ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

MONDAY, THE EIGHTH DAY OF JANUARY
TWO THOUSAND AND TWENTY FOUR
***

:Present:
Justice C.V. Nagarjuna Reddy, Chairman
Sri Thakur Rama Singh, Member
Sri P.V.R.Reddy, Member

OP No. 53 of 2022

Between

M/s Bharat Heavy Electricals Limited,
Boiler Auxiliaries Plant, Ranipet
Rep by its Dy. General Manager (WEG &WS)

… Petitioner

AND

1. Andhra Pradesh Transmission Corporation (APTRANSCO), Vidyut Soudha, Gunadala, Vijayawada - 520 004
2. The Chief Engineer (Power Systems, Planning and Designs), (Now as the Chief General Manager/commercial, APTRANSCO), Vidyut Soudha, Vijayawada.
3. Andhra Pradesh Southern Power Distribution Company Ltd. Rep by its Chief General Manager, IPS/SOLAR & RAC, Tirupathi, Andhra Pradesh.
4. The Chief Engineer/ Commercial APPCC, Vidyuth Soudha, Gunadala, Vijayawada, A.P
   (Respondent Nos.3 and 4 were added as per the Orders dated 03-5-2023 in I.A.No.1/2023)

… Respondents

This Original Petition has come up for final hearing before us on 08-11-2023 in the presence of Smt G.Malathi, learned counsel for the Petitioner; and Sri P. Shiva Rao, learned Standing Counsel for the Respondents; that after hearing the learned Counsel for the parties and on consideration of the material on record, the Commission passed the following:

ORDER

1. This petition has been filed by M/s Bharat Heavy Electricals Limited, Boiler Auxiliaries Plant, Ranipet, (for short "the petitioner") seeking a direction to the Respondents to pay sum of Rs.1,95,75,929/-(Rupees one crore, ninety five lakhs, seventy five thousand, nine hundred and twenty nine only) together with interest at 10%, per annum, due under invoice, dated 08.04.2019, issued in respect of the 1.32 MW power, i.e., for 58,08,881 units, injected between June 2014 to August 2018 at its Inter-connection point based on the collective Joint Meter reading.

2. The brief facts of the case are narrated hereunder:

   (a) The petitioner (BHEL) has set up a Nonconventional Energy Project, i.e., 4 MW Wind Power Project, at Kadavakallu, Anantapur District, Andhra Pradesh, with a proposal of 0.13 MW for auxiliary consumption, 1.32 MW for Captive Consumption by Wheeling, and 2.55 MW for sale to respondent No.1-APTRANSCO. Accordingly, the Petitioner has entered into a Wind Power Wheeling Agreement (WPWA) with Respondent No.1 on 27-03-1999, which provided

that the Unutilised Delivered Energy at the Captive Industry in the Ramachandrapuram Unit of Hyderabad, should be sold to respondent No.1. The said WPWA is enforceable subject to obtaining consent from this Commission; and this Commission, vide: Proceedings No.APERC/Dir-Eng/CPP/O.P.No.27/2022/13, dated 31-01-2022, has accorded consent for Captive consumption upto 1.32 MW of power generated by the Petitioner to be used in their Ramachandrapuram Unit at Hyderabad and R&D Unit at Vikasnagar, Hyderabad. The Project achieved commercial operations (COD) on 23.09.1999. On 22.07.2002 the petitioner entered into a Power Purchase and Captive Wheeling Agreement (PPCWA) with respondent No.1, superseding the earlier WPWA dated 27-3-1999. Subsequently, the PPCWA has undergone certain amendments on 29.06.2004.

(b) Out of the 4 MW of power produced and delivered at the inter-connection point, Respondent Nos.1 and 2 have agreed to purchase 2.55 MW for themselves and transmit the remaining power i.e.,1.32 ME to the petitioner's sister concern units at R.C. Puram, Hyderabad and R&D Vikasnagar, Hyderabad, for their captive consumption. Accordingly, the Petitioner has been performing its part of contract and continued to injected 4 MW at the Interconnection Point of the Respondents and the

Respondents utilised 2.55 MW for themselves and wheeled 1.32 MW to the aforementioned sister concern units of the petitioner for their captive consumption until 2013- 2014.

(c) It is alleged by the petitioner that, as per the terms and conditions of the PPCWA, the Petitioner continued to inject 4 MW power to the Interconnection Point of the Respondents and Joint Meter Readings were taken every month; that consequent to the bifurcation of the State of Andhra Pradesh into two states i.e., Andhra Pradesh and Telangana, in the year 2014, and formation of the Telangana Transmission Corporation (TSTRANSCO), out of the 4 MW of power injected by the petitioner at the Interconnection Point, the Respondents could not wheel 1.32 MW of power for captive consumption of the Petitioner's sister concern units at R.C. Puram, Hyderabad and R&D Unit Vikasnagar, Hyderabad and stopped its transmission from 01-6-2014, since both the said units fell in the State of Telangana and under the jurisdiction of TSTRANSCO, and utilised the total 4 MW of power for themselves; that the aforesaid arrangement under the PPCWA dated 22-7-2022 was continued till the same was further amended on 12-09-2018; and that by the amended agreement (PPCWA) dated 12-9-2018 the petitioner and the respondents have entered into an agreement for transmission of the aforesaid 1.32 MW for captive

consumption of the petitioner's sister unit at Visakhapatnam in the State of Andhra Pradesh, viz.,M/s BHEL, HPVP, Visakhapatnam unit.

(d) It is alleged by the petitioner that the Respondents have made payments for the invoices raised in respect of 2.55 MW of power purchased by them under PPCWA dated 22.07.2002 and the amended PPCWA dated 29.06.2004, but they did not make any payment for the invoice raised on 08.04.2019 for Rs.1,95,75,929/- in respect of 1.32 MW power, i.e., for 58,08,881 units, injected between June, 2014 to August, 2018 to the respondents at the Inter-connection point; that as per the terms and conditions of the PPCWA, it is entitled to receive a sum of Rs.1,95,75,929/- together with interest at the rate of 10% per annum; that, instead of paying the aforesaid amount, the Respondents have filed OP NO.33 of 2022 before this Commission seeking a claim of Rs.78,34,436,/- (Rupees seventy eight lakhs, thirty four thousand, four hundred and thirty six only) from the Petitioner towards wheeling charges; that the petitioner filed a counter and counterclaim in the said OP., praying this Commission to set off the said claim of Rs.78,34,436/- from Rs.1,95,76,929/-(Rupees one crore, ninety five lakhs, seventy six thousand, nine hundred and twenty nine only) due to the petitioner; that, subsequently, on their verification, it was noticed

that the respondents have calculated the wheeling charges on 2.55 MW, instead of 1.32 MW of power wheeled to the petitioner's sister concern units, and arrived at the aforesaid claim of Rs.78,34,436/- erroneously, but, in fact, the petitioner is required to pay Rs.35,58,958/- towards wheeling charges on 1.32 MW of power wheeled to its sister concern units; that, accordingly, a clarificatory note has been sent to the respondents through email dated 30-12-2020, followed by two reminders, but the petitioner did not receive any response from the respondents; and that, therefore, the petitioner is claiming to recover an amount of Rs.1,95,75,929/- in respect of 1.32 MW power, i.e., for 58,08,881 units, injected between June, 2014 to August, 2018 to the respondents at the Inter-connection point, based on the joint meter readings, along with interest at 10% per annum from the respective dates.

3. In the counter-affidavit filed on behalf of respondents 1 and 2, it is, *inter alia*, contended that the aforesaid claims of the Petitioner are not maintainable in law, since by operation of Law, APTRANSCO is precluded from the obligation of procurement of power and the same was conferred on the DISCOMs and APTRANSCO is not the appropriate authority to satisfy the alleged claims; that the petition is bad for non-joinder of necessary party and bad for misjoinder of

the respondents; and that the reliefs sought against them are not tenable.

4. Pursuant to the objections raised by respondents 1 and 2, in their counter-affidavit referred to supra, the petitioner filed an amendment petition on 15-3-2023 for impleading M/s APSPDCL as Respondent No.3 and the Chief Engineer Commercial, APPCC, Vijayawada, as Respondent No.4, which was allowed on 03-5-2023. On 17-5-2023 the petitioner filed the fair copy of the amended petition seeking the reliefs as set forth supra.

5. (a) Subsequently, a counter affidavit has been filed on behalf of respondent No.3-APSPDCL, *inter alia,* contending that the claim of the Petitioner is for the compensation towards unutilized banked energy of 58,08,881 units said to have been injected into the grid, without any agreement of Open Access during the period from June, 2014 to August, 2018; that the normal period of limitation to make any claim of dues or compensation being three years from the last date of injection of power, which came to an end by 31.08.2021; that, even after excluding the period from 22nd March, 2020 to the end of March, 2022, due to Covid-2019, in compliance of the judgement of Hon'ble Supreme Court, still the Petition is beyond three years, in particular, against Respondent No.3, who was impleaded in this case as a party respondent as

per the order dated 03.05.2023 of this commission; and that, accordingly, the claim of the petitioner against Respondent No.3 is barred by law of limitation and deserves to be rejected at threshold without going into the merits of the case.

(b) On merits, respondent No.3 contended that under the Agreement, respondent No.1, initially, agreed to purchase 2.55 MW, out of the 4 MW of electricity produced by the petitioner and to transmit the remaining power i.e., 1.32 MW, to the petitioner's sister units at R.C Puram, Hyderabad, and R&D, Vikasnagar, Hyderabad, for captive consumption; that the aforesaid obligation of wheeling of power for the petitioner's captive consumption was later transferred to the concerned DISCOM, which, during the year 2014, fell in the State of Telangana; that during 2018 an amendment was again made to the said PPCWA dated 22-7-2002 for transmission of 1.32 MW for the Captive Consumption of M/s BHEL, HPVP, at Visakhapatnam, falling in the State of Andhra Pradesh and, accordingly, power was wheeled to the said unit at Visakhapatnam till the expiry of PPCWA in the year 2019; that the plea of the petitioner that the Respondents have not paid for the 4 MW power injected is not true; that payments have been made only for 2.55 MW of power as stipulated in the aforesaid PPCWA; that any power injected beyond the capacity covered by PPCWA to the

Respondents shall be treated as an inadvertent power; that since the sister concern units of the petitioner are located in the State of Telangana, to where the petitioner wanted to continue the wheeling of power under the PPCWA, the Southern Region Load Dispatch Centre (SRLDC) has to give approval for Interstate Open Access; that, admittedly, such an approval was not obtained by the petitioner; that the respondents never requested the petitioner regarding 1.32 MW of power claimed to have been injected into the Grid without any valid agreement, and, thus, it is not accountable and respondent No.3 has no liability to pay any part of the said claim; that the principle of law as to non-gratuitous act is not applicable to the present case; that the order, dated 20-12-2021, passed by this Commission in **M/s. TGV SRAAC Limited Vs. AP TRANSCO and others (O.P No.65 of 2019)**[1] is very much applicable to the facts of the present case; and that, therefore, sought for dismissal of the petition with costs.

6. The petitioner filed a rejoinder to the aforesaid counter-affidavit filed by respondent No.3, *inter alia*, stating that after having received the invoice and admitted the liability by taking necessary action for payment of the amount to the petitioner in respect of the entire power generated and utilised by them, respondent No.3 has now

[1]) Order dated 20-12-2021 in OP No.65 of 2019 on the file of this Commission.

chosen to contend that the claim is barred by limitation, which is impermissible as the petitioner denies the dates and calculation of the period of limitation adopted by respondent No.3; and that, inasmuch the respondents never refused to pay the amount demanded in the invoice, the claim filed by the petitioner is well within the limitation.

(b) It is further stated that the obligation of wheeling of power for their captive use was later transferred to concerned DISCOM, which during the year 2014 fell in the State of Telangana, makes it clear that the respondents herein knowing fully well that the entire 4 MW injected at Interconnection Point upto 12.09.2018 was entirely for the purchase by the respondents, and, accordingly, the respondents have not only accepted the delivery of entire 4 MW power, but also recorded the same by entering the same in the Joint Meter Readings duly signed by both the parties every month; that it is false to allege that the power injected beyond the capacity covered by the PPCWA to respondent No.3 shall be treated as inadvertent power; and that Article-11 of the PPCWA provided for “Mutual Arrangement” between the parties for sale and purchase of the energy produced by the project and the same has been acted upon by the parties as is evident from the injection of entire 4 MW of powr and the joint meter readings entered by both parties.

(c) It is further stated that the claims were made when the PPCWA was in force and the petition has been filed well within the period of limitation; and that the decision of this Commission in **M/s. TGV SRAAC Limited (1 supra),** relied upon by the respondents, has no application to the facts of the present case since the petitioner is not a party to the said petition.

7. Heard Smt. G.Malathi, learned Counsel for the Petitioner, and Sri P.Siva Rao, Learned Standing Counsel for the Respondents at length on 08-11-2023 and that they were permitted to file case laws, if any, in support of their respective submissions.

8. In the written submissions filed on behalf of the petitioner on 21-11-2023, Smt. G.Malati, learned counsel for the petitioner, submitted that there is no specific Clause in the PPCWA for submission of monthly invoices relating to 1.32 MW of power, which was meant for captive consumption, and due to its own default committed in wheeling of energy to Hyderabad Unit, thus there is no contemplation for invoice in such an eventuality. She further submitted that the documents produced by the petitioner clearly show that the PPCWA was valid upto 22-9-2019; that the invoice was raised within the Agreement period, i.e. 22-9-2019, and that, therefore, it is within the limitation period. In support of her contentions, she relied upon the decision of the Hon'ble

Supreme Court in **AP Power Coordination Committee Vs. Lanco Kondapalli Power Limited and others**[2], and **Madras Port Trust Vs. Hymanshu International**[3].

9. Having regard to the respective pleadings of the parties and the submissions of the counsel representing them, the following points arise for adjudication:

1. Whether the respondents are liable to pay for the 1.32 MW power purportedly injected into the Grid between June, 2014 and August, 2018?

2. Whether the claims of the petitioner are barred by limitation?

10. **Re-Point No.1: Whether the respondents are liable to pay for the 1.32 MW power purportedly injected into the Grid between June, 2014 and August, 2018?**

As per the PPCWA, respondent No.1 has undertaken to purchase energy generated from 2.55 MW capacity from the petitioner and transmit the remaining power i.e., 1.32 MW to the petitioner's sister concern units at R.C.Puram, Hyderabad and R & D, Vikasnagar, Hyderabad, for captive consumption. However, consequent on the formation of the DISCOMs, the PPCWAs held by respondent No.1 were transferred to the respective DISCOMs, and, consequently, respondent No.3-APSPDCL has succeeded respondent No.1 with

[2]) (2016) 3 SCC 468
[3]) (1979) 4 SCC 176

respect to the PPCWA in question. There was no dispute between the parties, till the State of Andhra Pradesh remained undivided. However, due to the division of the State of Andhra Pradesh, under the Andhra Pradesh Reorganisation Act, 2014, a separate State of Telangana was formed with a part of the undivided State of Andhra Pradesh. Consequently, the nature of the transmission has taken the form of Interstate Transmission as the two Captive Units, to which the power was hitherto transmitted, falling in the State of Telangana. As a result, Interstate Transmission requires approval of the Telangana TRANSCO/DISCOM concerned and SRLDC under the extant Regulations governing the Interstate Transmission of Power. It is not in dispute that the petitioner did not apply for approval of Interstate Transmission to SRLDC and also to TSTRANSCO, which requires to transmit the power from the Andhra Pradesh State border. In this situation, the DISCOM was unable to transmit power to the petitioner's sister concern units situated in the State of Telangana from 01-6-2014 onwards. This stalemate continued till 12-9-2018, when an amendment to PPCWA dated 22-7-2002 was entered between the petitioner and the respondents for transmission of 1.32 MW of power for Captive Consumption of the petitioner's sister concern units, viz.,

M/s.BHEL, HPVP, Visakhapatnam Unit situated in the residuary State of Andhra Pradesh.

While the DISCOM continued to pay for 2.55 MW of power purchased by it, no such payment was made by it in respect of 1.32 MW of power. Even the petitioner also did not raise any invoices/bills from the month of June, 2014. It is only on 08-4-2019 that an invoice was raised for a sum of Rs.1,95,75,929/- representing the cost of 58,08,881 units of power allegedly injected into the Grid from June, 2014 and August, 2018. It is the specific case of the DISCOM that as a result of the petitioner's failure to obtain necessary permissions from the TS TRANSCO/TS DISCOM and APSLDC, the power could not be transmitted to the petitioner's sister units; and that since the DISCOM had an obligation to buy 2.55 MW capacity, any power injected beyond the said capacity will be treated as an inadvertent power. It is their further plea that when it is not able to get the power transmitted to its sister concern units situated in the State of Telangana, the petitioner should have restricted their generation limited only to the PPA capacity and, in the absence of the required permissions/approvals for making Interstate supply for exporting the power to the petitioner's sister units situated in the State of Telangana, such a power put into the Grid is not accountable; that

in this facts situation the principle of law as to non-gratuitous act is not applicable to the present petition. In support of this submission, the DISCOM has relied upon the order of this Commission in **M/s. TGV SRAAC Limited (1 supra)**.

Admittedly, the power purchase obligation of the petitioner was restricted to only 2.55 MW. The petitioner, however, pleaded that in view of bifurcation of the State of Andhra Pradesh, the respondents could not wheel 1.32 MW to its sister concern units and, as a result, the transmission of 1.32 MW to its sister concern units situated in Telangana State was stopped from 01-6-2014 and that, instead, the respondents utilised the entire 4 MW of power, including 1.32 MW, injected by the petitioner at the Interconnection Point of the respondents. The petitioner also pleaded that joint meter readings were taken every month, which were signed by the representatives of the petitioner and the respondents, thereby implying that there was an oral understanding between the parties to receive the power intended to be supplied to the petitioner's sister concern units situated in the State of Telangana, for utilisation by the DISCOM.

Nodoubt, there was no express contract between the parties in respect of 1.32 MW power. However, the respondents have not disputed the fact that the power in excess of 2.55 MW covered by

PPCWA between the petitioner and respondents has been injected into the Grid. As evident from Annexures-I, I-A and III consisting of meter readings filed for the disputed period, the Divisional Engineer (Operation) of APSPDCL, Gooty, has signed the joint meter readings, which is not denied in the DISCOM's pleadings. It would, thus, appear that even in the absence of an express agreement between the petitioner and the DISCOM, power from 1.32 MW capacity of the petitioner was nevertheless injected into the DISCOM's Grid and utilised by it, as could be seen from the joint meter readings.

The question then is - whether the DISCOM is liable to pay for the said power, and, if so, at what rate?

The answer to this question is not far to seek. The scope and ambit of Section 70 of the Contract Act,1872 was explained and considered, in detail, by this Commission in its Common Order dated 05-7-2021, passed in **M/s.Vibrant Greentech India Pvt. Ltd., Vs. APSPDCL and others[4].** We can do no better than reproducing the relevant portion of the said order, which reads as under:

"Section 70 of the Contract Act reads:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and

[4]) Common order dt.05-7-2021 in OP Nos.9 and 20 of 2020 on the file of this Commission.

such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Section 70 posits a principle by which unjust enrichment by one party by taking shelter under non-existence of a contract is prevented. This provision is based on the principle of equity whereby it provides for compensation to the person who provided benefit to the other party not intended to be gratuitous. We shall now discuss the relevant case law on the subject.

State of West Bengal Vs. B.K. Mondal and Sons (1962 Supp(1) SCR 876 = AIR 1962 SC 779) is a leading Indian case on Section 70 decided by a Constitution Bench. The brief facts of the case are that a contractor offered to construct certain buildings for use of the civil supplies department of the then State of Bengal. The offer was accepted by the said department by a letter. Construction was completed and payment made. The contractor was requested by the Sub-Divisional Officer, Arambagh to construct kutcha road, guard room, office, kitchen and room for clerks at Arambagh for the civil supplies department. The constructions were accordingly undertaken and completed. The contractor was again requested to construct certain storage sheds and constructions were accordingly made. When the contractor raised the bills, payment was denied forcing the contractor to institute a civil suit for recovery of bills. The trial Judge while holding that there was no valid and binding contract having regard to the provisions of Section 175(3) of the Government of India Act (similar to Article 299 of the Constitution of India) however upheld the claim of the contractor under Section 70 of the Contract Act. The intra-court appeal against the said Judgement having been dismissed, the State filed appeal before the Hon'ble Supreme Court. It was argued for the State that the word 'lawful' in Section 70 shall be construed with reference to Section 23 of the Contract Act. The Apex Court while negativing the said contention held that though the agreement was not in conformity with Section 175(3) of the Government of India Act and hence not enforceable, the contractor was still entitled for recovery of his bills by way of compensation. The scope and ambit of Section 70 is explained by the Hon'ble Apex Court at paras 13 to 15 as below :

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the

former in respect of, or to restore, the thing so done or delivered."

It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but, if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and Section 70 can be invoked. Section 70 occurs in Chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble these created by contract. That being so, reverting to the facts of the present case once again, after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract

and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by Section 70.

It is, however, urged by Mr Sen that the recognition of the respondent's claim for compensation virtually permits the circumvention of the mandatory provisions of Section 175(3), because, he argues, the work done by the respondent is no more than the performance of a so-called contract which is contrary to the said provisions and that cannot be the true intent of Section 70. It is thus clear that this argument proceeds on the assumption that if a decree is passed in favour of the respondent for compensation as alternatively claimed by it would in substance amount to treating the invalid contract as being valid. In our opinion, this argument is not well-founded. It is true that the provisions of Section 175(3) are mandatory and if any contract is made in contravention of the said provisions the said contract would be invalid; but it must be remembered that the cause of action for the alternative claim of the respondent is not the breach of any contract by the appellant; in fact, the alternative claim is based on the assumption that the contract in pursuance of which the respondent made the constructions in question was ineffective and as such amounted to no contract at all. The respondent says that it has done some work which has been accepted and enjoyed by the appellant and it is the voluntary acceptance and enjoyment of the said work which is the cause of action for the alternative claim. Can it be

> said that when the respondent built the warehouse, for instance, without a valid contract between it and the appellant it was doing something contrary to Section 175(3)? As we have already made it clear even if the respondent built the warehouse he could not have forced the appellant to accept it and the appellant may well have asked it to demolish the warehouse and take away the materials. Therefore, the mere act of constructing the warehouse on the part of the respondent cannot be said to contravene the provisions of Section 175(3). In this connection it may be relevant to consider illustration (a) to Section 70. The said illustration shows that if a tradesman leaves goods at B's house by mistake, and B treats the goods as his own he is bound to pay A for them. Now, if we assume that B stands for the State Government, can it be said that A was contravening the provisions of Section 175(3) when by mistake he left the goods at the house of B? The answer to this question is obviously in the negative. Therefore, if goods are delivered by A to the State Government by mistake and the State Government accepts the goods and enjoys them a claim for compensation can be made by A against the State Government, and in entertaining the said claim the Court could not be upholding the contravention of Section 175(3) at all either directly or indirectly. Once it is realised that the cause of action for a claim for compensation under Section 70 is based not upon the delivery of the goods or the doing of any work as such but upon the acceptance and enjoyment of the said goods or the said work it would not be difficult to hold that Section 70 does not treat as valid the contravention of Section 175(3) of the Act. That being so, the principal argument urged by Mr Sen that the respondent's construction of Section 70 nullifies the effect of Section 175(3) of the Act cannot be accepted.

Explaining the word “lawfully” in the provision, the Hon’ble Court held at paras 16 to 18 as under:

> It is true that Section 70 requires that a person should lawfully do something or lawfully deliver something to another. The word “lawfully” is not a surplusage and must be treated as an essential part of the requirement of Section 70. What then does the word “lawfully” in Section 70 denote? Mr Sen contends that the word “lawfully” in Section 70 must be read in the light of Section 23 of the said Act; and he argues that a thing cannot be said to have

been done lawfully if the doing of it is forbidden by law. However, even if this test is applied it is not possible to hold that the delivery of a thing or a doing of a thing the acceptance and enjoyment of which gives rise to a claim for compensation under Section 70 is forbidden by Section 175(3) of the Act; and so the interpretation of the word “lawfully” suggested by Mr Sen does not show that Section 70 cannot be applied to the facts in the present case.

Another argument has been placed before us on the strength of the word “lawfully” and that is based upon the observations of Mr Justice Straight in Chedi Lal v. Bhagwan Das [(1889) ILR 11 All 234] . Dealing with the construction of Section 70 Straight, J., observed: “I presume that the legislature intended something when it used the word ‘lawfully’ and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done”. It is urged that in the light of this test it cannot be said that the respondent held such a relation to the appellant as to be able to claim compensation from the appellant. With respect, we are not satisfied that the test laid down by Straight, J., can be said to be justified by the terms of Section 70. It is of course true that between the person claiming compensation and person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word “lawfully” in Section 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise to the claim for compensation. This aspect of the matter has not been properly brought into the picture when Straight, J., laid down the test on which Mr Sen's argument is based. If the said test is literally applied then it is open to the comment that if one person is entitled by reason of the relationship as therein contemplated to receive compensation from the other Section 70 would be hardly necessary. Therefore, in our opinion, all that the word “lawfully” in the context indicates is that after

> something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of Section 70 gives rise to a claim for compensation.
>
> There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Section 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therefore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary. It would thus be noticed that this requirement affords sufficient and effective safeguard against spurious claims based on unauthorised acts. If the act done by the respondent was unauthorised and spurious the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation. It is unnecessary to repeat that in cases falling under Section 70 there is no scope for claims for specific performance or for damages for breach of contract. In the very nature of things claims for compensation are based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of contract.

In **Mulamchand Vs. State of Madhya Pradesh {(1968) 3 SCR 214 = AIR 1968 SC 1218}** the Hon'ble Supreme Court followed the ratio in **State of West Bengal Vs. B.K.Mondal ((1962 Supp(1) SCR 876 = AIR 1962 SC 779).** It is instructive to note the following observations at para-6 of the report :

> Section 70 it is not on the basis of any subsisting contract between the parties but a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

In **Fibrosa v. Fairbairn (1943 AC 32, 61)** Lord Wright has stated the legal position as follows:

> ".... any civilized system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution".

In **Nelson v. Larholt (1948 1 KB 330, 343)** Lord Denning has observed as follows:

> "It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

In **Mahanagar Telephone Nigam Limited Vs. Tata Communications Limited (2019 5 SCC 341)**, the Hon'ble Supreme Court after referring inter alia to **Mulamchand Vs State of M.P.** (**1968) 3 SCR 214 = AIR 1968 SC 1218**) finds nexus between Section 70 and the third para of Section 73 and held at para-9 as under :

> "Indeed, the aforesaid position in law is made clearer by Section 73 of the Contract Act. Section 73 reads as follows:
>
> **Compensation for loss or damage caused by breach of contract:**- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation: In estimating the loss or damage arising from a breach of a contract, the means which existed and remedying the inconvenience caused by the non-performance of the contract must be taken into account."

This section makes it clear that damages arising out of a breach of contract is treated separately from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under paragraph 1 of Section 73. When, however, a claim for damages arises from obligations resembling those created by contract, this would be covered by paragraph 3 of Section 73."

From the Judgements of the Apex Court as discussed above, the legal position can be summarised as under :

(i) A claim for compensation lies even though there was no contract or there existed a contract which was not valid and Enforceable.

(ii) Voluntary acceptance and enjoyment of the work by one party creates a cause of action for the other party to make a claim under Section 70.

(iii) The word "lawfully" indicates that after something is delivered or something is done by one person for another not intended to be gratuitous and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which forms basis for claiming compensation.

(iv) Claim for compensation is based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of a contract.

(v) A claim for compensation may not mean the same thing as a claim for damages for breach of contract, if a contract was subsisting between the parties.

(vi) What Section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and government".

In **M/s.Vibrant Greentech India Pvt. Ltd., (4 supra)** the PPA was entered between the Developer and the Licensee after the Projects were synchronised. Pursuant thereto, the Licensee allowed the power to be evacuated into the Grid by the Developers and at no point of time any objection was raised by the functionaries of the DISCOM or SLDC. The DISCOM continued to avail the benefit of power supply from the Developers till the power connections were disconnected in March, 2020. In the said facts situation, this Commission observed as under:

"Thus, the conduct of the parties i.e., supply of power by the petitioners on the one hand and receiving and utilising the power without any demur on the other, constituted a fresh relationship between the petitioners and the respondents dehors the PPAs which formed the basis for a claim under Section 70 of the Contract Act. This transaction is separable from the obligations arising under the PPAs. Even though the PPAs are held to be unenforceable, the petitioners are nevertheless entitled for compensation under Section 70 of the Contract Act for the power supplied by them to respondent No.1".

In the present case, there was a PPCWA, which was valid till 23-9-2019. However, to the extent of power wheeling, the said part of the Agreement has become abortive from the month of June, 2014 in view of the Division of the State of Andhra Pradesh, rendering the nature of the wheeling as one of the Interstate Wheeling/Transmission. As a result, though the petitioner continued to generate power to its full capacity of 4 MW and injected the generated power into the Grid, the DISCOM continued to pay only for the capacity of 2.55 MW covered by the PPCWA, while not paying for the capacity of 1.32 MW intended for the wheeling to the petitioner's sister concern units. Though there was no express contract to utilise the said power injected into the Grid, the DISCOM has, obviously, received and utilised the said power as evident from the joint meter readings. There was, thus, voluntary acceptance and enjoyment of the power by the DISCOM and thereby a relationship was created between the two parties resembling that arising out of a contract. The whole transaction is lawful, even in the absence of an express contract, as there is nothing to indicate that there is any element of unlawfulness in the series of transactions involving injection of the petitioner's power into the Grid and its utilisation by the DISCOM. Thus, the transaction relating to 1.32 MW power between the petitioner and

the DISCOM squarely falls within the ambit of Section 70 of the Contract Act as interpreted by the Apex Court in various decisions, which were discussed in **M/s.Vibrant Greentech Pvt Ltd (4 supra)** and summarised in the said order of this Commission.

As regards the order in **M/s. TGV SRAAC Limited (1 supra),** the said decision turns on its own facts. It was a case where the wheeling agreement with the erstwhile APSEB had expired. There was no valid application for an Open Access pending with the DISCOM, the successor of the Electricity Board. However, the Developer claimed to have injected its power into the Grid without there being any valid OA permission and without any approval from the SLDC for continuing to inject the power into the Grid after expiry of the wheeling agreement. In that factual matrix, this Commission held that Section 70 of the Contract Act is not attracted. However, the present case on hand is similar to that in **M/s.Vibrant Greentech India Pvt. Ltd (4 supra),** if not identical. As discussed in detail, the facts clearly make this case fall within the purview of Section 70 of the Contract Act.

Point No.1 is, accordingly, answered.

11. Re Point No.2: Whether the claims of the petitioner are barred by limitation?

Admittedly, the claim is for the period from June, 2014 to August, 2018. The Apex Court in **Lanco Kondapalli Power Limited (2 supra)** held that the Law of Limitation applies to a claim brought before the Commissions in a dispute under Section 86(1)(f) of the Electricity Act, 2003; and, therefore, all the considerations as applied by the Civil Court must be equally applied by the Commissions as regards the aspect of limitation in money claims. The summary of the observations made by the Apex Court in paras 29 and 31 of the said decision is - "*there is nothing in the Electricity Act 2003 to create a right in a suitor before the Commission to seek claims which are barred by law of limitation merits a serious consideration. There is no possibility of any difference of opinion in accepting that on account of judgement of this Court in* ***Gujarat Urja Vikas Nigam Limited Vs. Essar Power Limited - (2008) 4 SCC 755*** *- the Commission has been elevated to the status of a substitute for the Civil Court in respect of all disputes between the licensees and generating companies. Such disputes need not arise from the exercise of powers under the Electricity Act. Even claims or disputes arising purely out of contract like in the present case have to be either adjudicated by the Commission or the Commission itself has the discretion to refer the dispute for arbitration after exercising its*

power to nominate the arbitrator". …. "In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) appears to be for speedy resolution so that a vital developmental factor - electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the Civil Court. Evidently, in absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. … "We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory".

In view of the aforementioned legal precedents cited supra, it is settled law that time barred claims cannot be entertained by this Commission for adjudication.

It has, therefore, to be seen - whether the claims are barred by limitation?

It is not in dispute between the parties that the period of limitation is three years under Article 137 of the Schedule to the Limitation Act, 1963. As per the said provision, limitation commences “when the right to apply accrues”.

Article-6 of the PPCWA deals with “Billing and Payment”. Articles 6.1,6.2, 6.3 and 6.5, which are relevant here, read as under:

> “6.1. For Delivered Energy purchased, the Company shall furnish a bill to the APTRANSCO calculated at the rate provided for in Article 3.3, in such form as may be mutually agreed between the APTRANSCO and the Company, for the billing month before the 5th working day following the metering date.
>
> 6.2. Any payment made beyond the due date of payment, APTRANSCO shall pay interest at a rate of 10% per annum as per existing nationalised bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction.
>
> 6.3. The APTRANSCO shall pay the bill on monthly basis as per Article 6.1, by opening a revolving Letter of Credit for a minimum period of one year in favour of the Company.
>
> 6.4. XXX XXX
>
> 6.5. **Direct Payment**: Notwithstanding the fact that a Letter of Credit has been opened, in the event that through the actions of the APTRANSCO, the Company is not able to make a draw upon the Letter of Credit for the full amount of any bill, the Company shall have the right to require the APTRANSCO to make direct payment of any bill by cheque or otherwise on or before the due date of payment by delivering to the APTRANSCO on or prior to the due date of payment of.such bill a notice requiring payment in the foregoing manner. Without prejudice to the right of the Company to draw upon the Letter of Credit if payment is not received in full, the APTRANSCO shall have the right to

> make direct payment by cheque or otherw-ise of any bill such that within 30 days after the date of its presentation to the designated officer of the APTRANSCO, the Company shall receive payment in full for such bill. When either such direct payment is made, the Company shall not present the same bill to the Scheduled Bank for payment against the Letter of Credit".

In the present case, it appears that the respondents have not opened Letter of Credit. In the absence of such a Letter of Credit, under Article 6.5, AP TRANSCO/DISCOM shall pay the Bill amount within 30 days of its presentation to the designated officer. Admittedly, the petitioner has not submitted its bills until 08-4-2019 and an invoice for Rs.1,95,75,929/- was issued in respect of the power injected between June, 2014 and August, 2018.

As per the above mentioned terms of the Agreement, the petitioner shall furnish a bill for the billing month on or before 5th working day following the metering date. Article 1.14 defined "Metering Date" as mid-day (i.e., noon) of the 24th (twenty fourth) day of each calendar month, at the Interconnection Point. Thus, for every month of supply, the bill shall be furnished by the petitioner on 29th of that month. If payment is not made within 30 days of presentation of the bill, the respondents could be committing default in payment, upon which "right to apply" accrues, within the meaning of 137 of the Limitation Act. For instance, for the month

of June, 2014, right to sue began at the end of July, 2014 and so on and so forth for each subsequent month upto September, 2018 (the period of supply ended in August, 2018), and if we reckon the three year period from the end of July, 2014, the limitation for the entire period has expired. Even for the last month, i.e., August, 2018, it has expired in August, 2021. If the period of two years is excluded due to Covid-2019, as per the orders of the Honourable Supreme Court, the limitation for August, 2018 will expire on 30-9-2022. However, the OP has been filed on 14-9-2022, which means that only for the month of August, 2018 the limitation survives and for all the rest of the period upto July, 2018, the claim is barred by limitation. In the above view of the matter, the petitioner is entitled to recover and respondent No.3 is liable to pay for the power which was injected into the Grid in the month of August, 2018.

Point No.2 is, accordingly, answered.

12. In view of the foregoing discussion, the OP is allowed in part to the extent indicated above. Accordingly, respondent No.3 is directed to ascertain the quantum of power which was injected in the month of August, 2018 based on the joint meter readings for the said month and pay at the tariff as payable for 2.55 MW power

purchased by the respondents from the petitioner. Such payment shall be made within one month from the date of receipt of this order.

Order passed on this the eighth day of January, 2024.

Sd/-	Sd/-	Sd/-
P.V.R. Reddy	**Justice C.V. Nagarjuna Reddy**	**Thakur Rama Singh**
Member	**Chairman**	**Member**