APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 18 OF 2016 &

IA NO. 37 of 2016

Dated : 2nd March , 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF :

Swasti Power Limited
Plot No. 111, Road No. 72
Jubilee Hills, Hyderabad- 500033 …….Appellant

Versus

1. Uttarakhand Electricity Regulatory Commission
   Through its Chairperson
   Vidyut Niyamak Bhawan, Near I.S.B.T.
   P.O. Majra, Dehradun
   (Uttarakhand) - 248171

2. Uttarakhand Power Corporation Ltd.
   Through its Managing Director
   Urja Bhawan, Dehradun - 248001

3. Power Transmission Corporation of Uttarakahand Ltd.
   Through its Managing Director
   Vidyut Bhawan, Near I.S. B.T Crossing,
   Saharanpur Road, Majra
   Dehradun – (Uttarakhand) 248002

Counsel for the Appellant (s) : Mr. Tarun Johri
Mr. Ankur Gupta
Mr. Ankit Saini

Counsel for the Respondent(s) : Mr. Buddy A Ranganadhan
Ms Stuti Krishn for R-1

Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-2

Mr. Sitesh Mukherjee
Mr. Divyanshu Bhatt
Ms. Supriya Ranjan Mahapatra
for R-3

J U D G M E N T

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

1. The present Appeal has been filed by the Swasti Power Limited ("Appellant") under Section 111 of the Electricity Act, 2003 ("Electricity Act"), challenging the legality, validity and propriety of the Uttarakhand Electricity Regulatory Commission's ("State Commission / Respondent No.1") Order dated 21.10.2015 in Petition No. 08 of 2015 ("**Impugned Order**") whereby the State Commission despite coming to the conclusion that the Respondents are in breach of their obligations towards construction of 220/33KV sub-station at Ghansali or in strengthening/augmentation of the existing 33KV evacuation system had erroneously dismissed the Petition filed by the Appellant while holding that there is no specific condition under the Power Wheeling Agreement dated 30.09.2005 and Power Purchase Agreement dated 03.07.2009 executed between the parties, under which the Appellant could be compensated for the loss of generation due to inactions of the Respondent No. 2 & 3.

2. Brief Facts of the Case:-

2.1 The Appellant i.e. Swasti Power Limited (hereinafter referred to as "**Company"**) is a company incorporated under the provisions of the

Companies Act, 1956 having its office at Plot No. 111, Road No. 72, Jubilee Hills, Hyderabad.

2.2 That the Respondent No.1 is the Uttarakhand Electricity Regulatory Commission(State Commission) constituted for state of Uttarakhand discharging functions under various sections of the Electricity Act, 2003(Act).

2.3 That the Respondent No.2 is the distribution licensee in the State of Uttarakhand located at Urja Bhawan, Kanwali Road, Dehradun – 248001, Uttarakhand.

2.4 The Respondent No.3 is a company registered under the provisions of the Companies Act, 1956 incorporated on 1st June 2004 to maintain & operate 132 KV & above Transmission Lines & substations in the State.

3. <u>Questions of Law</u>:

The Appellant has raised followed questions of law:

3.1 Whether in law, the Appellant is entitled to the compensation for breach of Contract by the Respondent No. 2 & Respondent No.3, i.e., Power Purchase Agreement, Power Wheeling Agreement, Memorandum of Understanding and legal obligations to provide reliable and efficient transmission system, in view of Section 73 of the Indian Contract Act, 1872?

3.2 Whether in law, Section 73 of the Indian Contract Act, 1872 is applicable upon the facts and the circumstances of the case?

3.3 Whether in law, the applicability of the provisions of Section 55 & 73 of the Indian Contract Act, 1872, is subjected to the terms and conditions of the Agreement entered into between the parties?

3.4 Whether in law, the Appellant is entitled to maintain a Petition for compensation/damages for breach of contractual and legal obligations by the Respondents in the absence of any specific condition to that effect under the Contract?

3.5 Whether in law, the failure and breach of contractual and legal obligations on the part of the Respondent No.2 & 3 in providing an agreed safe and reliable evacuation of the system for transmission of energy generated from the Project, resulting in financial losses to the Appellant would entitle to claim compensation and damages?

4. Shri Tarun Johri, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-

The agreement do not have specific condition under which the appellant could be compensated:-

4.1 The State Commission has completely overlooked the fact that Clause 9.3 of the Power Wheeling Agreement dated 30.09.2005, executed between the Appellant and Respondent No.3 specifically empowered the Appellant to claim damages or avail its remedies available in law, on account of the breach of the contractual obligations by the Respondent No.3.

4.2 Clause 9.3 of the Power Wheeling Agreement reads as under:-

> *"9.3 In the event of PTCUL committed a breach of any of the terms and conditions of this Agreement, the company shall be entitled to specific performance of this agreement or claim such damages as would be available under the law, at its opinion, by giving 30 days' notice to PTCUL."*

Thus, the findings rendered by the State Commission in the Impugned Order are liable to be set-aside and the Appellant is entitled to the award of compensation for the losses suffered on account of the inactions of the Respondents.

4.3 The Impugned Order has been passed in a mechanical manner in as much as the specific clause i.e., Clause 9.3, which entitles the Appellant to claim compensation for the losses suffered had been completely ignored by the State Commission, while passing the Impugned Order.

4.4 Because, examination of Clause 9.3 of Power Wheeling Agreement, would clearly evidence that the findings rendered by the State Commission against the maintainability of the Claim for transmission losses suffered by the Appellant, is legally liable to be set-aside.

4.5 Because in the light of provisions of Clause 9.3, the findings rendered in **Para (2)**, to the effect that there are no conditions on compensation, either in the Power Wheeling Agreement or in the PPA executed between the parties, is directly in teeth of the Clause 9.3 as noted above and thus, the said findings are liable to be set-aside. Thus, the failure of Respondents to perform its obligations under the Agreements is an event of default on the part of Respondents, which legally entitled the Appellant to claim compensation for loss suffered on account of breach of contractual obligations by the Respondents.

Application of section 73 & 74 of the Indian Contract Act, 1872 on the facts of the case:-

4.6 After having concluded in **Para (3)**, that delay in construction of 220 kv sub-station at Ghansali, is solely attributable to PTCUL, the State Commission ought to have allowed the claim of the Appellant against the losses suffered due to breach of contract by the Respondents, in terms of Section 73 & 74 Contract Act.

4.7 The entitlement of a party suffering damages on account of breach of contract by other party, is a statutory remedy under Section 73 & 74 of the Contract Act. The said remedy is also independent of the terms and conditions of the contract agreement executed between the parties. Thus, the findings rendered in **Para (6)**, by the State Commission, are liable to be set-aside.

4.8 The claims raised by the Appellant for payment of damages due to breach of contract by the Respondents, is well recognized and maintainable in facts and in law, as per Clause 9.3, as also under Section 73 & 74 of the Contract Act.

4.9 Under Section 73, a party is entitled to compensation for any loss or damage caused to him, which naturally arose in the usual course of things from the breach of the contract, or which the parties knew, at the time they made the contract, to be likely to result from the breach.

4.10 The Impugned Order is in violation of the law laid down by Hon'ble High Court of Delhi in the matter of **Simplex Concrete**

Piles (India) Ltd. V/s Union of India, MANU/DE/4538/2010, wherein it has been held as under:-

> *"Provisions pertaining to the effect of breach of contract, two of which provisions are Sections 73 and 55, in my opinion, are the very heart, foundation and the basis for existence of the Contract Act. This is because a contract, which can be broken at will, will destroy the very edifice of the Contract Act. After all, why enter into a contract in the first place when such contracts can be broken by breaches of the other party without any consequential effect upon the guilty party? It therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party. Contracts are entered into because they are sacrosanct. If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73 of the Contract Act are taken away."*

4.11 The Hon'ble Supreme Court in the matter of ***Mahanagar Telephone Nigam Ltd. V/s Tata Communications Ltd.; MANU/SC/0288/2019***; while examining Section 73 of the Contract Act, had been pleased to hold as under:-

Para 8

"*Section 73;- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

Such compensation for failure to discharge obligation resembling those created by contract:-
When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it, is entitled to receive the same compensation from the part in default, as if such person had contracted to discharge it and had broken his contract."

"9. This Section makes it clear that damages arising out of a breach of contract is treated separately from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under paragraph 1 of Section 73. When, however, a claim for damages arises from obligations resembling those created by contract, this would be covered by paragraph 3 of Section 73."

Thus, in the light of the specific conclusion arrived at by the State Commission, qua breach of the conditions of Power Wheeling Agreement by PTCUL, the claims for damages, as raised by the Appellant were legally maintainable and liable to be allowed, in law.

Admitted delay on the part of the Respondent's in construction of 220 kv sub-station at Ghansali for evacuation of energy generated from the project:-

4.12 Admittedly, the 220 Kv sub-station at Ghansali was scheduled to be completed in the Year, 2007. PTCUL's obligation to construct the sub-station at Ghansaliin line with the commissioning of the Project was also recorded in the MOU dated 12.06.2007. PTCUL extended the time period for construction of the sub-station to April, 2008. Respondents agreed to complete the construction of the 220 Kv sub-station at Ghansali by June 2012, in MOM dated 23.06.2010.

4.13 Even the State Commission vide MOM dated 05.08.2010, wherein the State Commission noted that the lackadaisical

approach of PTCUL in submitting the action plan for construction of the 200 KV sub-station at Ghansali.

4.14 The State Commission, in the Impugned Order at Para (3), has specifically held that, "*the Commission is of the view that both the Respondent No.1 and Respondent No.2 have been showing lackadaisical approach towards construction of the 220/33KV S/s at Ghansali or strengthening/augmentation of the existing 33kV evacuation system, respectively, which is highly reprehensible. Further, with regard to construction of 220 kV S/s Ghansali, the delay is solely attributable to Respondent No.2……. The Commission expresses its displeasure on the delay in commissioning of the transmission S/s and directs PTCUL to submit quarterly status of the same within 15 days.*"

4.15 The Respondents have not even challenged the findings rendered by the State Commission with regard to the delay in commissioning of the sub-station at Ghansali. Thus, the conclusion arrived at by the Commission with regard to the breach of contractual obligations by the Respondent's have attained finality, in law.

4.16 Admittedly, the 220 Kv sub-station at Ghansali, has not yet been constructed by PTCUL and the Appellant is being constrained to evacuate the energy generated from the Project through an unreliable 33kV Sub transmission network, resulting in spillage of valuable renewable to Uttarakhand and huge financial losses to the Appellant.

Arguments against the application of law of limitation on the claims raised by the Appellant:-

4.17 When the Petition No. 08 of 2015 was submitted before the State Commission, the provisions of the Limitation Act was not made applicable upon the provisions of the Electricity Act, 2003 and therefore, the claims against the losses suffered by the Appellant for the period prior to the Year, 2012, cannot under the law be rendered as barred by limitation, since, the Law of limitation had been made applicable by Hon'ble Supreme Court on the Electricity Act, 2003, only vide its Judgment titled ***A.P. Power Coordination Committee V/s Lanco Kondapalli Power Ltd.; (2016) 3 SCC 468***; in Para 30 of the Judgment; passed on 16.10.2015 i.e. much after the filing of the Petition by the Appellant before the State Commission.

4.18 Because the claims against the damages suffered for the period prior to the Year, 2012, are legally maintainable in the light of the law laid down by Hon'ble Apex Court in the matter of ***Thirumalai Chemicals Ltd. Vs Union of India &Ors;Civil Appeal no 3191-3194 of 2011*** held that:-

> ***"28.*** *Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe words within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and of a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provisions of the latest statute. Statutes of limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier,* ***but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of coming into operation,***

nor do they have effect on the extinguishing a right of action subsisting on that date……"

4.19 In view of the law laid down by Hon'ble Apex Court, as noted above, the subsequent application of the law of limitation on the provisions of the Electricity Act, 2003, would not extinguish the right of action of the Appellant, which was legal and subsisting as on date of submission of the Petition before the State Commission. The cause of action for seeking damages for the losses suffered on account of breach of obligations by the Respondents, having accrued and exercised by the Appellant, before the provisions of the Limitation Act, having been made applicable upon the Electricity Act, 2003, the Claims for the period prior to the Year, 2012, would be extinguished in terms of the law laid down by Hon'ble Apex Court. Thus, the claims raised by the Appellant are well within the prescribed period of limitation.

Actual losses suffered by the Appellant on account of non-availability of the evacuation system:-

4.20 Because there is no dispute qua the fact that the Appellant has actually suffered huge financial/revenue losses on account of non-availability of safe and reliable transmission system, which was the obligation of the Respondents under EA,2003 and agreements / MOU/MOM wiyh PTCUL and UPCL.

4.21 The Appellant hereby relies upon Month, which specifically details the month wise losses suffered by the Appellant on account of negligence and breach of contract by the Respondents.

4.22 Further, various letters issued by the Appellant informing the breakdowns of the transmission system, financial losses suffered and request for timely construction of 220 Kv Sub-station at Ghansali, etc.

4.23 Because the Respondents never even chose to submit any reply to the aforesaid letters issued by the Appellant and therefore, the objections taken by the Respondents against the quantification of the claim raised by the Appellant are liable to be rejected, being an after-thought.

Obligation of PTCUL under power wheeling agreement dated 30.09.2005:-

4.24 Relevant Clauses of Power Wheeling Agreement

> "**2.3** *Subject to the provision of this agreement, the* ***PTCUL Shall provide wheeling service to the company for the wheeling of delivered energy*** *from the interconnection point to the company's consumers / Licensees within the state of Uttaranchal."*
>
> *"**2.5. PTCUL shall operate and maintain its transmission system as per agreed guidelines and directions of SLDC/Grid Code**, so as to maintain the system parameters within the acceptable/reasonable limits except where it is necessary to take measures to prevent imminent damage to any equipment."*
>
> *"**2.6 (a)**The* ***PTCUL will be responsible for operating and maintaining its transmission system*** *in accordance with good and generally accepted electric utility engineering and generally accepted electric utility engineering and operating practices in such a manner as to ensure that it is able to provide wheeling service throughout the term of this agreement.* ***The cost of operating and maintaining the PTCUL's transmission system in order to provide wheeling charge shall be borne by PTCUL****."*

4.25 Relevant Clauses of the MOU dated 12.06.2007 :-

> "a. *PTCUL willarrange to evacuate power from the interconnection point i.e.,proposed 220/33kv substation at Ghansali and the implementation of the transmission line would be in line with the commissioning of the project."*
>
> *"d. PTCUL will provide wheeling and transmission services for wheeling of delivered energy from the interconnection point 220kv Ghansali substation to the delivered point (i.e., within the state of Uttaranchal at the voltage level 220kv."*
>
> *"e. Company will apply for long term access as stipulated by STU/ GoUand the relevant provisions of the act and regulations."*

The aforementioned clauses makes it evident that PTCUL was under contractual obligation to provide agreed safe and reliable transmission system for evacuation of power generated from the Project beyond the Interconnection point.

Regarding submission of the Respondent that Swasti did not construct its part of the transmission system:-

4.26 The Appellant vide letter dated 10.06.2009 intimated PTCUL that 33Kv double circuit transmission line with ACSR "Panther" conductor is ready from BHPP to UPCL's 33/11 Kv Substation at Ghansali. Appellant also intimated that extension of line from thereon upto the proposed 220/33Kv PTCUL sub-station has also been completed and is ready for connection to the 220Kv line section. ABT meters were also installed at this interconnection Point and the Project would be ready for commissioning by around 20.06.2009. The Appellant requested PTCUL to facilitate inter-connection of the Project with PTCUL system, as soon as, the line from Ghansali to chamba is ready upto Rajakhet.

4.27 Vide Letter dated 16.06.2009 issued by Swasti to UPCL and PTCUL, PTCUL was once again informed that Bhilangana Hydro Project is ready for commissioning and the PTCUL was requested to provide interconnection of the Bhilangana Hydro Project to 33/11kv Ghansali SS to UPCL.

4.28 Thus, the submissions made by the Respondent to the effect that the Appellant's own transmission system (33kV double circuit line from the Bhilangana to Ghansali as per the MOU and MOM with PTCUL and UPCL) was not ready at the appropriate time period for evacuation of the power generated from the Project is factually incorrect and liable to be rejected. In fact, without this 33kV double circuit line it would not have been possible to synchronize Bhilangana Hydro Project for power evacuation) Since, the Appellant had time and again intimated the Respondent about the completion of its part of transmission system.

4.29 The Respondent intimated the Appellant or raised any objection qua non completion of the Appellant's part of transmission system and therefore, cannot be allowed to raise any such plea before this Hon'ble Tribunal, especially in the absence of any document on record to that effect.

Regarding application for open access by Swasti:-

4.30 UERC in Petition No 8 of 2015 dated 21.10.2015 in Para (b), has specifically noted that the Appellant had submitted an application for grant of Open Access on 25.07.2007 with PTCUL and a fee of Rs.1,00,000/- was paid by the Appellant to PTCUL.

The said application was accepted by PTCUL but no connectivity was granted to the Project as agreed in the Power Wheeling Agreement and MoU.

4.31 The State Commission had also noted in the Impugned Order that just because a PPA had been executed by the Appellant with UPCL, under the circumstances, the said act of execution of the PPA would not condone the lapse of PTCUL for breach of its obligations.

4.32 The Tribunal may also refer to letter dated 10.06.2009 issued Swasti to PTCUL, wherein the Appellant had clearly mentioned that Long Term Open Access Application was submitted by the Appellant vide letter dated 25.07.2007and the prescribed open access fee of Rs.1,00,000/-(Rupees One Lakh Only) was also paid (Andhra Bank DD# 347270 dated 06.04.2008).

4.33 In the light of the aforesaid facts, it does not lie in the teeth of the Respondents to allege that the Appellant had failed to submit any application for grant of Open Access Application, especially, when there is no document on record in support of the said submission and neither any such objection was taken by the Respondents before the State Commission.

Binding nature of contract executed between the appellant and PTCUL by virtue of signing of the PPA between the Appellant and UPCL:-

4.34 The Power Wheeling Agreements and MOU executed between the Appellant and PTCUL are legal and valid documents in the

eyes of law and the same had neither been rescinded either expressly or impliedly by the parties.

4.35 The obligation of PTCUL to provide safe and reliable transmission system including 220 Kv sub-station at Ghansali, had never been taken away through execution of the PPA between UPCL and the Appellant.

4.36 Further, no such objection had ever been taken by PTCUL before the State Commission and thus, the objection as taken by the Respondent against the binding nature of the Agreements is nothing but an after thought and is liable to be rejected.

4.37 A perusal of the letter dated 27.01.2009) would itself evidence that PTCUL rather had put up a condition to execute the PPA with UPCL before first executing the Transmission Service Agreement with the Appellant.

4.38 The obligation of PTCUL under the Power Wheeling Agreement are completely different than the obligations of UPCL under the PPA executed with Appellant.

5. Shri Pradeep Misra, learned counsel appearing for the Respondent No.2 has filed the written submissions for our consideration as under:-

5.1 The Appellant has filed the abovenoted appeal against the order dated 21.10.2015 passed by UERC under Section 86(1)(f) in respect of claims for damages raised by Appellant against Respondent Nos. 2 & 3. UERC has dismissed the Petition filed by the Appellant on the ground that wheeling agreement dated 30.09.2005 as well as Power Purchase Agreement dated

03.07.2009 do not have any specific condition under which Appellant could be compensated for loss of generation.

5.2 The Appellant has claimed loss of generation from 01st September, 2009 onwards.

5.3 On 24.08.2005, the Appellant entered into a PPA with PTC for selling its power ultimately to Punjab State Electricity Board. Appellant executed a power wheeling agreement with Respondent No. 3, Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as PTCUL) on 30.09.2005. Appellant submitted an applicant dated 04.07.2008 for grant of open access before PTCUL Respondent No. 3. Further, the Appellant sent a letter dated 02.04.2019 to the Managing Director of Uttarakhand Power Corporation Ltd., Respondent No. 2 thanking him for agreeing to provide evacuation of power as an interim arrangement from its project. PPA was entered into by Appellant with the replying Respondent on 03.07.2009 . Relevant Clauses of the said agreement are as follows:

"16. Continuity of service

16.1 The supply of electricity by the Generating Company shall be governed by instructions from the State load dispatch centre, as per the provisions of the SGC as amended from time to time. However, UPCL may require the Generating Company to temporarily curtail or interrupt deliveries of power only when necessary in the following circumstances:

a. Repair and/or Replacement and/or Removal of UPCL's equipment or any part of its system that is associated with the Generating Company's facility, and/or

b. Endangerment of Safety: If UPCL determines that the continued operation of the facility may endanger the safety of UPCL's personnel or integrity of UPCL's) electric system, or have an adverse effect on the provision of electricity UPCL's other consumers/customers; and/or

c. Force Majeure Conditions as defined in Para 25 below.

16.2 Before disconnecting the Generating Company from UPCL's system, UPCL shall, except in the case of an emergent situation, give advance intimation to the Generating Company through telephone/wireless or through other means of communication along with reasons for disconnection, and the likely period of the disconnection. However, subsequent to disconnection, UPCL shall immediately notify the Generating Company by telephone and confirm in writing the reasons for and the likely period of disconnection. During the period so notified UPCL shall not be obligated to accept or pay for any power from the Generating Company.

16.3 In any such even as described above, UPCL shall take all reasonable steps to minimize the frequency and duration of such interruptions, curtailments, or reductions.

16.4. UPCL shall avoid scheduling any event described in 16.1 above, to the extent reasonably practical, during the Generating Company's operations. Where the scheduling of such an event during the Generating Company's operations cannot be avoided, UPCL shall provide the Generating Company with fifteen days advance notice in writing to enable the Generating Company to cease delivery of Power to UPCL at the scheduled time.

16.5. In order to allow the Generating Company's facility to remain on-line and to minimize interruptions to Generating Company operations, the Generating Company may provide automatic equipment that will isolate the Generating Company's facility from UPCL system during major system disturbances."

5.5 Along with the agreement, sale and accounting for power has been enclosed wherein Clause 5 provides as under:

> *"5. Under no circumstances, the saleable energy would be net of energy supply by Generating Company to UPCL and energy used by Generating Company in case of breakdown or any other emergency conditions."*

The agreement was not long term agreement as the Appellant has the liberty to terminate the same by giving two months' notice. It shows that even after executing the PPA the Appellant intended to supply the power outside the State.

5.6 This Tribunal on 11.01.2011allowed Appeal No. 88 of 2010 and 93 of 2010 by holding that the Commission's decision not to allow open access to the Appellant is wrong.

5.7 Uttarakhand Electricity Regulatory Commission (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 came into force on 14.08.2012.

5.8 UERC has in the order dated 17.12.2012 held that the PPA dated 03.07.2009 between Appellant and replying Respondent is not a valid long term PPA. Relevant part of order is as follows:

> *"15. With regard to the submission of the Petitioner at para 11 above the Commission is of the view that on 03.07.2009 when the conditional PPA was signed by the Petitioner, the UERC RE Regulations, 2008 were effective. The Petitioner as well as the Respondent were required to abide by the relevant provisions of that regulation and must have framed the PPA consistent with the said Regulations. The parties should have come up before the Commission for obtaining approval of the agreement executed.*
>
> *16. Taking cognizance of the terms and conditions of the PPA dated 03.07.2009 entered between the Petitioner and the Respondent, the Commission is of the view that the said PPA cannot be construed as a valid long term agreement particularly on account of the conditions provided in the agreement. Some of the conditions are reproduced below….*
>
> *……It is noted that both recital and duration of PPA re not only conditional but also bestow unilateral power of termination to the Petitioner. In view of this, the Commission holds that the power purchase agreement, as it exists today, is not a valid long term agreement*."

5.9 A supplementary PPA on long term basis was executed on 10.01.2013 between the Appellant and the replying Respondent.

5.10 The Appellant on January, 2015 filed a Petition under Section 86(1)(f) of Electricity Act, 2003 for loss suffered on account of frequent outages and inadequate line capacity for evacuation of power from the project before UERC claiming compensation/damages amounting to Rs. 1,776.58 lakhs from 01st

September, 2009 till July, 2014 along with interest. In the entire Petition no specific averment has been made regarding any breach of condition by replying Respondent and how much amount Appellant is claiming from replying Respondent. Appellant filed its reply on 24.03.2015 wherein it was stated that there is no dispute and the Petition filed by Appellant is liable to be dismissed.

5.11 The UERC on 21.10.2015 held that the PPA dated 03.07.2009 is not a valid long term agreement. It further held that as per UERC (Tariff and other terms for Supply of Electricity from Renewable Energy Sources and Non-Fossil Fuel based Co-generating Stations) (First Amendment) Regulations, 2012, Appellant can approach the replying Respondent claiming deemed generation. It was further held that as the agreement between the parties does not have any clause regarding compensation, hence claim of damages under Section 73 of Indian Contract Act, 1872 is not maintainable. Against the said order the present Appeal has been filed.

5.12 The claim prior to 2012 is time barred as held by Hon'ble Supreme Court in (2016) 3 SCC 468 Andhra Pradesh Power Coordination Committee & Ors. Vs. Lanco Kondapalli Power Ltd. Ors..

5.13 The PPA dated 03.07.2009 is not a valid PPA as held by UERC vide order dated 17.12.2012 which was not challenged and because final and conclusive between the parties. **I**n another appeal being Appeal No. 287 of 2015 filed by Appellant it has been held by this Hon'ble Tribunal that the Appellant has claimed only after 10.01.2013 vide judgment dated 23.04.2019.

5.14 That UERC in the impugned judgment has directed as follows:

"(5) The Commission in the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 had allowed the provisions of deemed generation for Small Hydro Plants (SHPs) selling power to UPCL (Respondent No. 1) in the State. The said Regulations provides that mechanism for calculation of deemed generation and also lays down the circumstances under which deemed generation can be claimed by SHPs in the State. With regard to the Petitioner's claim seeking compensation on account of trippings/breakdowns of existing evacuation lines/system provided by UPCL, the Generator is at liberty to apply to UPCL for claiming deemed generation charges in accordance with the aforesaid provisions of Regulations and only if such claim is disputed by UPCL, the Petitioner may approach the Commission for adjudication under the Act".

In view of the said finding of the Commission, the present Appeal is not maintainable qua replying Respondent. Thus, the Appeal under reply be dismissed qua replying Respondent.

6. Shri Sitesh Mukherjee, learned counsel appearing for the Respondent No.3 has filed the written submissions for our consideration as under:-

6.1 The Subject Petition was filed by the Appellant herein seeking damages on account of alleged loss of generation due to non-availability of adequate facilities for wheeling/ transmission of power from its Project to the beneficiary, i.e. Uttarakhand Power Corporation Limited ("**UPCL**"), which is the Respondent No. 2 herein. The said damages are being sought against UPCL and Respondent No. 3, Power Transmission Corporation of Uttarakhand Limited ("**PTCUL**"), from the day when the Appellant commenced the supply of power from its hydro power plant i.e. 16.07.2009. Vide the Impugned Order, the UERC dismissed the claims raised by the Appellant herein on account of it having adequate remedy available in terms of the UERC's regulations and that it should approach UPCL accordingly.

6.2 The Appellant had entered into an Implementation Agreement dated 16.10.2003 for development and implementation of the project and subsequent to this a Power Wheeling Agreement("**PWA**") was executed by the Appellant on 30.09.2005 with Power Transmission Corporation of Uttarakhand Limited("**PTCUL**"). According to the express provisions of the PWA, the Appellant was in the process of setting up the Bhilangana Hydro Project at Ghuttu, District Ghansali ("**Project**") to sell power to any consumer(s) outside the State of Uttaranchal (now known as Uttarakhand). It was proposed to utilize PTCUL's Grid System to transmit this power. As per Article 1.7 of the said agreement the Appellant was required to give notice regarding date of completion of its Project, for which the interconnection point was set-out to be at 220 KV S/ s Chamba. In accordance with the said Agreementit was envisaged thatPTCUL would evacuate power from the Appellant's Project through a 220 KV Sub-Station atChamba. In this regard, it is relevant to refer to Clause 1.17 of PWA which provides as follows:

> *"Interconnection point: Means the point in the PTCUL's Grid at 220 KV Voltage level, where the Company's interconnecting line if terminating duly providing interconnection facilities; and where Company's generation is delivered to PTCUL Grid. In this case the interconnection point is 220 KV Substation Chamba".*

6.3 Further, the Article 3.1 of the said PWA laid down express responsibility upon the Appellant to evacuate, design, install, operate and maintain the interconnection facilities and perform all work, at their expense necessary to transfer the power to the interconnection point in the designated substation of the PTCUL duly providing the interconnection line at 220KV level from the

Power Plant to the Chamba Substation of PTCUL. Further, as per Article 5.7 of the said agreement, the Appellant was under an express obligation to provide for Letter of credit within the time as per conditions mentioned therein. In this regard, relevant clauses of the PWA are reproduced herein for convenient perusal:

> *"3.1 The Company shall be responsible to evaluate, design, install, operate and maintain the Interconnection Facilities and perform all work, at the Company's expense, necessary to economically, reliably and safely transfer the power to the Interconnection Point in the designated Substation of the PTCUL, duly providing the Interconnection Line at 220 KV level from the Power Plant to the Chamba Sub-station of PTCUL. The Interconnection Facilities include termination of the Line, Protection (including Relays and Circuit Breakers etc.) and Metering System for measurement of Import and Export of energy, with Electronic Tri-vector Meters, as detailed in Article 4.1 and as per the PTCUL's standards and requirements. The Company shall design, install, operate and maintain the Interconnection Facilities in proper condition in accordance with good and generally accepted electric utility engineering and operating practices. The Company shall obtain from the PTCUL the details of these works as per PTCUL's standards and requirements and approved makes of the equipments.*
>
> *……*
>
> *3.4 The Company is fully responsible for establishment of Interconnection Facilities so as to be ready to match with the Implementation Schedule. The PTCUL may, subject to exigencies and receipt of adequate advance notice, undertake the erection of interconnection Facilities in the designated substation at Company' request as Deposit work. The Company in such a case shall explicitly state its intention and the scope of the work with completion date and deposit an amount with the PTCUL as required by PTCUL to star the work. The Company shall deposit the balance amount, if any, within 15 days of intimation of actual cost of the work. Unless all payments due to the PTCUL are made the interconnection line shall not be energised*
> *……*
> *……*
>
> *5.7 Letter of Credit: To provide security to the PTCUL for the company's obligations hereunder, the Company shall open an irrevocable revolving letter of credit in favour of PTCUL for payment of all sums due to PTCUL by the company under the agreement. The Value of Letter of Credit shall be 110% of estimated monthly billing and shall be opened by the company, one month prior to commissioning the transmission line and connecting it to PTCUL's grid. The L/C charges shall be borne by the company. The L/C shall be kept valid at all time*

during validity of this agreement. The amount of L/C shall be reviewed quarterly and company shall have to revise the L/C as per requirement of PTCUL. In the events of the failure to installed/enhance L/C within reasonable period or alternatively in the absence of L/C in any bill remains unpaid for a period exceeding two months from the date of issue of bill PTCUL shall have the option to discontinue/regulate transmission of Power Generated by the company as per provision of the 'Generic procedure for regulation of supply' issue by CERC/UERC and as amended from time to time."

6.4 However, the Appellant miserably failed to discharge its own obligations under the PWA and have now filed the present proceedings concealing material facts and defaults committed on its own. As such, the present Appeal is liable to be dismissed.

6.5 The meetings conducted by Additional Secretary (Energy), GoU were to review the development/ progress of Generators and other supporting framework within the State and to expedite the works related to evacuation of power from the various projects and to ensure the evacuation of power. In line with the above, a meeting was convened .by the Additional Secretary (Energy), GoU on 26.12.2006 with the Respondents (UPCL & PTCUL).In the said meeting, it was decided that while the 33/220 kV New Ghansali Substation and 220 KV line from Ghansali to Chamba would be built by PTCUL, the developers, which is the Appellant in the instant case, shall be responsible for constructing the 33kV line from the Project till the Ghansali Sub-station. Further, it was also decided that until its completion/ construction, the evacuation of Power from all the hydro power projects being constructed in the Bhilangana basin would be done through the 220 KV line by charging the same at 33 KV. Pertinently, even the Appellant failed to construct the line within its scope.

6.6 The State Government, in view of the guidelines issued in terms of the Hydro Policy, 2003 by the Ministry of Power, Government of India, had decided to plan and develop an integrated transmission/ sub-transmission network for the purpose of evacuation of power from the upcoming generators vide its G.O. No 1002/I/2006-04(3)/52/2006 dated 13.07.2006. In the same order it was directed that for 33 kV evacuation lines, PTCUL will formulate and plan the evacuation System and UPCL will implement the same keeping in view any changes that may be required in the plan. The 220kV Sub-station Ghansali was a part of this integrated Transmission Network which was to be developed for the SHPs mentioned as below: -

(a) Kotbudhakedar (3MW/Revised 6MW)
(b) AgundaThati (3MW)
(c) Jhalakhati (3MW/revised 6MW)
(d) Bhilangana –II (70 MW)
(e) Bhilangana-I (22.5MW) [i.e. the Appellant's Project]
(f) BH-III (24MW)

6.7 The 220/33kv Sub-station at Ghansali was to be built by PTCUL as a part of an integrated system which was to be built for the upcoming generators in the nearby areas of Ghansali.The said position has been reiterated in several meetings held before the UERC and in presence of the generators and has actually received due affirmation from the UERC itself. In this regard, it is relevant to note that the UERC, vide its order dated 29.04.2013 in Petition No. 11 of 2012, held as follows:

> "*16. Based on the above, the Commission is of the view that except for 220 kV D/C Bhilangana-III- Ghansali line other projects namely 220 kV GIS substation at Ghansali, 220 kV S/C Chamba -Ghansali line and 01 No. bay at 220 kV substation Chamba need be considered as system strengthening works of the transmission licensee and cost of these works, therefore will be included in the overall ARR of Transmission*

Licensee (Petitioner in the matter) to be recovered from distribution licensee of the State.

6.8 A bare perusal of the aforementioned order makes it clear that the 220/33kV Ghansali sub-station was envisaged for and planned to be commissioned matching with the commissioning of the upcoming generators and not solely/ exclusively for the Appellant in the instant case. Such a road map has been duly approved by the UERC itself. PTCUL is in the process of constructing its 220/33 kV Ghansali Sub-station matching with all the upcoming projects in the Bilangana basin in order to cater to all of them. If the Appellant's request is allowed, the said sub-station would have to be constructed only for serving a mere 22.5 MW load of the Appellant's generating station, without there being any contractual obligation upon PTCUL to do so. This would create severely adverse financial burden upon PTCUL as it would be required to construct an entire 220/33 kV sub-station and bear its cost without there being enough power requiring the construction of the said 220/ 33kV Ghansali sub-station.

6.9 The Appellant subsequently signed a Memorandum of understanding ("**MoU**") dated 12.06.2007 with PTCUL wherein the following was agreed: -

"..... (a) PTCUL would arrange to evacuate power from the interconnection point, i.e. proposed 220/33 KV Substation at Ghansali and the implementation of the transmission lines would be in line with the Commissioning of the project.

(b). Under this MoU PTCUL will plan & implement the power evacuation system and construction of 220/33 KV substation at Ghansali with associated 220 KV lines from Ghansali with associated 220 KV lines from Ghansali to Chamba station. However, the detailed planning, monitoring, construction & implementation shall be as per the terms of the wheeling and Transmission Agreement ('PWTA') to be entered into at a later stage.

> *(c). As the Commissioning of BHPP is expected to be prior to the Commissioning of –*
>
> *(i) The 220/33 KV Ghansali Substation and*
> *(ii) The 220 KV line from Ghansali to Chamba, PTCUL agrees to evacuate as stopgap arrangement the power of BHPP through 220 KV Ghansali-Rajakhet-Chamba line by charging it on 33 KV and through the existing distribution system at Ghansali 33 KV line from BHPP to Ghansali existing 33 KV substation including upto proposed 220 KV Ghansali substation will be arranged by the generator.*
> *…….*
> g. ***The parties agree to enter into a PWTA detailing the terms and conditions for evacuation of Power from the project. It is agreed that the parties shall sign a PWTA after confirmation of their Open Access Plan and identification of Beneficiary from the Company.....”***

In view of the aforementioned MoU signed between PTCUL and the Appellant it is clear that the detailed planning, monitoring, construction, and implementation had to be as per the terms of Power Wheeling and Transmission Agreement (“**PWTA**”) to be entered into at a later stage between the parties.However, no such PWTA or any other similar agreement has ever been signed between PTCUL and the Appellant as per the MoU dated 12.06.2007.Therefore, the said MoU was merely a set of terms agreed upon by the parties which, never attained finality as the said MoU itself envisaged the execution of an agreement to incorporate the terms and conditions, which has admittedly never been signed.

6.10 The reason why no PWTA or any such similar agreement was never entered into by the parties was because in terms of Clause 9 of the aforementioned MoU, the Appellant had to first identify its beneficiary and then apply for open access. This was a necessary pre-requisite for signing the PWTA. While the Appellant continuously re-iterated the limitations of the interim arrangements

for evacuation of 25 MW generation from the BHPP due to limited load demand at Chamba, it failed to enter into any concrete agreement with PTCUL to give effect to any terms and conditions envisaged in the MOU. Even though the Appellant requested PTCUL for taking necessary action on this account for the changes required in the system and also requested for indicating a date for signing Transmission Service Agreement ("**TSA**"). However, subsequently, PTCUL, vide its letter dated 27.01.2009, duly informed the Appellant that in order to seek Long Term Open Access("**LTA**"), it had to seek permission from UPCL to use their network as desired by GoU, MoM dated 26.12.2006 and also have Power Purchase Agreement ("**PPA**") with UPCL. Such an uncertainty prevailed at the time because the Appellant was unclear as to whether it wanted to sell its power within the state of Uttarakhand to UPCL or to any other beneficiary outside the State of Uttarakhand.

6.11 However, subsequently, with regard to the use of UPCL's network as requested by PTCUL, the Appellant approached UPCL vide letter dated 18.02.2009 for seeking permission to use its network, in line with the discussions recorded in the Minutes of the Meeting dated 26.12.2006. Subsequently, the Appellant signed a PPA on 03.07.2009 with UPCL for sale of entire energy generated by the Project. The said PPA clearly provided that the entire power generated from the Project would be sold to UPCL. Further, the said PPA categorically stated that the connectivity to the Grid System was provided at **33 KV bus bar of 33/11 KV S/s of UPCL** and the entire power shall be sold to UPCL directly through its

network. In this regard, the relevant clauses of the PPA are reproduced hereinbelow for convenient perusal:

> *"**2. POWER PURCHASE, SALE AND BANKING***
>
> *2.1 UPCL shall accept and purchase 22.5 MW (Plus 10% overloading) of power made available to UPCL system from the Generating Company based on Small hydro with capacity upto 25MW at the levelised rate specified for such plant in Schedule I of Uttarakhand Electricity Regulatory Commission (Tariff and other Terms for Supply for Electricity from Non-conventional and Renewable Energy Sources) Regulations, 2008 as amended from time to time.*
>
> *2.2 The rate applicable for supply of electricity by UPCL to the Generating Company shall be as per the tariff determined by the Commission under appropriate Rate Schedule of Tariff for the consumer category determined applicable laws, …… and regulations and the terms and conditions of this Agreement.*
>
> ***8. INTERCONECTION FACILITIES***
>
> *8.1 Interconnection Facilities means all the facilities which shall include, without limitation switching equipment, protection, control, meters and metering devised etc. for the incoming bay(s) for the Project Lines(s) to be installed and maintained by UPCL at the cost of the Company to enable the evacuation of electrical output from the project in accordance with the Agreement.*
>
> *8.2 Power from the Generating Company shall be transmitted at 33 KV voltage and to the interconnection point, i.e. 33 KV Bus bar of 33/11 KV sub-station of UPCL at Ghansali.*
>
> *8.3 The cost of the dedicated transmission line from the Generating Company to the interconnection point i.e. 33 KV Bus bar of 33/11 KV sub-station of UPCL at Ghansali and the cost of interfacing at both ends (the Generating Company and grid substation) including work at the UPCL sub-station, cost of bay tie-line, terminal equipments and associated synchronizing equipments and equipments necessary for interconnection facilities, shall be borne by the Generating Company.*
>
> *8.4 The Generating Company shall be responsible for the Maintenance of all interconnection facilities including terminal equipment at the generating end and the dedicated transmission line.*"

In view of the aforementioned clauses it is clear that the entire power had to be sold to UPCL by the Appellant from its Project on UPCL's network itself. Any previous understanding between the Appellant

and PTCUL came to an end by way of this PPA between the Appellant and UPCL.

6.12 If the Appellant was facing any issue with wheeling the power on UPCL's network and still desired to connect to PTCUL's network or any part thereof, the Appellant was required to apply for connectivity and execute a Connection Agreement for utilizing PTCUL's network for evacuation of its power in line with the provisions of the Uttarakhand Electricity Regulatory Commission (Intra-State Open Access) Regulations, 2010. However, neither any such application has been filed by the Appellant seeking connectivity to the transmission network of PTCUL nor any Connection Agreement has been signed.

6.13 For resolving the problems of power evacuation of hydro power generating stations in the State of Uttarakhand, the UERC convened meetings on 23.06.2010 and 05.08.2010 with UPCL, PTCUL and SHP in the State of Uttarakhand, in which the UERC directed PTCUL to submit its work plan alongwith the schedule of activities, in the form of PERT Chart, for completion of **220 KV Ghansali S/s and Bay at Chamba S/s by 20.08.2010.**

6.14 Pertinently, in view of this Tribunal's order dated 11.01.2011 in Appeal Nos. 88 and 93 of 2010, UPCL vide its letter dated 21.03.2011 informed the Appellant that if it wishes to continue to sell power to UPCL, then it shall have to enter into a long term agreement with UPCL as per UERC (Tariff and other Terms of Supply of Electricity from Renewable Energy Sources and non-fossil fuel based co-generating stations) Regulations, 2010 ("**RE Regulations, 2010**"). UPCL also informed the Appellant that the

power evacuation was being done temporarily through power evacuation arrangements to 33 KV line double circuit line at an estimate cost of 4.73 Crore and in case the Generator opted to take power outside the State the cost of construction of this line from 33 KV S/s Ghansali to Pipaldali Junction would be borne by Appellant as per the UERC's order dated 16.09.2010. In case Appellant did not enter into long term PPA with UPCL as per RE-Regulations, 2010 then energy bills of Appellant would be paid at old tariff as given in RE Regulation, 2008 from July 2010 onwards or at the rates decided by the UERC for short term power purchase.

6.15 In response, the Appellant vide its letter dated 23.03.2011 agreed to execute long term PPA with UPCL for sale of power from their Project and submitted an under taking vide letter dated 11.04.2011 for re-imbursement of the costs to be incurred by UPCL for strengthening of transmission line from UPCL's 33 kV substation at Ghansali to Pipaldali junction in case the Appellant opted to sell its power outside the State.

6.16 Thereafter, PTCUL sent a notice dated 25.04.2011 to the Appellant and intimated that the arrangement of power evacuation of the generation through 220 KV Ghansali-Chamba line would be withdrawn from 15.05.2011 as the 220 KV line was to be charged at 220 KV Voltage level.

6.17 The Appellant vide its letter dated 30.4.2011 informed UPCL that they had already agreed to supply power to it on long term basis and had executed an agreement with UPCL for supply of power. The Appellant further stated that after agreeing to sale of power to

UPCL on long term basis the existing PPA with UPCL would become the Long Term PPA.

6.18 The project was disconnected on 03.11.2011 from the 220 KV line charged at 33 KV as BH-III HEP, being developed by Bhilangana Hydro Power Limited, had executed a TSA dated 25.10.2008 with PTCUL. In view of the terms of the TSA dated 25.10.2008, PTCUL was under an obligation to provide the 220 KV BH-III (Ghuttu)-Ghansali-Chamba line to it for evacuation of power from its generating station. It is noteworthy to mention that only in order to aid the power evacuation of the Appellant and on the basis of discussions with the Appellant and UPCL, PTCUL has provided its system only as a temporary arrangement even though no PWTA or a Connectivity Agreement was ever signed by the Appellant with PTCUL, as was required by MoU dated 12.06.2007 and in line with UERC (Terms and Conditions of Intra-State Open Access) Regulation, 2010.

6.19 In view of the above, the legal issues that arise in the instant case for the determination of any liability qua PTCUL are, namely, (a) That the claims of the Petitioner before February, 2012 are barred by limitation; (b) That there is no existing contractual agreement between the Appellant and PTCUL; (c) That there can be no liability of PTCUL to pay for any charges on account of deemed generation in terms of the UERC's regulations; (d) Without prejudice, in order to claim damages on account of any losses, the said losses have to be proved; and (e) That a provision under a specific legislation shall gain precedence over any other general provision under any other legislation.

The claims of the Appellant prior to February, 2012 are barred by limitation

6.20 The dispute in question as raised by the Appellant is regarding the failure to fulfil an alleged contractual obligation of constructing adequate transmission services and to pay the money. Under Limitation Act, the period of Limitation in respect of the present dispute is 3 years from the date when the cause of action arises under Article 55 of the Limitation Act, 1963.

6.21 The cause of action in the said dispute allegedly arose from the day the Appellant started supplying its power, which is 17.07.2009. However, the Appellant only chose to raise such a dispute for the first time in the year 2015 by way of the Petition filed by the Appellant before the UERC. Since the said Petition was filed in February, 2015, it is clear that the Appellant was sleeping on its rights for the period from 2009 to 2012 and is now seeking to claim reliefs for the said period, without any justification.

6.22 In view of the provisions of the Limitation Act, only a period of 3 years from when the cause of action arose can be allowed to be considered for the purposes of calculating the damages. Since the Petition was filed in February, 2015, a period of 3 years prior to the filing of the Petition can be considered. Accordingly, any claims of the Appellant prior to the period of February, 2012 stand excluded.

6.23 Moreover, it is pertinent to note that this tribunal vide its judgment dated 23.04.2019 in Appeal No. 287 of 2015, which was another appeal filed by the Appellant herein, has allowed certain unrelated

claims of the Appellant. However, all these claims have been raised by the Appellant and allowed only after 10.01.2013, which is the date of execution of the Supplementary PPA. No claims have been made by the Appellant prior to that period.

6.24 In view of the above, it is clear that the Appellant's claim is clearly barred by limitation as it is trying to agitate a cause of action in respect of which the limitation was over much in advance.

No Binding Contract exists between the Appellant and PTCUL, or in any event of their being any contract, the same stood terminated by virtue of the signing of the PPA between the Appellant and UPCL

6.25 Without prejudice to the submissions hereinabove, it is submitted that for the purposes of claiming any damages against any party, the existence of a contractual arrangement is a necessary pre-requisite that has to be proved. In the absence of a contractual arrangement and an obligation therein, there is no basis for a party to claim any losses and, consequently, any damages.

6.26 A detailed account of the factual scenario has been provided in the preceding paragraphs. The Appellant is relying on two specific instruments, namely, the PWA and the MOU to claim damages against PTCUL. It is submitted that neither the PWA nor the MOU were subsisting or in operation on the date when the Appellant entered into a Power Purchase Agreement with UPCL. It is relevant to note that the PPA and the PWA cannot co-exist. Reference may be made to provisions of the PWA, specifically Recital no. 2, Articles 1.17, 3.1, 3.4,5.7 etc. These provisions clearly exhibit that the same obligations for which the PWA was signed, were now existing between UPCL and the Appellant by way of the PPA.

Therefore, there is no way that the PPA and the PWA could co-exist, vis-à-vis the Appellant.

6.27 Further, It is noteworthy to mention that the PWA and MOU signed between the Appellant and PTCUL could never be treated as concluding or final agreements as the specific condition mentioned therein i.e. the execution of PWTA/ TSA were never fulfilled by the Appellant and only after implementation of the term and conditions written in the PWA & MOU agreed upon by both the parties, the contract/ agreement could become final which was never achieved between the Appellant and PTCUL. It is beyond dispute that the Appellant never executed any PWTA/ TSA as contemplated by the MOU. In this regard, it is relevant to note that it is a settled proposition of law that when there is a Letter of Intent/ Memorandum of Understanding/ any such agreement that contemplates the execution of another agreement in the future, which has not been entered into, then such an instrument is not binding. In this regard, reference may be made to the following judgments of the Hon'ble Supreme Court that have settled the law on this proposition:

- ***Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd.*, (1996) 10 SCC 405**

  The Hon'ble Supreme Court of India has held as follows:
  "*7.*
  ….
  The Letter of Intent merely expressed an intention to enter into a contract. If the conditions stipulated in the Letter of Intent were not fulfilled by Respondent 1, and if the conduct of Respondent 1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in

deciding whether to enter into a binding contract with Respondent 1 or not."

- ***Speech and Software Technologies (India) (P) Ltd. v. Neos Interactive Ltd.*, (2009) 1 SCC 475**

The Hon'ble Supreme Court of India has held as follows:

"***22.*** *The said letter of intent on a bare reading is nothing but an agreement to enter into another agreement because it is provided in the said letter that "both parties agree to have set a deadline to sign this agreement by 15-9-2006". It is well-settled legal position that an agreement to enter into an agreement is not enforceable nor does it confer any right upon the parties. The agreement in terms of the said letter of intent was to be signed on or before 15-9-2006.*"

6.28 Further, pursuant to the notification of the UERC (Intra state open access) Regulations, 2010, the Appellant was also required to apply to PTCUL for connectivity. It is submitted that pursuant to the notification of the UERC Regulations 2010 for Open Access, there was a specific procedure required to be followed by all parties desirous of availing LTA and connectivity to PTCUL's network. The same was in the form of a specific application to be submitted by the Appellant and so on and so forth. Should the Appellant desired connectivity to PTCUL's network, the same ought to have been done which never was. It is a settled principle of law that once the Regulations have the field, any agreement to the contrary would cease to have any effect. In any event, there was no contractual obligation on part of PTCUL to provide such connectivity in the absence of any specific application from the Appellant. Moreover, no Connection Agreement with PTCUL for connectivity to its grid, which was required to be done as per the MOU, was ever executed

between the Appellant and PTCUL. Pursuant to execution of the PPA, the MOU ceased to have any effect and, accordingly, PTCUL was not liable to either provide a network or continue making available its network for evacuation of Power from the Appellant's generating station. It is a settled proposition of law that when there is another agreement executed, then the same shall take precedence over any existing MOU.

6.29 It is pertinent to point out at this stage that even if PTCUL did act on any of the terms of the MOU for a limited period, i.e. the provision of a stop-gap arrangement despite the execution of the PPA between the Appellant and UPCL, it was on the request of the Appellant/ UPCL and does not, in any way, mean that the parties intended for the MOU to be binding in any manner. There was no *consensus ad idem* between the parties with regards to the existence of any binding commercial arrangement. It is a settled principle of law that even if any actions in the interim period were initiated on the basis of an MOU, the same cannot constitute a binding legal relationship.

The Appellant is not liable to recover any charges on account of deemed generation from PTCUL in terms of the UERC's regulations

6.30 The Impugned Order directed as follows:

> "*(5). The Commission in the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 had allowed the provisions of deemed generation for Small Hydro Plants (SHPs) selling power to UPCL(Respondent No.1) in the State. The said Regulations provides the mechanism for calculation of deemed generation and also lays down the circumstances under which deemed*

generation can be claimed by SHPs in the State. With regard to the Petitioner's claim seeking compensation on account of trippings/breakdowns of existing evacuation lines/system provided by UPCL, the Generator is at liberty to apply to UPCL for claiming deemed generation charges in accordance with the aforesaid provisions of Regulations and only if such claim is disputed by UPCL, the Petitioner may approach the Commission for adjudication under the Act."

6.31 Therefore, as far as the reliefs sought by the Appellant are concerned, the Appellant has already been allowed to claim the same from UPCL by way of the Impugned order. The relevant extract of the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012for the purposes of Deemed Generation are reproduced hereunder:-

"*3. After Regulation 44 of the Principal Regulation the following shall be added:-*

44 (A) Deemed Generation:

(1) After the COD of the Project, loss of generation at the Station on account of reasons attributed to the following, or any one of the following, which results in Water Spillage, shall count towards Deemed Generation:

- Non availability of evacuation system beyond the Interconnection Point; and

- Receipt of backing down instructions from the SLDC.

Provided that the following shall not count towards Deemed Generation:

(i) the loss of generation at the Station on account of aforesaid factor(s) but attributed to the Force Majeure event(s);

(ii) the loss of generation at the Station due to the interruptions/outages attributed to the aforesaid factor(s) during the period in which the total duration of such outages/ interruptions, other than that excluded under (i) above, is within the limit of 48 hours in a month; and

(2) UPCL shall be required to maintain the voltages at the point of interconnection with the project within the limits stipulated hereunder, with reference to declared voltage:

a) In the case of High Voltage, +6% and -9%; and,

b) In the case of Extra High Voltage, +10% and -12.5%.

With effect from 01.04.2013, any loss in generation due to variations in the voltage beyond the limits specified above shall be reckoned as deemed generation.

Provided that any loss in generation due to variation in voltage beyond the limits specified above, should be atleast 25%.

(3) The period of outage/interruption on account of such factor(s) specified in sub-Regulation 1 and 2 above, shall be reconciled on monthly basis and the loss of generation at the Station towards Deemed Generation after accounting for the events specified under sub-Regulation (1) (i) & (ii) above, shall be computed on following considerations:

(i) The recovery on the above account shall be admissible if the actual energy generated during the year is less than the normative CUF of 45%, specified for recovery of fixed charges for small hydro projects. In case the sum of actual energy generated and the deemed generation during the year exceeds the normative CUF specified of 45%, then the deemed generation along with the actual energy generated will be allowed only upto the CUF of 45%.

(ii) The generation loss towards the Deemed Generation in accordance with sub-Regulation (1) above, if any, during the month shall be considered on the pro-rata basis on the number of hours lost based on the actual average generation achieved during that month divided by the total number of hours available during the month reduced by the number of hours outage/interruption occurred in the system.

(iii) The generation loss towards the Deemed Generation (in MWh) in accordance with sub-Regulation (2) above, if any, during the month shall be considered as the summation of the product of number of hours the variations in voltage beyond the specified limit existed and the Generation lost (in MW) due to the variation in the voltage beyond the specified limit. The Generation lost (in MW) would be the difference between the following:

a. Minimum of the actual generation (in MW) before the variation in voltage occurred and the generation (in MW)

achieved after 90 minutes immediately after variation in voltage was restored within the specified limit would be treated as the actual generation during the period when voltage variations occurred; and

b. The generation achieved during the period when variation in voltages took place.

(4) UPCL shall pay for the saleable deemed generation, on annual basis, for small hydro projects worked out on the basis of the deemed generation on the above lines, at the generic/project specific tariffs under the provisions of RE Regulations, as amended from time to time by the Commission. The settlement of payment towards deemed generation charges shall be carried out within 3 months of the completion of the financial year.

(5) Any charges paid by UPCL towards deemed generation shall not be allowed as an expense to be pass through in tariffs. UPCL will have to bear such charges.

(6) The deemed generation conditions stipulated above shall be applicable only on those small hydro projects who have signed a long term PPA with UPCL on the preferential tariffs specified in the Principal Regulations.

Further, the deemed generation conditions shall be applicable only on the small hydro projects where the evacuation line is connected to 11 kV or higher voltage Grid Sub-station.

(7) *The deemed generation conditions as stipulated above shall come into effect from the date of publication of the amendment regulation in the Government Gazette.*"

6.32 A bare perusal of the aforementioned provision read with the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 makes it categorically clear that the Appellant is only entitled to claim compensation for deemed generation against UPCL in terms of the regulations of the UERC. Further, it is UPCL, the distribution company, to whom all the power is being sold by the Appellant and the system for transmission of such power has also been provided

by UPCL in terms of the PPA. In the absence of any provisions under the Regulations, it is not open to the Appellant to claim any such compensation for deemed generation against PTCUL.

6.33 The Deemed generation is a means of compensating the generator if a loss of generation has been suffered. When one such provision exists, there is no basis for the Appellant to be compensated over and above that loss by seeking benefit under the provisions of the Contract Act, 1872. Further, it is settled proposition of law that a specific provision of a delegated legislation under a special legislation shall take precedence over a general provision under another legislation. The regulations enacted by the UERC on deemed generation are a specific legislation that allow the Appellant to recover any damages in lieu of the losses suffered by it. If the benefit of such provisions is already available to the Appellant, then the same ought to be given precedence and the Appellant ought not to be permitted to seek refuge under any general provisions of another legislation.

No evidence of actual loss has been furthered by the Appellant as its claim is based on hypothetical calculations.

6.34 Further, it is submitted that Sections 73 and 74 of the Contract Act, 1872 govern payment of compensation by a defaulting party to its counter-party and is limited to the actual losses suffered by the non-defaulting party due to a breach of contract by the defaulting party. It is submitted that all damages by their very nature are compensation for loss caused and the settled position is that losses have to be pleaded and proved by a party claiming it. This position has been upheld by the Hon'ble Supreme Court of India in its

judgment in the case of *Kailash Nath Associates v Delhi Development Authority* (2015) 4 SCC 136.

6.35 The losses claimed by the Appellant lack any basis or proof. The Appellant has provided no basis on how it arrived on the figures that are claimed to be generation loss for the period commencing from 01.09.2009 onwards. The Appellant ought to be put to strict proof to establish the claims of generation loss. In the absence of any evidence to substantiate such claims, the Appellant shall not be liable to claim any compensation on account of any alleged generation losses.

6.36 In the absence of any firm requirements, there is no basis for the Appellant, either in fact or in law, to ask for such reliefs. As such, the instant appeal ought to be dismissed with costs.

7. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission and learned counsel for the Respondent PTCUL at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issue emerges in the instant Appeal for our consideration:-

- *Whether in the facts and circumstances of the matter, the Appellant is entitled for the compensation on account of breach of contract by the Respondents?*

8. <u>OUR FINDINGS AND ANALYSIS</u>: -

8.1 Learned counsel for the Appellant submitted that the State Commission has completely overlooked the fact that Clause 9.3 of

the Power Wheeling Agreement dated 30.09.2005, executed between the Appellant and Respondent No.3, specifically empowered the Appellant to claim damages or avail its remedies available in law, on account of the breach of the contractual obligations by the Respondent No.3. Learned counsel further submitted that the State Commission has passed the order in a mechanical manner in as much as the specific clause i.e., Clause 9.3, which entitles the Appellant to claim compensation for the losses suffered had been completely ignored. A bare perusal of the Clause 9.3 of Power Wheeling Agreement, would clearly show that in case of failure of Respondents to perform their obligations, it would entitle the Appellant to claim compensation for losses suffered on account of such a failure / breach.

8.2 Learned counsel for the Appellant was quick to point out that even after having concluded in the order that the delay in construction of 220 kv sub-station at Ghansali, is solely attributable to PTCUL, the State Commission has rejected the claim of the Appellant against the losses suffered due to breach of contract by the Respondents. Learned counsel contended that Section 73 & 74 of Contract Act is entirely applicable to the present case and under the same, Appellant is duly entitled for the compensation against the suffered losses. To substantiate his submissions, learned counsel placed reliance on the judgment of Hon'ble High Court, Delhi in the matter of *Simplex Concrete Piles (India) Ltd. V/s Union of India, MANU/DE/4538/2010.* Further, learned counsel also relied upon *the judgment of Hon'ble Supreme Court in the matter of Mahanagar Telephone Nigam Ltd. V/s Tata Communications Ltd.; MANU/SC/0288/2019*, to emphasise that when a contract stands

broken, the party who suffers by such breach is entitled to receive compensation from the party who has broken the contract.

8.3 Learned counsel for the Appellant vehemently submitted that admittedly the 220 Kv sub-station at Ghansali was scheduled to be completed by the PTCUL in the Year, 2007, in line with the commissioning of the Project, was also recorded in the MOU dated 12.06.2007. However, PTCUL extended the time period for construction of the said sub-station at several times and could not complete the sub-station even after interference of the State Commission vide its meeting held on 05.08.2010. In fact, the State Commission in the impugned order has specifically noted the laxity of PTCUL in construction of the Ghansali sub-station. Learned counsel further submitted that admittedly, the 220 Kv sub-station at Ghansali, has not yet been constructed by PTCUL and the Appellant is being constrained to evacuate the energy generated from the Project through an unreliable 33kV Sub transmission network, resulting in spillage of water causing huge financial losses to the Appellant.

8.4 Learned counsel further submitted that the State Commission and also the Respondents have erroneously advanced the arguments against the application of law of limitation on the claims raised by the Appellant. He submitted that when the Petition No. 08 of 2015 was submitted before the State Commission, the provisions of the Limitation Act was not made applicable upon the provisions of the Electricity Act, 2003 and, therefore, the claims against the losses suffered by the Appellant for the period prior to the Year, 2012, cannot under the law be rendered as barred by limitation, since, the

Law of limitation had been made applicable by Hon'ble Apex Court on the Electricity Act only vide its judgment passed on 16.10.2015 in the case of *A.P. Power Coordination Committee V/s Lanco Kondapalli Power Ltd.; (2016) 3 SCC 468*. Learned counsel emphasised that as the claims against the damages suffered by the Appellant prior to the Year, 2012, are legally maintainable in the light of the law laid down by Hon'ble Apex Court in the matter of *Thirumalai Chemicals Ltd. Vs Union of India &Ors; Civil Appeal no 3191-3194 of 2011.* Stating above, learned counsel contended that the claims raised by the Appellant are, therefore, well within the prescribed period of limitation.

8.5 Advancing his arguments further, learned counsel for the Appellant submitted that as there is no dispute qua the fact that the Appellant has actually suffered huge financial/revenue loss on account of non-availability of reliable transmission system, being the sole responsibility of the Respondents herein, the Appellant is duly entitled for compensation in lieu of energy losses due to failure / break down of the transmission system. Learned counsel further relying on the obligation of PTCUL was under the PWA dated 30.09.2005 and relevant clauses of MOU dated 12.06.2007 highlighted that PTCUL was under contractual obligation to provide agreed safe and reliable transmission system for evacuation of power generated from the Project beyond the Interconnection point. Learned counsel also contended that in view of the factual information, the arguments of the Respondents that the Appellant did not construct its part of the transmission system are baseless and without rationale. In fact, the Appellant vide letter dated 10.06.2009 had intimated PTCUL that 33Kv double circuit

transmission line with ACSR "Panther" conductor is ready from the project to UPCL's 33/11 Kv Substation at Ghansali. It was also informed by the Appellant that extension of line from thereon up to the proposed 220/33Kv PTCUL sub-station has also been completed and is ready for connection to the 220Kv line section.

8.6 On the contentions of the Respondent PTCUL that the Appellant had never applied for Open Access, learned counsel indicated that the Commission in Petition No 8 of 2015 dated 21.10.2015 in Para (b) at Page 68-69, has specifically noted that the Appellant had submitted an application for grant of Open Access on 25.07.2007 with PTCUL and a fee of Rs.1,00,000/- was paid by the Appellant to PTCUL. The State Commission has also noted in the impugned order that just because a PPA had been executed by the Appellant with UPCL, the same would not condone the lapse of PTCUL for breach of its obligations. Summing up his arguments, learned counsel emphasised that the contracts executed between the Appellant, PTCUL and UPCL by virtue of signing up PPA & PWA are of binding nature and as party can get absolved of its obligations under such agreements.

8.7 ***Per contra*****,** learned counsel for the Respondent Commission submitted that the main grievance of the Appellant in the instant Appeal is that the damages raised by Appellant against Respondents has not been considered by the Commission on the ground that PWA dated 30.09.2005 as well as Power Purchase Agreement dated 03.07.2009 do not have any specific condition under which the Appellant could be compensated for loss of generation. While disallowing the claim of the Appellant,

the State Commission, among others, has held that the PWA dated 30.09.2005 does not have any specific condition under which the Appellant could be compensated for loss of generation. Besides, the PPA dated 03.07.2009 is not a valid long term agreement and the agreement does not have any clause regarding compensation, hence claim of damages under Section 73 of Indian Contract Act, 1872 is not maintainable. Moreover, as per the Limitation Act, any claim prior to 2012 is time barred as held by Hon'ble Supreme Court in (2016) 3 SCC 468 *Andhra Pradesh Power Coordination Committee & Ors. Vs. Lanco Kondapalli Power Ltd. Ors.*

8.8 Learned counsel for the Respondents further submitted that the State Commission in the impugned order had directed as under:-

"(5) The Commission in the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 had allowed the provisions of deemed generation for Small Hydro Plants (SHPs) selling power to UPCL (Respondent No. 1) in the State. The said Regulations provides that mechanism for calculation of deemed generation and also lays down the circumstances under which deemed generation can be claimed by SHPs in the State. With regard to the Petitioner's claim seeking compensation on account of trippings/breakdowns of existing evacuation lines/system provided by UPCL, the Generator is at liberty to apply to UPCL for claiming deemed generation charges in accordance with the aforesaid provisions of Regulations and only if such claim is disputed by UPCL, the Petitioner may approach the Commission for adjudication under the Act".

In view of the said finding of the Commission, learned counsel for the Respondents sought dismissal of the Appeal being non-maintainable.

8.9 Learned counsel for the PTCUL pointed out that according to the express provisions of the PWA, the Appellant was in the process

of setting up the Bhilangana Hydro Project at Ghuttu, District Ghansali to sell power to any consumer(s) outside the State and in the process, it was proposed to utilize PTCUL's Grid System to transmit this power. Learned counsel further pointed out that as per the said PPA, the Appellant has to construct and maintain the interconnection facilities so as to transfer the power to the interconnection power in the designated sub-station of the PTCUL. Besides, the Appellant was under an obligation to provide letter of credit. However, the Appellant miserably failed to discharge its own obligations under the PWA and have now filed the present proceedings in utter concealment of material facts and defaults committed on its own. Learned counsel vehmently submitted that the construction of generating projects and associated transmission system was being monitored at the Govt. level and responsibilities of generators as well as Respondents were distinctly segregated. It was inter-alia decided that until its completion/construction, the evacuation of power from all the hydro projects being constructed in the Bhilangana basin would be done through the 220 KV line by charging the same at 33 KV.

8.10 Learned counsel further contended that the State Govt, in line with Hydro Policy, 2003 of Government of India decided to plan and develop an integrated transmission/ sub-transmission network for the purpose of evacuation of power from the upcoming generators and issued an order dated 13.07.2006. In the same order, it was directed that for 33 kV evacuation lines, PTCUL would formulate and plan the evacuation System and UPCL will implement the same keeping in view any changes that may be required in the plan. Notably, the 220kV Sub-station Ghansali was also a part of

this integrated Transmission Network which was to be developed for all the hydro projects of the Basin including the project of the Appellant. It would thus be evident that the Ghansali sub-station to be constructed by PTCUL was envisaged for evacuation of power of the upcoming generators in the basin and not solely/ exclusively for the project of the Appellant. In other words, if the Appellant's request is allowed, the said sub-station had been constructed only for serving a mere 22.5 MW load of the Appellant's project.

8.11 Learned could was quick to point out that subsequent to the signing of the MOU dated 12.06.2007, the Power Wheeling and Transmission Agreement ("**PWTA**") was to be entered into at a later stage. However, no such PWTA or any other similar agreement has ever been signed between PTCUL and the Appellant. Therefore, the said MoU dated 12.06.2007 was mere a set of terms agreed upon by the parties which, never attained finality because of non-execution of an agreement like PWTA.

8.12 Learned counsel further submitted that for using the UPCL's network, the Appellant signed a PPA on 03.07.2009 with UPCL for sale of entire energy generated by the Project to UPCL. A bare perusal of the various clauses enshrined under the said PPA, It is clear that the entire power generated from the Project was to be sold to UPCL and a previous understanding between the Appellant and PTCUL came to an end by way of the PPA between the Appellant and UPCL dated 03.07.2009. Further, in case of any problem relating to the wheeling the power on UPCL's network, the Appellant was entitled to apply for connectivity and execute a

Connection Agreement for utilizing PTCUL's network for evacuation of its power in line with the provisions of the Uttarakhand Electricity Regulatory Commission (Intra-State Open Access) Regulations, 2010. In view of the settled arrangement between the Appellant and UPCL, the PTCUL sent a notice dated 25.04.2011 to the Appellant and intimated that the arrangement of power evacuation of the generation through 220 KV Ghansali-Chamba line would be withdrawn from 15.05.2011 as the 220 KV line was to be charged at 220 KV Voltage level. Thereafter, the Appellant vide its letter dated 30.4.2011 informed PTCUL that they had executed an agreement with UPCL for supply of entire power from the project and the existing PPA with UPCL would become the Long Term PPA. Accordingly, the project was disconnected on 03.11.2011 from the 220 KV line charged at 33 KV.

8.13 Learned counsel reiterated that in view of the above, the legal issues that arise in the instant case for the determination of any liability qua PTCUL are, (a) The claims of the Petitioner before February, 2012 are barred by limitation; (b) There is no existing contractual agreement between the Appellant and PTCUL; (c) There can be no liability of PTCUL to pay for any charges on account of deemed generation in terms of the UERC's regulations; (d) Without prejudice, in order to claim damages on account of any losses, the said losses have to be proved; and (e) The provision under a specific legislation shall gain precedence over any other general provision under any other legislation.

8.14 Learned counsel for the Respondent/PTCUL further submitted that the Appellant's claim is clearly barred by limitation as it is trying to

agitate a case of action in which the limitation was over much in advance and no binding Contract rules between the Appellant and PTCUL, or in any event of their being any contract, the same stood terminated by virtue of the signing of the PPA between the Appellant and UPCL. To fortify his submissions, learned counsel placed reliance on following judgments:-

- ***Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd.*, (1996) 10 SCC 405**

  The Hon'ble Supreme Court of India has held as follows:
  "*7.*
  ….
  The Letter of Intent merely expressed an intention to enter into a contract. If the conditions stipulated in the Letter of Intent were not fulfilled by Respondent 1, and if the conduct of Respondent 1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not."

- ***Speech and Software Technologies (India) (P) Ltd. v. Neos Interactive Ltd.*, (2009) 1 SCC 475**

  The Hon'ble Supreme Court of India has held as follows:

  > "***22.*** *The said letter of intent on a bare reading is nothing but an agreement to enter into another agreement because it is provided in the said letter that "both parties agree to have set a deadline to sign this agreement by 15-9-2006". It is well-settled legal position that an agreement to enter into an agreement is not enforceable nor does it confer any right upon the parties. The agreement in terms of the said letter of intent was to be signed on or before 15-9-2006.*"

It is, thus a settled principal of law that even any action in the interim was initiated on the basis of a MOU, the same cannot constitute a binding legal relationship. Further, the Appellant is not liable to recover any charges on account of deemed generation

from PTCUL in terms of the UERC Regulations. While looking at the impugned order, it is crystal clear that as far as relief sought by the Appellant is concerned, the Appellant has already been allowed to claim the same from UPCL. Accordingly, as provided by the State Commission, under the Regulations and also observed in the impugned order, the compensation for loss of generation could be claimed against UPCL to whom all the power is being sold by the Appellant and the transmission system for evacuation of such power is also being provided by UPCL in terms of the PPA. As such, it is not open to the Appellant to claim any compensation for deemed generation from PTCUL. Admittedly, there is no evidence of actual loss being furthered by the Appellant as its claim is based on only hypothetical calculation. In view of these facts, the instant appeal ought to be dismissed with costs.

OUR FINDINGS

8.15 We have carefully considered the rival submissions of the learned counsel for the Appellants and the learned counsel for the Respondents and also taken note of the judgments relied upon by the parties and other relevant material placed before us during the proceedings. The main question in the Appeal has arisen due to loss of generation on account of non–availability of reliable transmission system for evacuation of generated power from the Hydro project of the Appellant. It is not in dispute that the Appellant commissioned its Bhilanagana Hydro Project (22.5 MW) on 16.07.2009 and since its inception, it has signed a number of MOU/agreement with the transmission company/PTCUL which was responsible for the construction of 220/33 kv Ghansali sub-station.

It is also not in dispute that the interconnection facilities at 33 kv was to be constructed/provided by the Appellant to connect with the 220 kv sub-station at Ghansali. Admittedly, in first instance, the Appellant desired open access through PTCUL transmission system so as to sell its power to multiple beneficiaries in and outside Uttarakhand. Further, later on the Appellant entered into an agreement with UPCL on 03.07.2009 to sell its entire power from the project to UPCL and to avail the 33 kv transmission network of UPCL.

8.16 The Appellant in lieu of its energy loss due to unreliable transmission system has sought for compensation from the Respondents who are vested with responsibility of constructing and providing safe and reliable evacuation system. It is the contention of PTCUL that as the Appellant entered into an agreement with UPCL for sale of its entire power and using the 33 kv transmission system of UPCL, the responsibility of PTCUL stands to become obsolete and non-binding. Hence, any compensation due to any factor needs to be claimed from UPCL under the relevant regulations of the State Commission which has specific provision for granting relief in such cases in terms of deemed generation etc.. While going through the MOU dated 12.06.2007 & PWA dated 30.09.2005, it makes clear that the Appellant and PTCUL were required to sign a PWTA which in fact could never be done. The relevant clause of the said MOUR reads thus:

> "*The parties agree to enter into a PWTA detailing the terms and conditions for evacuation of Power from the project. It is agreed that the parties shall sign a PWTA after confirmation of their Open Access Plan and identification of Beneficiary from the Company.....*"

This non-compliance of provisions of MOU dated 12.06.2007 for execution of PWTA was on account of various reasons, the first being the Appellant dropped the idea of open access to sell power outside the state and second, the entire power was agreed by the Appellant to sell to UPCL through a PPA dated 03.07.2009 by using the transmission system of UPCL. We find force in the arguments of learned counsel for PTCUL that in the facts and circumstances of the case and various MOUs / agreements, any loss on account of spillage of water /loss of generation cannot be attributed to PTCUL when the Appellant itself decided to sell all of its power to UPCL and decided to utilise the 33 kv transmission system of UPCL.

8.17 The perusal of the impugned order dated 21.10.2015 also evidences the findings of the State Commission on the similar lines. Besides Regulations, 2012 of the State Commission for the purpose of deemed generation is reproduced as under:-

> "*(5). The Commission in the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 had allowed the provisions of deemed generation for Small Hydro Plants (SHPs) selling power to UPCL(Respondent No.1) in the State. The said Regulations provides the mechanism for calculation of deemed generation and also lays down the circumstances under which deemed generation can be claimed by SHPs in the State. With regard to the Petitioner's claim seeking compensation on account of trippings/breakdowns of existing evacuation lines/system provided by UPCL, the Generator is at liberty to apply to UPCL for claiming deemed generation charges in accordance with the aforesaid provisions of Regulations and only if such claim is disputed by UPCL, the Petitioner may approach the Commission for adjudication under the Act.*"

The Regulations issued by the State Commission are quite elaborate and also covers the instant case of the Appellant claiming the compensation for energy loss etc.. Accordingly, we

opine that the Appellant would need to work out the actual energy loss on account of frequent breakdown or inadequacy of the transmission system and present the same before the State Commission for prudent check for its allowance. Any claim made on general statement or hypothetical statement cannot sustain under law for any compensation.

8.18 In view of the above, we are of the opinion that the matter relating to claim of compensation on account of alleged energy loss etc. is required to be looked into by the State Commission afresh for which the appellant would assist the State Commission with all details and documents as required.

ORDER

For the foregoing reasons stated supra, we are of the considered view that the instant Appeal being Appeal No. 18 of 2016 has some merits and accordingly partly allowed.

The Impugned order dated 21.10.2015 passed by Uttarakhand Electricity Regulatory Commission in Petition No. 08 of 2015 is hereby set aside to the extent challenged in the appeal and our findings in Para 8.13 to 8.16.

The matter stands remitted back to the State Commission with a direction that the matter related to compensation on account of alleged energy loss may be examined afresh in accordance with law and pass the appropriate order as expeditiously as possible but not later than three months from the date of receipt of a copy of this judgment/order.

In view of the disposal of the Appeal, the relief sought in the IA No. 37 of 2016 does not survive for consideration and accordingly stands disposed off.

No order as to costs.

Pronounced in the Open Court on this **2nd day of March, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Pr