

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 139 OF 2015

Dated: 1st April, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:-

**ISMT Limited
Lunkad Towers,
Viman Nagar, Pune-411014,
Maharashtra, India**

...Appellant

Versus

**Maharashtra Electricity Regulatory Commission
World Trade Centre No. 1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai-400001.**

...Respondent No.1

**Maharashtra State Electricity Distribution Co. Ltd.,
5th Floor, Prakashgad,
Bandra (East),
Mumbai-400051.**

.... Respondent No. 2

**Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Dipali Sheth
Ms. Poorva Saigal**

**Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan for R-1
Mr. G. Saikumar
Mr. Nitish Gupta
Mr. Samir Malik**

Mr. Varun Pathak
Mr. Aditya Dewan
Ms. Soumya Saikumar for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

This Appeal has been filed under Section 111 of the Electricity Act, 2003 by M/s. ISMT Limited, Pune (hereinafter referred to as “**Appellant**”) against the Impugned Order dated 20.06.2014 passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as “**State Commission/Respondent No.1**”) whereby the State Commission has rejected claim of the Appellant on account of banking of energy.

2. The Appellant is a manufacturer of specialized seamless tubes and pipes and carbon and alloy steels with three manufacturing units/plants in the State of Maharashtra at Jejuri, Baramati and Ahmednagar.
3. Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred to as “**Respondent No. 2**”) is the Distribution Licensee in the State of Maharashtra.

4. The Appellant is a consumer of Respondent No.2 and has a total contracted capacity approximately 71 MVA with a combined power consumption of approximately 45 MW for its three manufacturing units.

5. **Facts of the Appeal:**

(a) The Appellant has set up a fossil fuel based Captive Power Plant (CPP) of 40 MW capacity at Chandrapur, Maharashtra, pursuant to issuance of State Commission's Order dated 08.09.2004 (CPP Order).

(b) The manufacturing processes at the three plants of the Appellant have a varying power load requirement and as such the Appellant had set up this CPP to cater to the power intensive nature of manufacturing units of the Appellant. The Appellant has set up this CPP, besides catering to its captive load on the assurance based on the CPP Order dated 08.09.2004 issued by the State Commission, inter-alia, providing the mechanism of energy banking facilities and the Appellant keeping in view the matter of power purchase and other dispensations in respect of fossil fuel based CPP was drawing it comfort especially regarding the provision of banking of surplus energy with the Respondent No.2

in terms of the State Commission's Order dated 08.09.2004 and the relevant extract dealing with the banking of energy is reproduced below:-

“Banking of energy shall be allowed by the Distribution Licensee, and will be regulated by the following conditions:-

An Energy Banking Agreement (EBA) should be executed between the CPP holder and the Distribution Licensee. The EBA will be for a minimum of 3 years and a maximum period of 5 years.

Accounting of the banked energy units would be carried out on Time of Day (ToD) basis, i.e. energy units banked by the CPP Holder during a particular ToD-slot should be accounted against the same ToD slot when the CPP holder draws the banked units. For this purpose the ToD slots as per latest approved tariff of the Distribution Licensee would be applicable. It should be noted that units banked during a higher tariff ToD-slot could be consumed in a lower tariff ToD slot at the option of CPP Holder, but the reverse would not be allowed (i.e. units banked during a lower tariff ToD-slot cannot be drawn by the CPP Holder during a higher tariff ToD-slot)”

- (c) The above CPP Order of the State Commission besides giving facilities of banking also provides that in case of Energy Purchase Agreement (EPA) and Energy Banking Agreement (EBA), the priority is given to the EBA and the relevant extract of CPP in this regard is reproduced below:-

“..... 1.55 it should be noted that at the end of the Financial Year accounting of the banked units should be carried out, and balance banked units would be adjusted against the

energy purchased by the CPP holder during the Financial Year. However, subsequent to adjustment of banked units at the end of the Financial Year, if there are additional balance banked units, such banked units would lapse at the end of the year.

Note: In case a CPP has a EBA (for banking) as well as EPA (for selling infirm power) arrangement with the Distribution Licensee, then the infirm power fed into the grid should be either banked and/ or sold to the Distribution Licensee as per the conditions of EPA and/ or EBA signed between the CPP Holder and the Distribution Licensee.

However, in case priority is not mentioned for Banking or selling of such power in EBA and/or EPA, then priority shall be given for Banking. In such cases, CPP holder shall have the right to choose the maximum quantum (in units) of power to be Banked, and if the additional power (beyond maximum quantum specified by the CPP Holder) is fed into the grid of the Distribution Licensee, then the same should be treated as infirm power sold (at the option of the CPP Holder) to the Distribution Licensee by the CPP Holder.

- (d) The Appellant, keeping in view the above provisions, entered into EBA on 07.05.2010 with the Respondent No. 2 to facilitate the banking upto 210 lakhs units per month of surplus energy generated from its 40 MW CPP set up by the Appellant for self use of its manufacturing units.
- (e) Pursuant to the EBA dated 07.05.2010, the Respondent No. 2 issued a letter dated 21.05.2010 stating therein that subject EBA shall be renewed every year. However, the EBA ought to have

been for a minimum period of 3 years and maximum period of 5 years as per the State Commission's CPP Order.

- (f) The CPP of the Appellant started generating power from 17.01.2012. However, the Respondent No. 2 vide its Commercial Circular No. 170 dated 13.06.2012 read with open access permission dated 11.01.2012 denied the Appellant facility of energy banking despite the fact that EBA was executed between the Appellant & the Respondent No. 2 on 07.05.2010.
- (g) The Appellant persistently approached Respondent No.2 for the provision of banking facility under the EBA and in accordance with the State Commission's CPP Order. Aggrieved by the denial of the Respondent No.2 to the Appellant for banking of surplus energy, the Appellant challenged the denial of banking facility before the State Commission vide its case No. 46 of 2013 and made the following prayers before the State Commission:

- “i) Quash the impugned Circular No. 170 dated 13 June, 2012 issued by the Respondent qua the Petitioner;***
- ii) Direct the Respondent to forthwith comply with the and act consistent with the Energy Banking Agreement dated 7 May, 2010 read with the Order dated 8 Sept., 2004 passed by the Commission in Case Nos. 55 and 56 of 2003;***

- iii) Direct the Respondent to allow the Petitioner to inject the power generated at the CPP into the Open Access consumer/plant situated at Jejuri or Baramati or Ahmednagar as per the Petitioner's choice subject to the MW specified in the Open Access Permissions and restrain the Respondent from unilaterally and without any authority giving proportionate credit of the power generated by the Petitioner's CPP and consumed amongst the Open Access Consumer/Plant situated at Jejuri or Baramati or Ahmednagar;**
- iv) Direct the Respondent to forthwith issue Open Access Permission in respect of Consumer No. 162019000401, 187279005573 and 186849005690 in accordance with the prevailing law for conveyance of power from the CPP to the manufacturing facilities as sought by the Petitioner."**
- (h) During the proceedings of the above case before the State Commission, the State Commission vide its Daily Order dated 13.05.2013 stayed the operation of the Respondent No.2's Commercial Circular No. 170 dated 13.06.2012. The Respondent No.2 simultaneously initiated a Writ Petition in the Bombay High Court, challenging the jurisdiction of the State Commission in respect of banking facility. The Hon'ble High Court dismissed the aforesaid Writ Petition vide Order dated 17.05.2013.
- (i) Meanwhile, the Respondent No.2 filed Appeal No. 110 of 2013 before this Tribunal against the Order of the State Commission dated 13.05.2013. This Tribunal vide its Order dated 31.05.2013

remanded the matter to the State Commission to hear the matter on merits including the issue of jurisdiction without expressing any opinion the issues raised in the Appeal and the relevant extract of the Tribunal's Order is reproduced below:-

***“Without going into the merits of the matter we think it appropriate to remand the matter to the State Commission after setting aside the Impugned Order with directions that the State Commission shall hear both the parties on all the issues including the issue of jurisdiction raised by the Appellant and pass the order uninfluenced by any of the findings given in its earlier order. Accordingly directed.*”**

- (j) On 03.012.013, the State Commission issued a detailed Order holding that it has jurisdiction to decide on the banking issue for CPPs and the relevant extract of the same is reproduced below:-

“Accordingly, all other provisions cited in previous paragraphs read together, establish that a promotional aspect referred is not merely for wire connection with the Grid, but also includes associated technical and commercial aspects which creates environment of gainfully utilizing CPPs. Hence, stipulating commercial arrangement for the beneficial use of Captive Power Plant comes within the jurisdiction of the Regulatory Commission. Accordingly, the Commission is empowered to make appropriate provisions related to banking for promoting Captive Power Plants in the State of Maharashtra and hence has the jurisdiction to stipulate provisions related to banking Facility.”

(k) The Respondent No.2 filed Appeal No. 71 of 2014 before this Tribunal against the Order dated 03.12.2013 of the State Commission pertaining to jurisdiction of the State Commission to decide the issue of banking facility in relation to Fossil Fuel Based CPPs. This Appeal was dismissed by this Tribunal vide its Order dated 24.07.2014.

(l) On 20.06.2014, the State Commission pronounced the Impugned Order, denying thereby the energy banking facility to the Appellant and aggrieved by this, the Appellant has filled this Appeal.

6. After perusal of the above facts of the case, we find that the following needs to be decided in the present Appeal:-

Whether the State Commission was right in denying the EBA facility to the Appellant specially in light of the fact that the State Commission's Order dated 08.09.2004 allowed EBA facility to the CPPs?

7. We have heard at length Mr. M.G. Ramachandran, Learned Counsel for the Appellant and Mr. G. Saikumar, Learned Counsel for the Respondent No.2 and considered their written submissions and

arguments put forth by the rival parties before us and the relevant issues needing consideration are detailed hereunder:-

- (i) The Appellant stated that it has set up CPP in pursuance of the State Commissions Order dated 08.09.2004 allowing EBAs to CPPs.
- (ii) As per the Appellant, the dispensations in the CPP Order dated 08.09.2004 have been provided to the similarly placed industries i.e. M/s. Sunflag and the relevant extract of the Order dated 20.05.2008 of the State Commission in this regard is reproduced below:-

“.... From the above extract of the order in the matter of fossil fuel based CPPs, it is clear that SISL has to be given credit for 100% of the units banked with MSEDCL, when the system frequency is below 50Hz. MSEDCL has also agreed during the hearing that credit has to be given to SISL in accordance with the stipulations in the Commission’s above said order....”

The Appellant stated that the State Commission has discriminated by not providing the EBA facility to its CPP.

- (iii) The denial of energy banking facility has resulted in Appellant’s drawl of power over and above its contracted demand by paying temporary tariff of Rs.8 per unit without giving it any credit for its

banked units. This higher temporary tariff should not be levied on the Appellant at least to the extent the units banked by it. The Appellant has its CPP to cater to its power requirements to a greater extent.

- (iv) As the manufacturing units of the Appellant have certain peculiarities due to its varying furnace loads, the consumption pattern cannot be firmed up and there could be many situations during which it could inject surplus power to the state grid and as such banking of electricity is more crucial for operation of its captive power plant.
- (v) The Learned Counsel for the Appellant alleged that the Respondent No.2 cannot arbitrary deny or violate the State Commission's Order dated 08.09.2004 as well as its own contractual commitments in the form of executed EBA dated 07.05.2010.
- (vi) The Appellant further stated that the Impugned Order has ignored the salient aspects, namely non-provision of banking in the light of its earlier Order dated 08.09.2014 and the fact that the

EBA facility to M/s. Sunflag has been granted by the same commission.

- (vii) It was further stated by the Learned Counsel for the Appellant that the State Commission in its Impugned Order has erroneously relied on the basis that the Appellant as well as the Respondent No.2 have mutually agreed to sign the Energy Purchase Agreement (EPA) and, therefore, the State Commission cannot allow giving effect to EBA. In this regard, the Appellant stated that when there has been clear stipulation in the State Commission's Order dated 08.09.2004 for granting priority between EPA and EBA to EBA over EPA, how the same Commission could deny the Appellant the EBA facility.
- (viii) It was further pointed out by the Appellant that the Impugned Order denying the energy banking facility to the Appellant is contrary to the settled position of law that any change is to be for prospective application. The Appellant having established such CPP on the basis of such benefits/dispensations, the denial of energy banking thereof after the commissioning of CPP is not

justified. In support of the same, the Appellant has cited the following judgments:-

"A. In U.P. Corporation Ltd. & Anr. V/s. Sant Steels and Alloys (P) Ltd. and Ors., 2008 (1) (UJ) SC 0045 (Decision dated December 12, 2007), the Hon'ble Supreme Court has held as under:

"No person can be permitted to misuse the concession or benefit and invoke promissory estoppels. Promissory estoppel is not one-sided affair it is rather two-sided affair. If one party abuses the concession then it is always open to the other party to revoke such concession but if one party avails the benefit and is acting on the same representation made by the other party then the other party who has granted the said benefit cannot revoke the same under the garb of public interest.....

In this 21st century, when there is global economy, the question of faith is very important. Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the short sightedness of the governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the appellant-Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in the governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be

permitted to withdraw from that. This is a matter of faith.

Therefore, as a result of our above discussion, we hold that the view taken by the Allahabad High Court on revoking the principle of promissory estoppels is correct and the respondent-units will be entitled to such benefits till the U.P. Electricity Reform Act, 1999 came in to force. Since after coming into force the Act of 1999 no such concession has been granted, therefore, the concession shall survive till the Act of 1999 came into force. The appeals are accordingly disposed of with no order as to costs.”

B. In Suresh Jindal V/s. BSES Rajdhani Power Limited & Ors. (2008) 1 SCC 341, the Hon’ble Court has held as under:

“40. At the outset we have noticed that the appellant did not object to the change of the meter. It proceeded on the basis that the change of the meter is permissible in law. He being allegedly unaware of his rights allowed the respondent to enter into his premises and change a correct meter by another one which according to him is also correct. It, therefore, in our opinion does not lie in the mouth of the appellant now to turn round and contend that electronic meters do not record correct consumption of electrical energy. It is one thing to say that electronic meters when tested do not register the actual consumption, as a result whereof, the consumer would have to pay the energy charges more than he is otherwise liable but it is another thing to say that it was legally impermissible. It is not, however denied or disputed that whether meter is installed by the licensee or by the consumer himself, the same must have the requisite certificate granted in terms of the regulations, the provisions where for have been made in the regulations made under the 2000 Act.”

C) **In Bhubaneswar Development Authority V/s. Susanta Kumar Mishra (2009) 4 SCC 684, the Hon'ble Court has held as under:**

“The case of the respondent in its complaint was that the interest could not be charged from September, 1989 as the allotment was made only on 1.5.1991 followed by the lease-cum-sale agreement on 6.5.1991 and delivery of possession on 9.5.1991. He also contended that there was no provision for payment of any interest by the lessee as Clause (6) of the agreement was applicable only in the event of default and he had not committed any default. It should be noted that the respondent did not protest against the provisions of clauses (2) and (6) of the lease-cum-sale agreement requiring payment of installments with effect from 1.9.1989 and took possession of the house in terms of the said agreement. Therefore, he could not be heard to say that the installments should commence only prospectively.”

- (ix) The Appellant has further alleged that the State Commission has not correctly appreciated the scope and the effect of the EPA entered into between the parties when it is in its earlier Order dated 08.09.2004 provides priority of banking over purchase which are for different purposes. Therefore, the reason that on signing of EPA, the State Commission holding that the surplus units generated by the CPPs of the Appellant are purchased and not banked is incorrect since the execution of EBA and EPA are for different purposes.

- (x) It was also pointed out by the Appellant that EBA dated 07.05.2010 executed between the Appellant and the Respondent No.2 did not specify the term/duration of the said agreement and in the same, there has been a reference to the CPP Order dated 08.09.2004 of the State Commission and according to this CPP Order, the terms of the EBA shall be minimum three years and maximum five years and, therefore, the Respondent's requirement of yearly renewal is irrelevant and not tenable.
- (xi) On the contention of the State Commission that the Appellant has approached the State Commission belatedly, Learned Counsel for the Appellant stated that it has approached the State Commission late because it was following up the matter for resolution with the Respondent No.2.
- (xii) The Respondent No. 2 while defending the findings of the Impugned Order of the State Commission stated that it was required by the Appellant for executing EPAs and as such it approached the Respondent No.2 for execution of EPA after commissioning of its CPP in January, 2012. As such, the Appellant executed three separate EPAs with the Respondent No.2 and in terms of the said EPAs, the surplus energy injected

into the state grid by the Appellant CPP were being purchased by the Respondent No.2 and not banked. Hence by way of signing EPAs, the Appellant availed the benefit of surplus energy generated by CPP.

- (xiii) The Respondents further stated that the Appellant could not provide any satisfactory explanation for not having approached the State Commission seeking implementation of the EBA executed on 07.05.2010. This EBA executed on 07.05.2010 cannot be given any effect since the Appellant has accepted the Respondent No.2's conditions by its letter dated 21.05.2010 requiring renewal of EPA on yearly basis which was not complied with by the Appellant and hence the Appellant was required to execute a fresh EBA after it achieved commercialization i.e. January, 2012.
- (xiv) The Respondents further stated that the Appellant executed the EPAs upon its commissioning of CPP knowing fully well that no banking facility shall be granted.
- (xv) The Respondent No.2 further stated that if the Appellant was aggrieved with the denial of banking facility to it per se, it could

have approached this Tribunal straight way within the stipulated period rather than seeking clarifications through Petition being No. 156 of 2014, filed on 06.08.2014 before the State Commission praying for a clarification as to the Impugned Order dated 20.06.2014 in the matter of denial of facility of banking whether it shall have a prospective or retrospective applicability which was disposed of by the State Commission vide its Order dated 12.01.2015 stating that the effect of applicability of the Impugned Order dated 20.06.2014 was clear and explicit and cannot be sought to be revisited or modified. Taking that as a plea, the Appellant is taking a circuitous route in order to justify the delay occurred in filing the present Appeal.

8. In light of the above, our observations on the issues deliberated in the present Appeal are detailed hereunder.
 - (i) As regards the banking of energy and energy accounting on time block basis, it is quite evident from the EBA executed between the Appellant and the Respondent No.2 on 07.05.2010 was without any mention about its duration, but there has been a reference of the State Commission's Order dated 08.09.2004 which states that it should be for minimum three years & maximum five years.

However, the duration of EBA was subsequently clarified by Respondent No. 2 vide its letter dated 21.05.2010 to the Appellant stating that EBA shall be renewed every year as per the terms & conditions. This clarification letter dated 21.05.2010 issued by the Respondent No.2 to the Appellant specifying therein that the said EBA shall have to be renewed every year was not contested/objected to by the Appellant. If the Appellant was in disagreement on this renewal clause and thought in its wisdom that the EBA shall be valid for a period as provided in the State Commission's Order dated 08.09.2004, the Appellant could have taken up this issue with the Respondent No.2 then and there. It means the Appellant was conscious of the fact that the EBA as executed on 07.05.2010 shall need renewal after a year irrespective the Appellant's generation from its captive power plant commences by that time.

From the Impugned Order dated 20.06.2014, we have noted that the Appellant did not even contest before the State Commission on the issue of renewal of EBA on yearly basis with a prayer that it should be for a minimum period of three years in terms of the prevailing State Commission's Regulations dated 08.09.2004.

- (ii) While granting open access permission initially on 11.01.2012 which was valid upto March 31, 2012 and subsequently extended upto 31.03.2013, the Respondent No.2 withdrew the banking facility to the Appellant. We have noted even after that the Appellant had not preferred any Petition for any directions of the State Commission.
- (iii) Another point comes to our mind is that instead of approaching the State Commission, the Appellant opted to execute the separate EPAs for the excess units injected into the grid by it be treated as purchased by the Respondent No.2 and by way of signing the EPA for selling excess units injected into the grid, the Appellant has already accrued the benefits from sale of such surplus energy being generated in its CPP but not consumed for its captive load..
- (iv) We fail to understand why the Appellant on receipt of Respondent No.2's letter dated 21.05.2010 regarding stipulation of annual renewal of EBA has not chosen to file the Petition before the State Commission seeking for a direction for implementation of the EBA for a minimum of three years period immediately after receipt of the letter dated 21.05.2010 or after grant of open

access on 11.01.2012 with no banking facility or immediately after the non-receipt banking credit for surplus energy when occurred at the very initial stage after commencing of generation of its CPP.

- (v) We do not want to get into another point brought out by the Appellant that it has been subjected to discrimination by the Respondent No.2 since banking facility has been granted by Respondent No.2 to other CPPs, as every case has its own background and merits/demerits and the fact that it was upto the Appellant to have timely objected to the specific condition imposed by the Respondent No.2 vide its letter dated 21.05.2010 regarding annual renewal of the EBA.
- (vi) Having not preferred any action against the annual renewal requirement of EBA as per the Respondent No.2's letter dated 21.05.2010, it would be considered as acceptance of the Appellant for such a condition.
- (vii) Yearly renewal of EBA was not in accordance with the Regulations, 2004 of the State Commission. As such, the Appellant without any loss of time should have taken up the

matter with the State Commission at that point of time and its concerns would have been addressed appropriately.

- (viii) Instead, the Appellant executed EPA with the Respondent No.2 to facilitate sale of surplus power generated from its CPP which can be taken as the Appellant was conscious of the fact that the EBA facility would not be provided by the Respondent No.2.
- (ix) We have also noted that the EBA executed on 07.05.2010 had expired on 07.05.2011 i.e. after one year as stipulated in the subsequent letter dated 21.05.2010 of the Respondent No.2 and the Appellant did not seek renewal of EBA beyond 07.05.2011 from the Respondent No.2. As such, the subject EBA was not renewed immediately thereafter.
- (x) The Appellant started generation from its CPP in January, 2012. Since then, no banking facility has been provided to the Appellant. Though the EPA was signed later on, the Appellant has been compensated for the surplus generation injected into the grid during the intervening period.

(xi) We have gone through the various judgments cited by the Appellant as brought out above and observed that these judgments do not have any application in the present Appeal.

9. In light of the above, we are of the considered opinion that the Appellant was conscious of the fact that the energy banking facility would not be provided at the time when it commenced generation from its CPP and accordingly entered into the another recourse available to it i.e. through EPAs so as to be compensated for injection of surplus energy into the grid from its CPP. Having not preferred to approach the State Commission for EBA facility for minimum three years period as specified in its Regulations after receipt of the condition imposed by the Respondent No.2 vide its letter dated 21.05.2010 insisting therein for yearly renewal of EBA, the Appellant has virtually accepted the stated position. It is not proper for us to get into this issue at this stage. It was wide open to the Appellant to have taken requisite actions at appropriate time rather than contesting the issue at this stage. EBA facility as per the earlier executed agreement dated 07.05.2010 does not remain valid now especially in light of the fact that the yearly renewal requirement as stated vide letter dated 21.05.2010 by the Respondent No.2 to the Appellant which made the subject EBA expired

on 07.05.2011 if not renewed by then. And the Appellant not seeking extension of the same after the initial lapse of one year i.e. May, 201, the Appellant has no valid reason to contest this issue at this stage.

ORDER

In view of the above, we are of the considered opinion that the present Appeal is devoid of merits and is hereby dismissed. The State Commission's Impugned Order dated 20.06.2014 is hereby upheld. No order as to cost.

Pronounced in the open court on this **1st day of April, 2016.**

(I.J. Kapoor)
Technical Member

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~~REPORTABLE/NON-REPORTABLE~~
dk

(Justice Ranjana P. Desai)
Chairperson