the project on the petitioner is to be reimbursed by APSEB / Respondent No.2 / Respondent Nos 3 to 6 in whom the rights and obligations vested by virtue of Third Transfer Scheme notified by GoAP vide G.O.Ms.No. 58 Energy (Power-III) dt. 07.06.2005.

iv) The term "Law" is defined in the Article 1.1 (38) of the PPA which in turn further defined in Article 11. So, if Article 3.9 is read along with Article 11.1 of the PPA, it becomes clear that the petitioner is required to minimize its tax liability by obtaining all permissible benefits in accordance with law which means the

statutory provisions which are in operation and in effect during the particular period.

v) In terms of the above Articles of the PPA, the petitioner from time to time called upon the respondents to make payment by issuing the Supplemental Bills. However, the respondents failed to make any payment. Therefore, the petitioner wrote several letters to respondent No. 2 about the outstanding bills which are pending from COD but Respondent No.2 did not choose to respond. Petitioner issued notice dated 08.09.2003 as per Article 14.1 of the PPA for settlement of disputes as per the provisions of the PPA. Respondent No. 2 by letter dated 24.09.2003 replied expressing its willingness to discuss and settle the pending the problems. Respondent No.2 further requested the petitioner not to initiate or seek reference to Arbitration for the resolution of disputes until final settlement.

vi) However, as Respondent No.1 did not come forward to settle the pending problems, the petitioner issued notice of Arbitration dated 26.03.2004 under Article 14.2 of the PPA. The petitioner nominated Justice B. P. Jeevan Reddy (Retd Judge of the Supreme Court of India) and requested Respondent No. 2 to nominate its Arbitrator within 30 days as required under the Arbitration and Conciliation Act. Thereafter, the petitioner filed Arbitration Application No. 31 / 2004 before Hon'ble High Court of AP for appointment of an Arbitrator on behalf of Respondent No. 2. The Hon'ble High Court issued notice to the respondents and the matter is pending adjudication. However, the petitioner has been regularly raising bills with regard to the payment of advance income tax and the respondents till today have not made any payments.

vii) By letter dated 25.08.2006 Respondent No. 1 denied liability on the ground that the reimbursement of MAT arose by virtue of Section 115JB of Income Tax Act which was inserted in the Act with effect from 01.04.2001. On 29.09.2006 petitioner sent a reply to Respondent No. 1 stating that Article 3.8 of the PPA does not contemplate any such distinction and Respondent No. 1 was

requested to reimburse the claim of advance income tax together with late payment charge in terms of Article 5.11 of the PPA.

viii) It is brought to the notice of Respondent No. 1 that Electricity Boards of Gujarat and Tamilnadu States were reimbursing MAT to the Independent Power Projects having PPAs with them. It is also brought to the notice of Respondent No. 1 that this Commission by its order dated 16.10.2007 in I.A. No. 11 / 2007 in O.P. No. 4 / 2007 was pleased to direct respondent distribution companies therein to pay the Advance Income Tax. The respondents though having sought for various information and documents, did not reimburse the bills AT / 01 to AT / 32 to the tune of Rs. 60,19,47,700/-. Because of such huge outstanding payment, the petitioner is put to financial inconvenience.

ix) In view of the above, it is prayed that

- a) Respondents may be directed to reimburse an amount of Rs. 60,19,47,700/- for the period from 2001-02 to 2008-09.
- b) Respondents may be directed to pay late payment charges as determined by the Commission on account of delay in reimbursement of Advance Income Tax / MAT.
- c) Interest till realization of the claim.

3. On 22.07.2009, on behalf of all the respondents, a common 'Counter' is filed stating that

i) The petitioner filed W.P.No. 7838/2004 before the Hon'ble High Court of A.P., challenging the validity of the Act and the jurisdiction of the Commission to decide the disputes between the generator and licensee. The Commission may direct the petitioner to withdraw the same so as to enable it to prosecute its cause before the Commission and till such time, the proceedings before the Commission are not maintainable.

ii) The claim of MAT of Rs. 60,19,47,700/- is barred by limitation. The petitioner pursued its claim before wrong forum and therefore, the time spent

during the said proceedings is not permitted to be excluded in computing the period of limitation of 3 years.

iii) The PPA contemplates that any advance tax payable for the project in any month supported by a certificate of Chartered Accountant approved by Respondent No. 2 will be reimbursed in the succeeding month after the tax assessment is completed for any year and the liability therefore is determined by the taxation authorities in India. It is the bounden duty of the petitioner to satisfy the respondent before making any claim towards the taxes that it had paid the taxes on the income from the project only. However, from the provisions of PPA, it can be safely inferred that MAT will not form a part of the regular billing, which is levied on book profits of the assessee company as per Section 115JB of the Income Tax Act.

iv) The petitioner placed reliance on the opinion of Hon'ble Justice Lahoti on this issue. With due respects to the Hon'ble Lahoti, his opinion is not in accordance with law, in the interpretation of the above special provision of the Income Tax Act Section 115 JB was inserted in the Income Tax Act with effect from 01.04.2001 providing for deemed total income and a special rebate of tax at 7.5% on such deemed total income in case of companies wherever the tax payable on total income as computed under regular provisions of Income Tax Act is less than 7.5% of book profits. The total income under Income Tax Act and book profits under Company Law are different and distinct. In the present context, the tax has become payable with reference to book profits of the petitioner's company and not on total income computed under the regular provisions of Income Tax Act. Book profits of a company have nothing to do with total income which is defined u/s 2 of the I.T. Act. Therefore, by no stretch of imagination can it be construed that the respondents are liable to reimburse MAT (payable by the company) which is computed based on their book profits and can not be called as the tax on income accruing to the petitioner by providing energy to the respondents.

v) There was no breach of any obligation in payment of supplemental bills as and when they are issued by the petitioner which were rejected as not in accordance with the terms of the PPA. The onus of proving the exact tax liability in respect of its business of providing energy to the respondent lies with the petitioner and it failed to satisfy the same. Tax on other income streams, if any, accruing to the company shall not constitute a pass through component in the tariff. Tax on such other incomes shall be payable by the company only.

vi) In several of its judgments including in Gujarat Urja case, the Hon'ble Supreme Court of India categorically stated that any dispute arising between the parties to PPA cannot be referred to arbitration unless it is specifically provided therein and shall be adjudicated only by the Electricity Regulatory Commission. The petitioner knowing fully well of the said settled position of law unnecessarily dragged the respondents to High Court which ultimately dismissed the petition filed by the petitioner.

vii) Respondents have been making payments as and when the bills are issued by the petitioner and there is no outstanding payment due to the petitioner with respect to the power supplied and the tariff bills thereof and have been honoring all the terms and conditions of the PPA. The petitioner is making false allegations against the respondents with an ill-intention to make wrongful gain and unjust enrichment. The respondents are not liable to make good whatever the petitioner is liable to pay under the Income Tax Act.

viii) The petitioner is not entitled to be re-compensated for the MAT payable u/s 115 JB which is not the advance income tax paid on the income accruing to the petitioner but a specified tax levied on its book profits (that are not attributable to the respondents). Since there is no liability of MAT, the respondents are not liable for interest on the alleged claim of MAT.

ix) For the aforesaid reasons, it is prayed that the Commission may be pleased to dismiss the claim petition of the petitioner.

4. On 22.08.2009 'Rejoinder' is filed by the petitioner stating that the averments and assertions mentioned in the 'Counter' filed by the respondents are false, baseless, misleading and do not answer the averments of the petition. Apart from reiterating the averments mentioned in the petition as detailed in paragraph 2 supra, it is further stated by the petitioner that ;

i) The claim of MAT to a tune of Rs. 60,19,47,700/- is hopelessly barred by Limitation is baseless. The petitioner filed the present petition within reasonable time and it cannot be said that the claim of the petitioner is barred by limitation. The assertion that Section 14.1 of Limitation Act is not applicable as the petitioner has approached wrong forum is false and baseless. The relationship between the petitioner and the respondents is governed by PPA dated 31.03.1997 which is a concluded contract and the said PPA clearly envisages that all the disputes between the parties shall be resolved through arbitration. The petitioner has bonafidely followed the said procedure. However, after the decision of Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd., the petitioner has filed the present petition for resolution of the dispute. Therefore, it is submitted that the petitioner has strictly followed the dispute resolution mechanism as agreed between the parties in the PPA. The precedents referred by the respondents in the counter are not relevant to the case on hand as the facts and circumstances in the said cases are totally different.

ii) The petitioner is submitting that the bills filed are supported by a Chartered Accountant from time to time. The respondents have at no point of time disputed the correctness of the said bills or sought any clarification on the same. Article 3.8 of the PPA provides for reimbursement of 'any advance income tax'. There is nothing in the said Article which lays down that the tax reimbursement under that Article will be limited only to the income tax payable at

the rate or in accordance with the provisions in force as at the time of the execution of the PPA. Irrespective of whether there is change in law regarding tax provision or not, any income tax as and when levied by the Income Tax authorities is reimbursable.

iii) the assertion that the total income under Income Tax Act and book profits under the Company Law are different and distinct is misleading. I.T.Act provides for various modes of calculation and payment of income-tax. MAT is nothing but one of the modes of income tax. It is nowhere provided in the PPA that the income computed u/s 5 of the Income Tax alone is payable. On the other hand, Articles 3.8, 3.9, 3.10 and 5.5 make it abundantly clear that any tax on income of the petitioner is reimbursable.

5. Heard the counsel for the petitioner on 26.11.2009.

i) While reiterating the averments mentioned in the petition, the counsel submitted that as per the provisions of Article 3.8 of the PPA, the petitioner is entitled for reimbursement of MAT. Reading of the said Article together with Article 3.9 of the PPA makes it clear that assessed income tax in respect of the petitioner's project is to be reimbursed by the respondents. The contention of the counsel for the respondents that MAT is not Income Tax is incorrect and if MAT is not Income Tax, the counsel for the respondents failed to explain, how MAT is to be accounted for ?

ii) Similarly, the contention of the counsel for the respondents is that the claim of the petitioner for reimbursement of MAT is barred by limitation, as the petitioner approached wrong forum for arbitration, is also incorrect. Till the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd case, the petitioner followed the procedure envisaged under the PPA for resolution of the dispute through arbitration. Even if limitation were to be applied, the period upto 18.03.2009 has to be excluded as the matter is pending in the Hon'ble High

Court. In this connection, the counsel for the petitioner referred to the judgment of the Hon'ble Supreme Court in Civil Appeal Nos. 2461 and 2462 of 2008.

6. Heard the counsel for the respondents on 05.03.2010.

i) While reiterating the averments mentioned in the common counter filed on behalf of the respondents, the counsel for the respondents submitted that MAT claim of the petitioner prior to 26.02.2006 is barred by limitation without going into the correctness or otherwise of its claim. For the period from 2001 to 2005, when the respondents did not choose to pay MAT, the petitioner did not take any legal remedy. As it is settled law that mere correspondence would not extend the cause of action or suspend the period of limitation, the claim for reimbursement for the said period is time barred. At the most, the petitioner is entitled for reimbursement of MAT for the period from 2006 and such claim may be decided on merits of the case. Plea of initiation of arbitration is bad and even if recourse to arbitration were permissible, the petitioner instead of approaching the Commission for such arbitration was all along prosecuting its claim for reimbursement in wrong forum.

ii) Relying on Section 14 of the Limitation Act is not sustainable because the petitioner deliberately pursued remedy of arbitration, despite knowledge that the Hon'ble High Court had no jurisdiction. Due diligence means that petitioner is not aware of the jurisdiction of court and pursuing a remedy out of ignorance. In this case the respondents filed a counter before the Hon'ble High Court that in the year 1963 itself, the Hon'ble Supreme Court in a case reported at AIR 1963 SC at page 1164 held that in view of the specific provisions viz., Section 52 of the Electricity Act, 1910 and Section 76 of the Electricity (Supply) Act, 1948, arbitration clause is unenforceable. Further, after enactment of the A.P.Reforms Act, 1998 and the Electricity Act, 2003 the arbitration clause in the PPA is not enforceable and it is the Commission which alone is empowered either to adjudicate or arbitrate disputes. Despite, the same the petitioner pursued arbitration by private arbitrators without any basis.

iii) Thus the petitioner miserably failed to explain for delay in approaching the Commission or that such delay is bonafide. Thus the petitioner is not entitled for exclusion of time spent before the Hon'ble High Court under Section 14 of the Limitation Act does not apply to the petitioner's case and the same is barred by limitation.

iv) Petitioner is not entitled for reimbursement of MAT payable u/s 115JB of the Income Tax as it is not advance income tax payable on the income accruing to the petitioner out of the business of power supply, but a specified tax levied on its book profits. That apart, the petitioner is not entitled for reimbursement of MAT as it is not envisaged in the PPA.

v) the petitioner declared COD on 25.10.2000. On 02.01.2001, respondent DISCOMs were directed by GoAP to purchase power provisionally from the petitioner and to make payments as an interim arrangement. Originally Naphatha is the fuel for the generating plant of the petitioner and subsequently, fuel is changed to Gas. However, inspite of directions to the developers of the power plants, in general, to obtain approval from the Commission for change of fuel, the petitioner did not do so. In view of such failure to obtain required approval, the PPA entered by the petitioner becomes invalid.

vi) Lastly the counsel for the respondents conceded the claim for reimbursement of MAT for the period from 2006 to 2009 in view of the decision of the Appellate Tribunal for Electricity in Appeal Nos.41, 59 and 60 of 2009, but requested the Commission to dismiss such claim for the period prior to 26.02.2006.

7. In reply, the counsel for the petitioner further submitted that in view of conceding the claim for reimbursement of MAT for the period from 2006 to 2009 by the respondents, the only issue that falls for consideration of the Commission

is whether the claim for such reimbursement for the period prior to 2006 is barred by limitation. With regard to MAT, the respondents also conceded that MAT is income tax. According to the counsel for the petitioner, it is not correct state that the Hon'ble Supreme Court settled law relating to arbitration in 1963 itself.

8. On 27.03.2010 'Written Arguments' are also filed on behalf of the respondents, reiterating the oral submissions.

9. The issues that arise for consideration of the Commission are:

- (i) Whether the petitioner is entitled for reimbursement of MAT as per Article 3.8 of the PPA dated 31.03.1997 for the period from 2001-02 to 2008-09 and if so, whether it is necessary to direct respondents to pay late payment charges on account of delay in reimbursement of MAT ?
- (ii) Whether the claim for the period from 2001-02 to 2005-06 is barred by limitation ?
- (iii) To what relief ?

Issue No. 1

10. The petitioner has vehemently argued that the respondents have to reimburse the MAT as per Art.3.8 of PPA dt.31.03.1997 for the period from 2001-02 to 2008-09. The respondents have vehemently opposed the request made by the petitioner on the ground that they are not entitled to be recompensated for the MAT payable u/s 115JB which is not the advance income tax paid on the income accruing to the petitioner out of the business of power supply but a specified tax levied on his book profits (that by no stretch of imagination are attributable to the respondents).

11. However, in the conclusion part of the written arguments, the respondents have conceded to the claim of MAT for the period 2006 to 2009 in the light of the latest judgment of the Appellate Tribunal dt.06.08.2009 in Appeal Nos. 41, 59 &

60 of 2009. Hence, there is no need to this Tribunal to decide this issue specifically, about the entitlement. Hence, this issue is answered in favour of the petitioner and against the respondents for the period which is not barred by time. (Since the limitation aspect is dealt separately in Issue No. 2).

Issue No. 2

12. The very contention of the petitioner is that he has filed a petition before the Hon'ble High Court for appoint of an Arbitrator when the respondents have not cooperated with them in appointment of an Arbitrator. The petition for appointment of an Arbitrator is closed by the Hon'ble High Court by virtue of the judgment of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd. This gives cause of action for them to file a petition on the ground that the Commission itself is competent to decide the issue involved and time spent by the petitioner in prosecuting the matter before the Hon'ble High court is to be excluded u/s 14(2) of the Limitation Act, as the petitioner has prosecuted the matter bonafidely, that too in accordance with Terms & conditions of the PPA (14(1)). Thus, the petitioner is entitled for the entire amount.

13. Whereas, the learned counsel for the respondents submitted his written arguments in O.P.No. 18 of 2009 and also vehemently opposed the same that the time spent by the petitioner in prosecuting the matter before the Hon'ble High Court will never save the limitation since a specific provision is incorporated in Electricity Act 2003. S.86(1)(f) clearly envisages about the appointment of an Arbitrator by the Commission. The petitioner has also ignored not only the provisions of law, but also the decisions rendered by the Apex Court in several judgments. Even long prior to the judgment of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd, several decisions have been rendered by the Apex Court barring the jurisdiction of arbitrator u/s 11 of the Arbitration Act. When the Act itself is very clear approaching the court other than the provisions incorporated under the EA2003 can never be said that petitioner

bonafidely prosecuted the matter before the High Court, which has no jurisdiction at all to entertain the same.

14. The approach made by the petitioner does not clothe or save time u/s 14(2) of the Limitation Act. Moreover, the petitioner has approached the Hon'ble High Court by taking the plea that Arbitration Act itself is a special Act and the Electricity Act is a general Act and the provisions of Arbitration Act overrides the provisions of said Electricity Act, and that the petitioner has misinterpreted the language and the Acts with a view to circumvent the issue and filed this petition claiming exemption of the time spent in the Hon'ble High Court and the petition itself is not maintainable under law and the main petition itself is to be dismissed as the claim from 2001 to 2005 is barred by limitation.

15. It is necessary at this stage to extract the relevant provisions of the Act for better appreciation of the above said issue.

Section 14(2) of Limitation Act reads as follows:

“14. Exclusion of time of proceeding bonafide in court without jurisdiction – (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

The following pre-requisite conditions have to be satisfied before invoking S.14(2) of the Act.

*“(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
(2) the prior proceeding had been prosecuted with due diligence and good faith;
(3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
(4) the earlier proceeding and the later proceeding must relate to the same matter in issue, and
(5) both the proceedings are in a court.”*

Section 86(1)(f) of Electricity Act, 2003 reads as follows:

“86. Functions of State Commission. (1) The State Commission shall discharge the following functions, namely: -

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”

The relevant portion of Section 22(1)(n) of Electricity Regulatory Commissions Act, 1998 reads as follows:

“22. Functions of State Commission.- (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely: -

(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration;”

Section 37(1) of A.P.Electricity Reform Act, 1998 reads as follows:

“37. Arbitration by the Commission. – (1) Notwithstanding anything contained in the Arbitration and Conciliation Act, 1996 (26 of 1996), any dispute arising between licensees shall be referred to the Commission. The Commission may proceed to act as arbitrator or nominate arbitrator or arbitrators to adjudicate and settle such dispute. The practice or procedure to be followed in connection with any such adjudication and settlement shall be such as may be prescribed by regulations.”

Section 185(3) of the Electricity Act, 2003 reads as follows:

“185. Repeal and Saving. - (3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.”

16. The above said provisions have clearly laid down that the Commission is given with the power to adjudicate the issue or to refer the matter for arbitration. Except the powers conferred u/s 11 of the Arbitration Act, the rest of the

provisions have to be followed if the matter is referred for arbitration by the Commission itself.

17. Here, in this case the petitioner has approached with a plea that he has bonafidely prosecuted the matter before the Hon'ble High Court till finding of the Supreme Court in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd case and filed this petition well within the time and the same is to be allowed by passing an order in their favour.

18. The respondents contention is that even long prior to the decision of the Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd, the Apex Court stated in several judgments holding that the EA 2003 is itself is a special Act and Arbitration Act is general Act and the provisions of the special Act prevails over the general act and the petitioner has filed and prosecuted in the wrong court claiming exemption u/s 14(2) of Limitation Act is not sustainable and the same is liable to be rejected.

19. The learned counsel for the petitioner relied upon the following rulings in support of his contention.

JT2008 (6) SC 22 (Consolidated Engg. Enterprises vs. Principal Secy. Irrigation Deptt. And Ors.). *In this it was held that*

“provisions of Limitation Act, 1963 apply to all proceedings under the AC Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of the AC Act.”

No doubt all the provisions are applicable and they have to be followed by the Arbitrator if appointed u/s 86(1)(f) of EA 2003 or under A.P.Electricity Reform Act.

The learned counsel for respondent relied upon a ruling reported in AIR 1994 (SC) 2544. In this it was held that

“the matters relating to which there is no direction in the Electricity Act requiring them to be determined by arbitration cannot be the subject-matter of arbitration. This is for the reason of the Electricity Act being not only a special Act on the subject of which disputes covered by the Act

could be decided by arbitration, but also because it is a later Act than the Arbitration Act.”

He has also relied upon another ruling reported in Air 2002 (SC) 2768. In this it was held that

“a person who has registered the objection regarding non-joinder of parties at the initial stage and also at there visional stage and taken the risk of proceeding with the suit without impleading the necessary parties cannot be said to have acted in good faith taking due care and attention; consequently, such person will not be entitled to benefit of S.14 of the Act for excluding the time spent by him in that proceeding in a fresh suit.”

He has also relied upon a ruling reported in SCC 1 (2004) 195 BSES Ltd Vs. M/s. Tata Power Co. Ltd. & Ors. In this it was held that

“13. Sub-section (2) of Section 22 empowers the State Government to confer by notification in the Official Gazette various functions upon the State Commission which are enumerated from clauses (a) to (p) in the said sub-section. One of the function which can be conferred under clause (n) is to adjudicate upon the dispute and differences between the licensees and utilities and to refer the matter for arbitration.”

He has also relied upon a ruling reported in AIR (SC) (1998) 1761 Grid Corporation Of Orissa Ltd vs. M/s. Indian Charge Chrome Ltd. In this it was held that

“In our considered view High Court has exceeded the jurisdiction while entertaining the application of ICCL u/s 11 of the Arbitration and Conciliation Act, 1996. The High Court erroneously assumed that the Regulatory commission had failed to arbitrate u/s 37(1) of the Reform Act. This finding is factually incorrect because vide application dated 19.07.1997 ICCL asked the Regulatory Commission to adjourn the proceedings pending before it on the ground that it had filed MJC No.229/97 in the High Court. In view of this application the Regulatory Commission did not proceed in the matter. If this be so the High Court in our opinion was wrong in holding that there was failure on the part of Regulatory Commission to arbitrate and consequently the application made by ICCL u/s 11 of Arbitration Act is maintainable. In our considered view the application made by ICCL u/s 11 of the Arbitration Act, 1996 (MJC No. 229/97) was premature and the High Court could not have entertained the same and granted desired relief to ICCL.”

20. It is clear from the Limitation Act that the period of limitation for the recovery of amounts is 3 years. The parties have to workout the rights in accordance with the agreement and if there is any liability that arises from the said contract, the claim has to be made within 3 years from the date of accrued cause of action.

Art. 55 of Limitation Act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
For compensation for the breach of any contract, express or implied, not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases.

21. In this case the cause of action has arisen in the month of January 2004 which has to be filed within 3 years from the date of said period. In this case the petitioner has approached the Hon'ble High Court for appointment of an arbitrator and now claims exemption u/s 14(2) of Limitation Act. In order to attract the application of S.14(2) the parties seeking its benefit must satisfy the Court (a) that the petitioner was prosecuting another civil proceeding with due diligence (b) that the earlier proceeding and the latter proceeding relate to the same matter issue and (c) the former proceeding was being prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it. In this case, the petitioner has filed the AAO 31/2004 on 27.04.2004. The said petition was closed basing on the case *Gujarat Urja Vikas Nigam Ltd* and finally held "*In view of the above, needless to mention that the parties are at liberty to approach the Commission u/s 86(1)(f) of the Act.*"

22. The petitioner is harping upon this observation and the cause of action for filing of petition before this Commission. Whereas, the respondents are claiming

that the courts have already held that there is a specific provision in the Act which is a special Act invoking the clause u/s 11 of Arbitration Act which is a general Act cannot be entertained. The petitioner is harping upon the clause contained in the PPA. Whereas, the respondents are harping upon the provision in the Act itself. Merely, because an observation is made it does not mean the court has given a verdict to receive the application by the Commission even if it is barred by time. The Hon'ble High Court made an observation while disposing of AAO 31/2004 that "the parties are at liberty to approach the Commission u/s 86(1)(f)". It does not mean that the parties are given with the power to approach the Commission even if the claim is barred by time. This observation to approach the Commission u/s 86(1)(f) is only subject to limitation. In the decision reported in 2002 (4) ALT Page 16, (J.Venkataramana Reddy vs. Kanagari Bhakthavatsalaih) it was held that the court which has no jurisdiction, it has to return the plaint to present in proper court. If the claim is bona fide, that period spent in wrong court can be excluded and the court which is returning the plaint has no power to give time to file the plaint in the proper court. It means the observation made by the Hon'ble High Court in giving liberty to file a petition before the Commission u/s 86(1)(f) does not mean that it has considered that it is a bona fide prosecution and the time spent in filing the petition is being excluded. If a petition is filed before the Hon'ble High Court in the form of writ, instead of filing a suit for recovery of money, it can be said that it is a bona fide prosecution or bona fide filing. Similarly, if the suit is filed in sub-court instead of Munsif court, it can be said that it is a bona fide prosecution; but if a specific provision is incorporated in the Act itself right from the beginning in the repealed Acts also with regard to the appointment of an arbitrator, certainly, it is not a bona fide prosecution and the same is not in good faith. In the final judgment in *Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd*, the ATE has clearly observed that the parties in the PPA have to be read special to statutory provisions. The provisions of the Act which are contrary to the statutory provisions cannot be given effect to. This is a well established law as held in 2000 Vol-3 SCC 379 *Indian Thermal Project Ltd vs State of Madhya Pradesh*.

23. The Apex Court has already held way back in 1998 and 2004 in respect of Section 37 (1) of A.P.Electricity Reform Act and Section 22 (2)(n) of Electricity Regulatory Commissions Act giving power to the Commission to appoint an arbitrator in the respective Acts are also akin to the provision incorporated in the Section 86(1)(f) of the Act. So, the prosecution of the proceeding ignoring specific provision in the Act itself cannot be said that it is done with good faith. At the same time, ignorance of law is also not an excuse to start the lis in a wrong court which has no jurisdiction. Moreover, the A.P.Electricity Reform Act is not repealed u/s 185 of the said Act even if the cause of action is arisen prior to the Act and it continuously follows even after the advent of the Act, the same cannot be wiped out.

24. It is not a concurrent remedy and party has offered one remedy and availed on remedy and he becomes unsuccessful, he cannot get the benefit of S.14 when instituting the alternate remedy. When the Act has specifically confined to approach the Commission u/s 86(1)(f) of the Act which is a special Act to make any claim and the Commission itself can decide or arbitrate by appointing an arbitrator. So it has specifically debarred the jurisdiction contained u/s 11 of Arbitration Act which is a general enactment, since special Act overrides the provisions of general Act.

Issue No. 3

25. In the light of the above said discussions, we are of the considered opinion that the claim made by the petitioner from 2001 to 2005 is barred by limitation and the petition filed by the petitioner is liable to be dismissed to that extent.

This order is corrected and signed on this 13th day of June, 2011

Sd/-
(R.Radha Kishen)
Member

Sd/-
(A.Raghotham Rao)
Chairman

//Certified Copy//

Per C.R.Sekhar Reddy

Issue No.1

26. The petitioner has vehemently argued that the respondents have to reimburse the MAT as per Art.3.8 of PPA dt:31.03.1997 for the period from 2001-02 to 2008-09. The respondents have vehemently opposed the request made by the petitioner on the ground that they are not entitled to be recompensated for the MAT payable u/s.115JB which is not the advance income tax paid on the income accruing to the petitioner out of the business of power supply but a specified tax levied on his book profits (that by no stretch of imagination are attributable to the respondents).

27. The claim was made in time. It is only the respondents who refused to agree with the claim. As the MAT was not paid, LANCO has issued Arbitration Notice as provided in Article 14.1 of the PPA on 08.09.2003. APTRANSCO is purchasing electricity from LANCO with effect from 01.01.2001.

28. However, in the conclusion part of the written arguments, the respondents have conceded to the claim of MAT for the period 2006 to 2009 in the light of the latest judgement of the Appellate Tribunal dt: 06.08.2009 in Appeal Nos. 41, 59 & 60 of 2009. Hence, there is no need to this Commission to decide this issue specifically, about the entitlement. Hence, this issue is answered in favour of the petitioner and against the respondents for the period.

Issue No.2 : Thus the short point that falls for consideration of the Commission is whether the claim of the petitioner for reimbursement of MAT for the period prior to 26.02.2006 is time barred or not?

29. The very contention of the petitioner is that he has filed a petition before the Hon'ble High Court for appointment of an Arbitrator when the respondents have not co-operated with them in appointment of an Arbitrator. The petition for appointment of an Arbitrator is closed by the Hon'ble High Court by virtue of the

judgement of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd., vs Essar Power Limited. This gives cause of action for them to file a petition on the ground that the Commission itself is competent to decide the issue involved and time spent by the petitioner in prosecuting the matter before the Hon'ble High Court is to be excluded u/s.14(2) of the Limitation Act, as the petitioner has prosecuted the matter bonafidely, that too in accordance with Terms & Conditions of the PPA [14(1)]. Thus, the petitioner is entitled for the entire amount in view of the admission about the liability of the MAT. The respondents have fairly conceded the claim for reimbursement of MAT of the petitioner in view of appeal nos. 41, 59 & 60 of 2009 of the Hon'ble ATE.

30. Whereas, the learned counsel for the respondents submitted his written arguments and also vehemently opposed the same that the time spent by the petitioner in prosecuting the matter before the Hon'ble High Court will never save the limitation since a specific provision is incorporated in Electricity Act 2003. S.86(1)(f) clearly envisages about the appointment of an Arbitrator by the Commission. The petitioner has also ignored not only the provisions of law, but also the decisions rendered by the Apex Court in several judgements. Even long prior to the judgement of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd., vs Essar Power Ltd., several decisions have been rendered by the Apex Court barring the jurisdiction of arbitrator u/s. 11 of the Arbitration Act. When the Act itself is very clear approaching the court other than the provisions incorporated under the EA2003 can never be said that petitioner bonafidely prosecuted the matter before the High Court, which has no jurisdiction at all to entertain the same.

31. The approach made by the petitioner does not clothe or save time u/s.14(2) of the Limitation Act. Moreover, the petitioner has approached the Hon'ble High Court by taking the plea that Arbitration Act itself is a special Act and the Electricity Act is a general Act and the provisions of Arbitration Act overrides the provisions of said Electricity Act, and that the petitioner has misinterpreted the language and the Acts with a view to circumvent the issue and

filed this petition claiming exemption of the time spent in the Hon'ble High Court and the petition itself is not maintainable under law and the main petition itself is to be dismissed as the claim from 2001 to 2005 is barred by limitation.

Section 86(1)(f) of Electricity Act, 2003 reads as follows:

"86. Functions of State Commission. (1) The State Commission shall discharge the following functions, namely: -

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration."

Section 185(3) of the Electricity Act, 2003 reads as follows:

"85. Repeal and Saving – (3) The provisions of the enactments specified in the Schedule , not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable."

32. The above said provisions have clearly laid down that the Commission is given with the power to adjudicate the issue or to refer the matter for arbitration. Except the power conferred u/s 11 of the Arbitration Act, the rest of the provisions have to be followed if the matter is referred for arbitration by the Commission itself.

33. Here, in this case the petitioner has approached with a plea that he has bonafidely prosecuted the matter before the Hon'ble High Court till finding of the Supreme Court in Gujarat Urja Vikas Nigam Ltd., vs Essar Power Ltd., case and filed this petition well within the time and the same is to be allowed by passing and order in their favour.

34. The respondents contention is that even long prior to the decision of the Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd., the Apex Court stated in several judgements holding that the EA 2003 is itself is a special Act and Arbitration Act is general Act and the provisions of the special Act prevails over the general act and the petitioner has filed and prosecuted in the wrong court

claiming exemption u/s 14(2) of Limitation Act is not sustainable and the same is liable to be rejected.

35. The learned counsel for the petitioner relied upon the following rulings in support of his contention.

JT2008 (6) SC 22 (Consolidated Engg. Enterprises vs Principal Secy. Irrigation Deptt. And Ors.). *In this it was held that*

“provisions of Limitation Act, 1963 apply to all proceedings under the AC Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of the AC Act.”

No doubt all the provisions are applicable and they have to be followed by the Arbitrator if appointed u/s.86(1)(f) of EA 2003 or under A.P. Electricity Reform Act.

The learned counsel for respondent relied upon a ruling reported in AIR 1994 (SC) 2544. In this it was held that

“the matters relating to which there is no direction in the Electricity Act requiring them to be determined by arbitration cannot be the subject-matter of arbitration. This is for the reason of the Electricity Act being not only a special Act on the subject of which disputes covered by the Act could be decided by arbitration, but also because it is a later Act than the Arbitration Act.”

He has also relied upon another ruling reported in Air 2002 (SC) 2768. In this it was held that

“a person who has registered the objection regarding non-joinder of parties at the initial stage and also at there visional stage and taken the risk of proceeding with the suit without impleading the necessary parties cannot be said to have acted in good faith taking due care and attention, consequently, such person will not be entitled to benefit of S.14 of the Act for excluding the time spent by him in that proceeding in a fresh suit”.

He has also relied upon a ruling reported in SCC 1 (2004) 195 BSES Ltd. Vs. M/s. Tata Power Co. Ltd., & Ors. In this it was held that

“13. Sub-section (2) of Section 22 empowers the State Government to confer by notification in the Official Gazette various functions upon the

State Commission which are enumerated from clauses (a) to (p) in the said sub-section. One of the function which can be conferred under clause (n) is to adjudicate upon the dispute and differences between the licensees and utilities and to refer the matter for arbitration.”

He has also relied upon a ruling reported in AIR (SC) (1998) 1761 Grid Corporation of Orissa Ltd. Vs. M/s.Indian Charge Chrome Ltd. In this it was held that

“In our considered view High Court has exceeded the jurisdiction while entertaining the application of ICCL u/s. 11 of the Arbitration and Conciliation Act, 1996. The High Court erroneously assumed that the Regulatory Commission had failed to arbitrate u/s. 37(1) of the Reform Act. This finding is factually incorrect because vide application dated:19.07.1997 ICCL asked the Regulatory Commission to adjourn the proceedings pending before it on the ground that it had filed MJC No.229/97 in the High Court. In view of this application the Regulatory Commission did not proceed in the matter. If this be so the High Court in our opinion was wrong in holding that there was failure on the part of Regulatory Commission to arbitrate and consequently the application made by ICCL u/s 11 of Arbitration Act is maintainable. In our considered view the application made by ICCL u/s 11 of the Arbitration Act, 1996 (MJC No. 229/97) was premature and the High Court could not have entertained the same and granted desired relief to ICCL.”

36. It is clear from the Limitation Act that the period of limitation for the recovery of amounts is 3 years. The parties have to workout the rights in accordance with the agreement and if there is any liability that arises from the said contract, the claim has to be made within 3 years from the date of accrued cause of action.

Art. 55 of Limitation Act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
For compensation for the breach of any contract, express or implied, not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (when the breach is continuing) when it ceases.

Section 14 of the Limitation Act, 1963 excludes the time which the applicant was prosecuting another civil proceeding in a court without jurisdiction. Section 14 reads as under:

“14. Exclusion of time of prosecution of proceeding bona fide in court without jurisdiction. –

- (1). In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it.*
- (2). In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in a good faith in a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it.”*

The following pre-requisite conditions have to be satisfied before invoking S.14(2) of the Act.

- “(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
(2) the prior proceeding had been prosecuted with due diligence and good faith;
(3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
(4) the earlier proceeding and the later proceeding must relate to the same matter in issue; and
(5) both the proceedings are in a court.”

From the reading of Section 14(2) above it is clear that the time spent bonafidely on another proceeding shall be excluded in computing the period of limitation. In the present case, LANCO has bonafidely pursued its remedy as agreed by the parties in the PPA. Further, the issue in dispute is one and the same.

37. In this case the cause of action has arisen in the month of January 2004 which has to be filed within 3 years from the date of said period. In this case the petitioner has approached the Hon'ble High Court for appointment of an arbitrator and now claims exemption u/s 14(2) of Limitation Act. In order to attract the application of S.14(2) the parties seeking its benefit must satisfy the Court (a) that the petitioner was prosecuting another civil proceeding with due diligence (b) that the earlier proceeding and the latter proceeding relate to the same matter issue and (c) the former proceeding was being prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it. In this case, the petitioner has filed the AAO 31/2004 on 27.04.2004. The said petition was closed basing on the case *Gujarat Urja Vikas Nigam Ltd* and finally held "*In view of the above, needless to mention that the parties are at liberty to approach the Commission u/s 86(1)(f) of the Act.*"

38. The petitioner is harping upon this observation and the cause of action for filing of petition before this Commission. Whereas, the respondents are claiming that the courts have already held that there is a specific provision in the Act which is a special Act invoking the clause u/s 11 of Arbitration Act which is a general Act cannot be entertained. The petitioner is harping upon the clause contained in the PPA. Whereas, the respondents are harping upon the provision in the Act itself. Merely, because an observation is made it does not mean the court has given a verdict to receive the application by the Commission even if it is barred by time.

39. In the counter a specific plea is taken by the respondent on the aspect of limitation. It is also clear from the record and also from the averments in the petition that the petitioner has filed an Arbitration Application No.31/04 before the Hon'ble High Court for appointment of an arbitrator. During pendency of the said application, the petitioner filed this petition for reimbursement of tax. So the very filing of the petition by him prior to the disposal of the Arbitration Application also saves the limitation under S 14(2), if this is prosecuted bonafidely.

40. Commencement of arbitral proceedings:

Under 21 of Arbitration Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. It is obvious from the provision of S.21 of the Act that the arbitral proceedings must be deemed to have commenced from the date on which a request for the dispute to refer to arbitration is received by the owners.

41. In the order of Hon'ble ATE dt.22.02.2010 in appeal Nos. 77 and 86 of 2009 Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd, it was held that:

"It cannot be disputed that the provisions of Limitation Act 1963 applies to the present case. Article 55 of the Limitation Act is relevant. Article 55 provides for filing of the suit for compensation for the breach of any contract, express or implied. According to this article the period of limitation is 3 years. This article further says that when the contract is broken or where there are successive breaches, then the breach in respect of which suit is instituted occurs. Under these circumstances, the above article applies to the present case and as per the same, the period of limitation for compensation for breach of contract is 3 years from the date when the contract is broken or where there are successive breaches. It is a settled law that once a period of limitation prescribed for suit begins to run, it is not stopped.

Thus, it is clear that the cause of action for compensation on account of alleged diversion of power arose in July 1996 itself and at any rate it arose when the demand notice dt.29.10.2003 was issued and the same was refuted on 01.11.2003 and 01.12.2003. Under those circumstances, the State Commission in our view rightly held that the claims of the appellant for the said compensation and for the refund of the said deemed generation incentive pertaining to any period prior to 3 years from the date of the filing of the petition before the State Commission ie., on 14.09.2005 are clearly barred by limitation.

42. In the AIR 2009SC1200 Shakti Tubes Ltd. tr. Director vs. State of Bihar and Ors. It was held that

“Normally for application of S.14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court, obviously pursued diligently and bona fide, needs to be excluded.”

43. In recent judgment, Supreme Court held that if writ petition is pending for considerable length of time in High Court, it would not be proper to declare the exercise of jurisdiction on the ground of available remedy. Basanti Prasad Vs Bildar School Examination Board 6 SCC 791 – (2009).

44. In a 2008(5)CTC 741, the Hon’ble Supreme Court of India held the ratio decedendi as *“The intention of the legislature in enacting Section 14 of the Act is to give relief to a litigant who had approached a wrong Forum.”*

It was also considered at para 12 as hereunder:

“While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity.”

Limitation: Whether suit for recovery of arrears filed by the Board is barred by limitation as the same was filed beyond the period of three years from the date on which the supply was disconnected and the meter itself was taken away after disconnection – **Held.** The agreement entered into the parties for the supply of

electricity showed that the agreement would be valid and subsisting from year to year unless it is terminated by either of the parties by a 6 month advantage notice. Further, as per agreement, notwithstanding the discontinuance of the supply of electricity the Consumer was liable to pay the minimum charges and minimum guarantee amount, payable under the Agreement. The agreement between the parties was not terminated. Hence, the suit was filed within the period of limitation.

45. Good faith is used in this section means “exercise of due care and attention”. A finding as to good faith or the absence of it is a question of fact. Institution or suit in any of the courts having jurisdiction does not constitute a lack of good faith, even if such choice causes inconvenience to the other side. Proceeding in a wrong court through the bonafide mistake of the counsel may be exercised under S.14 of Limitation Act, where the party has prosecuted his case with due diligence.

46. There is no uncertainty. Uncertainty cannot be caused by invoking inapplicable principle of limitation of time. Such equitable relief is sought to be denied by Discoms through such process. This claim should not be limited by statute. This is a statutory claim.

47. It is not defect of jurisdiction as High Court did not dismiss the petition. Finality of judicial certainty is reached only after pronouncement order by Hon’ble Supreme Court in Essar’s case. Law laid down by Supreme Court in Essar case is followed and then Court dismissed the petition. Hence, the claim is bonafide.

48. Arbitration Act does not restrict contractual obligations of the parties. It only gives effect to the choice of parties as regards to the forum where their disputes shall be taken.

49. Limitation Act is rule of procedure, not a substantive law and it governs process of litigation. Claim does not suffer by legal disability on the ground of

going to High Court. If claim is made after 3 years – then limitation of time applies. But claim is made in time and the claim is not disputed in retrospect. Statute of limitation is time frame that defines the length of time an individual has to file claim.

50. DISCOM will not get that benefit as claim was filed in time and that seeking parallel remedy through Hon'ble High Court through writ cannot be termed as lack of good faith.

51. Writ is inherent and equitable jurisdiction. It is an existing remedy. Hon'ble High Court did not usurp jurisdiction, it did not have. Maintainability of writ is not questioned.

52. There is no right without remedy. Both cannot be denied. Every right can be remedied by law. It is live claim.

53. There is equity in this fiduciary obligation through PPA. Equity should never lose jurisdiction especially in this case based on facts. PPA induces legitimate expectation of benefit which is substantive.

54. DISCOMs created exclusive legal situation intentionally to avoid fulfilling commercial obligation. Discoms did not also respond to petitioner with any reasons why MAT cannot be reimbursed. Discoms cannot position independence denying what is due at right time.

55. Contracting parties are under implied obligation to act in good faith in performance and enforcement of their contract. What reasonable person would have understood them to mean.

- (a) Only by non-action of DISCOMs limitation of time is arising.
- (b) If limitation arises, when will it commence?
- (c) Does limitation start independent from date of claim?
- (d) Is invoking limitation of time on facts of this case, substantial or procedural?

56. LANCO has regularly furnished Supplementary Bills to APTRANSCO/APPCC for reimbursement of MAT but the same are not paid.

57. This is statutory liability and claimed in time. The respondent cannot take a stand that it is time barred because the petitioner approached wrong legal authority to enforce his claim. It is a recurring liability happening year to year, whenever there is taxable book profit under MAT or taxable total income.

58. Therefore LANCO is entitled for reimbursement of Advance Income Tax (MAT) as per Article 3.8 of PPA. Limitation of time does not apply and claim is time barred is not legally valid.

59. It is substantial if it extinguishes right. The right of petitioner cannot be extinguished. The obligation of DISCOMs cannot be ignored. The intent of petitioner is relief not litigation. This denial of claim by limitation of time thus cannot extinguish right and also cannot invoke to bar the remedy. By invoking such limitation, DISCOMs cannot thrust risk on petitioner that claim is inadmissible. Passage of time cannot render claim inadmissible when claim is filed in time and such claim is contractual.

60. There is no limitation for action. Limitation of time espoused in this case cannot control claim. The thing that is required to be seen is whether there is timely presentation of the claim or not. If claim is made in time, it cannot be said that it is barred by time.

61. To satisfy the ingredients of S.14(2) of the Limitation Act in their favour it should be established before the adjudicating authority, that it is a civil proceeding that too prosecuted in a court. It must also be established that the prior proceeding is filed with due diligence and good faith. The claim made by the petitioner is reimbursement of tax paid by him as per terms and conditions under Article 3.8 of PPA. So, it is crystal clear, that it is a civil proceeding. This Commission is an adjudicating authority with regard to rights of the parties and

the claims of the parties and there is an appellate authority on the orders passed by the Commission. Therefore, it is discharging the functions of the court and it is deemed to be a court, as it is exercising the powers of the courts also. When a party is prosecuting the suit in good faith in a court having no jurisdiction is entitled to the exclusion of that period. This principle is laid down in *Globe Transport v Triveni* (1983)4 SCC 755. Even if the proceeding is filed before the court at which it is filed had no jurisdiction S.14 can be invoked if good faith is proved. Even if it is concluded at the appellate stage that the earlier court has no jurisdiction and initiated proceedings in the court which has good jurisdiction, the time spent in all the proceedings up to the appellate stage are also to be excluded under S.14 of the Limitation Act. S.14 contains general principle may be applied liberally but not in disregard of the express words of the section. This principle is laid down in *Ahmed Ali Khan v Asgarunissa* (1968)2 Andh WR 400.

62. Law of limitation only bars remedy of approaching court of law. It does not extinguish right. (Bombay Dyeing & Manufacturing Company Ltd., Vs State of Bombay AIR 1958 SC – 328H 1958 SCR 1122 [SC Constitution Bench].

Issue No. 3

63. In the result, the petition is allowed directing the respondents to reimburse the entire claim of the MAT with interest as prayed for.

This order is corrected and signed on this 13th day of June, 2011

Sd/-

(C.R.Sekhar Reddy)
Member

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