

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 160/MP/2023

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 9th May, 2024

In the matter of:

Petition under Section 79(1)(f) and Regulation 45 of the CERC Tariff Regulations, 2014 and Regulation 59 of the CERC Tariff Regulations, 2019 seeking Commission's intervention to allow NLCIL, to claim LPS from 1.1.2018 till the date of disbursement of LPS on account of the delay in payment, against order dated 19.03.2019 in Petition No. 54/MP/ 2018.

And

In the matter of:

NLC India Limited.,
135/73, EVR Periyar High Road
Kilpauk, Chennai -600010

.....**Petitioner**

Vs

1. Rajasthan Urja Vikas Nigam Limited
Ground Floor, Vidyut Bhawan,
Janpath, Jaipur-302005
2. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Heavy Industrial Area,
Jodhpur, Rajasthan-342003.
3. Jaipur Vidyut Vitran Nigam Limited,
Vidyut Bhawan, Janpath, Jaipur,
Rajasthan-302 005.
4. Ajmer Vidyut Vitran Nigam Limited,
Old Power House Hathibhata, Jaipur Road,
Ajmer, Rajasthan -305 001

.....**Respondents**

Parties Present:

Ms. Anushree Bardhan, Advocate, NLCIL
Ms. Sristi Khindania, Advocate, NLCIL
Ms. Surbhi Kapoor, Advocate, NLCIL
Ms. Akansha Wadhwa, Advocate, NLCIL
Shri Bipin Gupta, Advocate, RUVNL
Shri Paramhans, Advocate, RUVNL



ORDER

This Petition has been filed by the Petitioner, NLCIL, seeking the following relief(s):

- (a) *Admit the Petition;*
- (b) *Permit NLCIL to claim the delayed Late Payment Surcharge of Rs 6.28 crores from 1.1.2018 onwards till the date of disbursement of LPS; and*
- (c) *Pass such other order(s) as this Hon'ble Commission may deem just and proper in the circumstances of the case.*

Background of the case

2. NLCIL is a company incorporated under the Companies Act, 1956, and is owned and controlled by the Central Government. The Petitioner owns and operates the Barsingsar Thermal Power Station (2 x 125 MW) (in short, 'the generating station') in Rajasthan with Circulating Fluidised Bed Combustion lignite fired boilers feeding to Turbines. The allocation of power to Respondents 2 to 4 is based on the letter dated 29.9.2011 of the Energy Department, Government of Rajasthan. Unit-II of the generating station was declared under commercial operation on 29.12.2011, and Unit-I/generating station on 20.1.2012. The Petitioner entered into a Power Purchase Agreement (PPA) on 8.10.2003 with the Respondents 2 to 4. Respondent 1 is carrying out the power trading business of the State Distribution Companies viz., Respondents 2 to 4 herein, collectively referred to as the 'Rajasthan Utilities'

3. Due to non-payment of bills raised by NLCIL as per the ABT mechanism by the Rajasthan Utilities from December 2013, NLCIL filed Petition No. 54/MP/2018 before this Commission and the Commission vide its order dated 19.3.2019, decided as under:

"19. Accordingly, Rajasthan SLDC (Respondent No.5) is directed to ensure the availability of declaration, scheduling, despatch and Deviation Settlement Mechanism and issuance of necessary monthly/weekly Energy Accounts/ Deviation Settlement Accounts etc. as per IEGC and other applicable regulations in respect of this generating station.

20. Consequent upon the above, the amounts claimed by the petitioner not having been disputed, the Respondent No. 1/Rajasthan Discoms are liable to pay to the Petitioner the principal amount of Rs.25.63 crore (as on 31.12.2017) along with the



delayed payment surcharge of Rs.35.99 crore (as on 31.12.2017) towards capacity charges based on availability and energy charges, based on energy scheduled by the respondents. The payments shall be made within 30 days of this order. These Respondents are also directed to pay the fixed charges with effect from 1.1.2018 and onwards, based on availability and energy charges on the quantum of energy scheduled by the Respondents.”

4. On the basis of the above order, the Rajasthan Utilities paid the principal amount of Rs. 25.63 crore in April 2019 and May 2019. The Late Payment Surcharge (LPS) was paid in May 2019 by the Jaipur Discom and Ajmer Discom. The Jodhpur Discom, however, paid LPS only in October 2019 and November 2019. The details of the amounts paid by the Rajasthan Utilities to NLCIL is as under:

Date	Principal amount released by the Utilities (Rs in crore)			
	JVVNL	AVVNL	JdVVNL	Total Principal
22.04.2019	-	-	2.00	2.00
23.04.2019	-	-	2.00	2.00
24.04.2019	-	-	2.00	2.00
25.04.2019	-	-	2.20	2.20
15.05.2019	-	2.00	-	2.00
20.05.2019	-	2.00	-	2.00
22.05.2019	-	3.31	-	3.31
22.05.2019	10.12	-	-	10.12
Total Receipt	10.12	7.31	8.20	25.63

Details of Receipt of LPS amount (Rs in crore)				
Date	JVVNL	AVVNL	JdVVNL	Total LPS
21-05-2019	12.96	-	-	12.96
23-05-2019	-	2.00	-	2.00
24-05-2019	-	7.07	-	7.07
23-10-2019	-	-	3.00	3.00
24-10-2019	-	-	1.00	1.00
25-11-2019	-	-	2.00	2.00
26-11-2019	-	-	2.00	2.00
27-11-2019	-	-	2.00	2.00
28-11-2019	-	-	0.37	0.37
Total Receipt	12.96	9.07	10.37	32.40
Add: TDS deducted by Rajasthan Utilities	1.44	1.01	1.15	3.60
Total LPS	14.40	10.08	11.52	35.99

5. The Rajasthan Utilities have paid the principal amount of Rs. 25.63 crores in April 2019 and May 2019 and have also restricted the LPS amount to Rs. 35.99 crores only (i.e., the LPS amount as on 31.12.2017) even though the payment towards LPS was done as late as in November 2019, as above.



6. Aggrieved by the non-payment of the LPS by the Rajasthan Utilities till November 2019, NLCIL filed Petition No. 62/M/2022, before this Commission, to initiate proceedings against the Respondents, in terms of Section 142 of the Electricity Act, 2003 and sought the payment of LPS till the date of discharge of the dues. However, the Commission, vide its order dated 20.7.2022, disposed of the said petition, holding as under:

“5. Admittedly, in the present case, the Respondents have made the payment of outstanding amounts, to the Petitioner, in terms of the order dated 19.3.2019. In view of this, we find no reason to initiate proceedings against the Respondents in terms of Section 142 of the Act. However, the submission of the Petitioner that since the Respondents have made the outstanding payments belatedly, it is entitled for LPS, till such date the total dues were paid by the Respondents, in our view, gives rise to a separate cause of action, for which the Petitioner may seek appropriate relief(s) through a separate petition, which will be considered in accordance with law.”

7. In terms of the above order, NLCIL has filed the present Petition with the prayers in para (1) above, seeking adjudication of the disputes between NLCIL and the Rajasthan Utilities on the issue of the Delayed Payment Surcharge (DPS) payable for the period from 1.1.2018 till the date of reimbursement of the total dues (i.e., up to November 2019), on account of the delay in payment by Rajasthan Utilities, in terms of the order dated 19.3.2019 in Petition No.54/MP/2018.

Submissions of the Petitioner, NLCIL

8. The Petitioner NLCIL, in support of its prayers in the present Petition, has mainly submitted the following:

(a) NLCIL is entitled to DPS till such date the total outstanding dues are paid by the Rajasthan Utilities and not only up to December 2017. As per the Commission's order dated 19.3.2019, the Rajasthan Utilities were liable to pay the amount due to NLCIL within 30 days of the order, but the Rajasthan Utilities have delayed in making payments due to NLCIL as evident from the table mentioned in para 4 above. The Commission, in an order dated 19.3.2019, has stated that the DPS of Rs 35.99 crore (as on 31.12.2017) is payable, as the Petition No. 54/ MP/2018 was filed on 30.1.2018 and the computations of LPS were, furnished till 31.12.2017.

(b) The details of the DPS computed in the present petition from 1.1.2018 till the date of disbursement are as under:



Particulars				(in Rs)
	JVVNL	AVVNL	JdVVNL	Total
Total Principal outstanding as per petition	101168556	73141338	82028186	256338080
DPS from 1.1.2018 to 31.3.2018 (90 days)	4490221	3246273	3640703	11377197
DPS from 1.4.2018 to 31.3.2019 (365 days)	18210340	13165441	14765073	46140854
DPS from 1.4.2019 till the date of payment	2594350	1786857	952128	5333335
Total additional DPS	25294911	18198571	19357905	62851387

(c) The Rajasthan Utilities are liable to pay the DPS of Rs 6.28 crore to NLCIL, as computed above (and enclosed as Annexure-E), and the same is in accordance with Regulation 45 of the 2014 Tariff Regulations.

(d) The LPS, under the 2014 and the 2019 Tariff Regulations, namely 1.50%, is with the intention to disincentivize the delay in payment of the due amount. The procurer cannot be allowed to take advantage of its own default in payment of the Principal amount and further pay only part of the total amount. The LPS rate as per the Tariff Regulations and as recognized in the PPA is in the nature of compensation for delayed payment as dealt with in the various judgments of the Hon'ble Courts in Consolidated Coffee Ltd v Agricultural ITO (2001) 1 SCC 278; Adoni Ginning Factory v Secretary, APEB (1979) 4 SCC 560 and Kanoria Chemicals and Industries Ltd v UPSEB (1997) 5 SCC 772.

(e) In view of the above, the Rajasthan Utilities ought to pay Rs 6,28,51,387/- to NLCIL without any further delay as DPS. NLCIL will suffer irreparable loss if the Rajasthan Utilities, do not discharge the entire amount outstanding to NLCIL as above.

Hearing dated 23.8.2023

9. The Petition was heard and 'admitted' by the Commission on 23.8.2023, and directions were given to the parties to complete the pleadings in the matter.

Reply of the Respondent Rajasthan Utilities

10. The Rajasthan Utilities, vide their reply affidavit dated 24.8.2023 (filed on 1.9.2023), have mainly submitted as under:

The last payment was made on 28.11.2019, and the present petition has been filed after the lapse of three years. As per law, the time period to claim any amount on any account is three years from the last payment made, which expired on 27.11.2022. Since the present Petition was filed in April 2023, the claim of NLCIL is time-barred. As per the judgment of the Hon'ble Apex Court,



the amount that cannot be recovered in a civil suit cannot be recovered in the proceedings before the Commission. Admittedly, the cause of action accrued to the Petitioner on 28.1.2019, and the limitation for the recovery of dues expired on 27.11.2022. Therefore, the Petition is not maintainable.

Rejoinder of the Petitioner, NLCIL

11. In response, NLCIL, vide its rejoinder affidavit dated 15.9.2023 (filed on 22.9.2023), has mainly submitted as under:

- (a) NLCIL had filed Petition No. 62/MP/2022 on 13.1.2022, seeking compliance by the Rajasthan Utilities, with the order dated 19.3.2019 and for payment of the amount dues under order dated 19.3.2019 along with LPS, till the date of discharge of the dues, which was within the prescribed limitation period of three years. The Commission had disposed of the said Petition vide order dated 20.7.2022 stating that NLCIL can seek the relief of LPS by way of a separate Petition, and in the light of this, this Petition has been filed by NLCIL.
- (b) After the order dated 19.3.2019 in Petition No. 54/MP/2018, NLCIL and the Rajasthan Utilities were involved in the reconciliation of the claims and dues as late as on 30.11.2020 and 30.9.2021 (copies enclosed). NLCIL and the Rajasthan Utilities have also exchanged correspondences regarding the issue of LPS. The Rajasthan Utilities, in response to the NLCIL letter dated 26.3.2019 informing that the payment of the Principal amount of Rs 25.63 crore attracts surcharge from 1.1.2018 till the date of disbursement of dues, had recalculated the workings vide letter dated 24.12.2020, though they did not dispute the same before the Commission.
- (c) In view of the above, by no means can the claim be said to be time-barred, when the parties have been in discussion, and the Rajasthan Utilities had objected to the LPS issue only in the reconciliation dated 30.11.2020. It is only then that the dispute regarding LPS can be said to have arisen between the parties for the cause of action to run against NLCIL. The cause of action arose when, despite the reconciliations dated 30.11.2020 and 30.9.2021, the Rajasthan Utilities did not pay the amount. (*Judgment of the Hon'ble Supreme Court in Hari Shankar Singhania v Gaur Hari Singhania (20060 4 SCC 658 is relied upon)*)
- (d) It is a settled position of law that if any party was in a bonafide manner prosecuting the suit before the Court, which is unable to entertain the same because of any defect in the jurisdiction or other cause of like nature, the time from the date of institution of the suit, till the date of the decision, shall be excluded in computing the period of limitation, in filing the suit. Section 14 (Exclusion of the time of proceeding bonafide in court without jurisdiction) and Section 22 (Continuing breaches and torts) and the judgment of the Hon'ble



Supreme Court in Union of India v West Coast Paper Mills Ltd (2004) 3 SCC 458) are relied upon.

- (e) The Rajasthan Utilities, being a party to the proceedings in Petition No. 54/MP/2018 and having not disputed the amounts claimed by NLCIL, ought to have paid the LPS till such time the dues pending are fully discharged. The Rajasthan Utilities cannot, on the one hand, delay the payment to NLCIL and, on the other hand, refuse to pay the outstanding LPS till the full discharge of dues and not make payments towards the legitimate dues of NLCIL. On the 'general position of time value of money,' NLCIL has relied upon the judgment of the Hon'ble Supreme Court in Indian Council of Enviro-Legal Action v UOI (2011) 8 SCC 16, Vidarbha Industries Power Ltd v Axis Bank Ltd (2022) SCC OnLine SC 841 and the APTEL judgment dated 22.12.2012 in Appeal No. 40/2022 (APTEL in AP(M)L v MERC & anr).
- (f) In terms of the order dated 10.1.2022 of the Hon'ble Supreme Court in Suo motu (c) No. 3/2020, the period between 15.3.2020 and 28.2.2022 shall stand excluded for the purpose of limitation considering the impact of the Covid-19 Pandemic.

Hearing dated 6.12.2023

12. During the hearing, the learned counsel for the Respondent, RUVNL, mainly submitted that the claim of the Petitioner was barred by limitation. Referring to the judgment of the Hon'ble Supreme Court in AP Power Coordination Committee & ors v Lanco Kondapalli Power Ltd & ors (2016) 3 SCC 46, the learned counsel submitted as the time for the claim expired on 27.11.2022, the present petition for recovery of the LPS, which has been filed in April 2023, is time-barred. He accordingly prayed that the petition may be rejected as not maintainable. The learned counsel also pointed out that the Commission, while granting liberty to the Petitioner to claim the delayed LPS by a separate petition, had, in the said order, observed that the claims of the Petitioner would be considered in accordance with law. The learned counsel added that since no claim towards future interest was sought by the Petitioner in the original petition, the present claim of the Petitioner is barred by the principles under Order II Rule 2 of the CPC, 1908, apart from the claim being time-barred. In response, the learned counsel for the Petitioner, NLCIL, clarified that the claim of the Petitioner is not time-



barred, as the issue regarding a delay in LPS payments by the Respondents was raised by the Petitioner in Petition No. 62/MP/2022, in which the Commission, vide its order dated 20.7.2022, had granted liberty to the Petitioner to claim the said relief separately. Accordingly, she submitted that the time spent in the proceedings (in Petition No. 62/MP/2022) cannot be included for the purpose of calculating the period of limitation of three years. She also pointed out that the Respondents, having admittedly delayed the payments to the Petitioner, cannot now take advantage of its own wrong and deny the relief sought by the Petitioner on the ground that the claim is time-barred. At the request of the learned counsels, the Commission permitted NLCIL and the Rajasthan Utilities to file their written submissions and accordingly reserved its order in the Petition.

Written Submissions

13. In terms of the above, the Rajasthan Utilities filed its written submissions on 22.12.2023, and NLCIL filed its written submissions on 28.12.2023. Both the parties have reiterated their submissions made in the Petition/reply and rejoinder, and as such, the same is not reproduced herein for the sake of brevity.

Analysis and Decision

14. Though NLCIL has submitted that it has filed the present Petition, in terms of the liberty granted as above, the Rajasthan Utilities have objected to the reliefs claimed on the ground of limitation and in terms of Order II Rule 2 CPC.

15. Accordingly, based on the submissions of the parties and documents on record, we consider the issues raised in the following paragraphs:



RE- Limitation

16. The Rajasthan Utilities have submitted that the present Petition filed by NLCIL in April 2023 is barred by limitation since the cause of action accrued to the Petitioner on 28.11.2019 and the limitation for recovery of dues within three years expired on 27.1.2022. Referring to the judgment of the Hon'ble Supreme Court in APPCC v Lanco Kondapalli Power Ltd (AIR 2016 SC 1925), the Rajasthan Utilities have submitted that the amount which cannot be recovered in a civil suit cannot be recovered in the proceedings before this Commission. Per contra, NLCIL, while pointing out that the present petition has been filed in terms of the liberty granted, vide Commission's order dated 20.7.2022, has submitted that the cause of action arose when the Rajasthan Utilities, despite the reconciliation dated 30.11.2020 and 30.9.2021, did not pay the amounts due. NLCIL has added that in view of the Hon'ble Supreme Court's order dated 10.1.2022 in the Suo motu case, excluding the period between 15.3.2020 and 28.2.2022, for the purpose of limitation, the Petition is not time-barred.

17. We have considered the submissions. Though no period of limitation has been prescribed in the 2003 Act for filing of Petitions for adjudication of disputes, the Hon`ble Supreme Court in the 'Lanco Kondapalli case' has held that the claims coming for adjudication before the Commission cannot be entertained or allowed, if otherwise, the same is not recoverable, in a regular suit on account of the law of limitation. The relevant extract of the said judgment is as under:

"30.....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 Sections 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 the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the 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 the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”

18. In the light of the above judgment, the limitation period prescribed for money claims under the Limitation Act, 1963, i.e., 3 years, will be applicable for filing the application for claims before the Commission.

19. In the present case, the Commission, vide its order dated 19.3.2019 in Petition No.54/MP/2018, had directed the Rajasthan Utilities to make payment of the Principal amount of Rs 25.63 crore (as on 31.12.2017) along with a DPS amount of Rs.35.99 crore (as on 31.12.2017), to NLCIL, within 30 days of the said order (i.e. by 19.4.2019).

The relevant portion of the order is extracted below:

“20. Consequent upon the above, the amounts claimed by the petitioner not having been disputed, the Respondent No.1/Rajasthan Discoms are liable to pay to the Petitioner the principal amount of Rs.25.63 crore (as on 31.12.2017) along with the delayed payment surcharge of Rs.35.99 crore (as on 31.12.2017) towards capacity charges based on availability and energy charges, based on energy scheduled by the respondents. The payments shall be made within 30 days of this order. These Respondents are also directed to pay the fixed charges with effect from 1.1.2018 and onwards, based on availability and energy charges on the quantum of energy scheduled by the Respondents.”

20. Though the Rajasthan Utilities had paid the principal amount of Rs 25.63 crore, in terms of the order dated 19.3.2019, as submitted by NLCIL, they have staggered and made payment of the said DPS amount (of Rs 35.99 crore as on 31.12.2017) belatedly to NLCIL by 28.11.2019. Aggrieved thereby, NLCIL filed Petition No. 62/MP/2022, on 13.1.2022, before this Commission, seeking, amongst others, directions on the Rajasthan Utilities to comply with the order dated 19.3.2019 and to pay the amounts due under order dated 19.3.2019, along with DPS, till the date of discharge of the dues. Considering the fact that the Rajasthan Utilities had made outstanding



payments belatedly, the Commission, vide its order dated 20.7.2022, treated the same as a separate cause of action and accordingly granted liberty to NLCIL to seek the reliefs through a separate Petition to be considered in accordance with law (*para 6 above*).

21. We have considered the submissions of the Rajasthan Utilities contending that the present Petition is barred by limitation. We observe that the Hon'ble Supreme Court, vide its order dated 23.3.2020 in *Suo Motu Writ Petition (C) No.3/2020*, had taken *Suo motu* cognizance of the difficulties faced by the litigants in filing petitions/suits/appeals/all other quasi proceedings, within the period of limitation due to outbreak of Covid-19 pandemic, and had directed the extension of the period of limitation, in all proceedings before all Courts/Tribunals w.e.f. 15.3.2020 till further orders. On 8.3.2021, the above order dated 23.3.2020 was superseded by permitting the relaxation of the period of limitation between 15.3.2020 and 14.3.2021. Thereafter, vide order dated 23.9.2021, in *M. A. No. 665/2021* (in *Suo Motu Writ Petition (C) No.3/2020*), the limitation period in all proceedings before the Courts/ Tribunals was further extended till 2.10.2021. Subsequently, vide order dated 10.1.2022 in *M.A. No. 21/2022*, the Hon'ble Supreme Court had directed that the period from 15.3.2020 till 28.2.2022, shall stand excluded for the purpose of limitation, as may be prescribed under general or special laws, in respect of all judicial or quasi-judicial proceedings. In the light of the above discussions, we hold that the present Petition filed by NLCIL on 18.4.2023, cannot be said to be barred by limitation.

22. Further, a similar issue of limitation has been considered by the Commission in its order dated 7.11.2023 in *Petition No. 270/MP/2022* in the matter of 9.8.2023 in *Petition No. 173/MP/2022*, in the matter of *Sembcorp Energy India Ltd. v. TSPCC & ors.* The relevant findings of the Commission, in the said order, are reproduced below:



“18. We have considered the submissions of the Petitioner and Respondents on the aspect of limitation. It is noted that a similar issue of limitation has been considered by the Commission in its recent Order dated 9.8.2023 in Petition No. 173/MP/2022 in the matter of Sembcorp Energy India Ltd. v. APPCC and Ors. The relevant findings of the Commission in its Order dated 9.8.2023 are reproduced hereunder:

“27.... It is noticed that APTEL in the Udupi Judgment while dealing with LPS claims therein, it has been held that the period of limitation for LPS claims will be governed by Article 113 of the Limitation Act, which relates to the suits for which there is no prescribed period. The APTEL held that the limitation period shall be calculated as three years from the date on which the “right to sue accrues” or the “cause of action” arises. Relevant extracts of the Udupi Judgment are as under:

“The argument that Article 25 occurring in Part-I of the Schedule to Limitation Act, 1963 applies to the present dispute involving specific issue of LPSC itself is wrong. There is no specific limitation period specified for claiming LPSC in Schedule to the Limitation Act, 1963. Accordingly, even in cases where there is no running account, the period of limitation for LPSC claims will have to be governed by Article 113 of Limitation Act, 1963 (Part X- Suits for which there is no prescribed period), which provides the limitation period as three years computed from the date on which the “right to sue accrues” which is same as the date on which the “cause of action” arises.”

28. Although the findings in the Udupi Judgment were challenged before the Hon’ble Supreme Court in Civil Appeal No. 838 of 2021 titled Power Company of Karnataka Ltd. v. Udupi Power Corporation Ltd. However, vide order dated 8.2.2022, the Civil Appeal was dismissed on the ground that there was no substantial question of law that merited consideration. Thus, the order attained finality.

29. In the present case, the Respondents have neither disputed the amount under the weekly invoices raised by the Petitioner towards the supply of power nor denied that there had been a delay on their part in making payments thereof. The record also indicates that even the LPS invoices raised by the Petitioner do not appear to have been disputed by the Respondents in any of their communications at the relevant time until their stand taken in the reply filed to the present Petition. In the present circumstances, the “right to sue accrues” for the Petitioner in respect of its LPS claims can begin to run only when there is a default on the part of the Respondents in making the payment of LPS as per the terms of POs, which can only be subsequent to the crystallization of the LPS liability of the Respondents, i.e. date on which the payment towards weekly invoices was made by the Respondents. It is observed that the Petitioner has calculated the period of limitation from the date on which the liability to pay LPS was crystallized itself, i.e., the date on which the complete payment towards weekly invoices was made by the Respondents [...]

19. In the aforesaid order, the Commission has held that the ‘right to sue’ would commence only subsequent to the crystallization of the LPS liability of the Respondents. In the present case, the consolidated invoices for the deviation in the off-take of power were raised against Respondents on 2.6.2017 and 26.12.2017, and the payments towards the same were made by the Respondents in tranches starting from 30.7.2019 (payment of Rs. 2 crore) and the balance payments towards the principal amount were made between 6.12.2019 and 26.12.2019. Thus, the entire liability of LPS of the Respondents stood crystallized only upon the payment of the principal amount by the Respondents on 26.12.2019 and even if we were to consider the period of limitation commencing from such date itself, the claims of the Petitioner towards LPS on the delayed payment of such deviation charges fall within the period limitation as the period of limitation would expire on 26.12.2022 whereas the present petition came to be filed on 25.8.2022. Even if we were to consider that part of the LPS liability stood crystallized upon the part payment of the principal amount by the



Respondents on 30.7.2019, claims of the Petitioner would fall within the period of limitation in view of the Hon'ble Supreme Court's order dated 10.1.2022 whereby period from 15.3.2020 till 28.2.2022 has been excluded for the purpose of computing the period of limitation."

Xxx

23. We observe that the APTEL in the Udupi Judgment, as regards the claim for the LPS being a 'continuing wrong' has held that a "continuing wrong" includes a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. Further, the APTEL has held that every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings and that the default of the distribution licensee to pay LPS partakes the character of a continuing breach as contemplated under Section 22 of the Limitation Act. Relevant extracts of the Udupi Judgment are as under:

"207. We uphold the submission that, in the facts and circumstances presented before us, the elements of "continuing breach" are satisfied. Indisputably, there have been breaches of the contract on account of the non-payment of regular monthly bills and invoices towards infirm power and LPSC by the ESCOMs in terms of the PPA as well as Regulations. Each 'breach' by the ESCOMs resultantly burdened Udupi Power with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of 'continuing breach'. Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. The 'breach' being recurring, the second element of 'continuing breach' is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic..."

208. For the foregoing reasons, we uphold the submission of the second respondent that the default of ESCOMs in paying against monthly tariff bills as well as LPSC partakes the character of a "continuing breach" as contemplated under Section 22 of the Limitation Act, 1963. Thus, "a fresh period of limitation begins to run at every moment of the time during which the breach ... continues". Since the breach continues on account of continued refusal to discharge liability towards LPSC, a fresh cause of action is constituted so long as the breach is recurrent and continues."

24. Hence, even as per the ratio laid down by the APTEL in the Udupi Judgment, the failure of Respondents to discharge their liability towards the LPS partakes the character of a continuing breach, which gives a fresh cause of action so long as the breach is recurrent and continuous. Accordingly, such claims of the Petitioner cannot be held time-barred under the limitation period.



RE- Order II Rule 2 CPC

25. The Rajasthan Utilities have contended that since NLCIL had a right to claim future LPS in its earlier Petition (Petition No. 54/MP/2018), but having not done so, the claim of NLCIL in the present Petition is barred in terms of the principle laid down under Order II Rule 2 CPC.

26. Order II Rule 2 CPC states as under:

2. SUIT TO INCLUDE THE WHOLE CLAIM.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) xxx

The provisions of Order II Rule 2 state that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the Court in one suit, as Order II Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause. One of the objects of Order II Rule 2 is also to avoid multiplicity of litigation. In this case, NLCIL, in Petition No.54/MP/2018, filed on 24.1.2018, had claimed the Principal amount of Rs 25.63 crore (as on 31.12.2017) along with the DPS amount of Rs 35.99 crore (as on 31.12.2017), and the same was ordered to be paid to NLCIL by the Rajasthan Utilities, vide Commission's order dated 19.3.2019, within 30 days from the date of the order. The Principal amount of Rs 25.63 crore was paid by the Rajasthan Utilities in April 2019 and May 2019. Further, the payment of DPS of Rs 35.99 crore (computed up to 31.12.2017) was also staggered and paid by the Rajasthan Utilities to NLCIL during the months from May 2019 to November 2019 (till 28.11.2019). Accordingly, NLCIL had, in Petition No.62/MP/2022,



sought the compliance of the Order dated 19.3.2019 and prayed for payment of the amount due along with DPS till the date of discharge of dues by the Rajasthan Utilities. The Commission, in its order dated 20.7.2022, noted that the Petitioner is entitled to DPS to date, the total dues were paid by the Respondents and granted liberty to the Petitioner to seek appropriate relief through a separate petition to be considered in accordance with law. The relevant portion of the Order dated 20.7.2022 is extracted as under:

“5. Admittedly, in the present case, the Respondents have made the payment of outstanding amounts, to the Petitioner, in terms of the order dated 19.3.2019. In view of this, we find no reason to initiate proceedings against the Respondents in terms of Section 142 of the Act. However, the submission of the Petitioner that since the Respondents have made the outstanding payments belatedly, it is entitled for LPS, till such date the total dues were paid by the Respondents, in our view, gives rise to a separate cause of action, for which the Petitioner may seek appropriate relief(s) through a separate petition, which will be considered in accordance with law.”

27. In the instant petition, the Petitioner has claimed DPS of Rs 6.28 crores on the principal amount for the period from 1.1.2018 to 22.5.2019, i.e., the date on which final payment towards the principal amount of Rs. 25.63 Crore was made. Since we have already held that non-payment of DPS is a continuing breach until the payment is made, any of the ingredients of Order II Rule 2 are not attracted.

Decision

28. In light of the deliberations above, we allow the DPS of Rs. 6.28 Crore as claimed by the Petitioner, and the Respondents are instructed to remit the Petitioner's claimed DPS amount of Rs 6.28 Crore within 30 days from the publication of this order on the website. In case the amount is not paid within 30 days from the publication of this order on the website, the DPS clause as per PPA shall kick in.

29. Petition No. 160/MP/2023 is disposed of in terms of the above.

**Sd/-
(Pravas Kumar Singh)
Member**

**Sd/-
(Arun Goyal)
Member**

**Sd/-
(Jishnu Barua)
Chairperson**

