

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**  
**(APPELLATE JURISDICTION)**

**APPEAL NO. 209 of 2015**

**Dated : 6<sup>th</sup> December 2018**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**  
**HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF :**

1. GUJARAT URJA VIKAS NIGAM LIMITED  
Having its Registered Office at  
Sardar Patel Vidyut Bhavan  
Race Course Circle  
Vadodara – 390007  
Gujarat
2. MADHYA GUJARAT VIJ COMPANY LIMITED  
Sardar Patel Vidyut Bhavan  
Race Course Circle  
Vadodara – 390007  
Gujarat
3. UTTAR GUJARAT VIJ COMPANY LIMITED  
Visnagar Road  
Mehsana 384001  
Gujarat
4. PASCHIM GUJARAT VIJ COMPANY LIMITED  
Off. Nana Mava Main Road  
Near Bhaktinagar Railway Station  
Laxminagar, Rajkot – 360004  
Gujarat

5. DAKSHIN GUJARAT VIJ COMPANY LIMITED

Nan Varachha Road, Kapodara  
Surat 395006  
Gujarat

.... APPELLANTS

**Versus**

1. RENEW WIND ENERGY (RAJKOT) PRIVATE LIMITED

138, Ansal Chamber – II  
Bikaji Cama Place  
New Delhi - 110066

2. WIND INDEPENDENT POWER PRODUCERS ASSOCIATION

6<sup>th</sup> Floor, Block 4- A, DLF Corporate Park,  
Mehruali-Gurgaon Road,  
Gurgaon – 122002  
Haryana

3. GUJARAT ELECTRICITY REGULATORY COMMISSION

6th Floor GIFT ONE  
Road 5-C Zone 5, GIFT CITY  
Gandhinagar – 382 355  
Gujarat

.... RESPONDENTS

4. WISH WIND INFRASTRUKTURE LLP

A-71, 7<sup>th</sup> Floor, Himalaya House  
23, KG Marg, New Delhi - 110001

.... INTERVENER

**Counsel for the Appellant(s)**

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Mr. Ashwin Ramanathan

**Counsel for the Respondent(s)**

: Mr. Sanjay Sen, Sr. Adv.  
Mr. Shri Venkatesh  
Mr. Sandeep Rajpurohit  
Mr. Vikas Maini  
Ms. Nistha Samarthe Kashyap for R-1  
  
Mr. Vasav Anantharaman for R-1 & 2

Ms. Suparna Srivastava  
Ms. Nehul Sharma for R-3

Mr. Raunak Jain  
Mr. Vishvendra Tomar  
Mr. Vishal Gupta for Intervener

## **J U D G M E N T**

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The **Appellant** Gujarat Urja Vikas Nigam Ltd. & Ors., questioning the legality and validity of the impugned order dated 1-7-2015 (herein the **“impugned order”**) passed in Petition No. 1363 of 2013 on the file of the Gujarat Electricity Regulatory Commission (hereinafter referred to as **“State Commission”** or **“Respondent Commission”** or **“Gujarat Commission”**) presented this Appeal under Section 111 of the Electricity Act 2003.
  - 1.1 The Appellant No. 1 herein, Gujarat Urja Vikas Nigam Limited is engaged in procurement of power in bulk on behalf of the distribution licensees in the State and is a licensee within the meaning of the Electricity Act, 2003. The Appellants No. 2 to 5 are the distribution licensees in the State of Gujarat.
  - 1.2 The Respondent No. 1, Renew Wind Energy (Rajkot) Private Limited is a wind generator who has set up 25.2 MW Wind Turbine Generators at

District Rajkot, Gujarat under the Renewable Energy Certification scheme notified by the Central Electricity Regulatory Commission (hereinafter referred to '**Central Commission**').

- 1.3 The Respondent No. 2 is a Wind Independent Power Producers Association. The Respondent No. 2 was also a co-Appellant before the Commission and had sought relief on behalf of all wind generators in the State.
- 1.4 The Respondent No. 3, Gujarat Electricity Regulatory Commission is the regulatory commission under the Electricity Act, 2003 for the State of Gujarat.
- 1.5 The Respondent No. 4, a Wind Power Producer (also a Member of the 2<sup>nd</sup> Respondent Association) is an Intervener in the instant Appeal.

**2. Brief facts of the case are as follows:**

- 2.1 On 29.01.2010, the Central Commission framed Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (hereinafter referred to as '**2010 REC Regulations**') for development of power market for Non Conventional Sources of energy by way of issuance of tradeable and saleable Credit

Certificates (hereinafter referred to as ‘**Renewable Energy Certificates**’ or ‘**RECs**’). The said Regulations were further amended on 01.10.2010, 11.07.2013 and 31.12.2014.

2.2 The 2010 REC Regulations, inter alia, provided for eligibility for Renewable Generators for participation in Renewable Energy Certificates (REC) mechanism:

*“5. Eligibility and Registration for Certificates:*

*(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfils the following conditions:*

- a. it has obtained accreditation from the State Agency;*
- b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission;*
- c. it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, **at a price not exceeding the pooled cost of power purchase of such distribution licensee**, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.*

*Explanation.- for the purpose of these regulations ‘Pooled Cost of Purchase’ means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.”*

- 2.3 The intention of the above Regulations was to separate the physical electrical component and environmental (renewable) component of the energy for issuance of Certificate as an alternative mechanism of sale of renewable energy at preferential tariff which combines the price for electricity as well as promotional/concessional benefits for being renewable energy (environmental component). Under the scheme of REC mechanism, the environmental (renewable) component being sold through RECs was intended to contain the promotional benefits of renewable energy whereas physical electrical component was to be sold as any other conventional electricity. To ensure that the generators do not benefit twice by selling RECs as well as selling the physical energy at higher promotional tariff or taking concessional benefits from the concerned distribution licensee, the 2010 REC Regulation provided that the generator based on REC mechanism shall have amongst others one of the option to sell physical energy to the distribution licensee at a price not exceeding the Average Pooled Power Purchase Cost (APPC) of the distribution licensee.

2.4 As per the REC Regulations, it is not obligatory on part of the concerned distribution licensee to purchase physical component of electricity from the renewable energy Generators set up under REC mechanism since the REC based Generators have other alternative options with regard to the physical component of electricity, namely, (i) sale of electricity through Power Exchanges (ii) Wheeling of power for sale to third party at a mutually agreed rate or (iii) wheeling of power for their own consumption. In case of sale of physical component of electricity to a distribution licensee, the price for electrical component does not exceed the average pooled cost of the said distribution licensees. Similarly for wheeling of power for self consumption or sale to third party, the renewable generators are not eligible for any kind of concessional benefits in terms of banking facility, exemption from payment of cross subsidy surcharge etc. The promotional benefits for REC based Generators in all cases would be in terms of trading and selling of RECs.

2.5 The 2010 REC Regulations also provided for the floor price (minimum price) and the forbearance price (maximum price) within which the RECs could be traded in Power Exchanges. The floor price (minimum price) and the forbearance price (maximum price) would be determined by the Central

Commission for the entire country guided by various principles, inter alia, variations in pooled cost of purchase across the States.

2.6 On 30.01.2010, the State Commission passed Order No. 1 of 2010 for determination of tariff for Procurement of Power by Distribution Licensees from Wind Energy Generators and also deciding on the other commercial issues for wind energy generators set up under preferential mechanism. The Order provided for a preferential levelized tariff of Rs. 3.56 per kWh for supply of energy to distribution licensee for meeting its Renewable Power Purchase Obligation (RPO). The Control Period of Order dated 30.1.2010 was for the period from 11.08.2009 to 10.08.2012. The Order, inter alia, also provided the following promotional benefits for wind generators set up for third party sale under preferential mechanism :

- (a) Exemption from cross subsidy charges for sale of wind energy to open access users in the State.
- (b) Payment for excess (over and above that set off against monthly consumption in the 15 minutes time block) would be treated as sale to the distribution licensee concerned at a rate of 85% of the preferential tariff.

The above Order was applicable only to wind energy generators set up under preferential mechanism (i.e. Non - REC based) as there is no



reference or provisions with regard to Wind Energy Projects set up under REC mechanism. In fact, the Order dated 30.01.2010 was issued by the State Commission just one day after the REC mechanism was notified for the first time by the Central Commission on 29.01.2010

2.7 On 17.04.2010, the State Commission framed Gujarat Electricity Regulatory (Procurement of Energy from Renewable Sources) Regulations, 2010 which specified the percentage of total consumption that the distribution licensee and other obligated entities are required to purchase from renewable sources (**Renewable Purchase Obligation**). Further, an obligated entity could fulfil its renewable purchase obligation through two sources:

- (a) Purchase of renewable energy directly (at preferential tariff determined by State Commission);
- (b) Purchase of RECs at market price between Floor Price and Forbearance price determined by Central Commission.

2.8 In terms of the above, the purchase of electrical component or physical energy from renewable generator set up under REC mechanism at price not exceeding the pooled cost of power purchase could not satisfy the renewable purchase obligation of the Appellants. This is because the

renewable component has been separated from physical electrical component and is sold in the form of RECs.

2.9 The Respondent No. 1 had contended before the State Commission that the power project was completed in December 2011 and was ready for commissioning. The Respondent No. 1 opted to register under the REC Scheme of 2010 REC Regulations.

2.10 The Respondent No. 1 approached the Appellant No. 1 for the first time for sale of the electrical component of the energy generated on 20.03.2012 for sale of 23.1 MW of power i.e. nearly three months after it was ready for commissioning. Since this was sale of only electrical component, this would not be considered for fulfilment of Renewable Purchase Obligation of the Appellants No. 2 to 5 represented by Appellant No. 1 and therefore for Appellant No. 1, this would be considered as equivalent to purchase of normal conventional power.

2.11 The Power Purchase Agreement (**PPA**) was executed between the Appellant No. 1 and the Respondent No. 1 on 29.03.2012 and the power project was commissioned on such date. The salient terms of the PPA are as under:

“Average Power Purchase Cost” means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be. Further, for this agreement Average Power Purchase Cost for the term of the agreement shall be as per Article No. 5.2.

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**5.2 GUVNL shall pay a fixed rate of Rs. 2.64 per kWh (Average Power Purchase Cost for previous FY i.e. 2010-11) during the term of this agreement for delivered energy certified by Gujarat SLDC in the monthly State Energy Account (SEA).**

- a) In case in any subsequent FY the APPC goes below the APPC of FY shall be such lower APPC of the previous year.
- b) Power Producer and Power Procurer both have option to switch over from REC mechanism to preferential tariff after 10 years from commissioning of the 23.10 MW WTGS. In case either party exercises this option the tariff shall be Rs. 3.56 per KWh (as determined by GERC through Order No. 1 of 2010 dated 30.1.2010) for balance term of the agreement. Further, Power Producer shall submit documentary evidence to GUVNL for de-registration of wind project from REC mechanism in case either party exercise option to switch over from REC to Preferential tariff.”

2.12 In terms of the Power Purchase Agreement dated 29.03.2012, the Appellants had agreed to purchase from Respondent No.1 the power generated qua 23.1 MW of power as against the installed capacity of 25.2 MW of power. There was no agreement in regard to the balance 2.1 MW capacity. The balance capacity was to be used by Respondent No. 1 for third party sale through Open Access. The Appellants had no obligation whatsoever to purchase surplus capacity and more particularly the surplus power that may be there from time to time under the transaction for sale of power by the Respondent No. 1 to third party.

2.13 The Respondent No. 1 opted to sell balance 2.1 MW of power under the REC Scheme to third party and industries situated in the State of Gujarat. The Respondent No. 1 signed a Transmission Agreement with Gujarat Energy Transmission Corporation Limited on 20.04.2012 for transmission of electricity generated from 2.1 MW wind farm to the recipient unit of the third party consumer. Since the sale to third party was under REC Scheme and not under preferential mechanism, the Respondent No. 1 and the third party consumer (recipient units) agreed to forgo the concessional and promotional transmission or wheeling charges and other benefits like banking facility etc as available under Order dated 30.01.2010 which applies only to sale of power under preferential mechanism (non REC based

project). Similarly, the Respondent No. 1 agreed to pay cross subsidy surcharge as determined by the State Commission from time to time for 2.1 MW energy sold to third party under REC mechanism. Clause 4(c) of the said Agreement reads as under:

*“4(c) The company agrees to pay Cross Subsidy Surcharge as determined by the Commission from time to time to Discoms for energy drawn (set out given) at recipient unit.”*

2.14 Further the Respondent No. 1 executed a tripartite wheeling agreement dated 24.05.2012 with Appellant No. 2 and a third party consumer for wheeling of power from the Respondent No. 1 to recipient unit of third party. The Agreement specifically provided that wheeling of power being under REC mechanism, Respondent No. 1 shall pay cross subsidy surcharge as determined by the State Commission from time to time for 2.1 MW energy sold to third party under REC mechanism. Further, since Appellant No. 2 was not obliged to purchase physical component of electricity from REC based projects, it was specifically agreed in the Wheeling Agreement with Appellant No. 2 that there shall be no consideration paid by the Appellant No. 2 for surplus or inadvertent energy injected by the Respondent No. 1 due to non consumption by such third party. The relevant clause of said Wheeling Agreement dated 24.05.2012 reads as under:

**“3.3 Cross Subsidy Surcharge:**

*The Power Purchaser agrees to pay applicable Cross Subsidy Surcharge as determined by Ho'nble Commission from time to time for purchase of power under third party sale arrangement*

**5.5 Commercial settlement of Wheeled Energy:**

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*c. In case under drawl of energy by recipient unit, surplus energy shall be treated as in- advertent flow of energy for which no payment shall be made by DISCOM.”*

2.15 On 08.08.2012, the State Commission vide Order No. 2 of 2012 determined the tariff for procurement of power by distribution licensee and others from Wind Power Projects commissioned in the control period 11.08.2012 to 31.03.2016. The State Commission continued the exemption from cross subsidy surcharge for sale of wind energy to third party so far as wind energy generators set up under preferential mechanism (non-REC based) is concerned. As the REC based scheme had become functional by the time Order dated 8.8.2012 was passed, a clarification was sought in the proceedings of Order dated 8.8.2012 if the cross subsidy surcharge was applicable for third party sale of the electrical component by the wind generators availing RECs. The State Commission in the Order dated 08.08.2012 held that *“the Commission clarifies that the cross subsidy surcharge will be applicable in the case of third party sale availing REC*

*benefit*” i.e. there would be no exemption from cross subsidy surcharge for such sale to third party under REC mechanism.

2.16 On 11.07.2013 the Central Commission amended the 2010 REC Regulations by way of Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) (Second Amendment) Regulations, 2013.

*“(2) In sub-clause (c) of clause (1) of Regulation 5 of the Principal Regulations, the words "at price not exceeding the pooled cost of the power purchase of such distribution licensee" shall be substituted with the words "at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission".”*

2.17 The Second Amendment specifically modified the words “*at a price not exceeding*” meaning that the price could be any price up to the pooled cost to “*at the pooled cost*” meaning it could neither be lower nor higher than the pooled cost. Prior to such Amendment in 2010 REC regulations, there were PPAs executed between renewable energy generators and distribution licensees at tariff lower than the pooled cost. In this regard, a specific clarification was sought in regard to such PPAs in view of the above Amendment by some of the stakeholders during the consultation process at

the time of finalization of the Regulations. This was recorded in the Statement of Reasons dated 10.07.2013 issued by the Central Commission on such second amendment. The Central Commission specifically clarified that the Amendment did not affect the already executed PPAs and would only apply prospectively. The relevant extract is as under:

*“Some of the stakeholders have suggested to clarify as to whether the PPAs executed at price lower than APPC would become ineligible under REC Mechanism. It is felt that the tariff for electricity component lower or higher than APPC may lead to avoidable loss or profit to RE generator. **The Commission would like to clarify that the intention is not to debar the projects that have executed PPA at tariff lower than APPC. This amendment will apply prospectively and as such will not affect the already executed PPAs at lower than APPC.**”*

2.18 On 10.12.2013, the Respondent No. 1 along with Respondent No. 2 filed the Petition before the State Commission being Petition No. 1363 of 2013 and raised objections on specific terms of the PPA executed between the parties on the basis of alleged coercion and duress and sought relief on those terms of the PPA dated 29.03.2012 as well as Wheeling Agreement dated 24.05.2012.

2.19 The Appellant No. 1 specifically raised an objection on the locus of the Respondent No. 2 being an association pleading coercion and duress on



behalf of wind generators. The State Commission vide Order dated 01.07.2015 allowed the Petition filed by the Respondents No. 1 and 2 and further directed that the Order is a generic order applicable to all similarly situated wind generators.

2.20 Being aggrieved by the impugned order, the Appellant has preferred this Appeal.

### **3. QUESTIONS OF LAW**

Following questions of law have been raised in the appeal for consideration:

- A. Whether the clauses in the Agreement regarding tariff being lower than the Average Pooled Power Purchase Cost can be stated to be contrary to law?
- B. Whether in the facts and circumstances of the case, the State Commission was right in holding that the Respondent No. 1 and other wind generators were coerced to agree to the terms and conditions of the PPA executed with the Appellants when the Respondent No 1 and other wind power developers duly accepted the PPA despite having alternatives of selling power other than to the Appellants and acted upon the same without any protest at the relevant time?

- C. Whether in the facts and circumstances of the case, the State Commission was right in holding that the Appellant No. 1 had unequal bargaining power in the Power Purchase Agreement which is a commercial contract and when there was no obligation on the Appellant No. 1 to purchase power from the Respondents and when the Respondents had other options for sale of power?
- D. Whether in the facts and circumstances of the case the, Respondents having accepted and acted upon the terms of the PPA, are estopped from claiming that the clauses of the PPA are invalid?
- E. Whether the State Commission is entitled to amend the terms of the PPA by holding that there was alleged coercion and duress?
- F. Whether the State Commission is correct in reopening the PPA executed between the Appellant No. 1 and the Respondents and amending the terms and conditions thereof duly agreed to by the parties?
- G. Whether in the facts and circumstances of the case, the State Commission is correct in holding that the tariff agreed to between the parties was contrary to the 2010 REC Regulations?

- H. Whether in the facts and circumstances of the case, the State Commission is right in holding that ‘at a price not exceeding’ does not imply that the price can be below the pooled cost, particularly in the context of the Second Amendment to the 2010 REC Regulations made by the Central Commission explaining the position and providing for the application of the Amendment only prospectively?
- I. Whether the State Commission erred in failing to consider the Statement of Reasons issued by the Central Commission in interpreting the 2010 REC Regulations?
- J. Whether the State Commission erred in holding that the parties cannot agree to a fixed tariff for sale of electricity when there is no such restriction in the 2010 REC Regulations and the parties to the Agreement can agree for better terms for safeguarding the interest of consumer ?
- K. Whether the State Commission erred in holding that a Clause in the PPA providing an option exercisable by either of the parties to the Power Purchase Agreement in the future is not valid when there is no such restriction in law?
- L. Whether the State Commission erred in holding that the Respondent No. 1 and other wind generators wheeling power for sale to third

party under REC scheme were exempted from payment of cross subsidy surcharge despite a contrary clause in the Power Purchase Agreement and the provisions in the Order dated 30.1.2010 for such exemption being applicable only to the non - REC based wind energy generators and not REC based generators?

- M. Whether the State Commission erred in holding that the Respondent No. 1 and other wind generators arranging to sell power to third party under the REC scheme were eligible for deemed sale of surplus power at 85% of the APPC to the Appellants despite a contrary clause in the Power Purchase Agreement and no such provision in the Order dated 30.01.2010?
- N. Whether in the facts and circumstances, the State Commission failed to appreciate the basic principle of Electricity Act, 2003 to safeguard the interest of consumer by ensuring cheaper power to the consumers?
- O. Whether in the facts and circumstances of the case, the State Commission was correct in applying the Impugned Order as a generic order even though the decision was on coercion and duress pleaded by the Respondent No. 1?

4. **RELIEF SOUGHT:**

- A. Allow the appeal and set aside the order dated 01.07.2015 passed by the State Commission to the extent challenged in the present appeal; and
- B. Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

5. **Submissions of Mr. M. G. Ramachandran, learned counsel appearing for the Appellants are as follows:-**

- 5.1 The issues, broadly relate to the Respondents – Generators having sought for a modification to (a) the Power Purchase Agreement (**PPA**)(b) the Transmission Agreement and (c) Wheeling Agreements and the State Commission having allowed the same, vide the Impugned Order.

**Variation from PPA Claimed:**

- 5.2 The PPA dated 29.3.2012 was entered into between the Appellant No. 1 and Respondent No. 1. Admittedly, the PPA provides for the rates and charges in Articles 5.1 and 5.2. While, the Appellant has insisted on the above terms of the PPA to be enforced, the Respondents sought variation from the terms of the PPA on two counts:
- (a) that the tariff should not be fixed at Rs 2.64 per unit subject to a maximum of Pooled Power Purchase Cost as contained in Clause 5.2

of the PPA but it should be the tariff at the Pooled Power Purchase Cost as determined by the State Commission on year-on-year basis; and

- (b) the provision in the PPA allowing either party to exercise option to switch over to the regime of preferential tariff after 10<sup>th</sup> year of its commissioning should be deleted.

**Variation from transmission agreement:**

- 5.3 The Transmission Agreement dated 20.04.2012 was entered into between the Respondent No. 1 and the Gujarat Energy Transmission Corporation Limited for wheeling of energy generated from 2.1 MW wind farm to a third party under the REC Regulations 2010. The Company & Recipient Unit has agreed to forgo the concessional / promotional transmission or wheeling charges (in cash and kind) and banking facility as available under GERC orders for determination of tariff for Wind Turbine Generators from time to time to get the benefit of REC mechanism. The Company & Recipient Unit shall not avail waiver/concession in electricity duty also. The Company has agreed to pay Cross Subsidy Surcharge as determined by the Commission from time to time to Discoms for energy drawn (set off given) at recipient unit. Besides, procedure for commercial settlement of wheeled energy was also agreed to.

**Variation from wheeling agreement:**

- 5.4 The Wheeling Agreement dated 24.05.2012 was entered into between the Respondent No. 1 and the Appellant No. 2 for wheeling of electricity for third party purchase under the REC mechanism specifying associated modalities of wheeling, CSS, commercial settlement of wheeled energy, etc.
- 5.5 The Respondents, contrary to the above Agreements, sought relief on two aspects:
- (a) Non payment of cross subsidy surcharge on the power sold to third party under REC mechanism being wheeling of power under REC mechanism is different than wheeling of power under preferential mechanism; and
  - (b) Consideration of surplus capacity injected into the grid as sale to the distribution company and payment of 85% of the Pooled Power Purchase Cost (APPC) for such capacity.
- 5.6 The State Commission, vide its order dated 1-7-2015, has given the reliefs on the above four aspects as sought for by the Respondent – generators. In addition to the above, the State Commission has applied the Order passed in rem in respect of all others similarly placed Developers.

5.7 In a recent decision of the Hon'ble Supreme Court in Gujarat UrjaVikas Nigam Limitedv. EMCO Limited and Another dated 2.2.2016 passed in Civil Appeal No. 1220 of 2015, the issue of generators seeking modification to the tariff terms and conditions contained in the PPA has been considered by the Hon'ble Supreme Court. In the said judgement and Order the Hon'ble Supreme Court has, inter alia, held as under:

*“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.*

*30. The 1st respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that “the tariff is determined by Hon'ble Commission vide tariff order for solar based power project dated 29.1.2010”*

5.8 In the present case also the issue of tariff being Rs 2.64 per KWh subject to a maximum of the Pooled Power Purchase Cost was duly agreed to between the parties in pursuance of the decision of the Central Electricity Regulatory Commission as contained in the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable



Energy Generation) Regulations, 2010 (hereinafter referred to as '**REC Regulations 2010**')

- 5.9 The PPA was signed on 29.3.2012. At the relevant time, there was no requirement under the REC Regulations 2010 for purchase of power only at the pooled cost as determined by the Commission from time to time. The REC Regulations only provided that the tariff for supply of physical power to the distribution licensee at a price not higher (not exceeding) than the pooled cost but there was no bar on power being sold at a price lower than the pooled cost.
- 5.10 Clause 5.2 of the PPA provides that if the pooled cost (APPC price) for any subsequent year goes below Rs. 2.64 per kWh (the fixed tariff under the PPA), then such lower APPC would be the tariff. This Clause is to be benefit of the Respondent No. 1 because if such provision was not made, then in years when the pooled cost or APPC was lower than Rs. 2.64 per kWh, the Respondent No. 1 would be selling power to the Appellant No. 1 at a price exceeding APPC or pooled cost which would render them ineligible to claim RECs under the 2010 REC Regulation. Therefore such a provision is not a one sided agreement but beneficial to both parties.

**Amendment to REC Regulations not retrospective:**

- 5.11 After the signing of the PPA on 29.3.2012, the REC Regulations was amended with prospective effect by the Second Amendment Regulations, 2013 which came into force effective 11.7.2013. On the above amendment, the Central Commission itself clarified that the existing agreements i.e. agreements prior to 11.7.2013 executed at a tariff lower than the Pooled Cost/APPC will not be affected.
- 5.12 The State Commission erred in considering the viability of the renewable project for modifying the tariff to APPC as determined year on year, when the Central Commission had specifically clarified that existing PPAs were not to be modified. Further the Respondent No. 1 had clearly accepted the tariff of Rs. 2.64 per unit as adequate which tariff is in addition to the price for the REC and at the relevant time of signing of PPA, the respondent did not raise the issue of financial viability of the project etc. The Respondents having signed PPA with the Appellant without any reservation cannot now claim that the tariff is not adequate. Once the tariff has been accepted, the parties have to accept the same, even if it commercially inconvenient. The decision of the Hon'ble Supreme Court in EMCO case will apply and the generators are bound by the terms of the PPA.

5.13 In case the Appellants are obliged to purchase the electrical component at the prevailing APPC rates instead of the fixed tariff as agreed in the PPA, there may arise a situation wherein a wind generator under preferential mechanism would receive a tariff for the electrical and renewable component lower than the wind generator under REC mechanism for only its electrical component which is completely contrary to the intention of the 2010 REC Regulations. A Wind Generator being set up in a particular Control Period would be entitled to the tariff determined in accordance with the prevailing project cost of that control period. Such tariff would be applicable for the entire life of the project. As against which, the Average Power Purchase Cost of the distribution licensee is bound to be change year on year basis, in general there would be an increase in tariff. Accordingly, there may be a case that APPC in a future year may be more than preferential tariff determined by the State Commission for that particular Control period.

5.14 In the present case, a wind generator under preferential mechanism who had established the project in the same control period as the Respondent No. 1 would have been entitled to Rs. 3.56 per unit for 25 years. On the other hand, if the Respondent No. 1 is held to be entitled to the prevailing APPC, there may arise a situation in future where the prevailing APPC is higher than Rs. 3.56 per unit so that the Respondent No. 1 being under REC

mechanism would get a higher tariff for sale of only its electrical component in addition to the price for its RECs whereas the wind generator under preferential mechanism would get a lower tariff without any RECs. This establishes the capriciousness of the contention being raised by the Respondents.

5.15 The allegation of the Respondents that distribution licensees are not fulfilling their renewable purchase obligations and the lack of market of RECs cannot be a subject matter of the present proceedings. The Respondents cannot claim higher tariff for sale of physical power (to be regarded as conventional power) due to its own inability to sell the RECs.

5.16 The option to switch from REC based project to preferential tariff based project being granted to either party was agreed to by the Respondents. There is no restriction in law against a contract providing for either one party or both the parties to exercise an option in the future. Commercial transactions often provide for such an option which can be exercised by either party without specific consent of the other party at the time of exercise of the option. The other party is said to have consented to grant of such option at the time of execution of the Agreement. Further the option to switch has been provided to both parties and is not a one sided option being

granted only to the Appellant No. 1. Therefore such an option cannot be said to be unfair, unreasonable or unconscionable.

5.17 Further in case the Appellant No.1 exercises the option at the end of ten year, the Respondent No. 1 would be paid the preferential tariff of Rs. 3.56 per unit as determined by the State Commission for wind energy projects such as that of the Respondent No. 1 who are commissioned within the same control period. There is no front loading or back loading of returns in such tariff. Therefore there is no financial prejudice or disadvantage to the Respondents.

5.18 In an earlier decision dated 22.04.2015 of this Tribunal in Appeal Nos. 22 and 24 of 2014 relating to Ankur Scientific Energy Technologies Pvt Ltd and Surajbari Wind Farm Development Private Limited, this Tribunal had dealt with the issues and decided the matter against the Appellants herein. The Appellant had also filed before the Tribunal a petition for review of the part of the above Order dated 22.04.2015 passed in above appeals. The review was also rejected vide order dated 14.10.2015. The Appellants also filed a second appeal being Civil Appeal No 5425 of 2015 before the Hon'ble Supreme Court against the decision in the said appeal. The second appeal was not admitted by the Hon'ble Supreme Court. However, in the light of the principles of sanctity of contracts laid down in EMCO case by

the Hon'ble Supreme Court, the issues C & D, be reconsidered by Hon'ble Tribunal.

5.19 In the impugned Order, the State Commission has proceeded on an extreme basis that the Respondents have been coerced to enter into agreement with the above clause relating to pooled cost/APPC and also for grant of option to preferential mechanism to either party.

5.20 The allegation of coercion is vague and un-substantiated. The coercion or duress has to be conclusively established with specific pleadings and sufficient proof. In fact, the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited–v-Sai Renewables Power Private Limited and Ors (2011) 11 SCC 34 dealing with a similar allegation of coercion held as under:

*“Firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the appellants, particularly, in the facts and circumstances of the case, to substantiate, justify or argue the plea of duress.”*

5.21 The Appellant also craves reliance on judgments of the Hon'ble Supreme Court in in **Bishundeonarain and Anr-v-Seogeni Rai and Jagernath** AIR 1951 SC 280 and **Ladli Prasad Jaiswal-v-Karnal Distillery Co Ltd and Others** AIR 1963 SC 1279.

5.22 The allegation of coercion and duress made by Respondent No. 1 was frivolous and absurd in as much as the PPA was signed on 29.3.2012 and the petition alleging coercion and duress was filed in December 2013 i.e. after a period of about 21 months. During the intervening period the Respondent No. 1 had implemented the PPA without any reservation or protest. The allegation of coercion and duress was clearly an afterthought to gain undue advantage in the tariff i.e. higher tariff at the cost of public at large. Similarly the Respondent did not raise any objection or protest on payment of the liability of payment of cross subsidy surcharge as well as non payment for any surplus capacity injected as agreed to under the Wheeling and Transmission Agreements until December 2013, i.e. nearly 19-20 months after the execution of the respective Agreements.

5.23 The State Commission has proceeded on the basis of unequal bargaining power between the Appellant and Respondent without considering the facts and circumstances of the case. It is submitted that the Respondents were not bound to sell power only to the Appellant and were entitled to exercise

other options including sale to third parties as the Respondent No. 1 has done for balance capacity. Further even as per the case of the Respondent No. 1, the plant was ready for commissioning in December 2011, however the Respondent No. 1 approached the Appellant No. 1 only on 20.03.2012 for the draft PPA which was provided on 28.03.2012. The Appellant No. 1 did not force the Respondent No. 1 to sign the PPA on 29.03.2012 without examining each and every clause of the PPA and the contention of the Respondent No. 1 is unsubstantiated and false. The Respondents could have refused the terms; however the Respondents accepted the terms and conditions of the PPA, executed the PPA and acted upon it. The allegation of coercion and unequal bargaining power was raised for the first time in December 2013 i.e. 21 months after the execution of the PPA.

5.24 The State Commission has proceeded to rely on such un-substantiated allegation of coercion and duress and even applied the impugned Order in rem to all others. A decision on coercion and duress requiring specific pleadings and sufficient evidence cannot be granted on basis of a general proposition to all generators.

5.25 The State Commission has also not considered that the only consequence of the agreements entered into without free consent (assuming without admitting) is that the Agreement is voidable at the option of the party whose consent was so caused (Section 19 of the Contract Act, 1872). However



there cannot be any change in terms of the Agreement. The Tribunal in Velagapudi Power Generation Limited v. Southern Power Distribution Company of Andhra Pradesh and Other (Appeal No. 47 of 2009 dated 19.04.2010) has recognized that the claim of coercion and duress and seeking rectification of contract are contrary reliefs:

*“16. Ongoing through the various prayers it is clear that the Appellant has through the prayers sought various reliefs which are mutually contradictory. In short, the Appellant on one hand claims for declaration from the State Commission that he was coerced into signing of the PPA dated 23.11.2006 and as such, such coercion makes the PPA voidable and on the other hand it has merely sought for rectification of the PPA only in respect of some clauses.”*

5.26 In view of the above, the Order of the State Commission are liable to be set aside being contrary to the settled law of the Hon’ble Supreme Court in the case of Gujarat UrjaVikas Nigam Limited–v–EMCO Limited dated 2.2.2016 and Transmission Corporation of Andhra Pradesh Limited–v–Sai Renewables Power Private Limited and Another. Further, this Tribunal should impose exemplary cost on Respondent No. 1 for agitating coercion and duress to gain advantage when there cannot possibly be any such plea of coercion or duress.

5.27 The Respondent No. 1 has taken an extreme position that in the facts and circumstances of the case, the PPA required specific approval of the State Commission and as the PPA was not approved, the provisions in the PPA dealing with the tariff is not binding on Respondent No. 1 or the State Commission. This overlooks the basic fact that if according to Respondent No. 1 the PPA is not approved, then there is no obligation on the part of the Appellant to proceed with the contract. It is not open to the Respondents 1 and 2 to allege that the PPA between the parties having not been approved by the State Commission as required under the provisions of the Electricity Act, namely, Sections 62 (1) (a) and 86 (1) (b) but at the same time seek to sell power to the Appellants on the terms and conditions to be decided by the State Commission. The consequences of PPA being not approved as contended by the Respondent No. 1 would make the PPA *void ab initio* and not merely that the tariff provision will not be applicable and tariff will be determined by the State Commission. In view of the above, the Appellant is entitled to be release of any obligation to purchase power from Respondent No. 1 and other generators.

5.28 In view of the above, the impugned order of the State Commission is liable to be set aside.

6. **Submissions of Mr. Sanjay Sen, learned senior counsel, appearing for Respondent Nos. 1 & 2 are as follows:-**

- 6.1 The Appropriate Commission, as per the EA, 2003, has the exclusive jurisdiction to determine electricity tariff for purchase of electricity by a distribution licensee from a generating company. By virtue of incorporation of tariff, determined by the Commission under section 62 read with 86(1)(a) of the Electricity Act, 2003, in a Power Purchase Agreement executed between a generating company and a distribution licensee, the tariff so incorporated does not acquire contractual characteristics. The Average Power Purchase Cost (APPC) is a tariff determined in exercise of statutory powers. Therefore, the tariff in a Power Purchase Agreement is statutory in nature and parties have no say in the matter. [Gujarat UrjaVikas Nigam Ltd. v. Tarini Infrastructure Ltd. and Others, reported in (2016) 8 SCC 743; BSES Ltd. v. Tata Power Company and others, reported in (2004) 1 SCC 195; Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Ltd. and Others, reported in (2009) 6 SCC 235; Transmission Corporation of AP and another v. Sai Renewables; reported in (2011)11 SCC 34).
- 6.2 The REC Regulations, 2010 does not recognize any fixed price for sale of electricity to a distribution licensee under the REC Regulation. In fact, the explanation attached to Regulation 5(1)(c) unambiguously provides that pooled cost of purchase means “the weighted average pooled price at which a distribution licensee has purchased the electricity including cost of self-

generation, if any, **in the previous year from all energy suppliers ...**”.

From the aforesaid, it is abundantly clear that there is no concept of fixed price/ tariff for electricity under the REC Regulation when power is being sold by renewable power generator to the distribution licensee. It is a variable/ dynamic price. In this context, reference may also be made to Regulation 9, which deals with pricing of renewable energy certificates. In Regulation 9(2)(b), it is expressly provided that the Commission while determining the floor and forbearance price, shall be guided, *inter alia*, by various principles including variation in the pooled cost of purchase across States in the country:

- 6.3 Clearly, the regulation establishes a pricing mechanism both for actual electricity as well as the REC that is linked to variation in Pooled Cost of Purchase. Hence, the insistence of the Appellant that there can be a fixed long term price/ tariff, lower than the APPC, is wrong. It is contrary to the regulation. This wrong has been corrected by the State Commission in the impugned order.
- 6.4 The REC Regulations amendment came into effect on 10.07.2013. A reading of the amendment confirms that the principal regulation i.e. Regulation 5(1)(c) which provided “at price not exceeding the pooled price of power purchase of such distribution licensee” shall be substituted with the words “at the pooled price of power purchase of such distribution

licensee as determined by the Appropriate Commission”. The aforesaid amendment is clear and unambiguous. The aforesaid amendment becomes effective and operates from 10.07.2013.

6.5 The reliance of the Appellant on the Statement of Reasons issued by the Commission to interpret the amended provision is both impermissible and misplaced. It is the settled proposition of law that the Statement of Reasons cannot be utilized for the purpose of restricting and controlling the plain meaning of the language employed by the legislature in drafting a statute and excluding from its operation such transaction which it plainly covers. [Bhaji v. Sub-Divisional Officer, Thandla and Others, reported in (2003) 1 SCC 692; Gurudevdatla VKSSS Maryadit and Others v. State of Maharashtra and Others, reported in (2001) 4 SCC 534].

6.6 The Statement of Reasons cannot be read into the statutory provision to either add words to it or take away its plain and literal meaning. Further, the Appellant in its written submission had sought to mislead this Tribunal by relying on one part (i.e. the first part) of paragraph 4.3 of the Statement of Reasons. The Appellant have also sought to give an impression that the Statement of Reasons are in the nature of a clarification. This is wrong and misleading. The Statement of Reasons is issued along with the enactment/ amendment and as such, does not clarify any provision of the amendment. It only gives a background (historical basis) for the amendment, including

the mischief that the amendment sought to arrest. The amendment of a legislation, primary or delegated, can only be clarified by a subsequent amendment or can be explained / interpreted through judicial pronouncements.

- 6.7 In any event, the paragraph referred to by the Appellant in its written submission is misleading because the Appellant has deliberately left out the material paragraph of paragraph 4.3 of the Statement of Reasons. The complete text of paragraph 4.3 is as follows:

*“4.3 Analysis and Decision:*

*Some of the stakeholders have suggested to clarify as to whether the PPAs executed at price lower than APPC would become ineligible under REC Mechanism. It is felt that the tariff for electricity component lower or higher than APPC may lead to avoidable loss or profit to RE generator. The Commission would like to clarify that the intention is not to debar the projects that have executed PPA at tariff lower than APPC. This amendment will apply prospectively and as such will not affect the already executed PPAs at lower than APPC.*

*Regarding suggestion received that the PPA of electricity component should be a fixed price long term contract (without escalation) since the Commission has assumed a fixed price while determining the REC price bands in its methodology, it is clarified that the price band is subject to periodic revision; hence fixed APPC or long term contract without escalation might impact viability of RE projects. In any case proposed amendment*

provides that the APPC would be as determined by the  
Appropriate Commission.

*The Commission decided to retain the proposed amendment in  
the final Regulations.”*

6.8 From the aforesaid, it is clear that the first paragraph while dealing with a situation of a PPA having tariff lower than APPC, it does not deal with a fixed tariff/ price on a long term basis. This aspect is discussed in the second paragraph where the Commission rejects the suggestion that the PPA of electricity component should be a fixed price long term contract (without escalation). This suggestion is rejected on the ground that the price band is subject to periodic revision; hence fixed APPC or long term contract without escalation might impact viability of RE projects. Thereafter, the Central Commission observes in the Statement of Reasons that the proposed amendment provides that APPC would be as determined by the Appropriate Commission. Consequently, the Central Commission decides to retain the proposed amendment in the final regulation without any modification. The amendment has to be given effect to from the date of its coming into force.

6.9 As a result of the aforesaid, the tariff in the PPA is in violation of the principal regulation, which does not at all contemplate a fixed long term price/ tariff. Hence, the same is illegal and had to be modified, in order to

be aligned to the regulation. The Commission, in the impugned order, has only aligned the tariff to the regulation. The regulation has not been challenged and as such, has the force of statute and warrants that the PPA ought to align itself to such regulation. [PTC India Ltd. v. CERC, reported in (2010) 4 SCC 603].

6.10 Under the provisions of the statute, statutory bodies/ tribunals have the power to interfere with existing contracts. While such power is not available to a civil court, by virtue of provisions in a statute, statutory bodies/ tribunals may be vested with such powers. [Gujarat UrjaVikas Nigam Ltd. v. Tarini Infrastructure Ltd. and Others, reported in (2016) 8 SCC 743; The New Maneck Chowk Spinning and Weaving Co. Ltd., Ahmedabad and Others v. The Textile Labour Association, Ahmedabad, reported in (1961) 3 SCR 1; Rohtas Industries Ltd. v. Brij Nandan Pandey and Others, reported in (1956) SCR 800; Cellular Operators Association of India and Others v. Union of India and Others, reported in (2003) 3 SCC 186]

6.11 Section 86(1)(b) of the Electricity Act, 2003, empowers the State Commission to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply



within the State. The said provision empowers the State Commission to “regulate the price at which electricity shall be procured from generating companies” “through agreements for purchase of power for distribution and supply”. The language is clear. The word “regulate” is of wide import, and has been held so by the Hon’ble Supreme Court in several judgments [Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others v. State of Andhra Pradesh etc., reported in (1964) 7 SCR 456; K Ramanathan v. State of TN and Another, reported in (1985) 2 SCC 116; DK Trivedi and Sons v. State of Gujarat and others, reported in 1986 (supp.) SCC 20; Gujarat UrjaVikas Nigam Ltd. v. Tarini Infrastructure Ltd. and Others, reported in (2016) 8 SCC 743].

- 6.12 In view of section 86(1)(b) of the Electricity Act, 2003, a power purchase agreement is required to be approved by the State Commission. The State Commission in exercise of statutory power can impose such terms and conditions as may be necessary keeping in view the interest of the parties and the overall interest of the sector. The obligation to secure the approval of the State Commission vests with the distribution licensee, which is the Appellant in the present case. The Commission can approve the power purchase agreement with such modifications as it deems appropriate. In the absence of mandatory approval of the Appropriate Commission, the provision of PPA which the Commission does not approve of, cannot be

held as valid and binding on any of the parties [Ind Barath Energies (Thoothukudi) Ltd Vs. The Chairman Tamil Nadu Electricity Board, Judgment dated 26.7.2011 in Appeal no. 125 and 126 of 2010].

- 6.13 (a) Apart from the issue of fixed APPC which is illegal and contrary to the regulations framed by the Central Commission and the tariff order issued by the State Commission, the demand for cross subsidy surcharge by the Appellant is wrong and illegal. Clause 4.2(c) of the Transmission Agreement dated 20.04.2012 and Clause 3.3 of the Wheeling Agreement dated 24.05.2012 only requires payment of Cross Subsidy Surcharge for sale of power to third party as determined by the Commission. The regulation framed by the State Commission namely Regulation 11 of GERC (Procurement of Energy from Renewable Sources) Regulations, 2010 exempts purchase / sale of power from renewable energy projects from payment of cross subsidy surcharge. Further, the Tariff Order, being Order No. 1 of 2010 dated 30.01.2010 also rejected objections regarding grant of exemption from cross subsidy surcharge on open access transactions from wind projects. Neither the said Regulation nor the Tariff Order issued by the Commission has been challenged by the Appellant. Further, by an order dated 25.06.2013 in Petition No. 1265 of 2012 the Commission struck down the demand for cross

subsidy surcharge based on undertakings given by the generator. This order has been upheld by this Tribunal on 22.04.2015 in Appeal No. 22 and 24 of 2014. The second Appeal against this Tribunal's judgment and order has been dismissed by the Hon'ble Supreme Court.

- (b) Clearly, the Commission has confirmed in its Tariff Order dated 30.01.2010 that keeping in view climate change issues promotion of renewable sources of energy has to be encouraged and as such, the Commission does not propose any amendment to the provision for exemption from payment of cross subsidy surcharge in respect of open access use of wind energy. This order of the Commission has been accepted by GUVNL and as such, is final and binding. The Distribution Licensee does not have the ability to execute a contract and/ or make a demand for a regulated/ statutory charge in a manner that violates either the regulations framed by the Appropriate Commission or orders issued from time to time.
- (c) Additionally, the issue of cross subsidy surcharge and sale of inadvertent (surplus) power was specifically dealt with by the State Commission in its order dated 25.06.2013 in Petition No. 1265 of 2012, which order was subsequently upheld by this Tribunal in

Appeal No. 22 and 24 of 2014 dated 22.04.2015. The said order of the Tribunal covers the issue completely and binds the parties.

- (d) A similar commercial treatment is also provided for surplus/ excess generation in the course of captive sale of electricity.
- (e) The terms of the transmission and wheeling agreements cannot be the basis of a demand of cross subsidy surcharge when there is a specific regulation exempting such payment. Further, without determination of cross subsidy surcharge for supply by wind generators, the distribution licensee does not have the ability to impose any charges. This violates both section 62(4) as well as section 42(2) of the Electricity Act, 2003.

6.14 Even if the terms of the transmission and wheeling agreements are considered, it will be clear that no cross subsidy surcharge is payable for the reason that the agreements expressly provides that cross subsidy surcharge will be paid in accordance with the determination made by the State Commission (Articles 4.2(c) and 3.3 of the Transmission and Wheeling Agreements respectively). Admittedly, the State Commission has held in its order dated 30.01.2010 (i.e. order no. 1 of 2010) that cross subsidy surcharge for renewable power will be exempted. There is no determination made by the State Commission, which can be a subject matter of levy. Hence, the levy based on cross subsidy surcharge payable for procurement

of power from conventional energy is contrary to the provisions of the Gujarat regulation and the applicable order.

**JUDGMENTS RELIED UPON BY THE APPELLANT – DISTINGUISHED**

**GUVNL v. EMCO Ltd. and Another, Civil Appeal No. 1220 of 2015**

- 6.15 (a) The decision of the Hon'ble Supreme Court in the case of GUVNL v. EMCO Ltd. and Another, Civil Appeal No. 1220 of 2015 stands on a completely different footing. At the outset, it is necessary to appreciate that the Commission had issued two separate tariff orders being tariff order dated 29.01.2010 and tariff order dated 27.01.2012. In the Power Purchase Agreement, the parties elected to apply the first tariff order i.e. tariff order dated 29.01.2010. The generating company commissioned the project on 02.03.2012 i.e. beyond the control period specified in the first tariff order. The control period in the first tariff order ended on 28.01.2012.
- (b) The generating company therein filed a petition before the State Commission invoking section 86(1)(f) of the Electricity Act, 2003, seeking a declaration that the Petitioner is entitled to claim tariff as per the second tariff order i.e. 27.01.2012.
- (c) On the aforesaid facts the Hon'ble Supreme Court was pleased to hold in paragraph 29 and 30 as follows:

*“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.*

*30. The 1st respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that “the tariff is determined by Hon’ble Commission vide tariff order for solar based power project dated 29.1.2010.”*

- (d) The crucial distinction in the EMCO case and the present one is that in the EMCO case the parties elected for one of the two tariff orders passed by the Commission, which was subsequently incorporated in the PPA. Thereafter, the generator who had defaulted in commissioning his project within the control period of the first tariff order (the one the parties had elected) sought to opt out and seek the benefits under the second tariff order. This was held to be impermissible. The tariff incorporated in the PPA was in terms of the tariff order issued by the Commission. However, in the present case, the Appellant wants to deny applicability of the variable APPC tariff

available under the Central Regulation as determined by the Commission from time to time. It is not the Appellant's case that there is a valid tariff approved by the Commission, which has been incorporated in the PPA and that the Respondent generator is seeking to opt out of it. On the contrary, the Appellant is arguing that it has the ability to impose a tariff different from the tariff that is available under the regulation and tariff order. This was not the issue in EMCO, and EMCO has no application at all.

**Transmission Corporation of AP and another v. Sai Renewables; (2011) 11 SCC 34**

6.16 (a) The Appellant has relied upon the aforesaid judgment of the Hon'ble Supreme Court on the issue of duress of coercion. It is their submission that there has to be definite pleadings which have to be substantiated normally by reading cogent and proper evidence. It is also the case of the Appellant that the documents executed by the parties and their conduct of acting upon such agreement over a long period of time, binds them to the right and obligations stated therein. The parties cannot be permitted to deny the facts as they existed at the relevant time, just because it may not be convenient to adhere to those terms.

- (b) The aforesaid principles have no application in the present case. In fact, the Respondent herein relies upon this judgment for several other issues. The impugned judgment and order of the State Commission is not on the issue of duress or coercion nor is it on account of the parties wishing to avoid the contract that they have executed. The issue in the present appeal is limited to whether there can be a tariff between a generating company and distribution licensee in a PPA, which is not in accordance with the regulations and the orders issued by the Appropriate Commission. All that the State Commission has done is to align the tariff with the regulations and its orders.
- (c) Additionally, the State Commission is correct in the view that a PPA executed by the distribution licensee requires to be approved by the State Commission in exercise of powers under section 86(1)(b) of the Electricity Act, 2003. Admittedly, such approval of the terms of the contract was not sought by the distribution licensee. The terms were modified to align the PPA with (a) with the Central and State Regulations and (b) the previous order of the State Commission on the issue of Cross Subsidy Surcharge and Surplus Power.
- (d) The State Commission also rejected the Article 5.2 (b) of the PPA that allowed either party at its will to terminate the arrangement under the



REC protocol and migrate to preferential tariff. This ability to migrate at the will of either of the parties is not a situation envisaged under the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010. On the contrary, regulation 5(1)(b) expressly provides as follows:

*“5. Eligibility and Registration for Certificates:*

*(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfils the following conditions:*

*a. ... ..;*

*b. it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission; and  
... ..”*

- (e) Since the eligibility criteria itself imposes a condition that in order to qualify under the REC scheme there cannot be any PPA to sell power at preferential tariff, reverse migration of REC projects to the preferential tariff regime is not envisaged. In any event, it can only be done mutually, subject to the approval of the State Commission.

There are several regulatory uncertainties relating to the de-registration process etc. This issue requires regulatory superintendence and cannot be unilaterally initiated at the instance of one party.

**GUVNL vs. ACME Solar Technologies (Gujarat) Private Limited & Ors.  
(2017) 11 SCC 801**

6.17 The said Judgment is also not applicable to the facts of the present case for the following reasons:

- (i) It is not a tariff matter. It is not a matter concerning determination of cross subsidy surcharge. It is not a matter concerning sale and utilization of surplus power. In the ACME Case the entire issue was concerning the payment of damages by the generator under the PPA. In the said case the liability of ACME to pay Liquidated Damages was not in dispute, the only question was the time period within which the damages would arise.
- (ii) In the said case, the PPA dated 31.05.2010 provided for liability of ACME to pay liquidated damages from Scheduled Commercial Operation Date. Further, vide Supplemental PPA dated 24.03.2011, ACME had agreed to pay Liquidated Damages even in case of non-availability of transmission system for evacuation of power by Scheduled Commercial Operation Date. The transmission line was

being established by a third party and as such, the liability for any delay for reasons of default of such third party was accepted by the generator.

(iii) Further, certificate of commissioning issued by GEDA dated 31.05.2010 provided that though the date of commissioning is 13.03.2012 it also certified that the plant was ready for generation on 31.12.2011 but could not be commissioned for want of the 66 KV Transmission Line.

(iv) In this background the Hon'ble Supreme Court arrived at the finding that ACME was liable to pay liquidated damages because it had accepted that delay on account of such third party default will be borne by ACME. This issue was purely in the realms of contract and not regulation. In the case of ACME there were no regulation or tariff order occupying the field on the subject matter of dispute.

6.18 The next Judgment sought to be relied upon by the Appellant is **GUVNL vs. Solar Semiconductor Power Company (India) Private Limited & Anr., reported in (2017) 16 SCC 498**. The said Judgment is not applicable to the facts of the present case for the following reasons:

(a) Gujarat Electricity Regulatory Commission by an order had extended the 'Control Period' of Tariff Order dated 29.01.2010 to extend the applicability of the tariff determined under the said order by

exercising 'Inherent Power' as applicable under its Conduct of Business Regulation.

- (b) In that background the Hon'ble Supreme Court held that Inherent Power can only be exercised in cases where the Regulation/ Statute is silent.
- (c) The Hon'ble Supreme Court further held that the power to Regulate Tariff is specifically provided under Section 86 (1)(b) of the Act. Further, the Hon'ble Court also held that there can be no quarrel to the proposition that the Commission can fix or alter tariff in exercise of its statutory power.
- (d) The Hon'ble Supreme Court arrived at the conclusion that once such powers have been vested in the Statute the Commission cannot exercise its Inherent Power to modify the same.
- (e) Hence, the said Judgment actually supports the case of the Respondents, as the Respondents in the present matter had filed a substantive Petition under Section 86 (1)(a), (b), (e) and (f), 61 and 62 of the Act invoking the Statutory Power of the Commission, and not inherent powers.

6.19 Appellant has also sought to rely upon the Judgment of the Hon'ble Supreme Court in the case of **SK Jain vs. State of Haryana, reported in**

(2009) 4 SCC 357. The said case also does not apply to the facts of the present case.

- 6.20 (a) Further, the Appellant has also relied upon the Judgment of the Hon'ble Supreme Court in the case of **CCE v. Ramesh Food Products, reported in (2015) 15 SCC 132**, to say that if a Civil Appeal is dismissed at a preliminary stage the same cannot be considered as an affirmation of the finding of the Tribunal. The said argument can be agitated before the Hon'ble Supreme Court but not before this Tribunal as the Tribunal with a well-reasoned Order dated 22.04.2015 (in Appeal No. 22 and 24 of 2014) has already held the issue of cross subsidy surcharge and the applicability of 85% of APPC on surplus power in favour of the Respondents. This judgment applies to the facts of the present case.
- (b) In any event, the dismissal Order dated 03.08.2015 passed by the Hon'ble Supreme Court in Civil Appeal No.5425 of 2015 cannot be held to be entirely non-speaking. The Hon'ble Supreme Court while dismissing the appeal was pleased to hold as follows:

*“We have also gone through the concurrent findings of fact and law recorded by both the Central Electricity Regulatory Commission as also the Appellate Tribunal for Electricity.”*

*Hence, we do not find any substantial question of law to be decided in these appeals.*

*These appeals are dismissed accordingly*

*.....”*

6.21 The last judgment relied upon by the Appellant is Appeal No. 249 of 2013 in the case of **British Super Alloys Pvt. Ltd. Vs. GERC** to show that coercion has to be pleaded specifically and proved by the Party who raised the plea. The said judgment and all judgments related to Coercion also have no application in the facts of the present case as the Respondent Commission has passed the Impugned Order primarily on account of the PPA at variance with the applicable Regulations, PPA at variance with the applicable Tariff Order passed by the State Commission, PPA not being approved by the State Commission, and unequal bargaining power.

6.22 In view of the above, the present Appeal is devoid of merits and is liable to be dismissed.

7. **Submissions of Mr. Raunak Jain learned counsel, appearing for the Intervener are as follows:-**

7.1 At the outset it is stated that the instant Appeal filed by the Appellants herein is completely devoid of merits and is based on averments and contentions which are in direct contravention of the settled position of law established by the earlier judgments of this Tribunal. Further, it is stated

that the contentions made in the instant Appeal if accepted would defeat the purpose and objective of the Electricity Act and the regulations framed thereunder for promotion of renewable energy in the State of Gujarat and therefore the instant Appeal is liable to be dismissed.

- 7.2 The Intervener adopts the submissions made by the Respondent No. 1 and 2 herein and respectfully submits the following additional legal propositions in support of the Respondents and to defend the impugned judgment.

**PROPOSITIONS**

- 7.3 (a) There is no ambiguity about the fact that the PPAs are executed at Average Power Purchase Cost (APPC) for previous year as clause 5.2 of the PPA has specific mention of this aspect.
- (b) The Clause 5. 2 of PPA clearly show that the Appellant had agreed to sell power at APPC of the previous year and not at a price which was lower to the APPC of the previous year. The above shows the intention of the Appellant that it clearly understood that the PPA has to be APPC of the previous year and not a price lower than that. It arbitrarily and unjustifiably made the price fixed for the term of the PPA. The argument on the CERC Regulation at the relevant time providing the eligibility condition for the generator to participate in the REC mechanism to sell power at a price not exceeding APPC has

been advanced to justify such arbitrary fixation of price for the entire term of the PPA.

7.4 (a) Further, Clause 5.2 (a) of the PPA provides that in case in any FY the APPC goes below the APPC of FY 2010-11 the applicable tariff for ensuing FY shall be such lower APPC of the previous year. Clause 5.2 (a) is quoted hereinbelow for ready reference:

(i) In case of any subsequent FY the APPC goes below the APPC of FY 2010-11, the applicable tariff for ensuing FY shall be such lower APPC of the previous year.

(b) This establishes that Appellant No. 1 was well aware to the fact that APPC is variable in nature and therefore it provided in the PPA that in case the APPC is lower in any FY the tariff for the ensuing year will be such lower APPC. It is relevant to note that here again in such eventuality the tariff will be **at APPC** and not any price lesser than APPC.

7.5 As pointed above, Clause 5.2 (a) of the PPA provides that in case in any FY the APPC goes below the APPC of FY 2010-11 the applicable tariff for ensuing FY shall be such lower APPC of the previous year. Thus, the PPA itself recognizes APPC to be a dynamic figure depending upon the procurement of power by the distribution company in the previous year. However, the PPA only allowing the distribution company to pay a lesser



tariff when the APPC goes down and at the same time, precluding the RE generators from claiming a higher tariff when APPC increases is arbitrary, discriminatory and a blatant abuse of the dominant position by the Appellants herein.

- 7.6 (a) Further the option given in Clause 5.2 (b) of the PPA to either party to shift to preferential tariff mechanism after 10 years is erroneous.

Clause 5.2 (b) reads as under:

*“(b) Power Producer and Power Procurer both have option to switch over from REC mechanism to preferential tariff after 10 years from commissioning of the 23.10 MW WTGS. In case either party exercises this option, the tariff shall be Rs. 3.56 per KWh (as determined by GERC through Order No. 1 of 2010 dated 30.1.2010) for balance term of the agreement. Further, Power Producer shall submit documentary evidence to GUVNL for de-registration of wind switch over from REC to Preferential tariff.”*

- (b) The CERC Regulations give the option to remain in the REC mechanism or to opt for preferential tariff mechanism to the wind generator and not to the distribution licensee. By virtue of this clause, the Appellant herein has virtually taken over the rights of a generator vested to him through Regulations. This cannot be allowed and therefore, Gujarat Commission’s finding that the

abovementioned clause 5.2 (b) should be modified suitably is just and in line with prevailing regulatory framework.

7.7 Lastly, the State Commission in the impugned judgment has granted the relief to the similarly placed wind generators including to the members of the Respondent No. 2 and has held that

*“7.30. Before the parting with the judgment/order, we observe that in the present case, the Wind Energy Association is a co-petitioner and have prayed for similar reliefs for all the similarly placed the Wind Power Generators. The aforesaid prayers are generic in nature. We, therefore, decide that the decision pronounced in the present petition shall be applicable to all similarly placed wind generators.”*

- 7.8 (a) The Appellant have also challenged the above quoted part of the impugned order. The Appellant have suppressed from this Tribunal the Order dated 11.02.2014 passed by the State Commission on the preliminary objection being raised by the Appellant on the said issue. The State Commission has vide the said order declared that the issues involved in the matter are general issues, applicable to all the renewable energy generators registered under the RECs schemes and finding of impugned Order will be generic in nature.
- (b) The said Order was not challenged by Appellants herein and therefore, has attained finality. Thus, the Appellants having accepted

the above quoted order of the State Commission passed on the preliminary objection raised by them are now estopped in law to raise the said issue before this Tribunal.

7.9 In view of the above, the present Appeal is devoid of merit and is liable to be rejected.

8. **We heard learned counsel appearing for the Appellant, learned senior counsel appearing for the first and second Respondent and learned counsel for the Intervener at considerable length of time. We have gone through carefully the written submissions filed by the Appellant, the first & second Respondents and the Intervener through their counsel and also taken into consideration the relevant material on records available in file. On the basis of the pleadings available, the issues emerged in the instant appeal for our consideration are as follows:**

8.1 **Issue No.1**

Whether the State Commission is correct in reopening the PPA executed between the Appellant and the Respondents, thereby granting relief in tariff as well as other associated conditions?

**Issue No.2**

Whether the State Commission is right in holding that the Respondents / wind generators were to agree to the terms and conditions of the PPA on account of the Appellant having unequal bargaining power?

## **9. OUR FINDINGS & ANALYSIS**

### **Issue No.1**

9.1 Learned counsel for the Appellant submitted that as per the PPA dated 29-3-2012 executed between the Appellant No. 1 and the Respondent No. 1, the tariff was decided at Rs.2.64 per unit fixed subject to a maximum of Pooled Power Purchase Cost as contained in Clause 5.2 of the PPA. Additionally, the PPA envisaged the provision allowing either party to exercise option to switch over to the regime of preferential tariff after 10<sup>th</sup> year of commissioning. The learned counsel contended that the Respondents herein have sought modifications from the above terms of the PPA besides the Respondents have also sought other relief relating to transmission and wheeling of the generated power from wind turbines, i.e. non-payment of cross subsidy on the power sold to third party under REC mechanism and consideration of surplus capacity injected into the grid as sale to the distribution company with payment of 85% of the Pooled Power Purchase Cost of such capacity. The learned counsel further submitted that the PPA once signed cannot be reopened to pass an additional relief to any party as has been held under various judgments of the Apex Court. To substantiate his submissions, the counsel cited the decision of the Hon'ble Supreme court in **Gujarat UrjaVikas Nigam Limited vs. EMCO Limited and Another** dated 2.2.2016 passed in Civil Appeal No. 1220 of 2015

wherein the issue of generators seeking modification to the tariff terms and conditions contained in the PPA has been considered by the Hon'ble Supreme Court. In the said judgement and Order the Hon'ble Supreme Court has, inter alia, held as under:

*“29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.*

*30. The 1<sup>st</sup> respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that “the tariff is determined by Hon'ble Commission vide tariff order for solar based power project dated 29.1.2010”*

9.2 The learned counsel further submitted that after signing the PPA on 29-3-2012, the REC Regulations were amended with prospective effect by the Central Commission which came into force with effect from 11-7-2013. In the above amendment, the Central Commission clarified that the existing agreements executed at a tariff lower than Average Pooled Power Cost (APPC) will not be affected. He further contended that the Respondent No. 1 had unconditionally accepted the tariff of Rs.2.64 per unit in addition to the price of RE Certificates and now claiming that the tariff is not adequate,

does not appear to be logical. The counsel was quick to submit that if the Respondents are held to be entitled to the prevailing APPC, there may arise a situation in future wherein the prevailing APPC may be even higher than the preferential tariff and the wind generators, besides getting APPC tariff for electrical component, will also get additional revenue from the sale of RE Certificates.

9.3 Regarding switching over from REC based project to preferential tariff based project, the learned counsel submitted that there is no restriction in law against the contract providing for either one party or both the parties to exercise an option in future. Under the agreement, either party is said to have consented to grant of such option at the time of execution of the agreement AND the option is not a one sided one being granted only to the Appellant and such option can be exercised with a mutual consent. He submitted that as such, the option stipulated under Clause 5.2(b) of the PPA cannot be said to be unfair or unreasonable.

9.4 *Per contra*, learned counsel of the Respondents submitted that as per the Electricity Act 2003, the Appropriate Commission has the exclusive jurisdiction to determine electricity tariff for purchase by a distribution licensee. The APPC is a tariff determined in exercise of the statutory powers by the State Commission, and is not static but dynamic in nature

varying from year to year basis. Hence, there is no question of any fixed tariff when it is to be regulated based on the APPC. The learned counsel further contended that the REC Regulations amendment came into force from 11-7-2013 which provided the original stipulations, “at a price not exceeding the pooled price of power purchase of such distribution licensee” to be substituted with the words “at the pooled price of power purchase of such distribution licensee as determined by the Appropriate Commission”. The learned counsel further contended that the reliance of the Appellant on the statement of reasons issued by the Central Commission to interpret amended provisions is both impermissible and misplaced. It is a settled proposition of law that the statement of reasons cannot be utilised for the purpose of restricting and controlling the plain meaning of the language employed by the legislature in drafting a statute. To substantiate his contention, the learned counsel cited judgments of the Hon’ble Supreme Court, i.e. **Bhaji vs. Sub-Divisional Officer, Thandla and Others**<sup>1</sup>; **Gurudevdatla VKSSS Maryadit and Others vs. State of Maharashtra and Others**<sup>2</sup>.

9.5 The learned counsel for the Respondents further submitted that the REC Regulations / provisions and its amendments by the Central Commission is crystal clear that there cannot be a fixed tariff on a long term basis while

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<sup>1</sup> (2003) 1 SCC 692, at page 700, paragraph 11

<sup>2</sup> (2001) 4 SCC 534, paragraphs 18 at page 548, paragraph 19 at page 549 and paragraph 25 at page 552

having specific reference to the APPC being determined by the State Commission on yearly basis. The counsel further contended that as per Section 86 (1) (b) of the Act, the State Commission has to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from generating companies or licensees or from other sources through agreement of purchase of power for distribution and supply within the State. He submitted that the word “regulate” is of wide import and has been held so by the Hon’ble Supreme Court in several judgments such as **Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others vs. State of Andhra Pradesh etc.**<sup>3</sup>, **K Ramanathan vs. State of TN and Another**<sup>4</sup>, **DK Trivedi and Sons vs. State of Gujarat and others**<sup>5</sup>, **Gujarat UrjaVikas Nigam Ltd. vs. Tarini Infrastructure Ltd. and Others**<sup>6</sup>.

9.6 The learned counsel further submitted that apart from the issue of fixed APPC being illegal and contrary to the Regulations framed by the Central Commission and the tariff order issued by the State Commission, the demand of Cross Subsidy Surcharge (CSS) by the Appellant is wrong. The counsel pointed out that Transmission Agreement dated 20-4-2012 and Clause 3.3 of the Wheeling Agreement dated 24-5-2012 only requires

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<sup>3</sup> (1964) 7 SCR 456, page 467

<sup>4</sup> (1985) 2 SCC 116, paragraphs 14, 15, 18, 19, 20, 23, 24

<sup>5</sup> (supp.) SCC 20, paragraphs 30, 31, 32

<sup>6</sup> (2016) 8 SCC 743, paragraphs 16, 17, 18 and 19



payment of CSS for sale of power to third party as determined by the Commission. The Regulations framed by the State Commission exempts purchase / sale of power from renewable energy projects from payment of CSS. The tariff order dated 30-1-2010 also rejected objections regarding grant of exemption from CSS on open access transactions from wind projects. Further, by an order dated 25-6-2013 in Petition No. 1265 of 2012, the State Commission struck down the demand for CSS and this order has also been upheld by this Tribunal on 22-4-2015 in Appeal No. 22 and 24 of 2014. The second Appeal against this Tribunal judgment has also been dismissed by the Hon'ble Supreme Court.

- 9.7 The learned counsel emphasized that the exemptions on these accounts granted to renewable energy generators are provided keeping in view the issues of climate change and promotion of renewable energy sources. Additionally, the learned counsel submitted that the issue of CSS and sale of surplus power was specifically dealt with by the State Commission in its order dated 25-6-2013 which was subsequently upheld by this Tribunal. He further pointed out that the terms of transmission and wheeling agreement cannot be the basis for a demand of CSS when there is specific regulation exempting wind generation from such payment. Advancing his arguments further, the learned counsel contended that the judgments relied by the Appellant on previous issues are not applicable to the present case.

## **Our findings**

- 9.8 We have carefully considered the submissions of the learned counsel for the Appellants and the learned counsel for the Respondents. It is relevant to note that the PPA was executed at APPC for the previous year as stipulated at Clause 5.2 of the PPA which clearly shows that the Appellant had agreed to sale power at APPC of the previous year and not at a price which was lower to the APPC of the previous year. Admittedly, the tariff was agreed at Rs.2.64 per unit at fixed rate but simultaneously, it was linked to the APPC which is dynamic in nature and varies from year to year as determined by the State Commission. As the State Commission is empowered under the Statute, to regulate tariff for the distribution licensees for procurement as well as supply of electricity in the State, it determines the APPC for year on year basis and thus, any tariff based on APPC cannot be treated as fixed or static in nature as being contemplated by the Appellants herein.
- 9.9 Regarding other aspects like wheeling and transmission of the power from wind generators, payment of CSS, injection of surplus power, option to switch over after 10 years of operation etc, we hold that the State Commission has decided the issues as per its relevant Regulations as well as having regard to various decisions of the Apex Court and this Tribunal.

Accordingly, we hold that the findings of the State Commission its impugned order on this issue are just and right without any ambiguity or perversity.

**Issue No.2**

9.10 Learned counsel for the Appellant submitted that the State Commission has proceeded on an extreme premise that the Respondents have been coerced to enter into agreement relating to the fixed / APPC and also for grant of option to preferential mechanism to either party. The learned counsel contended that the allegation of coercion by the Respondents is vague and unsubstantiated. He further contended that the coercion or duress had to be conclusively established with the specific pleadings and sufficient proof as held by the Hon'ble Supreme Court in its judgment in **Transmission Corporation of Andhra Pradesh Limited Vs. Sai Renewables Power Private Limited and Ors.**<sup>7</sup> which read as under:

*“Firstly, there are no facts on record, much less, supported by any documentary or any other evidence to sustain the plea that the contracts (PPAs) are a result of undue influence or duress by the State or its agencies upon the generators. Secondly, the generators have already taken benefit of that contract which was based on the policy of the State as well as the order of the Regulatory Commission. Having attained those benefits, it will hardly be of any help to the appellants, particularly, in the*

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<sup>7</sup> (2011) 11 SCC 34

*facts and circumstances of the case, to substantiate, justify or argue the plea of duress.”*

9.11 The learned counsel also craves reliance on judgments of the Hon’ble Supreme Court in **Bishundeonarain and Anr. Vs. Seogeni Rai and Jagernath<sup>8</sup>** and **Ladli Prasad Jaiswal vs. Karnal Distillery Co Ltd and Others<sup>9</sup>**.

9.12 The learned counsel further submitted that the allegations of the Respondents before the Commission was frivolous in as much as the PPA was signed on 29-3-2012 and the petition with such allegations was filed in December 2013, i.e. after a lapse of about 21 months. In fact, the allegations of the Respondents were clearly an afterthought to gain undue advantage in the tariff. Similarly, the Respondents did not raise any objections or protest for payment of CSS as well as non-payment of any surplus capacity injected as agreed to under the Wheeling and Transmission Agreements until December 2013. He further contended that the State Commission has proceeded presuming unequal bargaining power between the Appellants and the Respondents without considering the facts and circumstances of the case. The counsel was quick to point out that the Respondents were not bound to sell power only to the Appellants and were entitled to exercise other options including sale to third parties as the

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<sup>8</sup> AIR 1951 SC 280

<sup>9</sup> AIR 1963 SC 1279

Respondent No. 1 had done for the balance capacity of 2.1 MW. He further submitted that as per the case of the Respondent No.1, its generating plant was ready for commissioning in December 2011; however, it approached the Appellant No. 1 only on 20-3-2012 for the draft PPA which was provided on 28-3-2012. The Appellant did not force Respondent No. 1 for signing PPA dated 29-3-2012 without examining each and every clause of the PPA; and therefore, the contention of the Respondent No. 1 is unsubstantiated and false. In fact, the allegations of coercion and unequal bargaining power were raised for the first time in December 2013 and the State Commission has unduly relied on such allegations of coercion and duress and has even applied the impugned order in rem to all other wind generators.

9.13 The learned counsel for the Appellant vehemently submitted that the State Commission has also not considered that the only consequence of the agreement entered into without free consent is that the agreement is voidable at the option of the party whose consent was so caused (Section 19 of the Contract Act, 1872). He contended that there cannot be any change in terms of the agreement as held by this Tribunal in the case of **Velagapudi Power Generation Limited vs. Southern Power Distribution Company of Andhra Pradesh and Other**<sup>10</sup>.

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<sup>10</sup> Appeal No. 47 of 2009 dated 19.04.2010

9.14 *Per contra*, learned counsel for the Respondents submitted that while going through various provisions of the PPA, it becomes crystal clear that such a one sided agreement cannot be signed by a party who is going to be affected throughout the life span of the project; will sign the agreement under normal circumstances. In other words, the PPA with so many discriminatory clauses and can be executed under coercion and duress only. He was quick to submit that the Appellant has relied upon the judgment of Hon'ble Supreme Court on the issue of duress and coercion in the case of **Transmission Corporation of Andhra Pradesh Limited Vs. Sai Renewables Power Private Limited and Ors.** It is the submission of the Appellant that there had to be definite pleadings which have to be substantiated conclusively by cogent and proper evidence.

9.15 The learned counsel further submitted that the parties cannot be permitted to deny the facts as they existed at relevant time just because it may not be convenient to adhere to those terms. Admittedly, the impugned order of the State Commission is not on the issue of duress or coercion alone nor is it on account of parties wishing to avoid contract that they have executed. The core issue in the present appeal is whether can there be a tariff between a generating company and distribution licensee in a PPA which is not in accordance with the Regulations and Orders passed by the State

Commission. He pointed out that the State Commission all that has done is only to align the tariff with its Regulations and its Orders.

9.16 He contended that the State Commission has also rejected the provisions under the Article 5.2(b) of the PPA that allowed either party at its will to terminate the arrangement under the REC protocol and migrate to the preferential tariff. Moreover, as the eligibility criteria itself imposes a condition that in order to qualify under the REC scheme, there cannot be any PPA to sell power on preferential tariff, reverse migration of REC projects to the preferential tariff regime is not envisaged.

9.17 Learned counsel for the Intervener while adopting all the submissions of the learned counsel for the Respondent No. 1 contended that the State Commission in the impugned order has granted the relief to the similarly placed wind generators including to the members of Respondent No. 2, and held that -

*“7.30. Before the parting with the judgment/order, we observe that in the present case, the Wind Energy Association is a co-petitioner and have prayed for similar reliefs for all the similarly placed the Wind Power Generators. The aforesaid prayers are generic in nature. We, therefore, decide that the decision pronounced in the present petition shall be applicable to all similarly placed wind generators.”*

9.18 The learned counsel for the Intervener further submitted that the State Commission, vide its order dated 11-2-2014 has rejected the preliminary objection of the Appellants on the said issue. The State Commission has rightly declared that the issues involved in the matter are generic in nature and are applicable to all the renewable energy generators registered under the REC scheme.

### **Our findings**

9.19 We have carefully considered the rival contentions of both the parties on this issue and also took note of the cited decisions / judgments of the Hon'ble Supreme Court and this Tribunal. Based on our critical analysis of the material placed before us, we note that the core issue in the present appeal is not only limited to the coercion or duress but to whether there can be a tariff between a generating company and a distribution licensee in a PPA which is not in accordance with the Regulations and Tariff Orders issued by the State Commission. The State Commission after careful consideration of the submissions made by both the parties and after due analysis of the available material on record has recorded its findings in the impugned order that the conditions envisaged in the PPA relating to the tariff and other associated conditions appeared to be one sided in favour of the Appellants and accordingly concluded the case of coercion or duress



and unequal bargaining power between the parties being responsible for executing an Agreement full of unjustness and perversity. In view of these facts, we hold that the State Commission has analysed this issue rightly in accordance with law and passed the order assigning cogent reasoning. Thus, we do not find any material case or ground for our interference in the matter.

**10. SUMMARY OF OUR FINDINGS :**

Having regard to the careful consideration and critical analysis of the facts and submissions of the learned counsel for the Appellants as well as the Respondents, we hold that the findings of the State Commission are just and right in accordance with law. Accordingly, the impugned order of the State Commission deserves to be upheld and the appeal filed by the Appellants is liable to be dismissed.

**ORDER**

**For the forgoing reasons, as stated supra, we are of the considered opinion that the issues raised in the present appeal being Appeal No. 209 of 2015 are devoid of merits. Hence, the Appeal is dismissed and the impugned order dated 1-7-2015 passed by Gujarat Electricity Regulatory Commission is hereby upheld.**

**Needless to say that the pending IAs, if any shall stand disposed of.**

**No order as to costs.**

**Pronounced in the Open Court on this 6<sup>th</sup> day of December, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

✓  
**REPORTABLE / ~~NON-REPORTABLE~~**

*tpd*