

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 133 OF 2019

Dated: 29th April 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

GUJARAT URJA VIKAS NIGAM LIMITED

Sardar Patel Vidyut Bhavan

Race Course,

Vadodara – 390 007

.... Appellant(s)

VERSUS

1. APRAAVA ENERGY PRIVATE LIMITED

(Formerly known as, CLP India Private Limited)

Reqd Office:

6th Floor, Chanakya Building,

Off. Ashram Road

Ahmedabad – 380 009

Corporate Office:

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Andheri (East)

Mumbai 400 099

2. GUJARAT ELECTRICITY REGULATORY COMMISSION

1st Floor, Neptune Tower,

Opp. Nehru Bridge, Ashram Road

Ahmedabad – 380 009

... Respondents

Counsel for the Appellant (s) : Mr. Anand K. Ganesan
Ms. Srishti Khindaria
Ms. Harsha Manav

Counsel for the Respondent (s) : Mr. Amit Kapur
Mr. Janmali Manikala
Ms. Priyanka Vyas
Ms. Sudipta Mukhopadhyay
Ms. Bitika Kaur (Dy. Legal Counsel)
for R-1

Mr. Pallav Mongia
Mr. Tushar Srivastava
Mr. Ankush Mangal for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The dispute relates to parties including the appellant *Gujarat Urja Vikas Nigam Ltd* (hereinafter “GUVNL” or “the appellant” or “the procurer”) and the first respondent *Apraava Energy Private Limited* - formerly known as *CLP India Pvt Ltd* - (hereinafter “Apraava” or “the first respondent” or “the generator”), who are bound by terms of the *Power Purchase Agreement* dated 03.02.1994 (“the PPA”) which was amended twice by subsequent agreements i.e. *First Supplementary Power Purchase Agreement* dated 05.12.2003 (“Supplementary PPA-I”) and then the *Second Supplementary Power Purchase Agreement* dated 26.02.2014 (“Supplementary PPA-II”), wherein latter (Apraava) is the generator of electricity (using gas/Naphtha as fuel) while the former (GUVNL) is the procurer. The generator has undergone change of name more than once, the last such change being during pendency of this appeal on 27.08.2021, the Registrar of Companies having issued a fresh Certificate of Incorporation pursuant to name change on 29.09.2021, this having resulted in cause title being amended (by IA no. 1821 of 2021 submitted on 11.11.2021).
2. The controversy at hand had arisen on account of the appellant GUVNL having made deduction of Rs. 65.53 crores, including on account of Delayed Payments Charges (“DPC”) of Rs. 3.51 Crores, and towards Interest on Working Capital (“IWC”) from the monthly bills for July, August and December 2013 against amounts

paid by GUVNL i.e. for the months prior to November 2013, followed by Rebate of Rs 31.73 lakhs deducted from invoices raised for the period November 2013 to January 2014 (collectively referred to as “the Deducted Amounts”). The Petition No. 1433 of 2014 filed by Apraava has resulted in Order dated 31.07.2015 (“*the impugned Order*”) passed by *Gujarat Electricity Regulatory Commission* (“GERC”), holding that the deductions made by GUVNL from amounts due and payable to the first respondent Apraava are contrary to the terms of the the PPA and the Supplementary PPA-I”), GUNVL having been directed to refund the Deducted Amounts to Apraava including DPC of Rs. 3.51 Crores in terms of Article 6.3(c) of the PPA, it having been computed as Rs. 114,18,67,073/- (Rupees One Hundred and Fourteen Crores Eighteen Lakhs Sixty-Seven Thousand and Seventy-Three only), inclusive of DPC amounting to Rs. 48,65,31,509/- (Rupees Forty-Eight Crores Sixty-Five Lakhs Thirty-One Thousand and Fifty-Nine only), as on 31.03.2022.

3. The impugned order was rendered primarily following the previous ruling of this tribunal in earlier dispute between the same set of parties against the backdrop of same contractual arrangement in appeal (No. 37 of 2014) *GUVNL v. GERC & Anr.* (Appeal) decided by judgement dt. 03.03.2015 (hereinafter referred to as “the IWC Judgement”). The prime questions raised by the appellant to assail the impugned order are as to whether IWC has to be computed for the period in question (FY 2010-11 up to October 2013) on “normative basis” or on “normative or actual, whichever is lower basis” and as to whether GUVNL was justified in unilaterally deducting the said amounts from the Monthly bills of July, August and December 2013 on the basis of the Supplementary PPA-II

admittedly applied prospectively with effect from 01.11.2013. It may be mentioned here that though appeal against the IWC Judgement is pending before Hon'ble Supreme Court there is no order staying its operation.

4. The background facts may be noted in brief.
5. On 30.03.1992, at a stage much prior to coming into force of the Electricity Act, 2003, the Government of India vide its Notification ("Tariff Notification") had specified that two-part tariff for sale of electricity from gas-based power station shall comprise recovery of (i) Annual fixed charges consisting of interest on loan capital, depreciation, operation and maintenance expenses (excluding fuel), taxes on income reckoned as expenses, return on equity and *Interest on Working Capital at normative level of generation*; and (ii) Energy (variable) charges covering fuel cost recoverable for unit (Kilowatt hour) of energy supplied and based on norms stipulated in the Tariff Notification. The clause 1.1, provided for norms of operation and *plant load factor* as laid down by the authority for the time being, subject to modification under Section 43 A (2) of the Electricity (Supply) Act, 1948 as "*During stabilisation period 4500 hours/Kw/year*" and "Subsequent period 6000 hours/Kw/year". In terms of the clause 1.5(f)(v) of Tariff Notification, IWC includes "*Receivables equivalent to two months' average billing for sale of electricity calculated on normative plant load factor basis*".
6. The PPA was entered into by the generator – then, *Gujarat Torrent Energy Corporation Limited* ("GTEC") – on 03.02.1994 with the procurer - then, *Gujarat Electricity Board* ("GEB") for supplying

entire electricity generated from its Plant. The Clause 7.5.9 of Schedule VII of the PPA related to IWC inclusive of the part payable for fuel cost component. This clause was amended first on 05.12.2003 by the Supplementary PPA-I and then again on 26.02.2014 by the Supplementary PPA-II. The comparative analysis of the said clause in the three documents will be convenient to comprehend in following tabular form:

<i>PPA dated 03.02.1994</i>	<i>Supplementary PPA-I dated 05.12.2003</i>	<i>Supplementary PPA-II dated 26.02.2014 (with effect from 01.11.2013)</i>
<p>Interest on Working Capital shall mean the sum of all interest, bank charges and associated financing charges with respect to:</p> <p>(i) <u>Fuel costs for one month</u></p> <p>(ii) Operation and Maintenance expenses (cash) for one month</p> <p>(iii) Maintenance spares at actuals but not exceeding one year's requirement less value of one fifth of initial spares already capitalized; and</p> <p>(iv) Receivable equivalent to two months average bills for sale of electricity.</p>	<p>Interest on Working Capital shall mean the sum of all interest, bank charges and associated financing charges and shall be charged at 11% or any such other rate as may be agreed to between GPEC and GEB from time to time, with respect to Working Capital comprising of:</p> <p>(i) <u>Fuel Cost for one month at 70% PLF</u></p> <p>(ii)</p> <p>(iii)</p> <p>(iv) <u>Receivable equivalent to two times the amount of Monthly Invoice for Sale of Electricity</u></p>	<p>Interest on Working Capital shall mean the sum of all interest bank charges and associated financing charges and shall be charged at 11% or any such other rate as may be agreed to between GPEC and GEB from time to time, with respect to Working Capital comprising of:</p> <p>(i) Fuel Cost for one month at 70% PLF</p> <p>(ii)</p> <p>(iii)</p> <p>(iv) <u>Receivable equivalent to two times the amount of Monthly Invoice for Sale of Electricity which shall be calculated as two times the sum of Fixed Charges at normative level (70%) for the respective month and lower of actual fuel cost for the month or fuel costs for that one</u></p>

<i>PPA dated 03.02.1994</i>	<i>Supplementary PPA-I dated 05.12.2003</i>	<i>Supplementary PPA-II dated 26.02.2014 (with effect from 01.11.2013)</i>
(v) All other reasonable expenses as mutually agreed		<u>month on normative level.</u>

7. There is sufficient material on record to support this, and the appellant does not deny it as a fact, that the changes in the PPA as above occurred at the instance of the appellant.
8. On 27.09.2010, the generator had filed Petition No. 1053 of 2010 before GERC challenging certain deductions made by the procurer towards incentive payable on deemed generation when the power station is operated in open cycle mode, *inter alia*, including cost of one month's fuel charges on normative basis in computing IWC when natural gas is used as fuel. The procurer had objected stating that the generator was not entitled to IWC on normative basis.
9. While the above said petition was pending, the procurer vide its letter dated 20.05.2013, had sought to renegotiate the PPA and proposed certain amendments to be made therein citing adverse financial conditions and supply installed capacity which was resisted by the generator by its reply dated 27.05.2013. Similar exchange happened in September 2013 when it was proposed by the procurer by letter dated 06.09.2013 to amend the PPA by deleting the provision of IWC completely or, in the alternative, IWC on fuel cost component of 'receivables' to be paid on lower of actual or normative basis, in future invoices raised by CLP, as against the then existing regime of paying IWC on normative basis,

this being unacceptable to the generator, as conveyed by response dated 17.09.2013. Against this backdrop, the appellant proceeded to unilaterally deduct Rs 65.53 Crores which GUVNL had paid to CLP (without protest or demur) towards IWC on the fuel cost component for the period 2010-11, 2011-12, 2012-13 and 2013-14 (up to October 2013) from amounts due and payable to CLP i.e., from the Monthly Bills of July, August and December 2013 along with DPC.

10. On 25.11.2013, GERC passed Order in Petition No. 1053 of 2010 holding that when parties had negotiated the contract based on Tariff Notification, which provided for IWC to be paid on normative basis, the same would have to be paid to the Generating Company irrespective of actual fuel cost incurred.

11. Apraava and GUVNL had agreed to amend prospectively the provisions relating to IWC to change the basis for computation of IWC from actuals (as in PPA) to normative (as in Supplementary PPA-I), as proposed by GUVNL. By its Order dated 25.11.2013 passed by GERC in Petition No. 1053 of 2010 it was held as under:

“11. We have considered the submissions made by the parties and in order to examine the issue, it is necessary to refer to clause 7.5.9 of Schedule II of the PPA which reads as under:

Interest on Working Capital: shall mean the sum of all interest bank charges and associated financing charges with respect to:

- (i) Fuel Cost for one month at 70% PLF*
- (ii) Operational and Maintenance Expenditure (cash) for a month*
- (iii) Maintenance spares at actuals but not exceeding on year's requirement less value of one fifth of initial spares already capitalized and*

- (iv) *Receivable equivalent to two times the amount of Monthly Invoice for sale of Electricity*

All other reasonable expenses may be mutually agreed.

'The above definition provides that the parties to the PPA agreed that normative interest on working capital payable by the procurer to the seller consists of (i) all interest, (ii) bank charges and (iii) associated financing charges with respect to (i) fuel cost for one month irrespective of gas or naphtha use in the plant, (ii) O&M expenses for one month (iii) Maintenance Spares at actual but not exceeding one year's requirement less value of one fifth of initial spares, and (iv) Receivable of two months average billing for sale of electricity. The various parameters of interest on Working Capital agreed between the parties are normative parameters. It is also agreed between the parties that one of the components of interest on working capital is fuel cost for one month

....

11.1. ...

The provision for interest on working capital is to meet the cash outflow agreed between the petitioner on normative basis. The said Article does not indicate that any verification as to whether the payment is for working capital on gas, or any other fuel individually used as fuel. Moreover, the fuel defined in the PPA say it can be gas as well as well as naphtha. Hence the provision of this Article is applicable to both the fuels i.e. gas as well as Naptha.

11.2 The working capital is provided to the generators to meet the requirements of cash flow. The generator incurs the cost for certain activities such as procurement of fuel, O&M Expenses, maintenance spares etc to generate electricity. However, the same is reimbursed to the generator as per the agreed terms between the generator and the procurer either on actual or normative basis. Therefore, when the parties to the PPA agree to pay interest on working capital the generator is entitled to receive the interest and other changes on normative calculations only. The normative parameters are to restrict the overall cost of working capital irrespective of actual expenses incurred. In the present case, it was agreed between the petitioner and respondent that interest on fuel and other items as stated in the earlier para is required to be paid by the respondents in the form of working capital as fuel cost for one month on normative basis. It is therefore, not necessary to ascertain as to whether there is burden of interest of working capital on the generator or not, irrespective of fuel being used...

...

11.6 *In view of the observations, we are of the view that petitioner is eligible to receive the interest on working capital from the respondent on normative basis for one month as stated in Clause 7.5.9 of Schedule VII of the PPA irrespective of whether it is natural gas or naphtha is utilized.”*

12. The above decision of GERC rendered on 25.11.2013 was challenged by the appellant by appeal no. 37 of 2014.

13. As said before, the PPA was amended by Supplementary PPA-II on 26.02.2014 modifying clause 7.5.9 of Schedule VII of the PPA to the effect that IWC for fuel cost component would be computed or payable on lower of normative or actual fuel cost for one month.

14. On 10.06.2014, the generator filed Petition No. 1433 of 2014 before GERC seeking refund of the deductions by GUVNL towards interest on working capital along with DPC for the years 2010-2011, 2011-12, 2012-13 and up to October 2013.

15. Whilst the above-said petition was pending consideration, this tribunal rendered decision on appeal No. 37 of 2014 titled “*Gujarat Urja Vikas Nigam Ltd vs. Gujarat Electricity Regulatory Commission & Anr*” on 03.03.2015 upholding GERC’s Order dated 25.11.2013 in Petition No. 1053 of 2010 (“the IWC Judgment”). Interpreting the amended clause 7.5.9 of the Supplementary PPA-I dated 05.12.2003 it was held that working capital of CLP, *inter alia*, includes fuel cost for one month at normative PLF of 70% and not on actual amount incurred. The relevant part of the said decision may be quoted thus:

“19. The second issue is regarding interest on working capital when natural gas is used as a fuel:

20. According to the Appellant, the interest on working capital for one month fuel cost is not payable to the Respondent No. 2. Learned Counsel for the Appellant furnished calculations showing that average inventory carrying days are less than 10 days and for Cairn gas it is nil. It is further argued that there is no storing gas. Interest on working capital is required to be paid only when generator is required to part with cash for meeting operational expenditure of the plant. When the Respondent no.2 has no exposure to deploying the working capital on gas as fuel, then they could not claim interest on working capital for the same.

...

23. We find that the State Commission after examining the provisions of the PPA has held that the provision for interest on working capital is to meet the cash outflow agreed to between the Appellant and the Respondent no.2 on normative basis. The said Article does not indicate that any verification as to whether the payment is for working capital on gas, or any other fuel used has to be made. Moreover, the fuel defined in the PPA says it can be gas as well as Naptha. Hence, the provisions of this Article is applicable to both the fuels, i.e. gas as well as Naptha.

...

25. The interest on working capital as amended by Supplementary PPA dated 05.12.2003 provides as under:

“Interest on working capital”: shall mean the sum of all interest, bank charges and associated financing charges and shall be charged at 11% or any such other rate as may be agreed to between GPEC and the GEB from time to time, with respect to the Working Capital comprising of:

- (i) Fuel costs for one month at 70% PLF.
- (ii) Operation and maintenance expenses (cash) for one month.
- (iii) Maintenance spares at actual but not exceeding one year’s requirement less value of one fifth of initial spares already capitalized.
- (iv) Receivables equivalent to two times the amount of the Monthly Invoice for sale of electricity.

26. Thus, the PPA provides for interest on working capital to be calculated on normative basis. The working capital, inter alia, includes the fuel cost for one month at normative PLF of 70%. The fuel as defined in the PPA is natural gas and/or any liquid fuel selected by the Respondent no.2 for use in power station for generating electricity.

27. We find that the tariff agreed to between the parties is a normative tariff. Therefore, the interest on working capital has to be determined on normative basis. The proposition suggested by the Appellant of actual or normative whichever is less will not be applicable to the Respondent no. 2 in view of the specific provision of interest on working capital on the normative basis in the PPA.

....

31. This Tribunal in Appeal no.1 of 2011 judgment dated 05.01.2012 in the matter between DPSC Ltd. Vs. WBERC after considering the findings of the Tribunal in various other cases has held that when the Regulations provide for interest on working capital on normative basis then the interest on working capital has to be allowed on normative basis and not on actual amount incurred. The findings of the Tribunal will apply to the present case also where the PPA entered into between the parties provided for interest on working capital on normative basis.

45. Summary of our Findings: -

.....

b) Interest on working capital when natural gas is used as a fuel: There is no merit in the contention of the Appellant in this regard. The State Commission has correctly decided the fuel for one month at 70% PLF to be included in the working capital as per the terms of the PPA."

16. The above-quoted judgment of this tribunal rendered on 03.03.2015 (IWC Judgment) has been challenged by the procurer by Civil Appeal No. 4259 of 2015 which is pending before Hon'ble Supreme Court but, as already noted, there is no stay granted against operation of the IWC Judgment of this tribunal.

17. The impugned decision was rendered by GERC on 31.07.2015 adopting the principles set out in IWC judgment eventually giving directions for refund of the deducted amount. A petition for review (no. 1540 of 2015) brought by the appellant was dismissed by order dated 10.08.2018 whereafter the appeal at hand was preferred on 24.09.2018. The following part of the impugned order, dealing with the contentions of the appellant, needs to be quoted in extenso:

"8.3 ...

As per the above agreement both the petitioner agreed that the fuel cost which is considered for working capital is linked with PLF @ 70%. Thus, it was linked with the 70% PLF of energy and hence was not linked to actual generation. Similarly, the receivable is equivalent

to two times of amount of monthly invoices for sale of electricity which in original PPA was equivalent to two months average billing of sale of electricity. Thus, the shifting from the original PPA by the parties in the working capital calculations is limited to the fuel cost upto 70% of PLF on normative basis instead of actual basis and the receivables as two times amount of the monthly bill instead of average of two months billing. The above amendment made in the original agreement by the parties mutually by shifting the limitation of the fuel cost as a part of working capital upto 70% of PLF. Similarly, in case of the receivable as a part of working capital it was agreed between the parties the same is shifted from “average two months billing charges” to “two times the amount of monthly invoices for sale of electricity”. Thus, for calculation of two months receivables, the monthly bill is required to be evaluated first. The said agreement does not stipulate that while evaluating the receivable the fixed charge are required to be limited upto 70% of PLF and the variable charge is evaluated with consideration of the fuel actually consumed and required to utilise on actual basis with PLF of 70% and lower of the above two items be considered as a part of receivable.

8.4 We further note that the petitioner and the respondents had further agreed to amend the agreement by signing supplemental agreement dated 26.02.2014. In the said agreement, the parties agreed to amend the sub clause (iv) of clause 7.5.9 of schedule VII of the PPA as under:

Sub-clause (iv) of Clause 7.5.9 of Schedule VII shall be amended and restated as follow:

“Receivables equivalent to two times the amount of the Monthly Invoice for sale of electricity which shall be calculated as two times the sum of Fixed Charges at normative level (70%) for the respective month and lower of actual fuel cost for that month or fuel costs for that one month at normative level.”

In the said clause it was agreed between the parties that the receivable which consists of fixed and variable charges be calculated as the sum of the fixed charge with consideration of PLF at normative level of 70%, while the variable charge/fuel charge be determined based on the actual fuel cost in the said month or the fuel consumption at normative PLF level and whichever is lower. Thus, by way of an amendment dtd. 26th Feb 2014 in PPA the parties to the PPA agreed to the change in the methodology for calculation of working capital. We also note that the parties to the PPA agreed in supplemental PPA dated 26.02.2014 as under:

“Article 2 – Effective date

2.1 Subject to the fulfillment of the following condition by GUVNL, this Agreement shall be deemed to have been effective from November 1, 2013:

(i) GUVNL shall refund deductions made by it towards ‘Income Tax on Incentive’ and amounts withheld on account of cash constraints amounting to INR 212.72 Crores and detailed in Annexure A of this

Agreement plus delayed payment charges on amounts withheld on account of cash constraints. With respect to refund of deductions made on 'Income Tax on Incentive' by GUVNL, should be the Comptroller & Auditor General (CAG) be of the view, as may be recorded in its final audit report on "reimbursement of tax to GPECL" that income tax on incentive payments are not reimbursable by GUVNL in terms of the GOI Notification No. S.O.251 (E), dtd 30.03.1992. then GUVNL shall be at liberty to raise a dispute against CLP India in terms of the PPA. In such an event, it is clarified that GUVNL shall not make any unilateral recovery of such amounts as stipulated in the PPA until resolution of such disputes.

2.2 It is clarified that the amendments contained herein are prospective in nature. It is further clarified that to the extent the conditions mentioned aforesaid remain unfulfilled, this Agreement shall not be effective, enforceable and/or binding."

In the said Article it is admitted between the parties the supplemental PPA dated 26.02.2014 becomes effective from 1st November, 2013.

8.5 From the above provisions of the PPA, it transpires that the parties to the PPA, i.e. petitioner and the respondent mutually agreed to amend in the original PPA dated 3.02.1994 in respect of the components of working capital stated in clause 7.5.9 of the PPA.

8.6 In the supplemental PPA dated 5.12.2003, it was agreed between the parties that the parameters as stated in clause 7.5.9 of schedule VII are normative parameters. The only amendment in the said PPA agreed between the parties is with regards to the working capital components (i) fuel cost for one month. However, the same is limited to 70 % PLF level only. Similarly, the receivable is restricted two times the monthly invoices for sale of electricity which is based on the monthly bill required to be evaluated and the same be doubled as 2 months receivable while calculating the working capital."

- 18.** It is argued by the appellant that the receivables under Clause 7.5.9(iv) of the PPA which factors in receivables equivalent to two times the amount of the Monthly Invoice for sale of electricity, the Monthly Invoice (consisting of the fixed charges and variable charges) is necessarily the actual invoice raised by the first Respondent since the receivables crystallize after the generation has taken place and bills for the generation are raised, the variable charges being based on actual fuel cost incurred by the generator for the month. Therefore, without actual generation,

no fuel cost having actually been incurred the same cannot become a part of receivables to be recovered from appellant.

19. It is submitted by the appellant that variable charges as part of Monthly Invoice to be included in the computation of receivables forming part of the working capital requirement, has to be considered in a contextual and purposive manner wherein the requirement to fund for the time gap from the time when fuel cost is incurred till the variable cost is billed as receivables in the monthly bill raised to recover the same through tariff from the Procurers of electricity. This, the argument is, necessarily relates to the actual fuel quantum used and cost incurred and not any higher quantum or notional higher amount for the purpose of computing the receivables and interest on working capital. The normative aspects in the computation of interest on working capital suggested by the appellant is two months period and not the quantum of receivables. It was argued that the method applied would mean the generator collects variable charges in excess of actual cost of fuel.

20. It is the submission of the appellant that the view canvassed by first respondent and accepted by GERC is capricious and arbitrary, since the purpose and objective of providing for receivables in the computation of working capital requirements, viz. to enable the generator to find the money to fund the tariff charges during the period from incurring the cost until its recovery, has not been considered. Such exposure to costs prior to recovery of tariff is the costs for one month until raising of invoice and receivables for the period after raising of invoice and until due date of payment. The period of two months is provided to take care of

the period between the date of billing and the due date of payment i.e. 60 days from the date of billing.

21. The appellant further submitted that the intention of the parties at the time of signing of the PPA on 03.02.1994 and the Supplementary PPA on 05.12.2003 could never have been that the variable charges component at 70% PLF would be the fuel cost to be included in the computation of two-month receivables irrespective of whether the actual invoice includes such amount or not or that the fuel cost is actually incurred or not, such a claim made by the generator being a case of unjust enrichment at the cost of the consumers at large. It was submitted that since the due date of the invoice is after 60 days, the period of 60 days is financed through interest on two months receivables. It is submitted that the receivables are based on actual invoice amount and if an amount is not part of the actual invoice, then it cannot be considered as a receivable. The receivables cannot be considered on a notional basis when actual invoice amounts are available.

22. The appellant argued that GERC has erred in interpreting the fuel cost of one month at 70% PLF at Clause 7.5.9 (i) of the PPA amounting to all components of the interest on working capital to be computed on a normative basis of fuel cost to be allowed at 70% PLF irrespective of the actual percentage of the use of fuel during the month. It is submitted that the omission of such reference to 70% PLF in the sub-clause (iv), including in sub-clause (i), is significant, it being reflective of the intention that it should be actual rather than normative, such being the harmonious construction. It is further submitted that the expression “at 70% PLF” used in Clause 7.5.9 (i) refers to a ceiling or maximum

quantum of interest on working capital i.e. permissible, viz. at the targeted level at which the generating company recovers its full fixed cost as per Clause 7.1 of Schedule VII of the PPA as amended by the Supplementary PPA-I.

23. The appellant also argues in the alternative, without prejudice to the above contention on interest on working capital, that GERC has erred in directing refund of the rebate availed by the appellant as per the terms of the PPA for payments made prior to due date. Asserting that payments were made and the rebate claimed as per the PPA, the impugned order having the effect of depriving the appellant of right to rebate for early payments, the State Commission having erred by directing delayed payment charge to be also paid with refund of the deducted amounts glossing over the fact that there was a serious dispute on the interpretation, there being no case made out of any illegal deduction or illegal recovery of any amount by the appellant.

24. We have considered the submissions of the appellant GUVNL but find no substance therein. We agree with the first respondent Apraava that the issue of manner of computation of IWC raised by appellant in the present appeal has been settled by this tribunal in the IWC Judgement. We may elaborate this.

25. In terms of Clauses 1 and 1.5 (f) (v) of the Tariff Notification dated 30.03.1992, the 'Receivables' for the purpose of IWC are payable on normative PLF. It is undisputed that Fuel cost is part of receivables, being one of the components for computation of IWC, payable to Apraava as part of its tariff on normative basis i.e., at 70% PLF in terms of Clause 7.5.9 of Schedule VII of the PPA. It is

important to note that despite Tariff Notification dated 30.03.1992 providing for computation of IWC on normative basis, the parties by way of Clause 7.5.9 of Schedule VII of PPA had agreed that IWC payable for fuel cost component shall be linked to actual fuel cost incurred by Apraava for one month. This arrangement was suitable to GUVNL at that point of time because it was anticipated that the availability of the Plant during the period (i.e., 1994 to 2003) would be below normative PLF of 70%. Accordingly, till execution of Supplementary PPA-I (on 05.12.2003), GUVNL had paid IWC for fuel cost component as part of receivables on actual basis. The inconsistency between Clause 7.5.9 of Schedule VII of the PPA and Clause 1.5 (f) (v) of Tariff Notification dated 30.03.1992, was prospectively rectified by way of an amendment vide Supplementary PPA-I at the instance of GUVNL, in terms of which the amended Clause 7.5.9 of Schedule VII (which continued to bind the parties till 01.11.2013 when Supplementary PPA-II came into effect) computation of IWC towards the fuel cost component was linked to PLF at 70% and not actual cost incurred towards fuel. The Supplementary PPA-I is in accordance with the Tariff Notification dated 30.03.1992. Therefore, tariff norms agreed in the Supplementary PPA-I have to be read in consonance with the Tariff Notification dated 30.03.1992.

- 26.** It is clear from the relevant part of the IWC judgment of this tribunal quoted earlier that it was concluded that (i) Clause 7.5.9 of Schedule VII as amended by Supplementary PPA-I provides for determination of IWC on normative basis; (ii) the working capital of Apraava, *inter alia*, includes the fuel cost for one month at normative PLF of 70% and not on actuals; (iii) for the purpose of computing working capital requirement of Apraava, fuel cost on

actuals will not be applicable in view of the specific provision as amended by Supplementary PPA-I; and that (iv) the contention of GUVNL that “*Interest on working capital is required to be paid only when generator is required to part with cash for meeting operational expenditure of the plant*” was expressly rejected. We agree with the generator that the issues raised in earlier round by this very appellant but rejected by the IWC Judgment cannot be re-agitated.

27. The dispute at hand relates to the period from FY 2010-11 up to October 2013(FY 2013-14) which is prior to Supplementary PPA-II. For the period in question, the parties were *ad idem* that various components of IWC were to be computed on normative basis with effect from 01.07.2003, as was demonstrated on basis of Clause 6 of Supplementary PPA-I, Tariff Notification dated 30.03.1992 and letters dated 10.10.2005, 20.05.2013, 27.05.2013 and 06.09.2013. It was only after the elapse of nearly 10 years after the execution of Supplementary PPA – I (on 05.12.2003) that, by letter dated 06.09.2013 GUVNL sought to renegotiate the PPA as amended by Supplementary PPA-I proposing that IWC on fuel cost component of ‘receivables’ be paid on lower of actuals or normative basis in lieu of the prevailing regime of paying IWC on normative basis. Noticeably, it (GUVNL) had had withheld payment of Rs. 175 Crores leading eventually to execution of new terms as recorded in the Supplementary PPA-II, the act of withholding being found improper. Apraava had expressly rejected the proposal dated 20.05.2013 of GUVNL by letter dated 27.05.2013 on the ground that it was contrary to Supplementary PPA-I and Tariff Notification dated 30.03.1992. We agree that the letters dated 20.05.2013, 27.05.2013 and 06.09.2013 seen against the

backdrop of facts showing that GUVNL had paid IWC on normative basis between 05.12.2003 to 01.11.2013 leads to the inference that the contemporaneous understanding of the parties was that IWC was to be computed on normative basis, this to prevail till the execution of Supplementary PPA-II. There was indeed an express understanding between GUVNL and Apraava for the period covered by Supplementary PPA-I that irrespective of actual expenditure, for the purposes of computation of IWC, fuel cost is to be factored in on normative basis at 70% PLF, the intent being to reduce the financial liability of GUVNL. Noticeably, it was proposal of GUVNL only by letter dated 06.09.2013 that the new mechanism for computing IWC on the basis of actuals or normative basis (whichever is lower) shall be implemented for future invoices.

28. Thus, it was by way of Supplementary Agreement-II entered into on 26.02.2014 that Clause 7.5.9 of Schedule VII of the PPA was amended to the effect that IWC for fuel cost component would be computed or payable on lower of normative or actual fuel cost for one month instead of normative basis solely. In terms of Clauses 2.1 and 2.2 of Supplementary Agreement-II, the parties specifically agreed that this amendment to clause 7.5.9 of Schedule VII is prospective and shall be applicable with effect from 01.11.2013. As such, there can be no doubt as to the fact that for the period anterior to 01.11.2013 (i.e., Effective Date of Supplementary PPA-II), the computation had to be on normative basis.

29. It is a cardinal rule of interpretation that all provisions of the contract must be harmoniously interpreted, and the interpretation so given cannot and ought not lead to absurdity.

30. In *Rajasthan State Industrial Development and Investment Corporation and Anr vs. Diamond & Gem Development Corporation Ltd. and Anr* (2013) 5 SCC 470, it was held thus:

*“23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Vide *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, (2004) 8 SCC 644, and *Polymat India (P) Ltd. v. National Insurance Co. Ltd.* (2005) 9 SCC 174.”*

[Emphasis supplied]

31. In *Nabha Power Ltd. vs. Punjab State Power Corporation Ltd. and Ors* (2018) 11 SCC 508, the ruling was as under:

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it...”

[Emphasis Supplied]

32. It is a settled principle of law that the terms of the contract must necessarily be interpreted literally unless there exists some ambiguity therein. If there is no ambiguity in the contractual provisions and the parties were performing their obligations without dispute, it is impermissible to imply terms as would be necessary to accept the contention of the respondent herein. The interpretation suggested by GUVNL is contrary to express language of Supplementary PPA-I. It seeks to imply terms into the Supplementary PPA-I which cannot be done.

33. In our considered opinion, the view canvassed by the appellant will lead to an anomalous situation if, for the purpose of computing IWC, receivables are computed on actuals but fuel cost is determined on normative. We agree that fuel cost ought to be considered on normative basis as indeed for all heads under Clause 7.5.9, for the period governed by Supplementary PPA-I. In view of the foregoing, we hold that for the purposes of IWC computation, fuel cost is to be considered as per Clause 7.5.9 (i) of Schedule B as amended by Supplementary PPA-I as already decided by IWC Judgment.

34. It is clear from the material on record that pursuant to the amended clause 7.5.9 of Schedule VII in the Supplementary PPA-I, GUVNL had paid IWC on fuel cost component of receivables on normative basis regularly for a period of 10 years i.e., from 05.12.2003 to October 2013, without demur or protest. It may be recalled that GUVNL had proposed to amend the PPA (resulting in Supplementary PPA-I) to the effect that IWC on fuel component of “receivables” is paid on the lower of actuals or normative basis. The proposal was given effect to by execution of Supplementary

PPA-II, but prospectively. In these circumstances, the appellant's argument that it had paid IWC on fuel cost component at normative basis inadvertently or that the Supplementary PPA-I intended otherwise cannot be accepted it being contrary to its contractual obligation. It is difficult to accept that the amounts duly paid GUVNL for over ten years pursuant to Supplementary PPA-I had resulted in unjust enrichment for Apraava in 2014.

- 35.** The Clause 6.2(c) of the PPA provides that notwithstanding any disputes between Apraava and GUVNL, billed amounts are to be paid on schedule as under, the provision reading thus:

“ ...

(c) Disputes

Within ninety (90) days from the receipt of an invoice, either Party may serve notice giving details to the other Party that the amount of any invoice is in dispute. If the Party receiving the notice agrees with the contentions in the Notice, it shall in the case of GTEC, adjust the invoice or refund the amount within seven (7) Days or in case of GEB pay the additional amounts within seven (7) Days. If the Parties cannot resolve the dispute immediately, all amounts, whether in dispute or not are to be paid on schedule.”

- 36.** Since the contract stipulates that billed amounts are to be paid on schedule, notwithstanding any disputes between the parties, unilateral retrospective deductions by GUVNL are clearly illegal, arbitrary and contrary to equity and fair play. The direction for refund of the said amounts with *Delayed Payment Charge* (“DPC”) given by GERC in terms of Clause 6.3(f) as amended by Supplementary PPA-I cannot be faulted.

- 37.** For the foregoing reasons, we find no merit in the contentions urged by the appellant in this appeal which consequently is dismissed. The appellant must comply with the

directions of GERC as to refund of the deducted amount with DPC without further delay.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 29TH DAY OF APRIL, 2022**

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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