CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

I.A. No. 29/2019
in
Petition No. 4/MP/2017

Coram:
Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S. Jha, Member

Date of order: 6th January, 2020

In the matter of

Petition under Section 79 (1) (f) and 79 (1) (b) of the Electricity Act, 2003 in connection with the dispute and differences arising under the PPA dated 18.7.2008 between the Petitioner and BSES Rajdhani Power Limited (Interlocutory application on behalf of BSES Rajdhani Power Limited for amendment of its reply/counter claim dated 13.9.2017)

And
In the matter of

Maithon Power Limited
Corporate Centre
34 Sant Tukaram Road, Carnac Bunder
Mumbai-400009

...Petitioner

Vs

1) BSES Rajdhani Power Limited
   2nd Floor, B Block
   BSES Bhawan, Nehru Place
   New Delhi-110019

2) Tata Power Trading Company Limited
   Corporate Centre
   34 Sant Tukaram Road, Carnac Bunder
   Mumbai-400009

…Respondents

Parties Present:

1) Shri Sanjay Sen, Senior Advocate, MPL
2) Shri Shreshth Sharma, Advocate, MPL
3) Ms. Apoorva Misra, Advocate, MPL
4) Shri Pankaj Prakash, MPL
5) Shri Buddy Ranganadhan, Advocate, BRPL
6) Shri Dushyant Manocha, Advocate, BRPL
7) Shri Vivek Singh, Advocate, BRPL

ORDER

The Petitioner, Maithon Power Limited (MPL) has filed the Petition No. 4/MP/2017 with the following prayers:

> "(a) admit the present petition;
>
> (b) issue appropriate directions to Respondent No. 1 to pay to the Petitioner an amount of Rs. 1.77 crore as differential price on account of the difference between the Normative PPA Tariff and the lower TPTCL rate at which Respondent No. 2 has charged Respondent No. 1 from time to time along with such carrying cost as this Commission may deem just and proper;
>
> (c) issue appropriate directions to Respondent No. 1 to pay to the Petitioner STOA Charges amounting to Rs. 1.09 crore which Respondent No.2 had erroneously charged to the Petitioner asset out in detail in Table 6 above along with late payment surcharge as per clause 7.4.5 of the PPA@ 1.25% per month from the date of invoice, i.e. 28.11.2011 till the date of actual payment;
>
> (d)direct Respondent No. 1 to pay the amount of Rs. 16.90 crore being the outstanding energy charges under invoice dated 22.11.2011 for the supply of power during the period01.092011 to 30.09.2011 (including Capacity Charges for the Un-availed Power during the period 8.09.2011 to 14.09.2011)along with late payment surcharge as per clause 7.4.5 of the PPA @ 1.25% per month from the date of invoice till the date of actual payment;
>
> (e) direct Respondent No. I to pay the Petitioner an amount of Rs. 89.43 crore being the Capacity Charge for the Un-availed Power during the period October, 2011 to March, 2012 as computed in Table 8 of the petition along with late payment surcharge as per clause 7.4.5 of the PPA @1.25% per month from the date of filing of this petition till the date of actual payment;
>
> (f) pass such other and further orders/directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case.

2. Respondent No. 1 BRPL has filed reply to the Petition vide its affidavit dated 13.9.2017. Broadly, the Respondent has taken the following objections:

(a) Claims raised by the Petitioner are barred by limitation.

(b) The Petitioner was in breach of the contractual obligations and therefore, the reliefs claimed cannot be allowed.

(c) Claim of Rs. 1.77 crore as differential price on account of difference charged by TPTCL, Rs. 1.09 crore towards short term open access charges, Rs. 16.90 crore towards outstanding energy charges for supply of power during 1st September 2011 to 30th September 2011, claim of Rs. 89.43 crore towards capacity charges for the un-availed power during October, 2011 to March, 2012 are not admissible.

(d) Respondent No. 1 has paid an excess amount to the tune of Rs. 113.6 crore for which it is entitled to refund.

Respondent No. 1 has prayed that the excess amount paid by it be refunded by the Petitioner along with interest/ carrying cost.

3. The Petitioner has filed its rejoinder vide its affidavit dated 10.1.2018 refuting the counter claims made by Respondent No. 1.

4. The Respondent No. 1, BRPL has filed IA No. 29/2019 seeking to amend its reply dated 13.9.2017. The Commission issued notice on the IA to the Petitioner and Respondent No. 2. The Petitioner has filed its reply to the IA vide its affidavit dated 13.3.2019 and the Respondent No. 1 has filed its rejoinder to the reply of the Petitioner to the IA vide its affidavit dated 28.3.2019.

5. The IA was heard on 29.10.2019 in which the Learned Senior Counsel for the Petitioner and Learned Counsel for the Respondent, BRPL advanced extensive arguments. The Petitioner and Respondent No. 1 have also filed their written submissions. Based on the pleadings of the parties and the oral arguments, we are proceeding to dispose of the IA.

6. Respondent No. 1/BRPL has sought to add paragraph 36A, 36B, 40A, 40B, 40C, the prayers (b1) and (b2) to its reply dated 13.9.2017 and place on record Annexure R-6 to Annexure R-10. The Respondent No. 1/BRPL has submitted that in Petition No. 4/MP/2017, MPL has claimed certain amounts from BRPL which included the payment of capacity charges for the period from September 2011 to March 2012 in terms of the provisions of the PPA dated 18.7.2008. BRPL has submitted that the power plant of MPL achieved COD only on 1st September, 2011 while MPL was claiming capacity charges for the period March 2011 to March 2012. BRPL filed its reply to the Petition in September 2017. However, subsequent to the filing of the reply, the Commission has issued order dated 31.8.2017 in Petition No. 28/MP/2016 and order dated 20.3.2018 in Petition No. 192/MP/2016 wherein MPL was directed to provide its past declared capacity figures to ERLDC. After obtaining the data from MPL and getting it verified by ERLDC, ERPC has issued a letter dated 9.5.2018 to all stakeholders capturing the declared capacity to MPL for past period including that of September 2011 till March 2012. Since the aforesaid letter revealed that MPL did not declare any capacity qua BRPL, the latter is not liable to pay any capacity charge. Accordingly, BRPL sought amendment of its reply in order to bring the subsequent developments i.e. orders dated 20.3.2018 and 9.5.2018 and the letter of ERPC dated 9.5.2018. BRPL has submitted

that the claim for capacity charge cannot be adjudicated without reference to the evidence regarding declaration of capacity qua BRPL and therefore, the proposed amendments are relevant for an effective adjudication of the disputes. BRPL has further submitted that as a natural consequence of the subsequent information that have become available, it is MPL that needs to compensate BRPL in terms of Clause 1.6.3 of the PPA for its failure to achieve 80% availability.

7. MPL in its reply to the IA has submitted that the counter claim of BRPL which pertains to period April 2011 to March 2012 is barred by limitation and hence, the application seeking amendment is not maintainable. The Petitioner has submitted that it filed the Petition No. 10/2012 before DERC. DERC held that CERC has the jurisdiction in the matter which was upheld by APTEL. In terms of APTEL's order dated 14.7.2016, the Petitioner has approached the Commission by way of Petition No.4/MP/2017. However, BRPL for the first time raised its counter claim to its reply dated 13.9.2017 to the present Petition which is after more than a period of 5 years of the Petition No. 10/2012 before DERC. BRPL through the reply dated 13.9.2017 has failed to explain or mention the reasons for the delay in filing the counter claim/set-off through present application and new facts and averments are being relied upon to amend a time barred counter claim and hence the amendment is not maintainable. The Petitioner has submitted that it cannot be made to suffer the burden of a time barred counter claim through the legally unsustainable application and compelled to adjudicate at the stage of final arguments. The Petitioner has further submitted that BRPL's reliance on the order of the Commission gives rise to fresh cause of action and therefore, it changes the nature and character of the case. It is settled principle of law that as a general rule,

the Court should decline amendments if a fresh suit on the amendment claims would be barred by limitation at the date of application. In this connection, the Petitioner has relied on a number of judgments of the Hon'ble Supreme Court. The Petitioner has further submitted that while counter claims are provisioned under Order 8 Rule 6 A of the Code of Civil Procedure 1908, the same is neither provisioned under the Electricity Act nor under the Conduct of Business Regulations, and therefore, the counter claim as filed and sought to be amended by BRPL are not maintainable. The Petitioner has further submitted that the documents sought to be introduced through the amendment i.e. the order dated 31.8.2017 and 20.3.2018 and the letter of EPRC dated 9.5.2017 were available with BRPL since May 2018 whereas BRPL has approached the Commission for the amendment of pleadings in February 2019. Therefore, the proposed amendment needs to be disallowed and dismissed.

8. BRPL in its rejoinder has submitted that the Petitioner has not raised the plea of limitation in its rejoinder to the BRPL's main reply/set off/counter claim and this ground cannot be raised at a time when amendment of pleadings is being sought. With reference to the Petitioner's contentions that by virtue of the decision of the Appellate Tribunal for Electricity in Appeal No. 100 of 2013 decided on 1st August, 2014 (Uttar Haryana Bijli Vitran Nigam Limited Vs. Central Electricity Regulatory Commission), cross objection in terms of Order 41, Rule 22 of the Code of Civil Procedure, 1908 is not maintainable, BRPL has submitted that the said judgment was in the context of the cross objection and not for counter claim or set off. BRPL has submitted that the Hon'ble Supreme Court in its order dated 31.3.2015 expressly permitted the parties to

argue all the contentions available to them. As regards the Petitioner's contentions that the counter claim of BRPL is barred of limitation, BRPL has submitted that the set off/ counter claim is not new and was raised in its original reply and the proposed amendment is to add an additional ground to the counter claim. BRPL has submitted that the only question which needs to be considered at the stage of considering whether or not to allow any amendment is whether the proposed amendments are necessary for a full and complete adjudication of the merits of the disputes. In this connection, BRPL has relied on the following judgments:

(a) Rajesh Kumar Aggarwal &Ors. Vs. K.K. Modi, (2006) 4 SCC 385.

(b) Andhra Bank Vs. ABN Amro Bank N.V.7 Ors. (2007) 6 SCC 167.

(c) Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors. (2009) 10 SCC 84.

Analysis and Decision

9. Based on the pleadings and the submissions of the learned counsel for the parties, the issue that arises for our consideration is whether the prayers in the IA seeking amendment of the reply of Respondent No. 1, BRPL dated 13.9.2017 should be allowed or not.

10. As per sub-section (1) of Section 92 of the Electricity Act, 2003 (the Act), the Commission shall observe such rule of procedure in regard to the transaction of business at its meeting as it may specify. The Commission has specified the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (CBR)

under the Electricity Regulatory Commission Act, 1998 which has been saved under Section 185 (2) (a) of the Act. The CBR does not have any provision with regard to the amendment of pleadings by the parties in the proceeding before the Commission. Per force, the Commission has been relying on the provisions of the Code of Civil Procedure, 1908(CPC) for the purpose of dealing with the issues which are not covered in the CBR. In the past also, the Commission has considered the issue of amendment of the pleadings by the parties in terms of Order 6 Rule 17 of the CPC. Order 6 Rule 17 of CPC is extracted as under:-

> "17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of trial."

As per the above provisions, pleadings can be amended at any stage of the proceedings if in the view of the Court, the amendments are necessary for the purpose of determining the real questions in controversy between the parties. The proviso to the said rule says that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.

11. The Hon'ble Supreme Court in Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors. [(2009) 10 SCC 84] has laid down the broad parameters for consideration of the applications for amendment of the pleadings as under:-

"63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

12. In the light of the above principles, the amendments proposed by Respondent No. 1, BRPL need to be considered. In prayer (d) and (e) of the Petition, the Petitioner has sought a direction to Respondent No. 1/BRPL to pay an amount of Rs. 16.90 crore being outstanding energy charges under invoice dated 22.11.2011 for the supply of power during the period 1.9.2011 to 30.9.2011 (including capacity charges for un-availed power during the period 8.9.2011 to 14.9.2011) and an amount of Rs. 89.43 crore being the capacity charges for un-availed power during the period October 2011 to March 2012 with late payment surcharge @1.25 per month in terms of Clause 7.4.5 of the PPA from the date of filing of the Petition till the date of actual payment.

Respondent No.1/BRPL in paras 5 to 8 of its reply has taken the objection that the claims of the Petitioner are time-barred. Respondent No. 1/BRPL in para 31 to 37 of its reply dated 13.9.2017 has refuted the claims of the Petitioner. Further, the Respondent No.1/BRPL has asked for set-off/counter claim in paras 38 to 40 on account of the excess amount allegedly paid by the Respondent to the Petitioner. Subsequent to the filing of reply by BRPL, the Commission issued order dated 31.8.2017 in Petition No. 28/MP/2016 and order dated 20.3.2018 in Petition No. 192/MP/2016 in which the Petitioner was directed to provide its past declared capacity to ERLDC. After obtaining the data from MPL duly verified by ERLDC, ERPC issued a letter dated 9.5.2018 with regard to the declared capacity of the Petitioner including the period from September 2011 till March 2012. Respondent No.1/BRPL has sought amendment to its reply particularly addition of para 36A, 36B, 40A, 40B and 40C to bring the above documents on record (Annexure R-6 to Annexure R-10) and to add two prayer clauses namely (b1) and (b2). The proposed amendments are extracted as under:

> "36A. Without prejudice to the above, the Petitioner has claimed capacity charges allegedly payable to it for the period September 2011 till March 2012, which according to the Petitioner is to the tune of Rs. 89.43 crore. While computing this figure of Rs. 89.43 crore, the Petitioner has (amongst other months) considered the availability of its generating unit from April 2011 till March 2012. This is despite the admitted fact that the COD of its generating unit was w.e.f 1st September 2011. In other words, the Petitioner has computed its availability (and consequent capacity charges allegedly payable by Respondent No. 1) for a period when admittedly its generating unit was not even commissioned.
>
> 36B. In any event and without prejudice to the above, even for the period September 2011 till March 2012 (i.e., after the generating unit purportedly achieved its COD), the Petitioner whilst calculating its Capacity Charges has considered a particular monthly availability of its generating unit (as detailed in Table 7 of the Petition). However, it appears that the numbers considered in the said Table are incorrect and misleading. This is inter alia on account of the following:
>
> (a) The Petitioner filed a Petition before this Hon'ble Commission being Petition No. 28/MP/2016 inter alia seeking appropriate directions from this Hon'ble Commission to the ERPC to certify the monthly/annual Plant Availability of its Project.

(b) This Hon'ble Commission, as an interim measure, directed the ERLDC to schedule power from the generating unit of the Petitioner and to consider the declared capacity and Plant Availability of the Petitioner from 1 August 2017. It was further observed by this Hon'ble Commission that insofar as the declared capacity and Plant Availability for the past period were concerned, the decision of this Hon'ble Commission in another matter (namely, Petition No. 192/MP/2016 filed by Jaiprakash Power Venture Limited) would govern the Petitioner's case as well. A copy of the Order dated 31 August 2017 passed by this Hon'ble Commission in Petition No. 28/MP/2016.

(c) Whilst disposing of Petition No. 192/MP/2016, this Hon'ble Commission directed the Petitioner to furnish to ERLDC, the declared capacity and day to day scheduling of its generating unit for the past period. It was further directed that on receipt of the data, ERLDC shall disseminate the said information to ERPC for inclusion in the Regional Energy Accounting by issuing necessary Addendum to the REA of the respective months for the past period. A copy of the Order dated 20 March 2018 passed by this Hon'ble Commission in Petition No. 192/MP/2016.

(d) After obtaining the data from the Petitioner (and verified by ERLDC), the ERPC issued a letter to all stakeholders dated 09 May 2018 capturing the declared capacity of the Petitioner's generating unit for the past period including the period for which the present claim pertains to, i.e., September 2011 till March 2012.

(e) A bare perusal of the said letter clearly reveals that for the period September 2011 till March 2012, the Petitioner did not declare any capacity qua Respondent No. 1. The only capacity declared by the Petitioner during this time was qua DVC. In other words, it is an undisputed position that the Petitioner was not declaring any capacity qua the Respondent No. 1 and therefore, there is no question of payment of any capacity charges, as sought or at all. A copy of the letter dated 9 May 2018 issued by the ERPC.

In view of the above, it is evident that the Petitioner did not declare any capacity towards Respondent No. 1 even from September 2011 till March 2012 and therefore, there is no question of payment of any capacity charges by Respondent No. 1 to the Petitioner. In fact, to the contrary and as has been detailed subsequently, it is the Petitioner who is liable to compensate Respondent No. 1 under the terms of the PPA."

40A. Without prejudice to the above, it is submitted and as has been demonstrated above, the Petitioner failed to declare any capacity qua Respondent No. 1 from September 2011 till March 2012. Further, for the period April 2011 till August 2011, admittedly, the generating unit in question had not achieved COD. Therefore, it is clear that for the entire period, i.e., April 2011 till March 2012, the declared capacity of the Petitioner qua Respondent No. 1 was nil.

40B. It is submitted that as per Clause 1.6.3 of Schedule G to the PPA, in the event of the Petitioner not achieving an availability of 80% in a given month, the Petitioner was liable to compensate Respondent No. 1 to the tune of 50% of the capacity charges payable. Clause 1.6.3 of Schedule G to the PPA reads as under:

"1.6.3. Notwithstanding the above provisions of Paragraph 1.6.1 and 1.6.2 above, in the event the Availability is below 80% calculated over all elapsed months in Contract Year (including the month for which the Monthly Availability Adjustment is being calculated), then the Seller shall be required to pay to the Buyer an amount equal to 50% of the Capacity Charges for month 'n', calculated as per the provisions of Paragraphs 1.2 of this Schedule, as multiplied by the shortfall in Availability before 80%, as additional penalty.

In view of the above, since admittedly, the Availability of the Plant in question was nil for the period April 2011 till March 2012, i.e., it was consistently below 80%, the above clause is clearly applicable. Therefore, it is the Petitioner who is liable to compensate Respondent No. 1 to the tune of Rs. 99 crores.

40C. Without prejudice to the above, presuming though not admitting that the Petitioner did have certain capacity available towards Respondent No. 1 and declared the same, even then the Petitioner is liable to compensate Respondent No. 1 in accordance with the formula prescribed under Clause 1.6.3 of the PPA. It is submitted that even if this Hon'ble Commission considers the availability figures claimed by the Petitioner, then for the period September 2011 till March 2012, the same were consistently below 80% and hence, Clause 1.6.3 is clearly applicable. On this count, it is the submission of Respondent No. 1 that the Petitioner is liable to compensate Respondent No. 1 to the tune of Rs. 19 crores, as is evident from the detailed working."

13. While considering the request of the parties for amendment of the pleadings, the Court is not required to go into the merit of the amendment. In this connection, the Hon'ble Supreme Court in Rajesh Kumar Aggarwal &Ors. Vs. V.K.K. Modi, (2008) 4 SCC 385, Para 19 has held as under:-

"19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."

Further, Hon'ble Supreme Court in Andhra Bank Vs. ABN Amro Bank N.V.7 Ors. (2007) 6 SCC 167 has held as under:-

"5.... So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. From a perusal of the amendment application, we find that the appellant in their prayer for amendment has

> only taken an additional defence that in view of Section 230 of the Indian Contract Act, the suit itself is not maintainable. It is well settled, as noted herein earlier, that at the time of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Indian Contract Act was or is not maintainable."

14. In view of the settled law as noted in para 13 above, the Commission is not required to consider the proposed amendment on merit at the stage of deciding whether the amendment to the reply of BRPL should be allowed or not. Accordingly, the Commission is confining itself to the consideration whether the amendment sought by the Respondent/BRPL meets the requirements of Order 6 Rule 17 of the CPC in the light of principles laid down by the Hon'ble Supreme Court in Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors. (2009) 10 SCC 84.

15. The first test for allowing the amendment is whether the amendment sought is imperative for proper and effective adjudication of the case. The Petitioner has made its claims for capacity charges for the un-availed power by Respondent No.1/BRPL. Declaration of capacity by the generator is intrinsically related to liability for capacity charges for the unavailed power since unavailed power means the power declared by the generator and not availed by the beneficiary. Therefore, the proposed amendment which seeks to bring on record the relevant documents and data regarding declaration of capacity during the relevant period is imperative for proper and effective adjudication of the claims of the Petitioner qua the Respondent/BRPL.

16. The next test is whether the application for amendment is bonafide or mala fide. The Petitioner has not pleaded mala fide on the part of BRPL for seeking to amend its reply. In any case, we do not find any mala fide in the proposed amendment sought by

BRPL which seeks to bring the documents on record which are available in public domain and to strengthen its case based on the said documents.

17. The next test is whether the proposed amendment would cause any prejudice to the other party which cannot be compensated adequately in terms of money. The petition has been filed under section 79(1)(f) of the Act for adjudication of dispute with regard to claim for capacity charge for unavailed power among other claims. The Respondent has every right to contest the said claims by filing appropriate reply. In fact, the Respondent has filed its reply on 13.9.2017 in which it has disputed the claims of the Petitioner and has raised certain counter claims. Through the amendment, the Respondent has sought to strengthen its case based on the documents available in public domain. We are of the view that allowing the proposed amendment would not cause any prejudice to the Petitioner as the claims are not decided on merit at this stage and the Petitioner would get the opportunity to refute the claims through its rejoinder.

18. The next test is whether disallowing the proposed amendment would in fact lead to injustice or lead to multiple litigations. The Petitioner has submitted that the counter claim of BRPL is to be treated as a separate cause of action to be pursued through an independent petition. The Petitioner has submitted that since the claims are time barred, the Respondent is seeking to amend its reply. The Petitioner has submitted that Hon'ble Supreme Court in A.P. Power Coordination Committee Vs LancoKondapalli Power Ltd. {(2016) 3 SCC 468] has held that claims which are time barred under the Limitation Act

cannot be entertained under the Electricity Act, 2003. The Petitioner has relied on the following observations in the said judgement:

> "31.....Evidently, in the 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 is barred by limitation prescribed for an ordinary suit before the civil court...."

In our view, the above judgement pertains to the maintainability of the claim under the relevant provisions of the Limitation Act which is a decision on merit and is not applicable for deciding the question whether to allow or disallow the amendment of the reply sought by the Respondent and not the maintainability of the claim on merit including whether the claim is time barred or not. It is pertinent to mention that the Respondent has already raised a counter-claim in paras 38 to 41 of its reply dated 13.7.2017. The Respondent No.1 by placing reliance on the Commission's orders dated 31.8.2017 in Petition No.28/MP/2016 and order dated 20.3.2018 in Petition No. 192/MP/2016 and ERPC letter dated 9.5.2018 has sought to revise its counter-claim or set-off. In our view, since the Respondent had already raised a counter-claim in its original reply dated 13.7.2017, allowing the Respondent to amend its reply to revise/strengthen its counter claim would not prejudice the interest of the Petitioner, especially when the Petitioner shall have a right to refute the claims in its rejoinder. Refusing the Respondent to amend the reply would force the Petitioner to file a fresh petition for the same. This would cause injustice to the Respondent and lead to multiple litigations.

19. The next test is whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case. The Petitioner has submitted that the application filed by Respondent No.1/BRPL is a fresh cause of action which changes the nature of the case. We are of the view that the proposed amendment are in continuation of its earlier reply and does not give rise to fresh cause of action and therefore, would not change the nature and character of the case.

20. The next test is that as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. The Petitioner has submitted that claims proposed to be introduced through the amendment are time-barred and the Respondent is seeking to introduce the time-barred claims through the back door in order to avoid the bar of limitation. The Petitioner has submitted that the Respondent should have raised its claim before DERC in response to the petition filed by the Petitioner in 2012 and since the Respondent/BRPL did not raise the claims before DERC, such claims are time barred and allowing the amendment would allow the time barred claims of BRPL which is not permissible.

21. We have considered the submissions of the Petitioner and Respondent No.1. Admittedly, the claims pertain to the period 2011-12. The Petitioner filed a Petition before DERC in January/February 2012 for payments by Respondent No.1 in terms of the PPA. Respondent No.1 contested the petition on the ground that DERC lacked jurisdiction to deal with the matter and it is the CERC which is the correct forum since the Petitioner is a inter-State Generating Station supplying power to more than one

State. DERC vide its order dated 10.9.2013 dismissed the petition granting liberty to the Petitioner to approach CERC. The Petitioner challenged the order of DERC in the Appellate Tribunal and vide judgement dated 14.7.2016, the Appellate Tribunal decided that CERC is the right forum and granted liberty to the Petitioner to approach CERC. The Petitioner filed the main petition on 2.1.2017 raising certain claims against BRPL. In its reply dated 13.9.2017, Respondent No.1/BRPL has not only contested the claims of the Petitioner as time-barred but has also raised some counter-claims/set-off. With regard to its claims, the Petitioner has submitted that since the Petitioner was seeking legal remedy for its grievances with due diligence before DERC and thereafter before the Appellate Tribunal on the same cause of action in good faith, the period during which the proceedings were pending before DERC and Appellate Tribunal must be excluded from the period of limitation in terms of Section 14 of the Limitations Act, 1961. However, the Petitioner has taken inconsistent stand with regard to the counter-claims of Respondent No.1/BRPL. While the Petitioner in its rejoinder has not taken any objection to the counter-claims of the Respondent No.1/BRPL as time-barred, in response to the IA, the Petitioner is resisting the amendment on the ground that the counter-claims are time-barred. In our view, it will not be appropriate to disallow the amendment of the reply sought by BRPL to bring on record the modified counter-claims alongwith supporting documents when the original counter-claims are already on record and the Petitioner has not taken the objection of time bar to such counter-claim.

22. There is another reason why the amendment sought for should be allowed. Regulation 49 of the CBR which deals with the filing of reply by the respondent in response to the petitions filed before the Commission provides as under:

> "49. Each person to whom the notice of inquiry or the Petition is issued (hereinafter called the "respondent") who intends to oppose or support the Petition shall file the reply and the documents relied upon within such period with ten copies. In the reply filed, the respondent shall specifically admit, deny or explain the facts stated in the notice of inquiry or the Petition and may also state such additional facts as he considers necessary for just decision of the case. The reply shall be signed and verified in the same manner as in the case of the Petition."

As per the above provisions of CBR, the Respondent No.1/BRPL has the right to file its reply either admitting or denying or explaining the facts stated in the petition or to state additional facts as may be considered for just decision of the case. Respondent No.1/BRPL has already filed a reply vide its affidavit dated 13.9.2017 and through the amendment seeks to bring additional documents and facts on record. Denial of the opportunity to Respondent No.1/BRPL to amend its reply in order to submit certain additional documents/information would interfere with the rights of BRPL as a Respondent. Further, Regulation 51 of the CBR provides as under:

> "51. Where the respondent states additional facts as may be necessary for the just decision of the case, the Commission may allow the Petitioner to file a rejoinder to the reply filed by the respondents. The procedure mentioned above for filing of the reply shall apply mutatis mutandis to the filing of the rejoinder."

As per the above provision, the Petitioner shall get an opportunity to file the rejoinder. At that stage, the Petitioner may take all such objections as it may consider appropriate including the objection with regard to the counter-claims being time-barred which will be considered by the Commission in accordance with law at the time of disposal of the petition.

23. In the light of the above discussion, we are of the view that the proposed amendments sought by Respondent No.1/BRPL through the IA deserves to be allowed for the purpose of determining the real questions in controversy between the parties and proper adjudication of the case. Accordingly, the reply filed by Respondent No.1/BRPL shall stand modified to the extent prayed in the IA. The Petitioner is directed to file its rejoinder to the amended reply within two weeks. The Petitioner is at liberty to take all such objections as it may consider appropriate including objections with regard to time barred claims. It is clarified that in this order, the Commission has decided the issue whether amendment sought by Respondent No.1/BRPL should be allowed or not. The Commission has not expressed any view with regard to the limitation, maintainability and merit of the claims/counter-claims either of the Petitioner or the counter-claims of the Respondent No.1/BRPL in this order and the same will be decided after hearing the parties at the stage of final disposal of the petition.

24. I.A. No. 29 of 2019 in Petition No. 4/MP/2017is disposed of in terms of the above.

25. The petition shall be listed for hearing on merit in due course.

sd/-	**sd/-**	**sd/-**
(I.S. Jha)	**(Dr. M. K. Iyer)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**