

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4881 OF 2010

DAMODAR VALLEY CORPORATION

...APPELLANT (S)

VERSUS

CENTRAL ELECTRICITY REGULATORY

COMMISSION & OTHERS

...RESPONDENT (S)

JUDGMENT

K.M. JOSEPH, J.

1. By this appeal maintained under Section 125 of the Electricity Act 2003 (hereinafter referred to as 'the Act of 2003'), the appellant seeks to challenge the order passed by the Appellate Tribunal dismissing the appeal filed by the appellant against the order of the Central Electricity Regulatory Commission (hereinafter referred to as 'the Commission').

BACKGROUND FACTS

2. The appellant is a statutory body constituted under the Damodar Valley Corporation Act, 1948 (hereinafter referred to as 'the DVC Act'). It was entrusted with multifarious functions. One of the functions it was entrusted was that it was duty bound to carry out generation, transmission and distribution of electrical energy both hydro electrical and thermal. It was also called upon to, operate schemes for irrigation, water supply and drainage besides flood control in the Damodar river and its tributaries. Acting under Section 20 of the DVC Act, the appellant was fixing the tariff for the electricity which it was generating and transmitting to its consumers. With the enactment of the Electricity Act in 2003, a *suo motu* proceeding was taken by the Commission with respect to the determination of the tariff of the appellant. Pursuant to the order dated 29.3.2005, the appellant filed Petition No. 66/2005 seeking determination of its tariff for the period from 2004 to 2009. By order dated 3.10.2006, the Commission proceeded to determine the tariff. The Commission proceeded

to take note of the multifarious functions with which the appellant was entrusted. Its case that it was following a cost plus policy for fixation of its tariff as also the difficulties that would be posed by imposing the tariff under the Act of 2003 with effect from 1.4.2004 was noticed. It was ordered that the tariff fixed by the Commission would apply from 2005-2006 and it was to operate from 1.4.2006. The Commission had also appointed one-man Commission. Besides the same it appreciated the scope of the Fourth proviso to Section 14 of the DVC Act and found that the provisions of the DVC Act which were not inconsistent with the 2003 Act would continue to hold good even after the enactment of the 2003 Act. Even if there was inconsistency between the DVC Act and the regulation made under the 2003 Act, the DVC Act would continue to operate. After settling the legal position, in this regard, the Commission proceeded to decide upon the various contentions relating to elements which were to constitute the tariff.

3. This order came to be challenged by the appellant before the Appellate Tribunal for Electricity. There were

also appeals filed by the consumers. By order dated 23.11.2007 the Appellate Tribunal allowed the appeal filed by the appellant and ordered as follows:

"In view of the above the subject Appeal No.273 of 2006 against the impugned order of Central Commission passed on October 3, 2006 is allowed to the extent described in this judgment and we remand the matter to Central Commission for *de novo* consideration of the tariff order dated October 3, 2006 in terms of our findings and observations made hereinabove and according to the law. Appeal No.271, 272 and 275 of 2006 and No.08 of 2007 are also disposed of, accordingly."

4. Pursuant to the said order of the Appellate Tribunal remanding the matter back for consideration, a revised tariff order came to be passed on 6.8.2009 by the Commission. The order dated 6.8.2009 came to be impugned by the appellant before the Appellate Tribunal and said appeal came to be dismissed. It is said order by the Appellate Tribunal which is challenged in the present appeal. It may be noted at this juncture itself that the first order of the Appellate Tribunal dated 23.11.2007 came to be challenged before this Court by certain consumers of

the appellant. Those appeals were taken up earlier and they came to be dismissed by this Court and the said decision is reported in the judgment of this Court in the case of Bhaskar Shrachhi Alloys Limited & Ors. Vs. Damodar Valley Corporation & Ors 2018 (8) SCC 281. This Court agreed with the Appellate Tribunal that the effect of the Fourth proviso to Section 14 of the Act of 2003 was to countenance the continued application of the certain provisions contained in the DVC Act which were not inconsistent with the 2003 Act. This Court also took the view that having regard to the fact that the appellant in addition to generation, transmission and distribution of electricity is under the Act obliged to undertake certain social security/beneficial matters like flood control, control of soil erosion, afforestation, navigation, promotion of public health etc, the grant of the transitory period could not be interfered with. It was reiterated that the provisions of the DVC Act would also have an overriding effect over the inconsistent provisions of the tariff regulations.

CONTENTIONS IN THE PRESENT APPEAL

5. Mr. M.G. Ramachandran, learned counsel for the appellant has narrowed down the scope of the appeal by limiting his submissions to two in number. The first complaint which is raised is that both the Commission and the Appellate Tribunal have not given the benefit of Section 38 of the DVC Act to the appellant in the computation on tariff. The second contention relates to the question of treating cumulative depreciation as on 31.3.2006 as repayment of loan and thereby reducing the notional loan component in the capital cost after applying the debt equity ratio. The substantial question of law apparently relating to the same are as follows:-

"Whether the Appellate Tribunal has correctly interpreted and applied the provisions of Section 38 of the DVC Act in regard to the claim of the Appellant on interest on capital despite the same had been considered and directed to be allowed in the earlier Order dated 23.11.2007 passed in Appeal No.273 of 2006?

Whether the decision of the Appellate Tribunal in approving the Order of the Central Commission equating cumulative depreciation recovered as adjustment towards loan repayment during the period

till 31.3.2006 is not contrary to the decision of this Hon'ble Court in the case of Delhi Electricity Regulatory Commission v. BYPL Limited, (2007) 3 SCC 33 and also the decision of the Appellate Tribunal itself in the case of judgment and orders dated 16.3.2009 passed in Appeals No. 133/08, 135/08, 136/08 & 148/08 and order dated 13.6.2007 passed in Appeals No.139 to 142 etc. of 2006?"

6. Section 38 of the DVC Act reads as follows:

"38. Payment of interest - The Corporation shall pay interest on the amount of capital provided by each participating Government at such rate as may, from time to time, be fixed, by the Central Government and such interest shall be deemed to be part of the expenditure of the Corporation."

7. It is the case of the appellant that this Court in the judgment in Bhaskar Shrachhi Alloys Limited & Ors. Vs. Damodar Valley Corporation & Ors 2018 (8) SCC 281 has approved of Section 38 being available to the appellant despite passing of Act of 2003 and the regulations. Appellant is entitled to interest on the capital. It is the case of the appellant that interest on capital under Section 38 is to be allowed to the appellant in addition to the other

tariff elements including the interest on loan, return on equity etc. permissible under the tariff regulation. Appellant would point out that interest on capital is not to be mixed up with interest on loan including interest on normative loan. Interest on capital, it is contended is a distinct element from interest on loan or return on equity. The contention of the respondents that interest on capital has also being considered by the Commission, is described as patently wrong as it is pointed out that this aspect was the subject matter of the appeal by the Central Commission in the appeal leading to the decision of this Court and this Court affirmed the availability of the element of interest under Section 38. In the second order passed by the Commission in pursuance to remand, it is contended that there is no reference to any interest on capital as contemplated under Section 38 which has not been given and the appellant must be held entitled to the same.

8. Regarding the second contention namely, reducing the cumulative depreciation from the notional loan, it is the case of the appellant that what is serviced under the

tariff is the interest on loan and not the repayment of loan. The interest being computed on the outstanding during the financial year when the loan gets repaid in a progressive manner, the loan gets reduced and therefore the amount of interest to be allowed in the tariff towards the loan is lessened. Till the enactment of the Act of 2003 and the transition period allowed till 1.4.2006, the entire capital cost has to be treated as equity alone. There cannot be a loan and therefore there cannot be repayment of loan or progressive reduction of loan reducing the outstanding loan to be serviced through interest on loan among other things. It is contended that these implications would be from 1.4.2006. Reference is made to Section 30 and 32 of the DVC Act. It is contended that the entire capital of the DVC was to be treated as equity. The capital cost as on 1.4.2006 should have been considered to be the total amount of gross fixed asset. This cost was to be totally divided to debt and equity for generating project at the rate of 50:50 established prior to 30.3.1992 and at the rate of 70:30 for generation project established after 30.03.1992.

The Tribunal had gone wrong in holding that there was deemed repayment of the above loan in the past years prior to 1.4.2006 on the basis of cumulative depreciation of the assets in the past. The tariff regulation of 2004 for the period 1.4.2004 to 31.3.2009 though relevant, does not provide for any such adjustment of cumulative depreciation towards repayment of loan. In this regard, appellant relies on orders passed by the Appellate Tribunal in the case of NTPC which took the view that cumulative depreciation cannot be treated as deemed repayment of loan. Reference is also placed on the judgment of this Court in the case of Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Limited & Others 2007 (3) SCC 33 for the proposition that depreciation is not repayment of loan and therefore, by the cumulative depreciation, the quantum of loan cannot be reduced. Yet it is pointed out that the Commission has applied the concept of cumulative depreciation as resulting in deemed repayment for the period prior to 31.3.2006, which is impermissible.

CONTENTIONS OF THE RESPONDENTS

9. As far as the respondents are concerned, they would support the order passed by the Tribunal. In regard to the complaint of the appellant that interest on capital under Section 38 was not applied though this court also held that Section 38 would continue to operate, it is contended that as a matter of fact appellant has been given the benefit of interest on capital. It is the case of the respondent that what the appellant is seeking is the grant of a double benefit. On the basis of debt equity ratio of 50:50, it is pointed out that authorities have already calculated return to the appellant by way of interest on the loan component of 50% and also vouchsafed for the appellant return on equity on the equity part. What the appellant is asking is over and above the same further interest on the entire capital on the basis of Section 38 which is impermissible.

10. As far as the point relating to non-availability of cumulative depreciation for reduction of the loan, the contention taken is that the appellant did not take this contention in the first round of litigation in the appeal

before the appellate Tribunal. 10 contentions were taken before the Appellate Tribunal in the first round. In regard to 5 contentions, the Appellate Tribunal agreed with the complaint of the appellant and remanded the matter back for de novo consideration in accordance with the observations which were contained in the order. In regard to 5 other issues, the matter was decided against the appellant. There is no appeal carried further by the appellant. Therefore, the first order of the Appellate Tribunal has become final, particularly, after the dismissal of the appeal which was carried out not by appellant but by the respondents which is reported in the case of Bhaskar Shrachi Alloys Limited & Ors. Vs. Damodar Valley Corporation & Ors. 2018 (8) SCC 281. They also have taken the contention that the orders passed by the Appellate Tribunal in the case of NTPC does not bear out the contentions of the appellant. It is their further contention that even in the order dated 3.10.2006 which is the first order passed by the Commission, the Commission had made use of the cumulative depreciation for reducing the loan and consequently reducing the interest

on loan. The appellant had not complained against the methodology employed by the Commission. Matters which have become final cannot be allowed to be reopened in the appeal from the order passed pursuant to remand.

DISCUSSION AND FINDINGS

11. An appeal under Section 125 of the Act of 2003 is permitted only if there are substantial questions of law. We may also bear in mind the view taken by this Court in the order in earlier batch of appeals between the parties reported in Bhaskar Shrachhi Alloys Limited & Ors. Vs. Damodar Valley Corporation & Ors. 2018 (8) SCC 281, namely, "Having considered the matter in the conspectus of aforesaid declaration of law we must proceed to examine the complaint of the appellant, whether the approach of the appellate Tribunal is fundamentally flawed and therefore there is merit in the appellant's case."

12. We have already referred to Section 38 of the DVC Act. There can be no dispute that Section 38 of the DVC Act will survive despite the enactment of the Act of 2003. In other words, it cannot be in the region of dispute that

appellant would be entitled to interest on capital under Section 38, in the computation of the tariff which the appellant is allowed to charge from its consumers. The question, however, is whether the appellant has been actually given the benefit of interest on capital under Section 38 of the DVC Act.

In order to consider the question, it is necessary for us to consider the orders which have been passed by the Commission and also the Appellate Tribunal. The order dated 3.10.2006 passed by the Commission which was the first order passed by it referred to the recommendations of the one Member Bench regarding the capital cost in a total sum of Rs.3146.01 crores and decided to accept the same insofar as generating assets were concerned. The Commission also accepted the 70:30 debt equity ratio which was recommended by the one Member Commission. It referred to the return on equity in terms of 2004 Regulations and adopted a rate of return on equity at 14% which is allowed on 30% of the capital cost in terms of the debt equity ratio. Thereafter, the Commission dealt with interest on loan.

The matter was dealt with under the 2004 Regulations. After extracting the relevant regulation, the Commission proceeded to take the view that the normative loan outstanding for individual station as on 31.03.2004 was to be computed by applying normative debt-equity ratio of 70:30 to the capital cost with weighted average rate of interest of the loan on appellant's Corporation as a whole. The Commission thereafter, in fact, refers to the cumulative depreciation as on 30.03.2004 or notional loan amount whichever is lower being taken as loan repayment and has been allowed to be serviced till it is fully repaid. The weighted average rate of interest thereafter arrived as shown in the table at paragraph 57 of its order and the loan for various projects were given.

13. This order was appealed against by the appellant. The appeal culminated in the order dated 23.11.2007. Let us examine what the appellate Tribunal said about the complaint of the appellant based on Section 38 of the DVC Act. The main order was written by the Technical Member

with whom the Chairman agreed with the separate concurring judgment.

14. The debt equity ratio which was fixed by the Commission at 70:30 was altered to 50:50 in respect of the old projects commissioned prior to 1992 on a normative basis and in respect of recent projects such as MEJIA, they were to be aligned with 70:30 capital structure specified in the Regulations. We may also refer to the following findings:

"A-9. The Appellant has contended that DVC having been created with the functions of deemed state to support the state's social functions of West Bengal and Jharkhand, it serves public interest at large and, therefore, by statute equity has been primary source of capital. It has further added that business risks, financials risks, etc. are largely, therefore, carried by the owner Governments who, therefore, by fundamental principles of risk and return are entitled to return on their entire share of capital investment.

A-10. It is true that the owners take upon themselves business related risks and are entitled for return on their share of capital investment. But the return is to be governed by the scheme of determination of tariff for supply of electricity as mandated by the law in place. The scheme provides for an assured ROE, as permissible under the Tariff Regulations, at the rate of 14%, on the equity deployed for the

purpose of supplying electricity. The scheme does not permit return on investments made on projects other than supply of electricity, to be recovered through tariff for supply of electricity.

A-13. Some of the Respondents have submitted that *"combined reading of Sections 30, 31 and 38 of the DVC Act clearly indicates that the entire capital invested on the projects as per the DVC Act is the loan capital and interest is a part of the expenditure. There is no provision of any equity capital under the DVC Act."*

A-14. The DVC Act provides for infusion of capital by the participating Governments and for payment of interest thereon. The DVC Act does not categorize such capital as borrowings and there is no reference about repayment of such capital to the participating Governments. It is difficult to assume a commercial organization running solely on borrowed funds. Lenders invariably prescribe for a margin money to be invested by the borrower also. In our opinion the capital infused by the participating Governments is in the nature of equity capital and for the purpose of determination of tariff, same would be eligible for return on equity, as may be permitted by the Tariff Regulations 2004.

A-15. It is to be noted that DVC provides interest on capital contributed by the participating Governments. The accrued interest has been allowed to be retained by DVC and is ploughed back into capital with the tacit consent of the participating Governments. This has to be provided to

DVC as per the provisions of Section 38 of the DVC Act.

A-16. It is observed that the DVC Act envisages the projects to be built only on capital contributed by the participating Governments and any deficit in the capital amount is to be made good by taking loan on behalf of the participating Government. The debt taken will obviously attract interest. The average interest rate of repayment payable during the tariff year is to be applied on 50:50 normative debt capital for tariff purposes. This would mean that out of aggregate equity including reserves, equity considering a normative Debt Equity Ratio of 50:50 would be eligible for ROE, at the rates prescribed in the Tariff Regulations and excess of equity if any over the equity earning ROE @14% shall be considered as interest bearing debt. For example, if the actual Debt Equity Ratio comes to 40:60, ROE would be available on 50% portion of the equity and interest would be available on 10% portion of equity and interest would be available on 10% portion of equity and 40% loan, as reduced by repayments."

It is also relevant to notice paragraph E-13 and the same is extracted below:

"E-13. As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the value of

operating assets when they are first put to commercial use. Subsequently, the loan component gets reduced on account of repayments while equity amount remain static. As per the scheme of the determination of tariff as per Tariff Regulations 2004, the recovery is in two forms; either by way of ROE or by way of interest on loans. We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan (including on the equity portion not covered as part of equity eligible for Return of Equity)."

THE ORDER DATED 6.8.2009 PASSED BY THE COMMISSION PURSUANT TO THE AFORESAID ORDER OF THE APPELLATE TRIBUNAL

15. In paragraph 38 of the order dated 6.8.2009, the Commission worked out the return on capital, interest on loan and depreciation on common assets and apportioned to each of the productive generating stations/ transmission system in terms of the capital cost which is already allocated as on 31.03.2004. This is purportedly done in terms of what was stated by the Appellate Tribunal in paragraphs 1.3 and 1.4 of its order dated 23.11.2007. Paragraph 37 reads as under:

"1.3. With the above process it is true that the cost of operating and maintaining the above facilities would be recovered but the recovery of capital cost in the form of depreciation and return on corresponding equity, interest on loans, if any, would be missed out without any justification.

1.4. We feel that once the Commission has agreed to treat these assets as part of the generating and transmission activities of the Appellate by permitting recovery of their O&M cost, these assets, after due prudence check, should also be included in the capital cost and consequential effect be given through determination of tariff."

16. The total capital cost as on 1.4.2004 is shown as Rs.314601 lakhs. The additional capitalisation allowed for 2004-05 and 2005-06 at paragraph 35 was also reckoned and the total average capital was shown as Rs.322797 lakhs for the year 2004-05 and Rs.326786 lakhs for 2005-06. Thereafter, the Commission also referred to the debt equity ratio fixed by the Appellate Tribunal in paragraph A-8 which we have extracted hereinabove. Thereafter, the commission proceeded to work out return on equity under the heading 'Interest on Loan'. This is what the Commission has stated in paragraph 48.

"48. The petitioner has submitted that it has not availed any loans to meet the expenditure towards additional capitalization. Based on the additional capitalization allowed and the revised debt-equity ratio and depreciation considered in line with the directions of the Appellate Tribunal, the interest on loan has been worked out with the weighted average rate of interest considered as per the Commission's order dated 3.10.2006. Depreciation calculated for the year has been treated as repayment of loan during that year."

17. Now let us see how in the order which was impugned before us, the Appellate Tribunal has dealt with the issue relating to interest on capital under Section 38 of the DVC Act. We may note paragraph 70 where the Appellate Tribunal holds as follows:

70. We have carefully considered the above grounds urged by the Appellant. On going through records, as indicated above, the operation of the limited remand order would relate to this issue also. The operations of the DVC which have to be implemented have been clearly spelt out in the following paragraphs of Remand Order:

"E-13. As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments we have to keep in mind that the total capital to be serviced has to be equal to the value of operating assets when they are first put to

commercial use. Subsequently the loan component gets reduced on account of repayments while equity amount remain static. As per the scheme of the determination of tariff as per Tariff Regulations 2004, the recovery is in two forms, either by way of Return on Equity or by way of interest on loans. We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan (including on the equity portion not covered as part of equity eligible for Return of Equity)."

18. Thereafter, the Appellate Tribunal undoubtedly notes that in its remand order dated 23.11.2007, it has directed the Central Commission to ensure that the capital employed in financing the operating assets is getting fully serviced either through return on equity or on interest on loan. The Appellate Tribunal goes on to hold that in compliance of the said order the Commission allowed debt equity ratio on the total capital employed. It further provided return of 14% on the normative equity capital in terms of Regulation 21(1)(iii), i.e., return on equity. The Commission also provided interest on loan of the normative type in accordance with Regulation 21(1)(i).

19. It is in the light of these orders that we must consider the contention of the appellant that despite appellant being entitled to the benefit of interest on capital it was not given the benefit despite the final pronouncement of this Court in 2018(8) SCC 281 upholding the view of the Appellate Tribunal itself that Section 38 of the DVC Act will continue to apply for the benefit of the appellant-corporation. On the other hand, the contention of the contesting respondents is that the benefit under Section 38 of the DVC Act as claimed by the appellant would result in appellant getting a benefit which would be a duplication of claims insofar as on the total capital, applying the normative debt equity ratio, appellant has been given the benefit of return on capital on the normative equity portion and it has also been allowed interest on the loan portion. The case of the appellant on the other hand, is that even after interest has been given on the loan portion and the return on equity has also been ensured on the normative equity portion by the impugned order, over and above the same, the appellant is entitled

to the benefit of interest on capital on the whole amount as that is so provided under Section 38 of the DVC Act.

20. In the order of the Appellate Tribunal dated 23.11.2007 the matter came to be dealt with under the heading 'debt equity ratio'. The Tribunal went on to accept the case of the appellant in respect of all old projects of DVC and normative debt equity of 50:50 was assigned, commissioned prior to 1992. In respect of recent projects such as Mejina, it was assigned debt equity ratio of 70:30 on capital structure as specified in the Regulations. This finding has become final. It was contended on behalf of the appellant that equity has been the primary source of capital. Thereafter, in paragraph A-10, it was found by the Appellate Tribunal that owners take upon themselves business related risk and are entitled to interest on capital investment, but the return is to be governed by the scheme of determination of tariff for the supply of electricity as mandated by the law in place. The Appellate Tribunal further proceeds to hold that the scheme

provides for assured Return on Equity (ROE) which is at the rate of 14% on the equity employed for the purpose of supplying electricity. The scheme does not permit return on investment made on projects other than for supply of electricity to be recovered from supply of electricity. The Tribunal went on to hold that the DVC Act does not recognise capital as borrowings and there is no reference about repayment of such capital to the participating Governments. The Appellate Tribunal proceeds to hold that the capital infused by participating Governments is in the nature of equity capital and for the determination of tariff, the same would be eligible for return on equity but the Appellate Tribunal does not end there. It clearly provides that the return on equity is as may be permitted by the tariff Regulation of 2004. It is thereafter that the Appellate Tribunal in para 15 proceeded to hold that the DVC Act provides for interest on capital which is contributed by the participating Governments. The accrued interest due to the Governments apparently has been allowed to be retained by the appellant. The same however came to

be ploughed back into the capital with the tacit consent of the participating Governments. Thereafter, it is stated that this has to be provided to the DVC as per the provisions of Section 38 of the DVC Act. It is thereafter paragraph A-16 which we have already extracted, the Tribunal proceeded to observe that under the DVC Act if there is any deficit in the capital contributed by the participating Governments, it is to be made good by taking loan on behalf of the participating Governments. The said debt would attract interest. The average interest rate of the repayment payable is to be applied on a 50:50 normative debt capital. This means that out of the aggregate equity including reserves, equity considering the normative debt ratio of 50:50 would be eligible for return on equity as specified in the Regulations and the excess of equity, if any, over the equity earning ratio of 14% is to be considered as interest bearing debt. In the example which has been given it is shown that if the debt equity ratio is 40:60, return on equity at 14% will be available on 50% equity

whereas interest would be available at 10% portion of equity and 40% loan which were reduced by repayments.

21. On the basis of the remand, the Commission has worked out the debt equity ratio as directed by the Appellate Tribunal. It has further provided return on equity at the rate of 14% on the equity portion, namely 50%. In respect of the debt portion, interest has been calculated no doubt after deducting depreciation, the legality of which is the subject matter of the other contention which we will deal with separately. It is quite clear to us that appellant has already been given return on equity in terms of the tariff Regulation in respect of capital on the basis of debt equity ratio which has been fixed by the Appellate Tribunal on a ratio which has become final between the parties.

22. Though a perusal of para A-9 of order dated 23.11.2007 may appear to show that equity has been found to be the main source of capital, a perusal of paragraph

A-10, A-16 and more importantly E-13 would show that capital under Section 38 of the DVC Act has been understood as the value of the operating assets when they were first put to commercial use. Capital is also understood not as equity alone but it has been understood both as loan and equity. The ratio between loan and equity is also fixed in respect of the old projects at 50:50 and under the new projects it is at 70:30. It is further clear from paragraph E-13 of the order of the Appellate Tribunal dated 23.11.2007 that the appellate Tribunal contemplated that the equity component would remain static and it would earn the rate of return as provided in the tariff Regulation. As far as the loan component is concerned, it would get reduced on account of repayments. Therefore, the recovery as contemplated under the Regulations was found to be in two forms, namely, either as return on equity in respect of the equity portion and as interest on the loan component.

23. There remains only one area of doubt. In paragraph A-15, the Appellate Tribunal noted that the

interest due from DVC on the capital employed by the participating Governments have been allowed to be retained by the appellant and it has been ploughed back into the capital. To this portion also, the Appellate Tribunal directed to apply under Section 38 of the DVC Act. However, firstly, it is after so providing that the Appellate Tribunal has later in paragraph E-13 given its direction under Section 38 of the DVC Act. Secondly, even in the written submission made this aspect has not been taken up as such and at any rate, the particulars are not given. Also in paragraph 73 of the impugned order which refers to the complaint of the appellant relating to cumulative depreciation being employed to reduce the loan component being illegal and reference is made to the retained interest being ploughed back as capital to the creation of capital assets resulting in the appellant enjoying perpetual moratorium as it has never repaid the loan and the question of adjustment of the depreciation for the loan did not arise. There is no complaint raised about interest under

Section 38 of the Act not being given in respect of interest which is ploughed back as capital.

24. The next question relates to the legality of taking into consideration the cumulative depreciation for reducing the loan component. The complaint of the appellant is that both the Commission and the Tribunal have calculated interest on the basis that cumulative depreciation will result in a reduction of loan which is unsustainable. The answer to the same which is raised by the respondents is that it is not open to the appellant to raise this contention as this contention was not raised before the appellate Tribunal in the first round of litigation which culminated in the order dated 23.11.2007 being passed by the Appellate Tribunal. The appellant no doubt seeks support from the order of the Appellate Tribunal passed in the case of NTPC. It is no doubt true that in the order of the Appellate Tribunal in the case of NTPC, the Tribunal discountenanced adjusting cumulative depreciation reducing the loan. As far as the judgment of

this Court in 2007 (3) SCC 33, there the question which really arose was related to the rate of depreciation. This Court took the view for power companies keeping in view the need to replace the assets, a higher rate of depreciation was necessary as it would reduce the number of years required for replacing the assets. The observation made therein incidentally may not have the effect which the appellant seeks to persuade us to accept. But the question would be whether the appellant would be entitled to raise the complaint in this appeal. In the original order passed on 3.10.2006 by the Central Commission, the Commission held as follows:-

57. Majority of the loans raised by the petitioner Corporation are not project specific. The normative loan outstanding for individual station, as on 31.3.2004, has been computed by applying the normative debt-equity structure of 70:30 (as mentioned above) to the capital cost with weighted average rate of interest of the loan for the petitioner Corporation as a whole. The cumulative depreciation as on 31.3.2004 or notional loan amount, whichever is lower, has been deemed as loan repayment and balance amount, if any, has been allowed to be serviced till it is fully repaid. Annual depreciation amount has been treated as normative loan repayment.

The weighted average rate of interest as claimed by the petitioner Corporation and as adopted for the tariff calculations is as follows:

Calculation of weighted average rate of interest

Total Loan	2004-05	2005-06	2006-07	2007-08	2008-09
Gross Loan opening	77095	77095	77095	77095	77095
Cumulative re-payment of loan up to previous year	6143	14948	22281	29614	39858
Net Loan opening	70952	62147	54814	47481	37237
Increase/Decrease due to FERV	0	0	0	0	0
Increase/Decrease due to ACE	0	0	0	0	0
Total	70952	62147	54814	47481	37237
Re-payment of loan during the year	8819	7333	7333	10244	5165
Net Loan closing	62133	54801	47468	37224	32059
Average Net loan	66543	58467	51134	42346	34641
Rate of Interest on loan including Guarantee fee	11.19%	10.67%	10.50%	10.23%	9.56%
Interest on Loan	7445	6239	5367	4332	3311

25. Being dissatisfied by the same, the appellant approached the Appellate Tribunal. Apparently, 10 issues were agitated by the Appellate Tribunal at the instance of the appellant. Since the matter has attained finality by the decision of this Court in 2018 (8) SCC 281, it is but apposite that we have set out paragraph 11 of the said

judgment. Paragraph 11 of the said judgment is extracted below:

11. Accordingly, the learned Appellate Tribunal while rejecting the following five claims and upholding the order of CERC on the aforesaid counts thought it proper to remand the matter, for a de novo consideration of the remaining five issues by CERC in the light of the findings recorded by it. The tabular chart, extracted below, would indicate the five issues that have been finalised by the learned Appellate Tribunal by upholding the order of CERC dated 3-10-2006 and the other five issues which have been remanded for redetermination by CERC:

	<i>Issues finalised by the learned Appellate Tribunal by upholding the order of CERC dated 3-10-2006</i>		<i>Issues remanded for redetermination by CERC</i>
(i)	Higher return on equity;	(i)	Additional capitalisation for the period 2004-2005 and 2005-2006;
(ii)	Depreciation rate;	(ii)	Pension and gratuity contribution;
(iii)	Resetting of operating norms at variance from the operating norms prescribed in the 2004 Regulations;	(iii)	Revenue to be allowed to the DVC under the DVC Act;
(iv)	Return on capital investment on Head Office, Regional Offices, administrative and other technical centres, etc.; and	(iv)	Operation and maintenance expenses;
(v)	Generation projects presently not operating.	(v)	Debt-equity ratio

26. A perusal of the same would appear to suggest the substantive question of law sought to be raised as part of the second contention, does not remain open for adjudication.

27. When the matter went back pursuant to the remand order in the first round of litigation which has become final in view of the dismissal of appeal by this Court, the Central Commission has only reiterated the procedure in the matter of calculating interest on loan by reducing the loan amount by the cumulative depreciation. This is a procedure to which exception was not taken in the first round when the appellant could have taken exception to the same. This is also for the period prior to 31.3.2006. Having regard to what is stated in paragraph 57 in the earlier round of litigation, therefore, on a point which has become final in the earlier round, we are not persuaded to hold that it will be open for the appellant to raise the same issue in the second round in respect of a matter which has attained finality. On this ground, we think that the appellant is

not entitled for consideration of the said point at our hands. Accordingly, we refuse to answer the question of law which is raised. The upshot of the above discussion is that the appellant has not made out a case for interference. The appeal fails and is dismissed. The parties will bear their respective costs.

.....CJI.
(Ranjan Gogoi)

.....J.
(Sanjay Kishan Kaul)

.....J.
(K.M. Joseph)

**New Delhi;
December 3, 2018**