2025 INSC 1160

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 6581- 6582 OF 2025

Gujarat Urja Vikas Nigam Limited … Appellant

versus

Essar Power Limited and another … Respondents

J U D G M E N T

SANJAY KUMAR, J

1. A tortuous litigative journey since the year 2005, notwithstanding, the matter is before this Court yet again.

2. By way of these appeals filed under Section 125 of the Electricity Act, 2003, Gujarat Urja Vikas Nigam Limited (GUVNL) assails the common judgment dated 21.03.2025 passed by the Appellate Tribunal for Electricity at New Delhi (APTEL) in Appeal Nos. 138 of 2021 and 201 of 2023. Appeal No. 138 of 2021 was preferred by GUVNL while Appeal No. 201 of 2023 was filed by Essar Power Limited (EPL). These appeals were directed against the order dated 27.12.2019 passed by Gujarat Electricity Regulatory Commission, Gandhi Nagar (GERC), in Petition No. 972 of 2009 filed by GUVNL.

3. Before considering the impact and effect of the past litigation between the parties and the orders passed therein, including by this Court, it would be apposite to note the factual narrative.

4. Shorn of unnecessary detail, relevant facts unfold thus: Gujarat Electricity Board (GEB), the predecessor-in-interest of GUVNL, entered into a Power Purchase Agreement (PPA) with EPL on 30.05.1996 for purchase of the electricity generated by EPL from its plant at Hazira for a period of 20 years. The total installed capacity of EPL's plant was 515 MW and 300 MW thereof was to be supplied to GEB under the above PPA. EPL entered into a separate PPA with Essar Steel Limited (ESL), its sister company, on 29.06.1996 for sale and supply of the remaining 215 MW. In effect, the proportionate share of GEB and ESL in the electricity generated by EPL was in the ratio of 58.25:41.75, rounded off to 58:42.

5. The cause for grievance, laying foundation for the inception of this litigation in the year 2005, dates back long prior thereto. In breach of the agreed proportionate shares in the electricity generated by it, EPL started supplying more power to its sister company, ESL, from out of the allocated share of GEB. This issue was raised by GEB, contending that EPL had supplied over its proportionate share of electricity to ESL which should be treated as deemed supply of electricity by GEB itself and it should be compensated. EPL addressed letter dated 17.02.2000 to GEB, wherein it stated that if ESL drew more power than its allocated capacity, then GEB

should charge ESL for the excess power drawn, as EPL's deemed power supply to GEB, but in that case no deemed non-generation penalty should be imposed upon EPL. Eventually, GEB addressed letter dated 29.07.2004 to EPL about under-allocation of power to it and proposed recovery, on monthly basis, in terms of EPL's letter dated 17.02.2000. GEB asked EPL to confirm the same to enable it to process the bill for the month of June, 2004 after adjusting the proposed recovery. There was further correspondence on the issue and GEB finally addressed letter dated 30.10.2004 to EPL, stating that a sum of ₹64 Crores would be recovered from EPL's pending monthly invoices for diverting GEB's allocated share from EPL's 515 MW plant to its sister company, ESL, by treating the same as deemed supply by GEB from April, 1998 till September, 2004. GEB further stated that recovery in respect of such diversion of energy from its allocated share to ESL from October, 2004 onwards would also be effected from the monthly invoices.

6. This was followed up by GEB's letter dated 11.11.2004 informing EPL of how the sum of ₹64 Crores was computed. The tabular statement in this letter set out the details of the energy diversion to ESL from 1998 till September, 2004. The amount recoverable was worked out, on the basis of HTP-1 Tariff Energy Charge @ ₹04.10 per kWh, and after adjusting reimbursement of variable charges, the total recovery to be made for that period was quantified at ₹64 Crores. It was made clear that

this recovery had been worked out without applying electricity duty and that EPL would be informed about the amount recoverable on that count after receipt of legal opinion. Notably, the letter ended with the caveat that it was without prejudice to GEB's rights under the provisions of the PPA.

7. In response, EPL addressed letter dated 30.11.2004 to GEB stating that, with a view to close the discussion on the supply of power to ESL in excess of allocated capacity, it accepted GEB's claim for ₹64 Crores. EPL thanked GEB officials for having closed the matter that was under discussion for the past few years and concluded by stating that it trusted that the methodology that had been finalized would be the basis adopted for the future. However, by letter dated 31.12.2004, GEB informed EPL that the amount of ₹64 Crores was not in final settlement of the issue nor was the methodology final for charging for the energy diverted in excess of the proportionate principle. GEB further stated that electricity duty was chargeable on such recovery and it would work out the final recovery amount and inform EPL accordingly.

8. Thereafter, GUVNL came into existence on 01.04.2005 upon the unbundling of GEB. On 14.09.2005, GUVNL filed a claim before GERC under Section 86(1)(f) of the Electricity Act, 2003, which came to be numbered as Petition No. 873 of 2006, seeking a declaration that it was entitled to adjust from the tariff payable by it to EPL all such amounts that were received by EPL as a result of wrongful allocation of electricity. This

petition was disposed of by GERC, *vide* order dated 18.02.2009, concluding thus:

> 1) that, EPL was obligated at all times under the PPA dated 30.05.1996 to declare the capacity from its entire generating station, as provided in Schedule VI of the PPA;
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> 2) that, once such declared availability was made known, GUVNL was entitled to issue dispatch instructions in accordance with the terms of the PPA;
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> 3) that, supply of electricity was to be made by EPL in proportion to the allocated capacity of 300 MW:215 MW, in accordance with the dispatch instructions;
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> 4) that, the claims of GUVNL prior to 14.09.2002, on account of adjustment of Deemed Generation Incentive and diversion of allocated electricity (except to the extent of settlement of ₹64 Crores for diversion of electricity by EPL to ESL, in excess of 215 MW, from 1998 to September, 2004), was barred by limitation;
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> 5) that, for the period after 14.09.2002, whenever EPL failed to declare the entire capacity of the plant, the supplies made by it to ESL in excess of the proportionate principle, as set out, was liable to be held as supply of electricity by GUVNL to ESL and GUVNL was entitled to be compensated for such supply at the prevailing HTP-1 Tariff, less variable costs, as was previously accepted by the parties for the diversion of electricity in excess of 215 MW;
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> 6) that, after 14.09.2002, if GUVNL did not schedule energy to the extent allocated under the proportionate principle, even though EPL had declared the capacity for the entire generating station in terms of Schedule VI of the PPA, then EPL was entitled to supply the additional power that was available to ESL upon reimbursing the proportionate annual fixed charges to GUVNL;
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> 7) that, GUVNL was entitled to recover Deemed Generation Incentive from EPL for the period 14.09.2002 to 29.05.2006.

9. Aggrieved by this order, both GUVNL and EPL preferred appeals before the APTEL. Appeal No. 77 of 2009 was GUVNL's appeal while Appeal No. 86 of 2009 was filed by EPL. By judgment dated 22.02.2010, the APTEL reversed in part the order dated 18.02.2009. The appeal filed by GUVNL was dismissed and the appeal of EPL was partly allowed. The APTEL held that EPL was not required to declare the capacity of the entire plant of 515 MW. It further held that non-declaration of available capacity on proportionate basis was not shown to have resulted in any loss to GUVNL and it was, therefore, not entitled to any compensation on that score. Lastly, the direction of GERC for reimbursement of annual fixed charges, whenever GUVNL did not secure electricity to the extent allocated under the proportionate principle, was held to be incorrect and the APTEL opined that no such refund was liable to be made.

10. This common judgment was subjected to appeal before this Court by GUVNL. Civil Appeal No. 3454 of 2010 was filed by it in relation to the APTEL's confirmation of GERC's finding on limitation, restricting its claims to three years prior to the filing of its petition on 14.09.2005. However, the said appeal was dismissed by this Court on 02.09.2011. The more substantial issue of diversion of its allocated electricity along with the consequences thereof was raised by GUVNL in Civil Appeal No. 3455 of 2010. The decision of this Court in the said appeal, delivered on 09.08.2016, is reported in ***Gujarat Urja Vikas Nigam Limited vs. Essar***

Power Limited[1]. Thereby, this Court set aside the judgment passed by the APTEL and restored GERC's order dated 18.02.2009. However, as the actual working out, based on the said order, was to be made by the GERC and GUVNL had already filed its claim in relation thereto in Petition No. 972 of 2009, this Court left it open to GERC to proceed in the light of the findings recorded in its decision. Petition No.972 of 2009 was decided by GERC on 27.12.2019. That order was challenged by both sides by way of separate appeals. APTEL's judgment dated 21.03.2025 in those appeals forms the fulcrum for the present set of appeals by GUVNL. GERC's order dated 27.12.2019 and the APTEL's appellate judgment dated 21.03.2025 will be analysed and discussed hereinafter.

11. At this stage, it may be noted that in this round of litigation, leading to the filing of the present appeals, GERC as well as the APTEL proceeded on the premise that the decision of this Court in ***Gujarat Urja Vikas Nigam Limited*** (*supra*) settled most of the issues. These appeals, therefore, turn upon what was held by this Court in the aforestated decision. Surprisingly, GUVNL and EPL place strong reliance on the said decision and both assert that the findings therein are in its favour. Correct understanding and application of that decision is, therefore, called for. Such hermeneutics would raise a substantial legal question, as rival

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1 (2016) 9 SCC 103

interpretations are sought to be placed by both parties on the aforestated decision. The maintainability of these appeals, therefore, stands settled.

12. Though both sides have taken us through the aforestated decision and relied upon particular paragraphs therein to assert a claim that this Court had decided the issues, presently under consideration, in its favour, we are of the opinion that such disjointed reading of specific paragraphs or even sentences, out of context, would not be the proper approach to understand the import of the decision. It must, necessarily, be read as a whole and in its entirety to glean the findings and *ratio decidendi* laid down therein.

13. The question of law framed by this Court in ***Gujarat Urja Vikas Nigam Limited*** (*supra*) was whether the APTEL had correctly interpreted the terms of the PPA dated 30.05.1996 and was justified in reversing the findings of GERC, based on the interpretation of the PPA and other documents. This Court, then, noted the underlying facts and, in particular, the prayer of GUVNL in its Petition No. 873 of 2006, which reads as under:

> "(a) hold that the petitioner is entitled to adjust in the tariff payable by the petitioner to the respondent for purchase of electricity all amounts received by the respondent as a result of wrong allocation of electricity; and deemed generation incentive when naphtha is proposed to be used as fuel;
> (b) award cost of the proceedings in favour of the petitioner and against the respondent; and
> (c) pass such other or further orders as may be deemed proper to give relief to the petitioner;
> (d) continue to raise bills on Essar Group of Companies based on proportionate methodology."

14. This Court then noted the observation of GERC in its order dated 18.02.2009 that GUVNL had an obligation, under the PPA dated 30.05.1996, to pay annual fixed charges for the allocated capacity, i.e., 300 MW, and upon paying such annual fixed charges for the said capacity, GUVNL had a right to an equivalent amount of electrical output. GERC had observed that the purpose of paying such annual fixed charges was to ensure that GUVNL alone had the right to the said capacity and that no part of the same could be sold to any other party. This Court also noted the conclusion of GERC, upon a reading of Article 3.1 of the PPA dated 30.05.1996, that the entire capacity of the generating plant of EPL was to be shared only by the two beneficiaries, i.e., GUVNL and ESL. Noting that EPL's PPA dated 29.06.1996 with ESL also recorded the allocation of electricity to GUVNL, GERC had held that the allocation was intended to be on a proportionate basis only between these two parties and, therefore, EPL could not argue that the PPAs did not recognize the proportionate principle. GERC's finding, which is of significance presently, was that, if the proportionate principle was acceptable for recovery of fixed charges, it could not be abandoned for allocation of supply. This finding would have to be kept in mind as the claim of GUVNL before us is with regard to reimbursement of such fixed charges.

15. GERC had held, in no uncertain terms, that once the entire capacity was allocated between the two parties in a particular proportion, EPL

could not violate the proportionate allocation for the benefit of any one party. Having sold 300 MW to GUVNL and 215 MW to ESL, for which fixed charges were paid by them in the said proportion, GERC opined that EPL could not argue that it could sell power to ESL beyond the capacity allocated to it. The obligation of EPL, as per GERC, was to clearly declare the capacity of the generating plant as a whole on a weekly schedule and, once the declared availability for the entire plant was made known, the two beneficiaries were to issue dispatch instructions in accordance with the terms of their PPAs. The argument of EPL that it did not have any obligation to declare the capacity for the entire plant was, therefore, rejected by GERC.

16. Further, GERC observed that once the capacity of the generating plant as a whole was made available, the allocation of such capacity has to take place in the proportion that is contracted, i.e., the electrical output will be allocated and supplied between the two beneficiaries on proportionate basis, in accordance with the dispatch instructions. GERC noted that the obligation of EPL was to supply electrical output to GUVNL up to the allocated capacity of 300 MW and it also had an obligation to make payment of Deemed Non-generation Incentive and reduce annual fixed charges on a *pro rata* basis. This, as per GERC, however, did not negate the proportionate principle of allocation when EPL declared availability less than the allocated capacity.

17. It was further held by GERC that if GUVNL did not take the power declared available by EPL in terms of the aforesaid ratio, EPL would then have the right to sell that power to ESL, its sister company, subject to reimbursement of the proportionate annual fixed charges. In effect, if GUVNL did not schedule the power to the extent of availability declared by EPL of the entire plant, in terms of the PPA, it could not complain if that power was sold to EPL's sister company and the proportionate annual fixed charges were reimbursed to it.

18. GERC further held that GUVNL would be entitled to claim compensation for the electricity wrongly diverted to ESL from the capacity allocated to GUVNL under the PPA dated 30.05.1996. The diversion, in the circumstance, was directed to be computed on an hourly basis. As regards the quantum of compensation payable on account of such diversion, GERC noted that the PPA was silent. It then referred to the settlement between the parties on account of such diversion between 1998 and September, 2004, by agreeing upon a particular methodology for determining the compensation. The methodology adopted was that GUVNL would be entitled to HTP-1 Tariff Energy Charge for such diverted power, after excluding the variable costs. Observing that this appeared to be a fair manner of determining the compensation that was to be paid for the period after September, 2004 also, the GERC directed the parties to reconcile the generation data and make a final calculation on the basis of

the said principle. As regards the remaining period of the PPA, GERC observed that EPL had a legal obligation to declare availability for the entire capacity and was not to divert any power to ESL, contrary to the proportionate principle but, if GUVNL declined to purchase the power allocated on proportionate basis, GERC held that EPL would have the right to sell that power to ESL, subject to reimbursement of the proportionate fixed charges.

19. This Court then noted the findings of the APTEL in its judgment disposing of the appeals filed against GERC's order dated 18.02.2009. Having set out those observations and findings, this Court held that the APTEL had committed an error in observing that GUVNL had not proved suffering of any damage, as paragraph 23 of its petition expressly demonstrated such damage. This Court also disagreed with the APTEL on its finding that there was no obligation on EPL to declare the availability of generated power for the entire plant, whereupon dispatch instructions could be issued by both the beneficiaries. This Court categorically held that the finding of the APTEL that GUVNL had accepted ₹64 Crores by way of settlement was against the record. The points for consideration were framed by this Court as under: -

> "…..Points for consideration
> 20. The points which arise for consideration are:
> 20.1. (i) True interpretation of PPA to determine whether there is any obligation to declare availability of power in the ratio of 300:215;

> 20.2. (ii) Effect of letters dated 17-2-2000,4-3-2000 and 4-10-2001 on the rights of the parties;
> 20.3. (iii) Interpretation of Schedule VI to determine whether the obligation to issue dispatch instructions arose before declaration of availability.
> 20.4. (iv) Relief to which the appellant may be entitled to."

20. On the first issue as to the true interpretation of the PPA, this Court held that it clearly contemplated the proportion of allocation of capacity between the two beneficiaries and EPL, necessarily, had to operate its generating plant to meet the requirement of electrical output that could be generated corresponding to the allocated capacity. This Court noted that GUVNL had to pay annual fixed charges as determined in terms of Article 7.1.1 of Schedule VII of the PPA dated 30.05.1996 and EPL was under an obligation to declare the weekly schedule of the capacity available so that dispatch instructions could be issued on the basis of the said declaration. The contrary view of the APTEL was held to be erroneous and GERC's finding was consequently held to be the correct interpretation of the PPA.

21. On the second issue, with regard to the effect of the correspondence between the parties on their respective rights, this Court noted the observation of GERC that, by its letter dated 17.02.2000, EPL had unequivocally agreed to supply of power in the ratio of 58:42 to GUVNL and ESL respectively. This Court held that the letters addressed by EPL clearly acknowledged its liability to allocate the generated power to GUVNL and ESL in the ratio of 58:42 and disagreed with the finding of the

APTEL that the said letters could not be relied upon to support the claim of GUVNL that it was entitled to be allocated power in that proportion.

22. On the third issue, with regard to interpretation of Schedule VI to determine whether the obligation to issue dispatch instructions arose before the declaration of availability, this Court held that EPL was liable to declare the weekly capacity available and it was only on that basis, dispatch instructions were required to be issued. Again, the contrary view taken by the APTEL was rejected.

23. On the last issue, with regard to the relief to be granted to GUVNL, this Court observed that the amount of ₹64 Crores was not accepted by GUVNL by way of a final settlement and held that the APTEL had erred in observing that GUVNL had committed default in making payments, amounting to a breach of promise on its part, thereby absolving EPL of its obligation to supply power as per the PPA dated 30.05.1996. However, upon being informed that these aspects had been examined by GERC in a subsequent dispute and an appeal in that regard was pending before the APTEL, this Court refrained from making further remarks and made it clear that its observations would not be treated as affecting the decision in the said appeal.

24. In summation, this Court held that the APTEL's judgment was erroneous and set it aside, explicitly restoring GERC's order dated 18.02.2009. As GERC had left the actual working out of the loss suffered

by GUVNL to be worked out separately and, on that basis, GUVNL had already filed a petition, this Court directed that the same could be revived and considered in the light of its findings.

25. Pursuant to the decision of this Court and the restored GERC's order dated 18.02.2009, Petition No.972 of 2009 was disposed of by GERC on 27.12.2019. GERC held that, in the light of the concurrent finding on limitation, the claims of GUVNL for the period prior to 14.09.2002 were time-barred, except to the extent of ₹64 Crores paid by EPL towards settlement of the claims for diversion of power during the period from 1998 to September, 2004. As regards the diversion computation, i.e., whether the same was to be made on hourly basis or on half-hourly basis, GERC referred to the letter dated 21.02.2005 of the Central Electricity Authority (CEA), based on EPL's request in its letter dated 24.01.2003, wherein the CEA recommended that recording of meters should be on half-an-hour basis on the ESL load side and power evacuation side. Noting that there was no written agreement amending the PPA to that effect, in keeping with Article 12.1 thereof, GERC however held that as the recommendation of the CEA, *vide* letter dated 21.02.2005, had been accepted by both parties and had been acted upon by them with effect from 23.02.2005, the same should be considered while calculating the wrongful diversion of electricity by EPL with effect from 23.02.2005. The computation by GUVNL on half-hourly basis was, therefore, taken to

be correct and not the hourly based computation submitted by EPL. GERC, however, opined that GUVNL would be entitled to receive only the Energy Charge of HTP-1 Tariff towards compensation for the diversion of electricity by EPL to ESL. Therefore, EPL was held liable to pay the difference at the rate of the Energy Charge of HTP-1 Tariff, after deducting variable costs/charges, for the diversion of excess electricity to EPL in violation of the proportionate principle of 58:42.

26. As regards the claim of GUVNL for reimbursement of fixed charges for the diversion of energy, along with penalty, GERC held that GUVNL was only entitled to compensation in terms of its earlier order dated 18.02.2009, which had approved and affirmed the methodology followed by the parties for computing the compensation, culminating in the settlement for ₹64 Crores. As that compensation methodology did not include fixed charges or penalty and as its order dated 18.02.2009 stood restored after being upheld by this Court, GUVNL was held disentitled to seek review of the same and claim something more. GERC affirmed that, as the component of fixed charges and penalty for drawal in excess of contract demand, had not been considered or factored in while determining the compensation earlier, the same could not be allowed in the present proceedings as it would amount to review of the earlier order.

27. GERC, accordingly, computed the compensation payable based on the HTP-1 Tariff Energy Charge, duly adjusting the variable charges

therefrom. EPL was held not liable to pay fixed charges and penalty for excess drawal of electricity. On the issue of Delayed Payment Charges (DPC), which had not been considered in the earlier round by GERC, APTEL and this Court, GERC held that GUVNL was entitled to Delayed Payment Charges from September, 2002 to March, 2019. Deemed Generation Incentive paid by GUVNL to EPL between September, 2002 and May, 2006, quantified at ₹36.62 Crores, was also held liable to be refunded. Delayed Payment Charges were directed to be paid by EPL, as per the PPA, at the rate of 2% over the average interest rate charged by GUVNL's bank on working capital loans during the preceding 12 months.

28. GUVNL and EPL assailed GERC's order dated 27.12.2019 in separate appeals before the APTEL. By the common judgment dated 21.03.2025, presently under scrutiny, the two appeals were disposed of. Therein, on the issue of whether computation of diverted energy should be on hourly or half-hourly basis, the APTEL disagreed with the view taken by GERC. According to it, once the earlier GERC's order dated 18.02.2009 recorded that the diversion should be computed on hourly basis and the same stood confirmed by this Court, GERC ought not to have held to the contrary. It was also noted that the PPA dated 30.05.1996 had not been amended and the unamended PPA spoke only of hourly based computation. On the claims of GUVNL arising from diversion of electricity by EPL to ESL, in the light of the earlier orders, the APTEL noted

that GUVNL would be entitled to compensation for the diverted supply of power by EPL to ESL in excess of the proportionate principle and, therefore, GERC had correctly worked out the units for compensation as the difference between the units actually supplied to ESL and its proportionate share in the entire plant availability. The APTEL also confirmed that the methodology for computation of the compensation was correctly applied as the HTP-1 Tariff Energy Charge. The order of GERC holding to this effect was, therefore, found to be free of infirmity. As regards the recovery of ₹36.62 Crores by GUVNL towards Deemed Generation Incentive, EPL contended that only a sum of ₹34.42 Crores had been paid towards such incentive and not ₹36.62 Crores. A dispute was, therefore, sought to be raised as regards the difference of ₹2.2 Crores. On the other hand, GUVNL contended that this aspect was never raised before GERC, though the data was presented by GUVNL in that regard and was accepted by GERC. It was also pointed out that the issue was not even raised in the appeal filed by EPL but was belatedly introduced in its rejoinder to GERC's reply. However, the APTEL opined that, as the matter was being remanded to GERC for re-computation of the amounts due under various heads, this aspect could also be considered. Similarly, another issue raised by EPL with regard to the actual amount that had been deducted by GUVNL from its invoices, that is, whether it was ₹234.60 Crores or ₹157.88 Crores, was also left open

to be considered by GERC. On Delayed Payment Charges, the APTEL noted that GERC had applied simple interest on such payment though EPL, in relation to its claims made against GUVNL on the count of delayed payment, had contended in another pending appeal that it was entitled to compound interest. APTEL noted that the issue of Delayed Payment Charges had not been determined in GERC's earlier order dated 18.02.2009. Observing that GERC had determined Delayed Payment Charges on simple interest basis, as per Article 5.3.4 of the PPA, the APTEL rejected the claim for compound interest. A caveat was, however, added that in the event EPL secured an order in its pending appeal for payment of compound interest on delayed payments, the same benefit should be given to GUVNL also. GERC's order was, accordingly, confirmed subject to the above modifications. GERC was directed to give both parties a reasonable opportunity of hearing and pass orders afresh in accordance with law and in terms of the directions issued. We are informed that GERC is presently seized of this exercise.

29. Though an argument was advanced on behalf of GUVNL for payment of compensation on the parameters laid down in Section 73 of the Indian Contract Act, 1872, and more particularly, illustration (j) therein, we are of the opinion that, in the light of para 9.13 in GERC's order dated 18.02.2009 which was affirmed by this Court in the earlier round, it is not open to GUVNL to agitate its claim for compensation beyond what was

determined as just and acceptable in the said para and was accepted and confirmed by this Court, while restoring the order of GERC. This Court, no doubt, also affirmed that there was no settlement between the parties as to the finality attaching to the sum of ₹64 Crores, but the fact remains that GEB and, thereafter, GUVNL never raised any further claim for compensation against EPL for the period covered by that settlement, i.e., April, 1998 to September, 2004. The imprimatur of this Court as to the methodology that formed the basis for the computation of ₹64 Crores for the diverted electricity from 1998 till September, 2004, and the edict that it would hold good even for the period after September, 2004, is binding on the GUVNL and there is no possibility of reopening that issue.

30. That being said, we may note that payment of fixed charges by GUVNL, in terms of the PPA dated 30.05.1996, is traceable to Article 7.1.1 in Schedule 7 thereof. 'Tariff', as defined by Article 7.1 therein, reads to the effect that it should be determined on the basis of annual fixed charges, in terms of Article 7.1.1, along with variable charges, in terms of Article 7.2, and incentive payment, in terms of Article 7.3. The annual fixed charges under Article 7.1.1 were to be computed on the basis of Interest on Debt, Operation and Maintenance Expenses, Depreciation, Tax on Income, Return on Equity, Interest on Working Capital and Base Foreign Debt Repayment Adjustment Amount. The invoicing of fixed charges was to be made on a monthly basis, based on the annual fixed charges

computed in terms of Article 7.1.1. Variable charges under Article 7.2 were to be calculated monthly on the basis of Quantity of Fuel and Cost of Fuel per kWh. Incentive payments under Article 7.3 included the Deemed Generation Incentive. Article 5 of the PPA dealt with billing and payment and Article 5.2 therein provided for the monthly invoice being submitted by EPL, consisting of the amounts to be paid as per the tariff computed in accordance with Schedule VII. Article 5.3.2 provided for payment and stated that variable charges would be payable in each month, within the due date, while fixed charges in each month would be the equivalent of 1/12th of the annual fixed charges and shall be adjusted at the end of the accounting year in the event the level of generation achieved by EPL during that accounting year was less than the allocated capacity. Incentives were also payable on a monthly basis from the month during which the level of generation exceeded the allocated capacity.

31. The issue before us is as to the total amount that can be claimed by GUVNL for the electricity diverted by EPL to ESL from out of its allocated share, that is, 58% of the available electricity for the entire plant declared on a weekly basis. In that context, what emerges now from the adjudication by GERC and the APTEL, presently under scrutiny, is that 'compensation' could only be claimed by GUVNL for such wrongful diversion by EPL on the basis of HTP–1 Tariff Energy Charge, as this was what was found to be an appropriate method for computing compensation

on the basis of the earlier settlement arrived at by and between the parties for the period April, 1998 to September, 2004. However, neither GERC nor the APTEL took note of what was stated earlier by this Court and GERC with regard to 'reimbursement' of fixed charges. This Court had explicitly recorded that the PPA dated 30.05.1996 provided for the 'proportionate principle' for recovery of fixed charges and, therefore, applied the same to allocation of available electricity also, noting the fact that there were only two beneficiaries for the electricity generated by EPL. This Court observed that once EPL sold 300 MW of the generated power to GUVNL and the remaining 215 MW to ESL, for which both parties paid fixed charges in the said proportion, EPL could not argue that it could sell more power to ESL. It was also noted that the intention of EPL was to recover the fixed charges only from these two beneficiaries in proportion to their allocated capacity.

32. As GUVNL was required to assess the fixed charges on an annual basis and adjust the same on a monthly basis, by paying 1/12th thereof, any shortfall in the supply of electricity from its allocated 58% obviously meant that the fixed charges proportionate to such shortfall were liable to be reimbursed. Even if GUVNL did not accept the electricity declared available by EPL, in terms of the proportionate principle, and EPL could sell that power to ESL, it was subject to reimbursement of proportionate annual fixed charges. This was pointed out by GERC in para 9.11 of its

order dated 18.02.2009 which was affirmed by this Court. The para reads as under: -

> '9.11. However, if GUVNL does not take the power declared available by EPL in terms of the aforesaid ratio, EPL will have the right to sell the power to its sister concern subject to reimbursement of the proportionate of the annual fixed charges. GUVNL cannot make a submission that although it will not purchase such power as declared available by EPL, EPL cannot sell the same to its sister concern. Such a submission would defeat the purpose of the Electricity Act, 2003 and the National Electricity Policy which promotes generation and encourages sale of surplus capacity. If GUVNL does not schedule the power to the extent of availability declared by EPL of the entire plant in terms of the PPA, it cannot complain if the power is sold to EPL's sister concern and the proportionate of the annual fixed cost is reimbursed.' (*emphasis is ours*)

33. Significantly, in its judgment dated 22.02.2010, the APTEL had disagreed with GERC's order dated 18.02.2009 on the reimbursement of fixed charges and held that no such reimbursement was to be made. However, that finding was reversed by this Court when the APTEL's judgment was set aside and GERC's order dated 18.02.2009 was restored. Therefore, reimbursement of fixed charges was separately dealt with by this Court and EPL was held liable to refund such fixed charges proportionately for the shortfall in the supply of electricity to GUVNL from its allocated share of 58% of the declared available electricity which had been diverted by EPL to ESL. Though para 9.11 of GERC's order dated 18.02.2009 spoke of a situation where this happened due to GUVNL not opting to purchase its share of the declared available electricity, the same

principle would apply even when EPL wrongfully diverted GUVNL's share of electricity to ESL without its knowledge. Further, and most significantly, the PPA envisaged adjustment of the fixed charges at the end of the accounting year if EPL's generation during that year was less than the capacity allocated to GUVNL. Therefore, payment of fixed charges by GUVNL was pegged to the actual supply of its allocated share of electricity and reimbursement of such fixed charges was to be made proportionately in the event of any shortfall.

34. In addition to such reimbursement of fixed charges as a separate component, in terms of what was held by this Court, GUVNL was also held entitled to 'compensation' in accordance with para 9.13 of GERC's order dated 18.08.2009, which reads as under: -

> '9.13. As regards the quantum of compensation payable on account of diversion, the PPA is silent on the same. The parties in the settlement for dues on account of diversion for the period between 1998 and September, 2004 agreed on a particular methodology for determining such compensation. The parties had agreed that GUVNL is entitled to the HTP 1 energy tariff after excluding the variable cost. The diversion in the circumstance should be computed on an hourly basis. This appears to be a fair manner of determining the compensation that is to be paid for the period after September, 2004. The parties are required to reconcile the generation data and make final calculation on the basis of the aforesaid principle.'

35. Needless to state, the very connotation of 'compensation' would imply the payment to be made to one party to make good the loss or damage suffered by it owing to a breach or violation of an obligation by

the other. Reimbursement of fixed charges flowed from the provisions of the PPA itself and was not traceable only to the breach by EPL, in terms of the diverted capacity which fell to GUVNL's share. That was only one of the scenarios in which such reimbursement stood triggered apart from those envisaged by the provisions of the PPA. The misconceived notion that 'fixed charges' were also to be included in the 'compensation' to be claimed by GUVNL, resulted in arguments being advanced before GERC and the APTEL to that effect and the rejection thereof by both the fora, in this round of litigation, relying on para 9.13 of GERC's order dated 18.02.2009. However, neither GERC nor the APTEL took note of what was stated by this Court, in the preceding paragraphs, referring to the GERC's earlier order with regard to reimbursement of fixed charges in the event the corresponding power was not supplied to GUVNL, as per its allocated proportionate share in the declared available capacity.

36. At this stage, we may make it clear that we are not building up a new case for GUVNL contrary to its pleaded case. It is a well settled proposition of law that parties would be bound by their pleadings and the case put forth by them on the strength thereof and it is not for the Court to substitute its own notion of what that case should be. However, as already noted *supra*, this case entirely turns upon the earlier decision of this Court. Each of the parties has its own take on how that decision is to be interpreted to suit its own interest, even if mistakenly so. We are merely

giving effect to the clear findings of this Court in that earlier decision, irrespective and independent of how the parties understood them and how they formulated their cases on the basis of such understanding. This Court cannot be a mute spectator when its judgments and findings are misconstrued or misunderstood by the parties and are projected erroneously in a subsequent round of litigation.

37. In any event, it is not open to EPL to claim fixed charges twice over, by appropriating the excess fixed charges paid by GUVNL for electricity that was never supplied to it from its allocated proportionate share, on the one hand, and also pocketing the fixed charges paid by ESL for the extra electricity that was supplied to it from out of GUVNL's share. In this regard, we may note that the PPA dated 29.06.1996 between EPL and ESL also provided for similar fixed charges being paid by ESL for the electricity supplied towards its proportionate share. Once that proportion was not adhered to and excess power was supplied to ESL, EPL would obviously collect fixed charges from ESL for such excess power supply also.

38. The finding of GERC and the APTEL that GUVNL is not entitled to reimbursement of fixed charges is, therefore, unsustainable. Once GUVNL did not receive the electricity for which such fixed charges had been computed and paid on a monthly basis, it was entitled to reimbursement thereof, not as compensation, but on the principle of restitution as such payment was not at all due from it. The argument to

the contrary by EPL, which was accepted by GERC and the APTEL, on the strength of the methodology to be adopted for computing compensation under para 9.13 of GERC's order dated 18.02.2009, therefore, cannot be accepted. GUVNL was entitled to reimbursement of the fixed charges, in relation to the diverted electricity from out of its allocated share, in addition to the compensation payable for such wrongful diversion, computed on the basis of HTP-1 Tariff Energy Charge.

39. As regards the computation of the electricity diversion being made on hourly or half-hourly basis, we find that the PPA dated 30.05.1996 executed by and between GEB and EPL provided under Article 1 thereof that 'Availability Period' would mean 'each of the 24 consecutive periods of 60 minutes in each day'. Similarly, the PPA dated 29.06.1996 between EPL and ESL provided under Article 1 that the 'Availability Period' would mean 'each of the 24 consecutive periods of 60 minutes in each day'. Therefore, there was no difference in the two PPAs as to the computation methodology. While so, it appears that EPL itself addressed letter dated 24.01.2003 to the CEA seeking its advice under Section 73 of the Electricity Act, 2003, with regard to the metering scheme and installation of a circuit breaker for its 515 MW plant at Hazira. The CEA noted that EPL had set up a 515 MW Power Plant at Hazira in the year 1996-97 and had entered into two separate PPAs, one for 300 MW with GEB and the other for 215 MW with ESL. However, as GEB wanted to install a circuit

breaker in the main bus bar, EPL had addressed letter dated 24.01.2003 raising certain queries for the advice of the CEA. EPL had voiced the concern that installation of a circuit breaker may jeopardize the safety of its plant as it needed to be connected with the grid in all conditions. Thereupon, *vide* its letter dated 21.02.2005, the CEA made certain recommendations, one of which was that recording of meters should be on half-hourly basis on ESL load side and power evacuation side. Admittedly, based on this recommendation, GUVNL, EPL and ESL acted upon and carried out the metering on the load side and power evacuation side of ESL on half-hourly basis.

40. The recommendation of the CEA was on 21.02.2005. It was shortly thereafter that GUVNL filed its first petition before GERC. Prior to that, GEB also calculated the diversion of energy up to 21.02.2005 on hourly basis and it was only thereafter that the computation was made on half-hourly basis. As the power diversion, for which GUVNL has to be paid compensation, is for the supply made by EPL to ESL, over and above its allocated share, and as it was at the behest of EPL itself that this half-hourly computation methodology was adopted, pursuant to the recommendation of the CEA, there is no reason why the very same methodology should not be used for computing the electricity diversion so as to quantify the compensation payable to GUVNL for the excess power supply made to ESL by EPL from out of GUVNL's allocated share.

41. Reference made by EPL, in this regard, to the grounds of GUVNL before the APTEL, in Appeal No. 77 of 2009, is misconceived. The ground raised was apropos the allocated share of 58:42 of the 515 MW capacity, i.e., 300 MW:215 MW, and in that context, GUVNL stated that in accordance with the above ratio, EPL was obligated to declare availability from the 515 MW capacity generating station for supply to GEB/GUVNL and the ESL maintaining the proportion of 58%:42% for each time block which for the purpose of the PPA is one hour. This passing reference to the PPA methodology of one hour is not sufficient in itself to negate the admitted adoption of the methodology recommended by the CEA on the application made by EPL itself. Having invited that methodology for supply of power so as to avoid installation of a circuit breaker, EPL cannot fight shy of the same methodology being adopted for computation of the excess power diverted by it to ESL from out of the allocated share of GUVNL. GERC was, therefore, correct in adopting this methodology but the APTEL reversed the same on the technical ground that the PPA had not been amended. Even if both PPAs were not amended by way of written agreements, as provided in Article 12.1 thereof, the irrefutable fact remained that GUVNL, EPL and ESL accepted, adopted and acted upon the recommendation of the CEA in its letter dated 21.02.2005 and converted the 'Availability Period' from hourly basis to half-hourly basis on ESL load side and power evacuation side. It is not open to EPL to secure,

at its own behest, such a modification, act upon it, and then argue that though the same was adopted for supply of electricity by it to ESL, it ought not to be adopted for computing the excess electricity supplied by it to ESL from out of the allocated share of GUVNL. Significantly, this aspect was not even in issue during the first round and the mere statement by GERC in its order dated 18.02.2009 that the diversion should be computed on an hourly basis, in ignorance of the CEA's recommendation to the contrary and its acceptance by the parties, cannot be said to be binding even if the GERC's order was restored by this Court thereafter.

42. GUVNL objects to the remand of certain issues by the APTEL, which were not raised initially by EPL, on the ground that it was not open to EPL to raise such new grounds at the appellate stage. However, we may note that GUVNL itself did not raise the issue of hourly/half-hourly computation before the APTEL or this Court, in the earlier round of litigation, though GERC had referred to it in its order dated 18.02.2009. Despite the same, we have entertained that ground in this round of litigation as it is not open to EPL, which acted contrary to its obligations under the PPA, to claim such protection and seek undue advantage. Similarly, in the event GUVNL actually paid a lesser amount towards Deemed Generation Incentive and is now claiming ₹2.2 Crores more than what is due and payable to it, that is an aspect that can be looked into by GERC. So too is the case with the actual deductions made by GUVNL, as that would be a matter of record

and can be easily verified and determined by GERC. We are, therefore, not inclined to interfere with those directions of the APTEL. However, the order dated 27.12.2019 passed by GERC and the judgment dated 21.03.2025 passed by the APTEL shall stand modified to the extent indicated hereinabove.

43. The appeals are disposed of in the aforestated terms. Parties shall bear their own costs.

……..J
[SANJAY KUMAR]

……..J
[ALOK ARADHE]

New Delhi;
September 25, 2025.