

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 237/MP/2023

Coram:

**Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V., Member
Shri Harish Dudani, Member**

Date of Order: 19th March, 2025

In the matter of

Petition under Section 79(1)(b) read with 79(1)(f) of the Electricity Act, 2003 for recovery of late Payment Surcharge under the Power Purchase Agreement dated 01.11.2013 (for non-payment as also belated payment of capacity charges) and carrying cost.

And

In the Matter of:

DB Power Ltd.,
Office Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills, Opposite MP Nagar, Zone-I,
Bhopal-462016.

..... Petitioner

VERSUS

- 1. Rajasthan Urja Vikas Nigam Ltd.,**
Vidyut Bhawan, Janpat,
Jyothi Nagar,
Jaipur – 302005.
- 2. Jaipur Vidyut Vitran Nigam Ltd.,**
Vidyut Bhawan, Jyoti Nagar,
Near New Vidhan Sabha Bhawan,
Jaipur – 302005.
- 3. Ajmer Vidyut Vitran Nigam Ltd.,**
Vidyut Bhawan,
Makarwali Road,
Panchsheel Nagar, Ajmer– 305004
Rajasthan.
- 4. Jodhpur Vidyut Vitran Nigam Ltd.,**
New Power House,
Industrial Area,



Jodhpur -342003.

- 5. PTC India Limited,**
Having its office at
2nd floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi-110066.

...Respondents

Parties present:

Shri Sanjay Sen, Sr. Advocate, DBPL
Shri Deepak Khurana, Advocate, DBPL
Shri Vineet Tayal, Advocate, DBPL
Shri Abhishek Bansal, Advocate, DBPL
Ms. Neeha Dabral, Advocate, DBPL
Shri Ravi Kishore, Advocate, PTCIL
Shri Keshab Singh, Advocate, PTCIL
Shri Anand Ganesan, Advocate, Rajasthan Discoms
Shri Amal Nair, Advocate, Rajasthan Discoms
Ms. Shivani Verma, Advocate, Rajasthan Discoms

ORDER

The Petitioner, i.e, DB Power Ltd. (hereinafter referred to as 'DB Power') has filed the present Petition under Section 79(1)(b) read with 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking recovery of the Late Payment Surcharge ('LPS') as per the back-to-back Power Purchase Agreement dated 1.11.2013 entered into between the Petitioner and Respondent No.5, PTC India Limited – pursuant to a Power Purchase Agreement dated 1.11.2013 entered into between Respondent No.5 and Respondent Nos. 2, 3 & 4, ('Rajasthan Utilities') and further in terms of the liberty granted by the Commission, vide order dated 13.6.2023 in Petition No.55/MP/2021 along with recovery of carrying cost. The Petitioner has made the following prayers:

“(a) Direct the Respondents to pay a sum of Rs. 111,98,84,002, as Late Payment Surcharge (being computed as on 30.06.2023);

(b) Direct the Respondents to pay further Late Payment surcharge, which becomes due & payable since 01.07.2023 onwards till full & final payment of the capacity charges along with applicable Late Payment surcharge thereon;



(c) *Direct the Respondents to pay a sum of Rs. 56,98,56,546 as carrying cost along with Late Payment Surcharge applicable thereon as per the terms of the PPA;*

(d) *Pending final adjudication of the present Petition, pass an ex-parte ad interim order, directing the Respondents to forthwith make payment of 'Late Payment Surcharge' and carrying costs in terms of prayers (a) to (c); and*

(e) *Pass such other and further order or orders as this Commission may deem fit and proper under the facts and circumstances of the present case."*

Submission of the Petitioner:

2. The Petitioner has set up a 1200 MW coal based Thermal Power Plant (2 units x 600 MW each) at village Badadarha, Janjgir Champa, in the State of Chhattisgarh. The Petitioner is supplying (a) 311 MW power to Respondents 2 to 4 (hereinafter referred to as the 'Rajasthan Discoms') through Respondent No. 5, PTC India Ltd. (hereinafter referred to as 'PTC') in terms of the Power Purchase Agreements (PPAs) dated 1.11.2013 read with the amended PPA dated 29.5.2018. The Petitioner had filed Petition No. 63/MP/2019, *inter-alia*, seeking recovery of capacity charges/damages for 160 MW of power not procured by the Respondents for the period from 30.11.2016 to 31.7.2018 under back-to-back Power Purchase Agreement (PPA) dated 1.11.2013 entered into between the Petitioner and Respondent No.5 ('PTC'), pursuant to the Power Purchase Agreement dated 1.11.2013 entered into between PTC and Respondent Nos. 2, 3 and 4 ('Rajasthan Utilities'). The said Petition was decided by the Commission, vide its order dated 15.1.2020 whereby, *inter-alia*, it was held that the Petitioner is entitled to compensation in terms of the capacity charges for the 61 MW (instead of 160 MW as prayed for by the Petitioner) for the period from 30.11.2016 to 31.7.2018 after offsetting the capacity charges, if any, earned on the said capacity during the relevant period and consequently asked the Petitioner to calculate its claims accordingly and to share all the relevant documents with the Respondents while claiming the compensation. Thereafter, the Petitioner filed Petition No. 55/MP/2021

against the Respondents for non-compliance with the order dated 15.1.2020 passed in Petition No. 63/MP/2019 and further directed the Respondents to forthwith comply with the said order. The Commission, vide order dated 13.6.2023, disposed of the said Petition No. 55/MP/2021 and *inter-alia* directed the Respondents to pay the balance amount and also granted the liberty to the Petitioner to approach this Commission for payment of the Late Payment Surcharge. Article 8.8.2 of the Procurer PPA provides that the Supplementary Bill is payable by the due date. As per Clause 8.8.3 of the Procurer PPA, 'Late Payment Surcharge' as per Clause 8.3.5 of the Procurer PPA is also applicable in case of delay in payment of the Supplementary Bill beyond the due date. Furthermore, as per Clause 8.3.5 of the Procurer PPA, the Petitioner is entitled to a Late Payment Surcharge of 2% in excess of the applicable SBAR calculated on a day-to-day basis and compounded monthly. In light of Clause 8.3.5 of the Procurer PPA and in light of the liberty granted by this Commission, vide order dated 13.6.2023, it is evident that the Petitioner is entitled to Late Payment Surcharge on the delayed payment of the capacity charges. Thus, the Petitioner is entitled to a sum of Rs. 111,98,84,002 as the Late Payment Surcharge, being computed up to 30.06.2023 and accruing further till the date of actual payment.

3. It is further submitted by the Petitioner that the Petitioner, vide its letter supplementary Invoice dated 27.06.2023, has also claimed a sum of Rs. 56,98,56,546/- as carrying cost on the capacity charges, which was due and payable by 27.7.2023. However, the said amount has not been paid till date. Thus, the Petitioner is also entitled to recover the said sum along with the Late Payment Surcharge on the same till the date of actual payment. On account of non-payment of the capacity charges in a timely manner as also non-payment of the balance remaining capacity charges along with the Late Payment Surcharge and carrying cost, the Petitioner is in a financially precarious condition. With each passing day, the financial

burden of the Petitioner is increasing. It is submitted that if the Respondent does not clear the dues in terms of the Supplementary Bill and the PPAs, the Petitioner will continue to suffer irreparable harm and injury and will have a cascading effect on the operations of the Petitioner Power Plant.

Proceedings before the Commission

Hearing dated 13.12.2023

4. During the course of the hearing on 13.12.2023, the learned counsel for the Petitioner, DB Power, reiterated the submissions made in the pleadings. Learned counsel for Respondent Nos. 1 to 5 accepted the notice and objected to the maintainability of the Petition. Learned counsel for the Respondent, Rajasthan Discoms, also submitted that by order dated 13.6.2023 in Petition No.55/MP/2021, the Commission granted the liberty to the Petitioner to approach the Commission for a grant of LPS for delayed payment by Respondents "in accordance with law" and hence, the Respondents are entitled to raise all just objections to the maintainability of the Petition as available under the law.

5. Considering the submissions made by the learned counsel for the Parties, notice was issued in the matter permitting the Respondents to file their respective replies and rejoinder.

Reply of the Rajasthan Discoms (Respondents Nos. 1 - 4)

6. Pursuant to the liberty granted by this Commission, Respondent Nos.1 to 4, Rajasthan Discoms vide their common reply dated 2.1.2024, has mainly submitted as under:

- (a) The Petitioner had, in Petition No. 63/MP/2019, prayed for capacity charges along with interest. However, only the claim of capacity charges has been allowed by this Commission, leaving the claim of interest on capacity charges to be deemed rejected. Thereafter, the Petitioner filed an execution

petition, i.e., Petition No. 55/MP/2021 under Sections 142 and 146, before this Commission.

(b) On 13.6.2023, this Commission passed an order in Petition No. 55/MP/2021, thereby directing the Respondents to pay the balance sum of Rs. 57,58,95,872 within a period of four weeks. Further, this Commission also held that since the grant of interest or 'LPS' is not covered under the order dated 15.1.2020, the same cannot be considered in the said execution proceedings.

(c) The liberty given in the order dated 13.6.2023 cannot now wrongly be relied on by the Petitioner to contend that this Commission has granted blanket liberty to seek the LPS and carrying cost under the PPA. It is clear from a perusal of the above-stated order dated 13.6.2023 that this Commission has granted the liberty to the Petitioner to seek LPS 'in accordance with law.'

(d) The Petitioner's prayer of interest stood rejected vide order dated 15.1.2020 as passed by this Commission in Petition No. 63/MP/2019. Thereafter, the Petitioner had claimed for the interest in its Appeal No. 90 of 2020. However, this claim also stood rejected by the APTEL by dismissal of the Petitioner's appeal. Therefore, since the Petitioner did not file an appeal against the said order of the APTEL, it amounts to the Petitioner having accepted the rejection of its claim towards interest on capacity charges.

Re: Maintainability of the present petition

(e) The Petitioner had, in Petition No. 63/MP/2019, prayed for capacity charges along with interest. However, only the claim of capacity charges has been allowed by this Commission. The claim of interest on capacity charges, not being allowed by this Commission despite an express prayer sought by the Petitioner in Petition No. 63/MP/2019, is considered to be rejected.

(f) Since the Petitioner, being aggrieved of the order dated 15.1.2020 by this Commission in Petition No. 63/MP/2019, filed an appeal before the APTEL being Appeal No. 90 of 2020 and in its Appeal No. 90 of 2020 had claimed for additional capacity charges of 99 MW (410 MW-311 MW) along with interest @ 18% PA., which has not been accepted by the APTEL in its Judgment dated

20.9.2021. The Order dated 15.1.2020 has merged into the Judgment dated 20.9.2021 and cannot be re-construed or re-interpreted to grant any interest at this stage. If a lower court decree merges with the decree of an Appellate court, it is the Appellate Court's decree that prevails. In this regard, the reliance was placed on the judgment passed by the Hon`ble Supreme Court in the matter of *Kunhayammed and Ors. v. State of Kerala and Anr.*, [(2000) 6 SCC 359].

(g) When an order is not appealed against, it is considered to have attained finality. Since the Petitioner had not appealed against the Judgment dated 20.9.2021, the said issue of interest on capacity charges is considered to have attained finality by way of the said Judgment as being deemed rejected. Further, when a relief prayed is not granted by a court, it amounts to the waiver of the said prayer or deemed rejection of the said prayer in accordance with the principle of Constructive Res-Judicata. It is equally well settled that if a prayer is not granted by a court, it amounts to deemed rejection of the said prayer. In this regard, the reliance was placed on the judgment passed by the Hon'ble Delhi High Court in W.P.(C) 5843 of 1999) in the matter of *M.M Aggarwal v. Union of India and Ors.*

(h) Considering that the Petitioner's prayer for interest was deemed rejected by this Commission in Petition No. 63/MP/2019 and further confirmed by the APTEL in Judgment dated 20.9.2021 in Appeal No. 90 of 2020, the said issue of deemed rejection had attained finality since the Petitioner did not claim for the same by way of filing a civil appeal. The Petitioner cannot start a new round of litigation on the same issue again by wrongly seeking/claiming interest on capacity charges in its execution Petition No. 55/MP/2021. The Petitioner is not entitled to the interest on capacity charges at this stage when the said interest was not granted by this Commission earlier.

(i) This Commission while adjudicating the execution of Petition No. 55/MP/2021, was careful and has only granted the liberty to the Petitioner to seek LPS for delayed payment by the Respondents in accordance with the law. This does not mean that the earlier Order and Judgment passed can be given a go-by, and fresh litigation on interest can be started. The Petitioner is, in fact, making out a case as if there are no previous orders binding the parties.

(j) The Petitioner is effectively seeking to review the initial order dated 15.1.2020 of this Commission in Petition No. 63/MP/2019 by way of taking advantage of limited liberty as provided. A liberty granted in an execution proceeding cannot amount to a review of an earlier order. The instant Petition ought not to be entertained by this Commission, considering that it is a fresh petition claiming interest on capacity charges based on the limited liberty granted in the execution proceeding. This Commission had granted the liberty to the Petitioner considering its limited powers being an executing court at that instance. However, no relief can be granted in an execution proceeding that is beyond the original decree. In this regard, the reliance was placed on the judgments passed by the APTEL in the matter of *M/S Sprng Soura Kiran Vidyut Private Limited v. Southern Power Distribution Company of Andhra Pradesh Limited and Ors.* and in the matter of *MB Power (Madhya Pradesh) Ltd. v. Central Transmission Utility of India Limited & Ors.*

(k) The grant of interest is a substantive right, which can be claimed only if stated in a contract (PPA) or a legislation/regulation. In the instant case, there is no regulatory relation whatsoever, and the issue at hand is purely a contractual issue. Even so, the Petitioner has also referred to the PPA and the PSA in a confusing manner and the project as if it is one document. This is perhaps because there is no provision in the PPA that permits a claim for the LPS being maintained by the Petitioner.

(l) The claim of deemed capacity charges is itself outside the scope of the PPA. However, the same has been levied on the Respondents in view of the same flowing from the order dated 25.04.2018. Without prejudice to the contentions of the Respondents in Civil Appeal C.A. No. 6668 of 2021, the claim for interest does not flow from the order dated 25.4.2018 either. Since, in the present case, neither the PPA nor any applicable regulation/notification, etc., contains any provision for interest, the same cannot be claimed on the basis of equity, justice, and fair play. In this regard, the reliance was placed on the judgments passed by the Hon`ble Supreme Court in the matter of *National Thermal Power Corporation Limited v. Madhya Pradesh State Electricity Board and Ors.*, [(2011) 15 SCC 580].

(m) The Petitioner has erred by claiming the LPS in the present Petition by going outside the scope of the order dated 15.1.2020. The present claim of interest to be paid is already rejected by this Commission in Petition No. 63/MP/2019. Therefore, the Petitioner, by filing the present Petition seeking interest, is also hit by the principle of res-judicata.

7. In response, the Petitioner, vide its affidavit dated 23.5.2024, has mainly submitted as under:

Re' Respondents' assertion that the present Petition is not maintainable

(a) A reading of the order dated 15.1.2020 would show that this Commission had not quantified any amount that was payable as compensation towards capacity charges but had directed the Petitioner to calculate & claim the said compensation after offsetting the capacity charges, if any, earned on the awarded capacity during the relevant period, by sharing all relevant documents including the calculations with the Respondents. Therefore, with this Commission having so ordered and directed, there was no occasion for it to direct grant of the LPS as also carrying cost, which could be so done only upon assessment & quantification of the principal claim towards capacity charge and of non-payment thereof by the Respondents. Such being the case, the assertions of the Respondents of there being a deemed rejection of the Petitioner's claim for the LPS and carrying cost by this Commission vide its Order dated 15.1.2020 is wholly erroneous and misleading.

(b) The Petitioner, vide its letter dated 17.11.2020, while submitting all the relevant details, reiterated its claim of Rs. 230,58,89,377.201/-, towards capacity charges for the period from 30.11.2016 to 31.7.2018, being in terms of the said order dated 15.1.2020 and requested the Respondents to pay the said amount in terms of the aforesaid order passed by this Commission. The Petitioner had not earned any capacity charges during the said period of 30.11.2016 to 31.7.2018 and, accordingly, had raised the invoice dated 16.1.2020. It is upon non-payment of the aforementioned Invoice dated 16.1.2020 amounting to Rs. 230,58,89,377.201/-, that the Petitioner raised supplementary invoices claiming LPS. It is after affecting adjustment of the part-

payments made by the Respondents towards the principal claim of capacity charge that the Petitioner herein has in the present Petition claimed & computed the payable LPS amount of Rs. 111,98,84,002/- starting from February 2020 (i.e., post passing of Order dated 15.1.2020 and raising of invoice dated 16.1.2020 towards the capacity charge of 61 MW) till June 2023 (i.e., a month prior to the filing of the present Petition).

(c) In light of such factual position, with the Petitioner's claim for the LPS having arisen after assessment/ quantification of the claim of capacity charge (being in terms of and post passing of this Commission's Order dated 15.1.2020) and subsequent non-payment thereof within the due date – there is no merit whatsoever in the Respondents' assertion of there being a deemed rejection of the Petitioner's claim towards LPS in this Commission's Order dated 15.1.2020. Further, the Petitioner's claim for carrying cost was also raised subsequently vide supplementary invoice dated 27.6.2023, and as such, cannot be deemed to have been rejected by this Commission vide its Order dated 15.1.2020.

(d) The aforesaid finds force from the fact that this Commission, in its order dated 13.6.2023 passed in the Petitioner's Execution Petition (being Petition No. 55/MP/2021), also held that the grant of interest or LPS was not covered under Order dated 15.1.2020 and that the Petitioner was at liberty to approach this Commission for the grant of LPS for delayed payment by the Respondents. Therefore, with this Commission also having held that the grant of interest or LPS was not in the scope of the order dated 15.1.2020, there cannot be any deemed rejection thereof by the Commission in the said order, as erroneously contended by the Respondents. If the assertion of the Respondents that there was a deemed rejection of the Petitioner's entitlement to claim interest or LPS was assumed to be correct, then there was no occasion for this Commission to have, vide order dated 13.6.2023, granted the liberty to the Petitioner to claim such LPS and interest on account of delayed payment by approaching this Commission. By having to so erroneously assert and contend, the Respondents are nullifying this Commission's order dated 13.6.2023 and the liberty granted therein.

(e) The Respondents, in their reply, more specifically in Para 43 thereof, have also sought to question the liberty as having been granted by this Commission in its order dated 13.6.2023, by having to assert & suggest that this Commission, by doing so, had gone beyond the original decree. There is no basis for the Respondents to question the liberty as granted by this Commission in its order dated 13.6.2023, inasmuch as, *inter-alia*, the said order and the liberty granted therein has attained finality. Further, in view of the aforesaid factual position, in terms of which the Petitioner's claim for the LPS arose after assessment/ quantification of the claim of capacity charge (being in terms of and post passing of this Commission's order dated 15.1.2020), and subsequent non-payment thereof within the due date – there is no merit whatsoever in the Respondents' assertion that by having granted liberty to the Petitioner to claim the LPS for delayed payment in order dated 13.6.2023, the Commission has gone beyond the original decree i.e. order dated 15.1.2020. Such assertion of the Respondents is grossly erroneous and misleading.

(f) The averments of the Respondents that the present Petition are not maintainable, with their having been a deemed rejection of the Petitioner's claim for interest under order dated 15.1.2020 (passed in Petition No. 63/MP/2019), and that the Petitioner by way of the present Petition is seeking review of the said order – is wholly untenable, erroneous and hence, denied. In fact, basis all the above, the judgments, as relied upon by the Respondents in their reply, do not advance its stand, and which judgments are otherwise also not applicable to the present case.

Re' Respondents' assertion of there being no provision for claiming LPS.

(g) The Petitioner has not referred to its PPA with Respondent No. 5 and the PPA with Respondent Nos. 2, 3 & 4 and Respondent No. 5 in a confusing manner. A perusal of the Petition would show that while the Petitioner has referred to its PPA with Respondent No. 5 as PPA-1, it has referred to the PPA between Respondent Nos. 2, 3 & 4 and Respondent No. 5 as PPA-2/ Procurer PPA. Further, while having to so refer, the Petitioner has also asserted that its PPA, i.e., PPA-1 is back to back to the Procurer PPA, which aspect has been so stated and admitted by the Respondents in Para 8 of their reply. Further, the

Petitioner has in Para 5(xxii) of the present Petition cited specific reference to Articles 8.8.2, 8.8.3, and 8.3.5 of the Procurer PPA to assert & claim LPS or delayed payment by the Respondents. The Petitioner's PPA being admittedly back to back to the Procurer PPA, the provisions of the Procurer PPA would also apply on a back-to-back basis to the Petitioner's PPA with Respondent No. 5. Therefore, there is no merit whatsoever in the Respondents' assertion that there is no provision for the Petitioner to claim the LPS. Based on the above, the judgments, as relied upon by the Respondents in their reply, do not advance its stand, and the judgments are otherwise also not applicable to the present case.

(h) During the pendency of the Petition, the parties carried out a reconciliation of the amounts that were due and payable to the Petitioner. Pursuant to such reconciliation, the Petitioner raised a credit note dated 13.10.2023 for Rs. 24.15 crores towards capacity charges earned on 61 MW capacity from November 2016 to July 2018. The same was confirmed by the Respondent vide its letter dated 02.11.2023. Accordingly, the claim of the Petitioner stood reduced to Rs. 206.44 crores in place of Rs. 230.89 crores. As a sequitur thereto, there has been a revision in the Late Payment Surcharge payable to the Petitioner by the Respondent, which comes to Rs. 109.92 crores as of March 2024. In addition to the above, based on the reconciliation between the parties, the carrying cost claimed by the Petitioner until 15.1.2020 (i.e. date of the Order passed by this Commission in Petition No. 63/MP/2019) also underwent a downward revision with the same now being for Rs. 51.27 crores instead of Rs. 56.98 crores as claimed in the Petition.

Hearing dated 14.1.2025

8. During the course of the hearing on 14.1.2025, the learned senior counsel for the Petitioner and the learned counsel for the Respondents made detailed submissions and concluded their respective arguments in the matter. After hearing the learned senior counsel and learned counsel for the parties, the matter was reserved for order by permitting the parties to file their respective written submissions, if any.

Written Submissions by Parties

9. The Petitioner and the Respondents, in their written submissions dated 29.1.2025 & 27.1.2025, respectively, have reiterated their submissions, and the same are not repeated here for the sake of brevity.

Analysis and Decision

10. After considering the submissions of the parties and perusal of the documents placed on record, the following issues arise for consideration:

Issue No.1: Whether the present case is hit by the principle of res judicata?

Issue No.2: Whether the Petitioner's claims of LPS and carrying cost are maintainable?

We now proceed to discuss the above issues and examine the claims of the Petitioner.

Issue No.1 Whether the present case is hit by the principle of res judicata?

11. As per Respondents 1 to 4, the present case is squarely hit by the principle of res-judicata. They have submitted that in Petition No. 63/MP/2019, the Petitioner had sought for the interest to be paid, including pre-trial interest, pendent lite interest, and also future interest, and while the Petitioner's claim for capacity charges was allowed by the Commission in the order dated 15.1.2020, the claim for interest was not allowed. The Petitioner had also challenged the said order before the APTEL in Appeal No. 90/2020, which also came to be dismissed by the APTEL by judgment dated 20.9.2021, and no interest was awarded therein. The Petitioner, thus, cannot be permitted to start another fresh proceeding claiming the interest, and the present case is squarely hit by the principle of res judicata. It has also been submitted that insofar as the averment of the Petitioner that the Commission did not specifically and expressly reject the claim for interest in the order dated 15.1.2020, Explanation V to

Section 11 of CPC clearly provides that any relief claimed, which is not expressly granted, shall be deemed to be refused. The Respondents have also placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Chief Administrator v. Dr. Abhaya Charan Mishra* [(1999) SCC (L&S) 660] in support of their above submissions.

12. *Per contra*, the Petitioner has submitted that the Respondents' objection of *res judicata* is wholly misconceived and untenable. The Petitioner has stated that its claims towards LPS arose post-passing of the order dated 15.1.2020 by this Commission and the consequent non-payment of its invoice dated 16.1.2020 within the due date. The said claim, therefore, arose on account of a fresh cause of action, being non-payment of the said invoice within the due date, and such a claim could not have been covered in the earlier proceedings. Therefore, the objection of *res judicata*, as raised by the Respondents, is wholly misconceived and not tenable. In this regard, the Petitioner has also placed the reliance on judgments of the (i) Hon'ble High Court of Madras in *Doraiswami Ayyar v. Subramania Ayyar*, [(1917) 41 Mad. 188], (ii) Hon'ble Supreme Court in *Vallabh Das v. Madan Lal & Ors.* [(1970) 1 SCC 761], (ii) j Hon'ble Supreme Court in *Ishwar Dutt v. Land Acquisition Collector & Anr.* [(2005) 7 SCC 190], (iv) Hon'ble Supreme Court in *Infrastructure Leasing & Financial Services Ltd. v. BPL Limited* [(2015) 3 SCC 363], and (v) Hon'ble High Court of Uttarakhand in *Rajesh Goyal & Ors v. State of Uttarakhand & Ors.* [AIR 2017 Utt 119]. The Petitioner has further submitted, keeping in view the ultimate directions passed by this Commission in the order dated 15.1.2020, i.e., of the Petitioner being directed to calculate & raise its claim for capacity charges upon the Respondents, this Commission was not called upon (much less being obligatory on its part) to adjudicate, determine, and decide the amount of capacity charges, much less the interest payable

thereon. Therefore, with there being no such adjudication & decision on the auxiliary issue of the amount that the Petitioner was entitled to, and which issue this Commission was not called upon or obligated to decide – the present Petition claiming interest from the Respondents for delayed payment of capacity charges – would not be barred by the principle of *res judicata*. It has been further submitted that as per the settled proposition of law, there must be an adjudication on the concerned issue after a full hearing, with the Court having applied its judicial mind thereon, followed by its decision – for the principle of *res-judicata* to be invoked and applied qua such issue.

13. We have considered the submissions made by the parties. Section 11 of the Code of Civil Procedure, 1908, which encompasses the principle of *res judicata*, provides as under:

“11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

...
Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.”

14. As explained by the Hon’ble Supreme Court in its various decisions, in order to attract the principles of *res judicata*, the necessary ingredients required to be fulfilled are (i) the matter must have been directly and substantially in issue in the former suit; (ii) the matter must be heard and finally decided by the Court in the former suit; (iii) the former suit must be between the same parties or between the parties under whom they or any of them claim, litigating under the same title; and (iv) the Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Further, in the context of determining

if an issue was 'directly and substantially' decided in the previous suit, the Hon'ble Supreme Court in the case of *Jama Masjid v. Sri K V Rudrappa* (since dead) by Lrs. & Ors., [2021 INSC 528], after having referred to the previous authorities, reiterated the twin test of essentiality and necessity as under:

*"36. The locus classicus on the point of determining if an issue was 'directly and substantially' decided in the previous suit is the decision of Justice M Jagannadha Rao (writing for a two judge bench) in **Sajjadanashin Syed MD B.E. Edr. (D) by Lrs. v. Musa Dadabhai Ummer**.²⁵ During the course of the judgment, the Court analysed the expression "directly and substantially in issue" in Section 11 and laid down the twin test of essentiality and necessity:*

"12. It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue."

[...]

*18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? **One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case** (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (*Ishwer Singh v. Sarwan Singh* [AIR 1965 SC 948] and *Syed Mohd. Salie Labbai v. Mohd. Hanifa* [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in Mulla is a correct statement of the law.*

19. We have here to advert to another principle of caution referred to by Mulla (p. 105): "It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."

*37. Adverting to the decision in **Mahant Pragdasji Guru Bhagwandasji** (supra) and two earlier decisions, the Court held that these were instances where in spite of adverse findings in an earlier suit, the finding on that specific issue was not treated as res judicata as it was purely incidental, auxiliary or collateral to the main issue in each of these cases and not necessary in the earlier case.*

*38. In another decision in **Gram Panchayat of Village Naulakha v. Ujagar Singh**²⁷, it has been held that the decision in an earlier suit for an injunction, where no question of title was adjudicated upon will not be binding on the question of title:*

“10. We may also add one other important reason which frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into or decided. The said decision cannot, therefore, be binding on the question of title. See in this connection *Sajjadanashin Syed v. Musa Dadabhai Ummer* [(2000) 3 SCC 350] where this Court, on a detailed consideration of law in India and elsewhere held, that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a later suit or proceeding where title is directly in question, unless it is established that it was “necessary” in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case.”

However, in *Sajjadanashin Syed* (supra), an earlier judgment in *Sulochana Amma* (supra) and the Madras High Court’s judgment in *Vanagiri* were referred to in order to lay emphasis on the unique facts of each case and its importance for determination of whether the issue was substantially decided. In both the referred cases, the issue was whether the finding of title in an injunction suit would operate as *res judicata* to a subsequent suit for declaration of title. While in *Sulochana Amma*, it was held that by the doctrine of *res judicata*, the finding would bar the subsequent suit, in *Vanagiri*, it was held that the title was not conclusively decided and that the subsequent suit would not be barred. It was observed that the twin tests of necessity and essentiality might lead to different conclusions on suits of a similar nature based on the facts and circumstances in each of them.

39. In a more recent decision in *Nand Ram (Dead) Through Legal Representatives v. Jagdish Prasad (Dead) Through Legal Representatives*²⁹, a Bench of two judges reiterated the principle that if a matter has only collaterally or in an auxiliary manner been in issue or decided in an earlier proceeding, the finding would not ordinarily be *res judicata* in a later proceeding where the matter is directly and substantially in issue. Justice Hemant Gupta (writing for a two judge bench) noted that the material test to be applied is whether the adjudication of the issue is material and essential for the decision. In *Nand Ram*, the land leased by the plaintiffs to the defendants was acquired under the Land Acquisition Act, 1894. A dispute arose on the apportionment of the compensation. The suit was decided against the defendant on the ground that defendant did not pay the lease rent for more than 12 months and thus according to the lease agreement, the lease had come to an end. It was thus held that the defendant would not be entitled to the compensation. Subsequently, the plaintiff filed an eviction suit asserting that the defendant was in possession of the land that was not included in the lease deed. The High Court in the second appeal held that the subsequent suit was barred by *res judicata* since the former suit had conclusively decided on the title of the suit property. On appeal, this court set aside the judgment of the High Court on the ground that the issue of title was not conclusively decided in the former suit.

40. In view of the authorities cited above, the twin test that is used for the identification of whether an issue has been conclusively decided in the previous suit is:

- A. Whether the adjudication of the issue was ‘necessary’ for deciding on the principle issue (‘the necessity test’); and
- B. Whether the judgment in the suit is based upon the decision on that issue (‘the essentiality test’).”

15. As per the principles laid down above, in determining whether an issue was directly and substantially decided in the previous suit, the twin test of essentiality and necessity would apply. The necessity test would entail ascertaining whether an

adjudication of the issue was necessary for deciding on the principle issue. Whereas the essentiality test would entail ascertaining whether the judgment in the suit is based upon the decision on that suit. It has also been held that if a matter was only 'collaterally or incidentally' in issue and decided in the earlier proceedings, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

16. Applying the above principles to the present case, it may be relevant to note that the Petitioner had filed Petition No.63/MP/2019 *inter alia* seeking recovery of capacity charges/damages for 160 MW capacity of power not procured by the Respondents for the period from 30.11.2016 to 31.7.2018 under the back-to-back PPA dated 1.11.2013 as entered into between the Petitioner and Respondent No.5, PTCIL pursuant to the PPA dated 1.11.2013 entered into between Respondent No.5, PTCIL and Respondents Nos. 2-4, Rajasthan Discoms. The primary issue examined and determined by the Commission therein vide order dated 15.1.2020 was the entitlement of the Petitioner to claim the compensation in terms of capacity charges consequent to the relief of modification of the contracted capacity from 250 MW to 311 MW as allowed by the Hon'ble Supreme Court, vide its judgment dated 25.4.2018. Consequently, the Commission allowed the Petitioner to calculate and claim the compensation in terms of the capacity charges for 61 MW for the period from 30.11.2016 to 31.7.2018 after offsetting the capacity charges, if any, earned on the said capacity during the relevant period. Although the Petitioner, in its prayer(a) therein, had prayed for the past, pendente lite, and future interest on the amount to be awarded as capacity charges, the order dated 15.1.2020 did not return any findings thereon. By relying upon this aspect, read with Explanation V of Section 11, Respondents 1-4 have advanced the argument that in the present case, re-raising the

claim of interest is hit by the principle of *res judicata*. However, the issue raised in the present case is that of the entitlement of the Petitioner to the LPS on account of the failure on the part of the Respondents to timely pay the invoice raised as per the order dated 15.1.2020. Even considering that such an issue/claim(s) is to be covered under the prayer of interest made by the Petitioner in Petition No.63/MP/2019 and the absence of any finding of the Commission thereon amounts to deemed rejection, such an issue cannot and does not satisfy the twin test of necessity and essentiality. Neither the adjudication upon the aspect of the Petitioner's entitlement to LPS was necessary for the deciding on the principal issue in said case as noted above, nor the Commission's order dated 15.1.2020 was based on the decision on such issue. Hence, the issue of the Petitioner's entitlement to the LPS on the account of failure on the part of the Respondents to timely honour the invoice raised as per order dated 15.1.2020 can at best, be termed as collateral or an auxiliary to the main issue therein and the present case, which raises them as directly and substantially in issue, cannot be said to be hit by the principle of *res judicata* as enshrined in Section 11 of CPC and as elucidated by the Hon'ble Supreme Court in its various judgments.

17. In view of the above, the objection of Respondents 1-4 that the present case is hit by the principle of *res judicata* is hereby rejected.

18. This issue is answered accordingly.

Issue No.2: Whether the Petitioner's claims of LPS and carrying cost maintainable?

19. Having held that the present case is not hit by the principle of *res judicata*, this brings us to the claims of the Petitioner to LPS and the carrying cost.

20. The Petitioner has submitted that in terms of the Commission's order dated 15.1.2020, it raised the invoice dated 16.1.2020 for Rs. 230,58,89,377.21/- towards

capacity charges for 61 MW for the period from 30.11.2016 to 31.7.2018 along with the computation sheet. In response thereof, Respondents 1-4, vide letter dated 3.2.2020, while agreeing to process the Petitioner's claim, requested the Petitioner to submit its invoice along with all relevant documents in terms of the capacity of the 61 MW for the period from 30.11.2016 to 31.7.2018 Discom-wise, after offsetting the capacity charges, if any, earned on the said capacity during the relevant period. The Petitioner vide letter dated 17.11.2021, while submitting all the relevant details, reiterated its above claim and requested the Respondents to pay the said amount. Since the aforesaid amount remains unpaid, the Petitioner was constrained to file Petition No.55/MP/2021 seeking execution of the order dated 15.1.2020, and it was only during the pendency of the above proceedings the Respondents paid a sum of Rs. 115,17,91,743/- on 4.3.2022 and a sum of Rs. 57,58,95,872/- on 29.6.2022 pursuant to the directions of this Commission. Thereafter, by order dated 13.6.2023 in Petition No.55/MP/2021, the Commission directed the Respondents to pay the balance sum of Rs. 57,58,95,782/- within four weeks from the date of the said order. It has also been stated by the Petitioner that during the pendency of the proceedings, the parties had carried out a reconciliation of the amounts that were due and payable to the Petitioner, and pursuant thereto, the Petitioner has raised a credit note dated 13.10.2023 for Rs. 24.15 crores, which was also confirmed by the Respondent(s) vide letter dated 2.11.2023 and, as a result, the Petitioner's claim stood reduced to Rs. 206.44 crores in place of 230.89 crores. As a sequitur thereto, there has been a revision in LPS payable to the Petitioner by the Respondent(s), which works out to Rs. 109.92 crores for the period commencing from February 2020 onwards and as of March 2024.

21. On merits, the Respondents have mainly contended that in the present case, neither the PPA nor any applicable regulation/notification, etc., contain any provision for interest, and therefore, the same cannot be claimed on the basis of equity, justice, and fair play. The Respondents have also sought to submit that the claim of deemed capacity charges is outside the scope of the PPA. However, the same has been levied in view of the order dated 25.4.2018 passed by the Hon'ble Supreme Court, and the Petitioner's claim for the interest as such does not flow from the said order either.

22. In response, the Petitioner has submitted that the PPA dated 1.11.2013 entered into between the Petitioner and Respondent No. 5/PTCIL ('PPA') was a back-to-back agreement to the PPA dated 1.11.2023 entered into between Respondent No. 5 and the Respondent Discoms ('Procurer PPA'), for the purchase of power. Therefore, provisions of the Procurer PPA were applicable to the Petitioner's PPA, which is also so clear from Clause (G) of the Petitioner's PPA. It is submitted that as per Article 8.8.2 of the Procurer PPA, the Supplementary Bill is to be paid by the due date. In case of delay in such payment, LPS would be applicable as per Clause 8.3.5 of the Procurer PPA. Accordingly, by operation of Clause 8.3.5 of the Procurer PPA, the Petitioner is entitled to an LPS of 2% in excess of the applicable SBAR calculated on a day-to-day basis and compounded monthly. It is further submitted that the amount of the capacity charge payable by the Respondents to the Petitioner is a matter of record, and towards which the Respondent also made part payments, though belatedly. It is with respect to the said delayed payments, as well as the remaining unpaid balance capacity charges, that the Petitioner herein is entitled to LPS as per the aforementioned clauses of the PPA.

23. We have considered the submissions made by the parties. Perusal of Clause G of the PTC – PPA clearly reveals that the provisions of the Procurer PPA signed

between PTCIL and Rajasthan Discoms shall be applicable mutatis mutandis to the said PPA except to the extent of the deviations as expressly stated in the said PPA. Besides, Article 8.8.3 of both the PPAs clearly provide that in the event of delay in payment of the Supplementary Bill by either Party beyond the Due Date, LPS shall be payable at the same terms as applicable to the Monthly Bills in Article 8.3.5. Both the PPAs being back-to-back in nature, there cannot be any doubt about the Petitioner's entitlement to the LPS in the event of delayed payment against the invoice(s) raised by the Petitioner. In the present case, the Commission vide order dated 15.1.2020 in Petition No. 63/MP/2019 had held the Petitioner entitled to the compensation in terms of the capacity charges for the 61 MW for the period from 30.11.2016 to 31.7.2018 after offsetting the capacity charges, if any, earned on the said capacity during the relevant period. Consequently, the Petitioner was directed to calculate and claim the compensation in terms of the capacity charge as above and to share all the relevant documents, including calculations, with the Respondents while claiming the compensation. In terms of the above order, the Petitioner proceeded to raise the invoice / supplementary bill upon the Respondents on 16.1.2020, which admittedly were not been paid to by the Respondents herein within the due date and were paid only in terms of the directions issued by the Commission during the execution proceedings in Petition No. 55/MP/2021. Pertinently, the order dated 15.1.2020 passed by the Commission in Petition No. 63/MP/2020 has also been upheld by the APTEL by its judgment dated 20.9.2021 in Appeal Nos. 68/2020 and 90/2020 filed by Respondents 1-4 and the Petitioner, respectively. Thus, the Respondents, having failed to honour the invoice raised by the Petitioner in terms of the order dated 15.1.2020 for a considerable period of more than 2 to 4 years (the last tranches of Principal appear to have been paid only in November- December 2023 and February 2024) cannot be heard saying no LPS liability is attracted towards the non-payment of

such invoice. In our view, the Petitioner is entitled to the LPS on the invoice dated 16.1.2020 raised pursuant to the order passed by this Commission dated 15.1.2020 in Petition No. 63/MP/2019 on account of the failure of the Respondents to honour such invoice within the due date. Accordingly, the Respondents are hereby directed to pay their outstanding liability towards the LPS to the Petitioner, calculated for the period beyond the due date of said invoice till the payment of the entire principal amount (duly adjusting the credit note generated by the Petitioner based on reconciliation as noted above), within sixty days from the date of this order.

24. It is further observed that the Petitioner has also prayed for carrying costs for the period from November 2016 to January 2020, along with LPS thereon. However, keeping in view that only vide order dated 15.1.2020, the Petitioner was held entitled to claim the compensation in terms of capacity charges for 61 MW capacity for the period from 30.11.2016 to 31.7.2018 after offsetting the capacity charges, if any, earned on the said capacity for the relevant period, on the basis of the judgment of Hon'ble Supreme Court dated 25.4.2018 and the such finding(s) not being premised upon any express economic restitutionary principles, as being in Change in Law cases/reliefs, we do not find it appropriate to award any carrying cost to the Petitioner as prayed for.

25. This issue is answered accordingly.

26. Petition No. 237/MP/2023 stands disposed of in terms of the above observations and findings.

Sd/-
(Harish Dudani)
Member

sd/-
(Ramesh Babu V.)
Member

sd/-
(Jishnu Barua)
Chairperson

