REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6036 OF 2012

A.P. Power Coordination Committee & Ors. .....Appellants

Versus

M/s. Lanco Kondapalli Power Ltd. & Ors. .....Respondents

W I T H

C.A.Nos. 6061 of 2012; 6138 of 2012; 9304 of 2013 and 6835 of 2015

J U D G M E N T

SHIVA KIRTI SINGH, J.

1. The leading matter – C.A.No.6036 of 2012 as well as C.A.No.6061 of 2012 are statutory appeals arising out of a common order dated 2.7.2012 passed by Appellate Tribunal for Electricity (for short, 'APTEL') whereby pleas under Section 14 of the Limitation Act, 1963 to explain the alleged delay in preferring claims by the common respondent – M/s. Lanco Kondapalli Power Ltd. (for brevity referred to as 'M/s. LANCO') a power generating company before the Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as 'the Commission') has been accepted and as a result the main claim in the leading matter relating to Bill for Capacity Charges and in the

other appeal for Minimum Alternate Tax (MAT) for 2001-2005 have been remanded for a follow up order by the Commission on the actual claims and interest. In respect of MAT, a concession on merits was recorded in respect of period 2006-2009 and for the earlier period (2001-2005) the contest was confined only to issue of limitation, as evidenced by Original Order of Commission dated 13.6.2011. Hence, through a SLP leading to C.A.No.6835 of 2015, the Appellant has chosen to make a direct challenge to aforesaid order to explain and overcome the alleged concession in respect of claim for reimbursement of MAT for the entire period of 2001-2009. C.A. No.6138 of 2012 is a statutory appeal to again challenge MAT for 2006-2009 but directed against appellate order dated 20.7.2012 by APTEL. The last matter, C.A.No.9304 of 2013 arises out of a SLP against the original order of Commission dated 8.8.2013 relating to MAT claim for the period 2009-2012. Since issues are same or similar between the same appellant and respondent in all these appeals, they have been heard together and shall be governed by this common judgment. Unless otherwise indicated the facts have been noted from the records of the main matter, i.e., C.A.No.6036 of 2012.

2. Instead of merits of bills raised by M/s. LANCO for capacity charges the issue of limitation has assumed greater significance and has thrown up two important points. First, whether the Limitation Act is applicable to a claim before the Commission and if the answer is in positive, then second, whether APTEL's order reversing the views of Commission and accepting claim under Section 14 of the Limitation

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Act is in accordance with law or not. It is not in dispute that if the order of APTEL is upheld, the issue of correctness or validity of capacity charges will stand remanded for decision by the Commission in accordance with law. So far as claim of M/s. LANCO for reimbursement of MAT for the period 2001-2005 is concerned, it shall stand rejected if APTEL's order on the issue of limitation is reversed, otherwise such claim for the aforesaid period as well as for later period upto 2012 will be governed by the present judgment on the issue of legality and admissibility of claim for MAT.

3. Before adverting to the issues noticed above and the rival contentions, it will be useful to notice the essential facts relevant for deciding the issues. M/s. LANCO is engaged in the generation and sale of electricity. Its Registered Office is at Hyderabad and it has set up its power project at Kondapalli Industrial Development Area in Krishna District of Andhra Pradesh. A.P. Power Co-ordination Committee, the appellant no.1, as the name suggests, was constituted on 07.06.2005 to ensure coordination between the four distribution companies of Andhra Pradesh who are appellant nos.3 to 6. M/s. Transmission Corporation of Andhra Pradesh (APTRANSCO) is the second appellant. At the relevant time the appellant no.2 was engaged in procurement of power for the Distribution Companies. In the first phase of power sector reforms, Andhra Pradesh State Electricity Board was unbundled into Generation and Transmission Corporation and subsequently the four Distribution Companies were

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notified by the Government on 31.3.2000 on account of unbundling of the Transmission Corporation in the subsequent phase of reforms.

4. There is no dispute between the parties that the erstwhile A.P. State Electricity Board had invited bids for short gestation power projects. M/s. LANCO also submitted its bid which was accepted by the Board and approved by the Government of Andhra Pradesh leading to a Power Purchase Agreement (for brevity, 'PPA') dated 31.3.1997. M/s. LANCO then set up a 355 MW (ISO) Combined Cycle Gas Power Plant. The completion of the plant took more than the scheduled period of 16 months. It is not necessary to go into reasons for the delay in the present proceeding. It will suffice to note that M/s. LANCO declared 25.10.2000 as the date of commissioning of their project but this was not accepted as the Commercial Operation Date (COD) by APTRANSCO. However, M/s. LANCO continued to generate power and delivered it to grid. It raised bills from 19.9.2000. While the charges for the energy delivered were accepted, the bill for capacity charges was disallowed on the ground that it was not in accordance with the PPA. On 8.9.2003 M/s. LANCO issued a notice of arbitration under Article 14 of the PPA. There is some dispute as to whether this notice was only for invoking the mechanism for informal dispute resolution or also a notice for resolution of dispute by Arbitration. The appellants through a reply dated 24.9.2003 requested for an ordinary meeting to discuss pending problems before considering the request for arbitration. On 14.10.2003 M/s. LANCO wrote a letter intimating the nomination of its Company's Secretary as

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its representative to participate in the proceeding for informal dispute resolution required by Article 14.1. It requested the other side to designate their representative and to intimate the date and venue of the meeting. The appellants through a letter dated 25.11.2003 designated their Chief General Manager to act as their representative but the meeting scheduled could not take place. On 26.3.2004, M/s. LANCO issued another notice for arbitration and intimated the name of Justice B.P. Jeevan Reddy as its arbitrator. Through a letter dated 8.4.2004, APTRANSCO raised various grounds in support of its stance that the arbitration clause was not enforceable, particularly in the light of Section 86(1)(f) of the Electricity Act, 2003.

5. M/s. LANCO did not accept the stand of appellants and filed an Arbitration Application bearing No.31 of 2004 on 27.4.2004 before the High Court of Andhra Pradesh at Hyderabad under Section 11(4) of the Arbitration and Conciliation Act, 1996 seeking appointment of arbitrator for APTRANSCO so that the disputes raised by it could be resolved through arbitration. APTRANSCO contested the maintainability of arbitration proceedings on various grounds including Section 86(1)(f) of the Electricity Act, 2003. While the matter before the High Court was still pending, the scope and effect of Section 86(1)(f) of the Electricity Act was decided by a judgment of this Court dated March 13, 2008 in the case of **Gujarat Urja Vikas Nigam Ltd.** v. **Essar Power Ltd.** (2008) 4 SCC 755. This Court held that all disputes between the licencee such as the appellants and generating companies such as M/s. LANCO require adjudication only by the

State Commission which is alone competent to either adjudicate the disputes or refer them for arbitration and to appoint arbitrator. It was clearly held that it is the State Commission or its nominee under Section 86(1)(f) of the Electricity Act, 2003 and not the Chief Justice or his nominee under Section 11 of the Arbitration and Conciliation Act, 1996 who will have the authority to appoint an arbitrator if it decides to refer the disputes to arbitration. This Court further clarified that except the power of appointing arbitrator getting shifted to the State Commission, conduct of arbitration even under Section 86(1)(f) of the Electricity Act would be governed by provisions of the Arbitration and Conciliation Act, 1996. Only in cases of conflict the Electricity Act would prevail.

6. In view of law settled by the judgment in the case of **Gujarat Urja** (supra), the Arbitration Application No.31 of 2004 was closed by the High Court on 18.3.2009 with liberty to M/s. LANCO to approach the Commission under Section 86(1)(f) of the Electricity Act. M/s. LANCO filed O.P.No.33 of 2009 before the Commission on 5.6.2009 to claim capacity charges on the basis of bills raised from 15.9.2000 onwards to 11.1.2001. The appellants resisted the claim *inter alia* on the ground of limitation. The appellants preferred a specific application for rejecting the O.P.No.33 of 2009 on the ground of limitation. M/s. LANCO preferred a reply in which Section 14 of the Limitation Act was invoked for seeking exclusion of time when the arbitration proceeding had remained pending with the High Court in the form of Arbitration Application No.31 of 2004. The Commission

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rejected the claim by order dated 13.6.2011 on the ground of limitation by holding that the time spent in the arbitration proceedings did not merit exclusion under Section 14 of the Limitation Act because it had not been pursued in good faith. M/s. LANCO preferred Appeal No.129 of 2011 before APTEL. That appeal was allowed by the impugned judgment presently under appeal, dated 2.7.2012. APTEL reversed the findings of the Commission on the issue of limitation and directed the Commission to pass appropriate follow up order on the actual claims and interest.

7. So far as claim of M/s. LANCO for reimbursement of MAT for various periods is concerned, the claim for the period 2001-2005 was rejected by the Commission on the ground of limitation but it got revived on account of common appellate order by APTEL dated 2.7.2012 and after the remand only a consequential order is required to be passed by the Commission. For other periods, the claim for reimbursement of MAT has been allowed in favour of M/s. LANCO. The Commission allowed the claim for the periods 2006-2009 and 2009-2012 on account of its earlier order in respect of similar claim in another case which elicited a concession by the counsel for the appellants, although in the written statement before the Commission the appellants had seriously contested such claim on merits. It is contended by Mr. V. Giri, learned senior counsel for the appellant that the concession was misconceived and unauthorized. Learned senior counsel for M/s. LANCO, Mr. Sundaram, fairly conceded that the issue relating to claim for reimbursement of MAT may be heard and

decided by us on merits and accordingly the parties have been heard in detail on the merits of such claim for the entire period, i.e., from 2001 to 2012. But in case the claim of MAT for 2001-2005 is held by us to be barred by limitation, it will not be considered on merits.

8. Appearing for the appellants, learned senior advocate Mr. V. Giri pointed out that in the impugned order under appeal APTEL has not considered the claim of capacity charges on merits and therefore this Court is not required to go into facts for deciding the merits of bills for capacity charges. On the issue of limitation he contended that there was no issue raised before the Commission that bar of limitation as per Limitation Act is not applicable to the proceedings before the Commission. He referred to the arguments advanced on behalf of M/s. LANCO before APTEL to highlight that even in appeal it claimed exclusion of time spent in arbitration proceedings under Section 14(2) of the Limitation Act and hence this Court should not allow M/s. LANCO to now urge that the Limitation Act cannot apply and hence there will be no bar of any limitation in preferring a claim before the State Commission. We have noticed that in para 28 of the judgment under appeal APTEL has noted that the appellant no.1 (M/s. LANCO) does not seriously dispute the fact that the Limitation Act would be applicable to the present case. But learned counsels have conceded that the issue whether Limitation Act is applicable or not is one of law and accordingly the parties have advanced detailed submissions on this issue. Hence we propose to consider these submissions also.

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9. From the above stand of the parties, the following issues emerge for our consideration and adjudication :-

(i) Whether the Limitation Act, 1963, particularly Section 3 and the Schedule will apply to any action instituted before the Commission under Section 86(1)(f) of the Electricity Act, 2003?

(ii) Whether the impugned order passed by APTEL permitting application of principles emerging from Section 14 of the Limitation Act, is against Law so as to warrant interference?

(iii) And whether on merits the claim for reimbursement of MAT is in contravention of relevant terms and conditions of the Power Purchase Agreement (PPA)?

10. At this juncture, relevant provisions or articles of PPA need to be noticed. They are as follows:

> **"Article 3.8 - Claims for Taxes on Income**
>
> Any advance Income tax payable for the Project in any month supported by a certificate of a chartered accountant approved by the Board (such approval not to be unreasonably withheld or delayed) shall be reimbursed by the Board. After the tax assessment is completed for any year, and the liability thereon is determined by the taxation authorities in India, the excess or shortfall in the tax liability so determined will be adjusted in the supplementary bill (as defined in Article 5.5) for the succeeding month or on the due date of payment thereof, whichever is later, subject to Article 3.9. Tax to be reimbursed will be calculated on the income from the project only, and calculated on the assumption that the Company is engaged solely in the ownership, design, financing, construction, operation and maintenance of the Project and will not include tax reimbursements of the previous year.

5.5. - Supplementary Bills

For payments due to the Company for reimbursement of taxes on income, incentives or taxes and duties levied on generation and/or sale of electricity, payments for periods of political Force Majeure affecting either Party or Non-Political Force Majeure affecting the Board or any other adjustments or payments due to the Company hereunder, the Company shall present a supplementary bill, in such form as may be mutually agreed upon by the Board and the Company, (duly supported by supporting data). Each supplementary bill shall be payable by the Board on the Due Date of Payment, except in case of supplementary bill for taxes on income. At least thirty (30) days prior to the date when income tax is required to be paid by the Company, the Company shall submit to the Board a supplementary bill for the same. This bill shall be payable by the Board within twenty-five (25) days of its presentation to the Board by the Company or at least five (5) days before the date on which the tax is required to be paid by the Company, whichever is later.

5.7 - Billing Disputes

Notwithstanding any dispute as to all or any portion of any bill submitted by the company to the Board, the Board shall pay the full amount of the bill provided that the amount of the bill is based on (a) a meter reading that has either been signed by both Parties or certified by the Company with respect to the Board's refusal to sign within three (3) days of the meter reading date and (b) the provisions of this Agreement. The Board shall notify the Company of any disputed amount, and the Company shall rectify the defect or otherwise notify its rejection of the disputed amount, with reasons, within five (5) days of the reference by the Board, falling agreement on which the provisions of Article 14 shall apply with respect thereto. If the resolution of any dispute requires the Company to reimburse the Board, the amount to be reimbursed shall bear interest at the Working Capital Rate applicable to the Board from the date of payment by the Board to the date of reimbursement. The Board may not dispute any amount after sixty (60) days following the Due Date of Payment therefor.

11.1 - Definition of Law

For the purposes of this Agreement, "Law" means the constitution of India and any act, rule, regulation, directive, notification, order or instruction having the force of Law enacted or issued by any competent legislature, or Government Agency.

11.2 - Definition of Change in Law

For the purposes of this agreement, "Change in Law" means
(i) any enactment or issue of any new Law,

(ii) any amendment, alteration, modification or repeal of any existing Law or any new or modified directive or order thereunder,

(iii) any change in the application or interpretation of any Law by a competent legislature or Government Agency in India which is contrary to the existing accepted application or interpretation thereof, in each case coming into effect after the date of this Agreement, provision for which has not been made elsewhere in the Agreement.

11.4 - Additional/Reduced Expenditures or Other Increased/Reduced Costs due to a Change in Law or Change in Permits

(a) Within sixty (60) days after the COD of the first Generating Unit or the end of any Tariff Year, the Company shall determine after accounting for the net economic effects on the Company during the period prior to the COD of the first Generating Unit or, as the case may be, such Tariff Year of any Changes in Law or Changes in Permits, based on an accounting conducted by an independent chartered accountant reasonably acceptable to the Board. If as a result of such accounting, the company suffers an increase in costs or a reduction in after-tax cash flow or any other net economic burden which it would not have experienced but for such changes in Law or Changes in Permits (taking into account the reasonable costs of financing of any capital improvement in the period prior to the COD of the first Generating Unit or, as the

case may be, such Tariff Year), the aggregate economic affect of which exceeds the equivalent of Rupees three (3) crores per 100 MW or pro-rata for any part thereof during the period prior to the COD of the first generating unit and Rupees one (1) crore per 100 MW or pro-rata for any part thereof during the period after the COD of the first Generating Unit, during any Tariff Year (excluding cost adjustments in respect of Changes in Law or Changes in Permits from any prior period), the Company may notify the Board of any proposed amendments to this Agreement required to put the Company in the same economic position it would have occupied in the absence of such cost increase reduction in the net after-tax cash flow or any other economic burden. Such notice shall be accompanied by a certification of the Company's independent chartered accountant and a reasonably detailed explanation of certification of any officer of the Company respecting the basis for such net economic burden increase. The amount of an net economic burden claimed by the Company shall be net of any insurance proceeds received in respect thereof.

(b) Within sixty (60) days after the COD of the first Generating Unit or the end of any Tariff Year, if after accounting as provided in subsection (a) for the net economic effects on the Company during the period prior to the COD of the first Generating Unit or as the case may be, such tariff year of any changes in law or Changes in Permits, the Company experiences a reduction in costs or an increase in after-tax cash flow or any other net economic benefit which it would not have experienced but for such Changes in Law or Changes in Permits, the aggregate economic effect of which exceeds the equivalent of Rs.3 crore per 100 MW or pro-rata for any part thereof during the period prior to the COD of the first Generating Unit or Rupees one (1) crore per 100 MW or pro-rata for any part thereof, following the COD of the first Generating Unit, during any tariff Year, the Company shall provide to the Board results of such accounting together with a certificate of the Independent chartered accountant and the Board, in response thereto may notify the company of any proposed amendments to this Agreement required in its good faith judgment to put the Company in the same economic position it would have occupied in the absence of such cost reduction, increase in the net after-tax cash flow or any other economic benefit. Such notice shall be accompanied

by a reasonably detailed explanation of a certification of an officer of the Company respecting the basis for such decrease.

(c) Only increased costs which are necessarily and unavoidably incurred in complying with or as a direct result of the Changes in Law or Changes in Permits taking into account, all reasonable steps which may be taken by the Company to minimize such increased costs, shall be considered as increased costs for the purposes of this Article.

(d) As soon as practicable during the period prior to the COD of the first Generating Unit or any Tariff Year after the Company becomes aware of any Change in Law or Change in Permits which could reasonably be expected to give rise to an increase/reduction in costs or reduction/increase in after-tax cash flow pursuant to paragraph (a) and (b), the Company shall provide an interim notice thereof to the Board describing, to the extent possible, the expected effect on the costs and the cash flow of the Company. The Company shall consult with the Board regarding such increased expenditures and the Company shall use all reasonable efforts to implement the Board's recommendations, if any, to minimize such increased expenditures consistent with Prudent Utility Practices and the Company's obligations under this Agreement. If prior to the end of any Tariff year the Company demonstrates on the basis of a certification of its chartered accountant that any Change in Law or Change in Permits would result in the Company's being unable to meet its payment obligations to its lenders under the Financing Documents on a current basis, then in addition to the Company's right under sub-section (a) but notwithstanding the time period for exercising such rights specified therein, the Company shall be entitled to propose amendments to this Agreement as provided in sub-section(a) and the Parties shall consider such proposal as provided in subsection (e) below, provided that any benefits which the Company is eligible to receive under subsection (a) shall be reduced by any benefits received by the Company prior to the end of the relevant period under this subsection.

(e) Within thirty (30) days after receiving any proposal pursuant to paragraph (a), (b) or (d), the Parties shall

meet and agree on either amendments to this Agreement or alternative arrangements to implement the foregoing. If no such agreement has been reached within ninety (90) days after any meeting pursuant to Article 11.3(a), (b) or (d), as the case may be, the proposals of the Parties shall be submitted to the Independent chartered accountant referred to in paragraphs (a), (b) and (d), as the case may be.

14.1 - Informal Dispute Resolution

(a) Each Party shall designate in writing to the other Party a representative who shall be authorized to resolve any dispute arising under this Agreement in an equitable manner.

(b) If the designated representatives are unable to resolve a dispute under this Agreement within fifteen (15) days, such dispute shall be referred by such representatives to a senior officer designated by the Company and a senior officer designated by the Board, respectively, who shall attempt to resolve the dispute within a further period of fifteen (15) days.

(c) The Parties hereto agree to use their best efforts to attempt to resolve all disputes arising hereunder promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to any and all non-privileged records, information and data pertaining to any such dispute.

14.2 - Arbitration

(a) In the event that any dispute is not resolved between the Parties pursuant to Article 14.1, then such disputes shall be settled exclusively and finally by arbitration. It is specifically understood and agreed that any dispute that cannot be resolved between the Parties, including any matter relating to the interpretation of this Agreement, shall be submitted to arbitration irrespective of the magnitude thereof, and the amount in dispute or whether such dispute would otherwise be considered justiciable or ripe for resolution by any court or arbitral tribunal. This Agreement and the rights and obligations of the Parties hereunder shall remain in full force and effect

> pending the award in such arbitration proceedings, which award shall determine whether and when termination of this Agreement if relevant shall become effective."

11. Although, we were taken through various other Articles of PPA but it is not imperative to reproduce all such provisions. Article 3.1 provides for capacity charge which is required to be computed as per Article 3.2 and is meant to be paid by the Board. This is in respect of the Cumulative Available Energy provided by the Project in respect of any tariff year, upto (but not exceeding) an amount calculated on the basis of Prescribed Plant Load factor. Since the issue of capacity charge is not required to be addressed by us on merits, further details need not detain us. Clause 3.8 has been read over again and again because it is of immense significance in deciding the issue relating to MAT. Article 5 contains various sub-articles relating to billing and payment. They provide for monthly tariff bills which are payable by the Board or the licensee on the Due Date of Payment. The supplementary bills are covered by Article 5.5. They cover different items and are required to be supported by supporting data. Such bills are also payable on the Due Date of Payment, except the supplementary bill for taxes on income which is to be submitted at least 30 days prior to the time when the income tax is required to be paid by the generating company. Such bill is payable by the Board within 25 days of presentation or at least 5 days before the date on which the tax is required to be paid by the company, whichever is later.

12. Article 5.7 relates to billing disputes and it refers to the provisions of Article 14 which governs Arbitration including Informal Dispute Resolution. Article 11 caters to the effects of Change in Law upon the rights and liabilities of the parties. This has assumed relevance in the present context on account of stand taken by the appellant that MAT does not fall under Article 3.8 governing claims for Taxes on Income but under Article 11.4 which provides an altogether different procedure for making claim for additional costs by the company on account of any Change in Law etc. In this context it may usefully be noted that Article 1 of PPA contains definitions for the purposes of the agreement. Article 1.2 adopts definition of several terms as defined in the Indian Electricity (Supply Act) 1948 and set out in Schedule B to the Agreement. Article 1.4 contains various general provisions such as - unless the context otherwise requires, the singular shall include plural etc. and vice versa and that " ....a reference to any Law shall be construed as a reference to such Law as from time to time amended or re-enacted."

13. Mr. Giri drew our attention to various provisions of the Electricity Act, 2003 particularly to Section 86 providing for various functions of a State Commission which include the function under clause (f) in Sub-Section (1) empowering the Commission to "adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration." He also referred to Section 94 which vests the Commission, for purposes of any inquiry or proceedings under this Act, with same powers as are vested

in Civil Court under the Code of Civil Procedure, 1908 in respect of various matters such as summoning and enforcing the attendance of any person and examining him on oath; discovery and production of any document etc; receiving evidence on affidavit; requisitioning of any public record; issuing commission for the examination of witnesses; reviewing its decisions, directions and orders; and any other matter which may be prescribed by the Commission. The Commission shall also have powers to pass suitable interim order and authorize any suitable person to represent the interest of the consumers in the proceedings before it. Section 95 declares that all proceedings before the Commission shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code and it shall be deemed to be a Civil Court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973. Section 158 is a solitary provision in Part XVI which provides for arbitration under the heading "Dispute Resolution". According to Section 158, any matter directed to be determined by Arbitration, unless there is expressed provision to the contrary in the license of a licensee, shall be determined by such person or persons as the Commission may nominate in that behalf on the application of either party; but in all other respects the Arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

14. On the basis of powers and functions of the Commission highlighted above and on account of law declared in **Gujarat Urja** (supra) as well as in **Tamil Nadu *Generation & Distribution Corpn.***

Ltd. v. PPN Power Generating Co. (P) Ltd., *(2014) 11 SCC 53,* the contention of Mr. Giri is that in discharge of its functions to adjudicate all disputes between the licensees and generating companies and/or in referring a dispute to arbitration under Section 86(1)(f) of the Electricity Act, the Commission deserves to be treated as a substitute and therefore equivalent of civil court for the purpose of attracting the bar of limitation provided under the Limitation Act, 1963. According to him the law laid down by this Court that Limitation Act applies only to civil courts in the strict sense of the term requires reconsideration in an appropriate case but in the present matter, since in the case of ***PPN Power Generating Co. (P) Ltd****.(supra)* it has been categorically held that the State Commission discharges judicial functions and judicial power of far reaching effect and has essential trapping of the Courts, the same should be sufficient to make the Limitation Act applicable to petitions or applications that come before the Commission requiring adjudication even of matters arising purely out of contract like in the present case and not from the statutory provisions of the Electricity Act. He also advanced a supplementary or alternative submission that there is nothing in the Electricity Act, 2003 to restore to any party the right to sue for a cause which has already become barred by law of Limitation, rather under the mandate of Section 175 of the Electricity Act, the Limitation Act has to be given full respect as a law for the time being in force unless any provision of the Limitation Act is found to be inconsistent with the Electricity Act. Only in a situation of conflict,

the electricity Act will have a superior or overriding force by virtue of Section 174 of the Electricity Act.

15. Yet another submission of Mr. Giri is that the matter does not attract Section 2(4) of the Arbitration and Conciliation Act, 1996 (for brevity 'Arbitration Act') rather Section 43 of the Arbitration Act shall govern the rights of the parties and it mandates that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in courts. It may however be noted here that in the case of ***PPN Power Generating Co. (P) Ltd.*** *(*supra) in para 65, the Court held that the Limitation Act would not be applicable in such matters for various reasons including Section 2(4) of the Arbitration Act which was extracted to highlight that sub-section (1) of Section 40, Sections 41 and 43 all in Part I of the Arbitration Act, would not apply to arbitration under any other enactment. Only rest of the Limitation Act would be applicable to the extent not inconsistent with the other enactment or any Rule made thereunder. On that basis in Paragraph 66 it was held that the provisions with regard to Limitation Act under Section 43 of the Arbitration Act would not be applicable to statutory arbitrations conducted under the Electricity Act, 2003.

16. In fairness to the submission of Mr. Giri, it is noted that in the ***PPN Power Generating Co. (P) Ltd.****(supra),* in Paragraphs 64 and 68, this Court was satisfied on facts itself that the principle of delay and laches was not attracted. Further, the provisions in the PPA in that case provided that the seat of Arbitration shall be in London and that

alone made part I of the Arbitration Act inapplicable to the arbitration proceeding and ruled out applicability of Section 43 also.

17. Mr. Giri has placed considerable reliance upon a judgment by three Judges of this Court in **State of Kerala** v. **V.R. Kalliyanikutty** (1999) 3 SCC 657. The question of law in that case was whether a debt which is barred by the law of limitation can be recovered by resorting to recovery proceedings under the Kerala Revenue Recovery Act of 1968. The High Court held that in the absence of any provision in the aforesaid Kerala Act creating a substantive right to recover time barred debts, such debts could not be recovered through the summary proceedings under that Act. As per Section 71 of the Kerala Act the Government could issue a notification making the provisions of the Act applicable to the recovery of "amounts due" from any person or class of persons to any specified institution or any class of institutions. The say of State Government and the State Financial Corporation was that the words "amounts due" will encompass time barred claims also. This Court placed reliance upon judgment of the Privy Council in the case of **Hans Raj Gupta** v. **Dehra Dun-Mussoorie Electric Tramway Co. Ltd.** AIR 1933 PC 63. It found that the Kerala Act did not create any new right rather it only provided a process for speedy recovery of moneys due. Therefore the person claiming recovery cannot claim amounts which are not legally recoverable nor can a defence of limitation available to a debtor in a suit or other legal proceeding be taken away under the provisions of the Kerala Act. The State supported its stand by highlighting the settled legal principle

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that the statute of limitation merely bars the remedy without touching the right. But such submission did not cut any ice. Relevant provisions of the Kerala Act led to a conclusion that although the necessity of filing a suit stood avoided, the claim which could be legally recovered was not enlarged. In para 16 this Court concluded thus :

> "……… An Act must expressly provide for such enlargement of claims which are legally recoverable, before it can be interpreted as extending to the recovery of those amounts which have ceased to be legally recoverable on the date when recovery proceedings are undertaken. ….."

In fact this Court looked to the scheme of the Kerala Act to come to a conclusion that "amounts due" are those amounts which the creditor could have recovered had he filed a suit.

18. It is noteworthy that besides drawing relevant inference from the provisions of the Kerala Act, in paragraph 11 the Court acted cautiously in interpreting the words "amounts due" in view of Article 14 of the Constitution. It expressed its views thus :

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> "….. Moreover, such a wide interpretation of "amounts due" which destroys an important defence available to a debtor in a suit against him by the creditor, may attract Article 14 against the Act. It would be ironic if an Act for speedy recovery is held as enabling a creditor who has delayed recovery beyond the period of limitation to recover such delayed claims."

In para 12 the Court referred to and relied upon judgment in the case of **New Delhi Municipal Committee** v. **Kalu Ram** (1976) 3 SCC 407 wherein this Court had similarly interpreted Section 7 of the Public

Premises (Eviction of Unauthorised Occupants) Act, 1958. The words "arrears of rent payable" were given a limited meaning by holding thus:

> "….. In the context of recovery of arrears of rent under Section 7, this Court said that if the recovery is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent the determination must be in accordance with law. …."
>
> (emphasis added)

19. Mr. Giri referred to paragraphs 98 and 99 of the judgment in the case of **Kihoto Hollohan** v. **Zachillhu** 1992 Supp. (2) SCC 651 to highlight the attributes of a "Court" and those of a Tribunal and also the relevant tests which led the court to hold that the Speaker while deciding certain disputes is a Tribunal. Similarly in the case of **Thakur Jugal Kishore Sinha** v. **Sitamarhi Central Co-operative Bank Ltd.** 1967 (3) SCR 163, this Court held that the Assistant Registrar of Co-operative Societies was a court within the meaning of the Contempt of Courts Act, 1952. This inference was based on the pronounced view that the subordination for the purpose of Section 3 of the Contempt of Courts Act means judicial subordination under the constitutional provisions and not subordination under the usual hierarchy of courts as per Civil Procedure Code or the Criminal Procedure Code. The next case in this series is that of **Brajnandan Sinha** v. **Jyoti Narain** AIR 1956 SC 66. In this case it was found that the Commissioner appointed under the Public Servants (Inquiries) Act

1850 (Act 37 of 1850) is not a court within the meaning of the term under Section 3 of the Contempt of Courts Act. This view found favour largely because the Commissioner did not have the legal capacity under that Act to deliver "definitive judgment". Mr. Giri has however sought to highlight paragraphs 14 to 18 of the judgment which deal with the essential attributes of a Tribunal so as to clothe it with the status of a court. Those paragraphs are as follows :

> "(14) The pronouncement of a definitive judgment is thus considered the essential 'sine qua non' of a Court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be predicated that he or they constitute a Court.
>
> (15) The Privy Council in the case of 'Shell Co. of Australia v. Federal Commissioner of Taxation', 1931 AC 275 (A) thus defined 'Judicial Power' at p.295:
>
>> 'Is this right? What is 'Judicial power'? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in – 'Huddart, Parker & Co. v. Moorehead', (1909) 8 CLR 330 at p.357 (B) where he says: 'I am of opinion that the words 'judicial power' as used in S.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action'.
>
> Their Lordships further enumerated at p.297 certain negative propositions in relation to this subject :
>
>> '1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision;
>>
>> 2. Nor because it hears witnesses on oath;

> 3. Nor because two or more contending parties appear before it between whom it has to decide;
>
> 4. Nor because it gives decisions which affect the rights of subjects;
>
> 5. Nor because there is an appeal to a Court;
>
> 6. Nor because it is a body to which a matter is referred by another body.

See 'Rex v. Electricity Commissioners' 1924-1KB 171(C)'

and observed at page 298:

> 'An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a Court of judicial power.'

(16) The same principle was reiterated by this Court in – 'Bharat Bank Ltd. v. Employees of Bharat Bank Ltd.', AIR 1950 SC 188 (D); and – 'Meqbool Hussain v. State of Bombay', AIR 1953 SC 325 (E), where the test of a judicial tribunal as laid down in a passage from – 'Cooper v. Willson', 1937-2 KB 309 (F) at p.340, was adopted by this Court :

> 'A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: - (1) The presentation (not necessarily orally) of their case by the parties to the dispute, (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal arguments by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law'.

(17) 'Maqbool Hussain's case (E)', above referred to, was followed by this Court in – 'S.A. Venkataraman v. Union of

> India', AIR 1954 SC 375 (G), where a Constitution Bench of this Court also laid down that both finality and authoritativeness were the essential tests of a judicial pronouncement.
>
> (18) It is clear, therefore, that in order to constitute a Court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement."

20. On behalf of appellants reliance was next placed upon case of **P. Sarathy** v. **State Bank of India** (2000) 5 SCC 355. A Bench of two Judges considered the scope of the word "Court" occurring in Section 14 of the Limitation Act and held that any authority or tribunal having trappings of a court is covered because "Court" does not necessarily have to be a civil court. On such reasonings the appellate authority under Section 41 of Tamil Nadu Shops and Establishments Act was held to be a court. One must notice here only that the judgment in the case of **P. Sarathy** (supra) has been considered in a recent judgment of this Court rendered by a Bench of two Judges in the case of **M.P. Steel Corporation** v. **Commissioner of Central Excise** (2015) 7 SCC 58. In this case it was held that although the Limitation Act including Section 14 thereof would not apply to appeals filed before a quasi-judicial tribunal such as the Collector (Appeals) mentioned in Section 128 of the Customs Act, 1962 but the principles underlying Section 14 of the Limitation Act would nevertheless apply as they advance the cause of justice. The Court repelled the submission that

Section 128 of the Customs Act excludes the application of the principles underlying Section 14 of the Limitation Act. In order to reach the conclusion that only principles underlying Section 14 and not the very Section itself can apply to tribunals having attributes of Court, in **M.P. Steel Corporation** (supra) the Court analysed the precedents and the Limitation Act 1963. It concluded that a quasi-judicial Tribunal will suffer Limitation Act only as per the statutory scheme under which it is created and functions. On the other hand, on its own the Limitation Act is applicable in respect of proceedings before courts proper, i.e., courts as understood in the strict sense of being part of the Judicial Branch of the State. In support of this principle several judgments of this Court were noted such as a three-Judge Bench judgment in **Commissioner of Sales Tax** v. **Parson Tools and Plants** (1975)4 SCC 22 in which reliance was placed upon **Ujjam Bai** v. **State of U.P.** AIR 1962 SC 1621. For the same purpose reliance was also placed upon judgment in the case of **Jagannath Prasad** v. **State of U.P.** AIR 1963 SC 416. A contrary view taken by a two-Judge Bench in the case of **Mukri Gopalan** v. **Cheppilat Puthanpurayil Aboobacker** (1995) 5 SCC 5 was therefore held to be at variance with at least five earlier binding judgments and also at odd with a later judgment in the case of **Consolidated Engg. Enterprises** v. **Irrigation Deptt.** (2008) 7 SCC 169. The latter judgment was considered in detail because the three-Judge Bench examined the provisions of the Arbitration and Conciliation Act 1996 and held that provisions of Section 14 of the Limitation Act 1963 would be

applicable to an application under Section 34 of the 1996 Act filed before a Civil Court for setting aside an Arbitral Award. This view in **Consolidated Engg.**(supra) has been further clarified by Ravindran, J. (as he then was) in his separate but concurring judgment, particularly in paragraph 44.

21. In an attempt to show that the word "Court" has been interpreted differently in context of different statutes, Mr. Giri referred to the case of **Trans Mediterranean Airways** v. **Universal Exports** (2011) 10 SCC 316. In paragraphs 44 and onwards a number of precedents were noticed as to the meaning and interpretation of the word "Court" and in paragraph 57 it was held that the word "Court" in Rule 29 of the Second Schedule of the Carriage by Air Act 1972 has been borrowed from the Warsaw Convention and had not been used in the strict sense as used in the procedural laws of this country. The word "Court" was, therefore, held to include the consumer forums. In para 58 it was reiterated that in legislations like the Consumer Protection Act the word "Court" cannot be given a strict meaning.

22. In reply on this issue, learned senior advocate Mr. Sundaram took a frontal stand that Limitation Act does not apply to a proceeding before the Commission because it is not a court stricto-sensu. For this proposition he relied upon judgments in the case of **PPN Power Generating Co. (P) Ltd.** (supra) and **M.P. Steel Corporation** (supra). He however floated a suggestion that even when no period of limitation is applicable for initiating action before the Commission, if this Court finds it necessary and in the interest of justice, then a

reasonable period may be indicated by this Court for the aforesaid purpose. He hastened to add that such reasonable period can only be as an illustration and not as a fixed period. According to him, a reasonable illustrative period indicated by the court, in practical application, can vary from case to case as per facts of each case. He also contended that even if a definite limitation period is found to be attracted, in view of law laid down clearly in **M.P. Steel Corporation** (supra), the principles underling Section 14 will be applicable and the same has been rightly applied by APTEL while rendering the impugned order under appeal.

23. Mr. Sundaram referred to **PPN Power Generating Co. (P) Ltd.** (supra) and placed reliance upon a solitary sentence at the end of paragraph 64 which reads thus :

> "In any event, the Limitation Act is inapplicable to proceeding before the State Commission."

He also placed reliance upon paragraph 65 which is as follows:

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> **"65.** The submission of the appellant that the Limitation Act would be available in case the reference was to be made to arbitration, in our opinion, is also without merit. Firstly, the State Commission exercised its jurisdiction to decide the dispute itself. The matter was not referred to arbitration, therefore, the Limitation Act would not be applicable. Secondly, Section 43 of the Arbitration and Conciliation Act would not be applicable even if the matter was referred to arbitration by virtue of Section 2(4) of the Arbitration Act, 1996. Section 2(4) of the Arbitration Act reads as under :
>
> > '2(4) This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an

> arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

24. Mr. Sundaram placed reliance upon judgment in the case of **M.P. Steel Corporation** (supra) to support his submission that Limitation Act applies only to courts stricto-sensu and not to quasi-judicial tribunals. It may be noted here that the matter in **M.P. Steel Corporation** (supra) had arisen from proceedings under the Customs Act and hence in that case there was no occasion to consider the issue whether the Limitation Act is applicable to an action initiated before the Commission by virtue of provisions of the Electricity Act, 2003. However, this judgment does help the respondents to an extent by holding that principles underlying Section 14 of the Limitation Act will be applicable even in matters filed before a quasi-judicial tribunal such as the Commission. But the moot question remains to be answered – whether the bar of limitation is required to be respected by the Commission on the ground that there is no provision in the Electricity Act conferring additional rights upon a party moving the Commission for relief so as to claim even such reliefs which stand barred by limitation before the Civil Court or even for arbitral proceedings. The other ancillary issue required to be answered is – whether by virtue of provisions of the Electricity Act 2003 the Limitation Act has been made applicable to an action before the Commission by express provision or even by necessary intendment.

25. Before answering the aforesaid two issues and then adverting to the question whether principles of Section 14 were rightly applied by APTEL (in case any period of limitation is held to be attracted), it will be proper to note some relevant contentions advanced by learned senior advocate Mr. Jayant Bhushan who has appeared for some of the respondents.

26. Mr. Bhushan pointed out that Commission is a creature of Statute and hence it cannot reject a claim on the ground of limitation unless limitation is found to be applicable by virtue of the provisions of the Electricity Act 2003. According to him if Limitation Act does not apply, courts cannot import limitation and the exceptional cases where this Court has introduced principles of delay and laches relate to proceedings before quasi-judicial tribunals which are vested with discretionary or suo motu jurisdiction like revisional power; the other exception being courts having extraordinary or equity jurisdiction such as writ jurisdiction vested in the High Courts or the Supreme Court. In support of the limited and exceptional applicability of principles of delay and laches as distinguished from limitation, Mr. Bhushan placed reliance upon an old judgment of Supreme Court of United States in the case of **Henry Hauenstein** v. **John A. Lynham** 100 U.S. 483 and also upon extracts from Halsbury's Laws of England and a judgment of Chancery Division in the case of **Re. Jarvis (Deceased) Edge** v. **Jarvis** (1958) 2 All.ER 336. Since the principle noted above is well settled, the above authorities need not be discussed particularly when this Court has taken similar view in the

case of **Bombay Gas Co. Ltd.** v. **Gopal Bhiva** 1964(3) SCR 709 and **Hindustan Times Ltd.** v. **Union of India** (1998) 2 SCC 242. In the latter case the issue under consideration was of delay in passing order levying damages under Employees Provident Funds and Miscellaneous Provisions Act, 1952. The Court distinguished long line of cases such as **State of Gujarat** v. **Patil Raghav Natha** (1969) 2 SCC 187 and **Ram Chand** v. **Union of India** (1994) 1 SCC 44 by pointing out that same principles will not apply to moneys withheld by a defaulter when he actually holds the money in Trust for the beneficiaries. Paragraph 19 of that judgment highlights that the concerned Statute does not contain any provision prescribing a period of limitation either for assessment or recovery and although the moneys payable into the Fund are for the ultimate benefit of the employees but there is no provision by which the employees can directly recover the due amounts. The power of recovery is vested in the statutory authorities to be exercised in the manner provided by the Statute and not by way of suit.

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27. Mr. Bhushan also referred to some judgments in support of the principle that Statute of limitation only bars a remedy through ordinary suit and not a remedy provided under a special Statute such as the Industrial Disputes Act which must be given effect to on the basis of various provisions contained therein. For this purpose he relied upon a Constitution Bench judgment in the case of **Bombay Dyeing & Manufacturing Co. Ltd.** v. **The State of Bombay** AIR 1958 SC 328. He sought to explain the Constitution Bench judgment in the

case of **M/s. Tilokchand and Motichand** v. **H.B. Munshi** (1969) 1 SCC 110 by pointing out that delay and laches were held to be applicable to a petition under Article 32 of the Constitution of India for the reason that such jurisdiction was always recognized and held to be a discretionary one.

28. Coming back to the issues relating to limitation, in view of law noticed above and for the reasons noted in **M.P. Steel Corporation** (supra), we respectfully concur and hold that by itself the Limitation Act will not be applicable to the Commission under the Indian Electricity Act 2003 as the Commission is not a Court stricto sensu. Further stand of the respondents that the Commission being a statutory tribunal, cannot act beyond the four walls of the Electricity Act also does not brook any exception. In the case of **PPN Power Generating Co. (P) Ltd.** (supra) this Court examined the issue of limitation in a very summary manner and without referring to the relevant provisions of the Electricity Act 2003, at the end of para 64 it was observed in a single sentence that the Limitation Act is inapplicable to proceeding before the State Commission. But in view of detailed discussion in the case of **M.P. Steel Corporation** (supra), we have held above that by itself the Limitation Act is inapplicable to proceeding or action brought before the State Commission. However, the Electricity Act 2003 requires a further scrutiny to find out whether by virtue of Section 175 of the Electricity Act or otherwise it can be inferred that the provisions of Limitation Act will govern or curtail the

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powers of the Commission in entertaining a claim under Section 86(1)(f) of the Electricity Act. Section 175 reads thus:

> "**175. Provisions of this Act to be in addition to and not in derogation of other laws**. – The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."

A plain reading of this Section leads to a conclusion that unless the provisions of the Electricity Act are in conflict with any other law when this Act will have overriding effect as per Section 174, the provisions of Electricity Act will not adversely affect any other law for the time being in force. In other words, as stated in the Section the provisions of the Electricity Act will be additional provisions without adversely affecting or substracting anything from any other law which may be in force. Such provision cannot be stretched to infer adoption of the Limitation Act for the purpose of regulating the varied and numerous powers and functions of authorities under Electricity Act 2003. In this context it is relevant to keep in view that the State Commission or the Central Commission have been entrusted with large number of diverse functions, many being administrative or regulatory and such powers do not invite the rigours of the Limitation Act. Only for controlling the quasi judicial functions of the Commission under Section 86(1)(f), it will not be possible to accept the contention of the appellant that by Section 175 the Electricity Act, 2003 adopts the Limitation Act either explicitly or by necessary implication.

29. The only other weighty contention of Mr. Giri that there is nothing in the Electricity Act 2003 to create a right in a suitor before the Commission to seek claims which are barred by law of limitation merits a serious consideration. There is no possibility of any difference of opinion in accepting that on account of judgment of this Court in **Gujarat Urja** (supra) the Commission has been elevated to the status of a substitute for the Civil Court in respect of all disputes between the licencees and generating companies. Such dispute need not arise from the exercise of powers under the Electricity Act. Even claims or disputes arising purely out of contract like in the present case have to be either adjudicated by the Commission or the Commission itself has the discretion to refer the dispute for arbitration after exercising its power to nominate the arbitrator. It is in view of such far reaching judicial powers vested in the Commission that in the case of **PPN Power Generating Co. (P) Ltd.** (supra) this Court advised the State to exercise enabling power under Section 84(2) to appoint a person who is/has been a Judge of a High Court as Chairperson of the State Commission. In such a situation it falls for consideration whether the principle of law enunciated in **State of Kerala** v. **V.R. Kalliyanikutty** (supra) and in the case of **New Delhi Municipal Committee** v. **Kalu Ram** (supra) is attracted so as to bar entertainment of claims which are legally not recoverable in a suit or other legal proceeding on account of bar created by the Limitation Act. On behalf of respondents those judgments were explained by pointing out that in the first case the peculiar words in the statute – "amount due" and in the second

case “arrears of rent payable” fell for interpretation in the context of powers of concerned tribunal and on account of aforesaid particular words of the statute this Court held that the duty cast upon the authority to determine what is recoverable or payable implies a duty to determine such claims in accordance with law. In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Section 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time barred claims, there is no conflict between the provisions of the Electricity Act and Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation on account of provisions in Section 175 of the Electricity Act or even otherwise the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. 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. We have taken the aforesaid view to avoid injustice as well as possibility of discrimination. We have already extracted a part of paragraph 11 of the judgment in the case of **State of Kerala** v. **V.R. Kalliyanikutty** (supra) wherein Court considered the matter also in the light of Article 14 of the Constitution. In that case the possibility of Article 14 being attracted against the statute was highlighted to justify a particular interpretation as already noted. It was also observed that it would be ironic if in the name of speedy recovery contemplated by the statute, a creditor is enabled to recover claims beyond the period of limitation. In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor - electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the Civil Court. Evidently, in absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. 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. But in appropriate case, a specified period may

be excluded on account of principle underlying salutary provisions like Section 5 or 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.

31. In the light of above there can be no difficulty in appreciating that M/s. LANCO rightly appreciated the hurdle of limitation in its way when such an objection was taken by the appellant and it rightly chose to seek exclusion of the period it was pursuing arbitration proceeding before the High Court, on the basis of principles underlying Section 14 of the Limitation Act.

32. The issue as to whether the impugned order by APTEL permitting application of principles on Section 14 of the Limitation Act is in accordance with law or warrants interference now requires to be answered on the basis of law as well as facts. In law, the APTEL could grant exclusion of certain period on the basis of principles under Section 14 in view of law laid down or clarified in **M.P. Steel Corporation** (supra). On facts, although the parties have argued at length, we find no difficulty in holding that APTEL has adopted a just and lawful approach in examining the relevant facts and in excluding the entire period claimed by M/s. LANCO which starts from the notice for arbitration dated 8.9.2003 given by M/s. LANCO, till the application of M/s. LANCO under Section 11 of the Arbitration Act

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before the High Court was finally disposed of on 18.3.2009. The issue whether the first notice dated 8.9.2003 or the next notice dated 26.3.2004 should be treated as notice for arbitration for the purpose of Section 21 of the Arbitration Act was rightly not pursued further by Mr. Giri after some initial arguments. But since this issue was touched, we have looked at the entire Article 14 of the PPA as well as the notice dated 8.9.2003 and we find no difficulty in holding it as the notice for arbitration which amounted to initiation of arbitral proceedings as contemplated by Section 21 of the Arbitration Act. A spirited argument was advanced on behalf of appellant that after the judgment of this Court in **Gujarat Urja** (supra) on 13.3.2008, the continuance of the arbitral proceedings before the High Court at the instance of M/s. LANCO should not be accepted as bona fide and that the commission was justified in not excluding this period of about one year on the ground that it was not bona fide and in such facts APTEL should not have taken a contrary view. Having considered submissions of the parties we find no merit in the aforesaid contention advanced on behalf of appellant. The view which we are going to take has been indicated by this Court in several judgments including **M.P. Steel Corporation** (supra). But the point requires no debate in view of clear stipulation in explanation (a) to sub-section (3) of Section 14 of the Limitation Act. This explanation reads as follows:

> "Explanation – For the purposes of this section, -
> (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted.........."

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The same conclusion is inevitable even on other relevant facts. The appellant had notice of the arbitral proceeding and after judgment in **Gujarat Urja** (supra), the appellant also took no steps to get the application under Section 11 listed and disposed of earlier to 18.3.2009. The averments and the materials are not sufficient to establish the claim of the appellant that the proceeding ceased to be bona fide after 13.3.2008. As a consequence of aforesaid discussion, the challenge to impugned order in respect of views taken on the issue of limitation in the light of principles of Section 14 of the Limitation Act fails.

Issues relating to MAT

33. The notice of Arbitration dated 8.9.2003, inter alia, made a demand for reimbursement of income tax payment made by M/s. LANCO, as per Article 3.8 of the PPA. No doubt the claim on this head for the subsequent years was not and could not be in this notice but the difference between the parties on the issue had already arisen. In the notice claims for advance income tax for the period 1.4.2001 to 15.6.2003 amounting to Rs.13.14 crores were included under the heading "General Nature of Claims" and under the heading "Relief Sought", M/s. LANCO claimed – "a declaration that the claimant is entitled to reimbursement of advance income tax paid by the claimant". Under the same heading M/s. LANCO mentioned that it reserves its rights to seek such other reliefs or amend/supplement the reliefs in the Statement of Claim as it may deem appropriate whenever

the same is filed before the Arbitral Tribunal. Thus the issue whether MAT is covered by article 3.8 of the PPA was clearly covered by Arbitration notice. The filing of upto date claims through amendment or otherwise before the Arbitral Tribunal could not happen for the obvious reason that application under Section 11 of the Arbitration Act itself remained pending till 18th March, 2009 before the High Court and thereafter before the Commission.

34. It has already been noted that the claim for reimbursement of MAT for the period 2001-2005 was rejected by the Commission on the ground of limitation and after impugned order by APTEL reversing such order, that claim stands remitted to the Commission for passing a consequential order. The claims for other periods have been allowed by the Commission. On account of our view indicated earlier upholding the order of APTEL on the issue of limitation, the claim of MAT for 2001-2005 cannot be treated as barred by limitation. Thus the claim of MAT for entire concerned period that is from 2001-2012 will be covered by our decision on Merits of Claim relating to MAT. The argument of Mr. Giri that MAT cannot be covered by the provisions in Article 3.8 of the PPA providing for claims for taxes on income because the appellant had not foreseen such eventuality in view of the then prevailing tax regime under which income from such power projects stood exempted, is noticed only to be rejected. The entire phraseology used in Article 3.8 of the PPA leaves no manner of doubt that parties were aware that tax regime keeps changing and therefore any advance income tax payable for the income from the

project only had to be reimbursed by the Board. As a successor of the Board the appellant cannot avoid the liability to reimburse advance income tax paid by the M/s. LANCO, on the ground that MAT was a new variety of tax concept introduced subsequently in which minimum tax became payable on the basis of mere book profits of even power generating companies. The argument that such tax is not on income from the project and therefore, not covered by Article 3.8 of the PPA is also found to be without any substance.

35. The objective of levying MAT, as declared by the Income Tax Department is to bring into the tax net "Zero Tax Companies" which inspite of having earned substantial book profits and having paid handsome dividends, do not pay any tax due to various tax concessions and incentives provided under the Income Tax Law. It is no body's case that in fact M/s. LANCO had not generated income from the project during the relevant years. The taxable income, of course, became amenable to MAT on account of Section 115JB. The Legislative changes in respect of MAT show that it came into force initially with effect from 1.4.1988 by introduction of Section 115J in the Income Tax Act, 1961 but this provision was amended to exempt power generating companies with effect from 1.4.1989 and from 1.4.1991 MAT became inapplicable because of deletion of Section 115J which was reintroduced with effect from 1.4.1997 by insertion of Section 115JA. But it was not made applicable to power generating companies till 31.3.2001. However, Section 115JA was withdrawn and Section 115JB was inserted with effect from 1.4.2001 to make

MAT applicable to all targeted corporate entities including power generating companies. The submission on behalf of the appellant that Section 115JB is a tax not on profit but of different character is based on misconception. No doubt this Section has a special provision for payment of tax by certain companies on the basis of its book profit which is deemed to be the total income of the assessee and is subjected to income tax at a specified rate. The provisions of Sections 115JA and 115JB have been also construed as a self-contained code in **Ajanta Pharma Limited vs. CIT,** 2010 (9) SCC 455 and in several other judgments as stand alone sections. But that does not change the basic nature of the provision. It remains a provision under the Income Tax Act and what is levied is income tax on the assessment of income as per such a special provision.

36. Article 1.4 of the PPA provides inter alia that reference to any 'Law' shall be construed as a reference to such Law as from time to time amended or re-enacted. This general provision in our view is sufficient to take care of all the taxes on income under Article 3.8 of the PPA notwithstanding different rates of income tax or other changes which may be brought about in the Income Tax Act. This view commends itself to us because such change in Law relating to Income Tax does not require any additional claim to be raised by the power generating companies. There is no specific amount - or rate which is to be reimbursed by the Board. Rather, the entire advance income tax payable requires reimbursement on account of Article 3.8 of the PPA provided of course that the accounts are maintained in the

manner required by the Agreement so that tax is only on the basis of income from the project. No such dispute has been raised in the present case.

37. The claim of the appellant that liability of MAT is on account of change in Law and therefore required M/s. LANCO to adopt the procedure for making claims under Article 11.4 of the PPA does not appeal to us for the aforesaid reasons. The entire stipulation in Article 11.4 of the PPA is in respect of additional or reduced expenditures or costs which have not been catered for and arise later due to change in Law. The burden on account of income tax as per Article 3.9 of the PPA cannot be treated as additional or reduced burden because the entire actual advance income tax payable for the project is required to be reimbursed by the Board. It is immaterial whether the income tax payable is high or low in any particular year. When there is already a special provision in respect of entire payable taxes on income under Article 3.8 of the PPA, that should have precedence over the general provisions in Article 11.4 of the PPA.

38. We have also considered other relevant provisions of the Income Tax such as definition of income, total income, tax and find that they do not help the case of the appellant in any manner. Section 2(43) defines 'Tax' to mean income tax chargeable under the provisions of Income Tax Act and 'Total Income' has been defined with reference to Section 5 which enlarges the scope of total income not only to income received or accrued but also deemed to be received or deemed to be accrued in India (for a resident). Simply because the exemption earlier

granted to power generating companies has been withdrawn so as to subject them to income tax liability under a special provision, cannot lead to any inference as suggested on behalf of the appellant that it is not an income tax but some other tax which is levied under Section 115JB of the Income Tax Act. Hence we hold the claim for MAT covered by Article 3.8 of the PPA and payable as such when requisite conditions stand satisfied.

39. In the final conclusion, we find no scope to interfere with the impugned order in these appeals. The appeals are dismissed but without any order as to costs.

.....................................J.
[VIKRAMAJIT SEN]

.....................................J.
[SHIVA KIRTI SINGH]

New Delhi.
October 16, 2015

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