IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 119 OF 2020
APPEAL NO. 125 OF 2020
APPEAL NO. 132 OF 2020
APPEAL NO. 193 OF 2020
APPEAL NO. 194 OF 2020
APPEAL NO. 227 OF 2020
APPEAL NO. 226 OF 2021
APPEAL NO. 227 OF 2021
AND
APPEAL NO. 269 OF 2022

Dated: 18th August 2022

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

APPEAL NO. 119 OF 2020

In the matter of:

BOTHE WINDFARM DEVELOPMENT PVT. LTD.
Through its Authorized Representative
Registered & Corporate Office at:-
C/o Continuum Wind Energy,
102, "El Tara", Orchard Avenue,
Hiranandani Gardens, Powai,
Mumbai – 400 076,
Maharashtra … **Appellant(s)**

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.**
Through Chief Engineer (Renewable Energy)
Prakashgad, Plot No. G-9
AnantKanekarMarg,
Bandra (East)
Mumbai-700051

3. MAHARASHTRA STATE LOAD DESPATCH CENTRE
Through its Chief Engineer
Kalwa, Thane-Belapur Road, P.O. Airoli,
Navi Mumbai 400708
Maharashtra

4. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Nodal Officer
MHADA Commercial Centre,
II Floor, Opposite Tridal Nagar,
Pune 411006
Maharashtra

5. GOVERNMENT OF MAHARASHTRA,
Industry, Energy and Labour Department
Through its Principal Secretary (Energy)
Madam Kama Road,
Hutatma Rajguru Chowk, Mantralaya,
Mumbai – 400 032 **… Respondents**

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Tushar Nagar
Mr. Samikrith Rao

Counsel for the Respondent (s) : Ms. Pratiti Rungta for R-1

Mr. Ravi Prakash
Mr. Rahul Sinha
Ms. Sheel Sood for R-2

Mr. Sudhanshu S. Choudhari
Mr. Mahesh P. Shinde for R-3

APPEAL NO. 125 OF 2020

In the matter of:

KHANDKE WIND ENERGY PRIVATE LIMITED
Through its Authorized Representative
1st Floor, IL&FS Financial Centre,
C-22, G-Block, BandraKurla Complex,
Bandra (East)
Mumbai – 400 051
Maharashtra **… Appellant(s)**

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
Through Chief Engineer (Renewable Energy)
Prakashgad, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai-700051

3. MAHARASHTRA STATE LOAD DESPATCH CENTRE
Through its Chief Engineer
Kalwa, Thane-Belapur Road, P.O. Airoli,
Navi Mumbai 400708
Maharashtra

4. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Nodal Officer
2nd Floor, MHADA Commercial Complex,
Opposite Tridal Nagar, Yerwada
Pune 411006
Maharashtra **… Respondents**

Counsel for the Appellant (s)	:	Mr. Sanjay Sen, Sr. Adv. Mr. Tushar Nagar Mr. Samikrith Rao
Counsel for the Respondent (s)	:	Ms. Pratiti Rungta for R-1
		Mr. Ravi Prakash Mr. Rahul Sinha Ms. Sheel Sood for R-2
		Mr. Sudhanshu S. Choudhari Mr. Mahesh P. Shindefor R-3

APPEAL NO. 132 OF 2020

In the matter of:

LALPUR WIND ENERGY PRIVATE LIMITED
Through its Authorized Representative
II&FS Financial Centre,C-22, G-Block,
Bandra Kurla Complex, Bandra (East)
Mumbai 400051 **… Appellant(s)**

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
Through its Chief Engineer (Renewable Energy)
Prakashgad, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai-700051

3. MAHARASHTRA STATE LOAD DESPATCH CENTRE
Through its Chief Engineer
Kalwa, Thane-Belapur Road, P.O. Airoli,
Navi Mumbai 400708
Maharashtra

4. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Nodal Officer
2nd Floor, MHADA Commercial Complex,
Opposite Tridal Nagar, Yerwada
Pune 411006
Maharashtra **… Respondents**

Counsel for the Appellant (s)	:	Mr. Sanjay Sen, Sr. Adv. Mr. Tushar Nagar Mr. Samikrith Rao
Counsel for the Respondent (s)	:	Ms. Pratiti Rungta for R-1
		Mr. Ravi Prakash Mr. Rahul Sinha Ms. Sheel Sood for R-2
		Mr. Sudhanshu S. Choudhari Mr. Mahesh P. Shindefor R-3

APPEAL NO. 193 OF 2020

In the matter of:

WININDIA VENTURES PVT LTD
Through its Director
282, 4th Phase, Link Road
Jigani Industrial Area
Bangalore South- 560 105 **... Appellant(s)**

VERSUS

1. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
Through Chief Engineer,
5th Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai-700051

2. MAHARASHTRA STATE LOAD DISPATCH CENTRE
Through its Authorized Representative
Thane-Belapur Road, P.O. Airoli,
Navi Mumbai – 400 708

3. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005 **… Respondents**

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Mr. Ashish Singh

Counsel for the Respondent (s) : Mr. Ravi Prakash
Mr. Rahul Sinha
Ms. Sheel Sood for R-1

Mr. Sudhanshu S. Choudhari
Mr. Mahesh P. Shinde for R-2

Ms. Pratiti Rungta for R-3

APPEAL NO. 194 OF 2020

In the matter of:

WININDIA VENTURES PVT LTD
Through its Director
282, 4th Phase, Link Road
Jigani Industrial Area
Bangalore South- 560 105 **... Appellant(s)**

VERSUS

1. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
Through Chief Engineer,
5th Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-700051

2. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Chairman
MHADA Commercial Centre,
II Floor, Opposite Tridal Nagar,
Pune 411006
Maharashtra

3. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005 **… Respondents**

Counsel for the Appellant (s) : Mr. Buddy A. Ranganadhan
Mr. Ashish Singh

Counsel for the Respondent (s) : Mr. Ravi Prakash
Mr. Rahul Sinha
Ms. Sheel Soodfor R-1

Ms. Pratiti Rungtafor R-3

APPEAL NO. 227 OF 2020

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANYLTD.
Through Chief Engineer (Renewable Energy),
5th Floor, Prakashgad, Plot No. G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-700051 … Appellant(s)

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. WININDIA VENTURES PVT LTD
Through its Director
282, 4th Phase, Link Road
Jigani Industrial Area
Bangalore South- 560 105

3. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Nodal Officer
MHADA Commercial Centre,
II Floor, Opposite Tridal Nagar,
Pune 411006
Maharashtra **... Respondents**

Counsel for the Appellant (s)	:	Mr. Ravi Prakash Mr. Rahul Sinha Ms. Sheel Sood
Counsel for the Respondent (s)	:	Ms. Pratiti Rungta for R-1 Mr. Buddy A. Ranganadhan Mr. Ashish Singh for R-2

APPEAL NO. 226 OF 2021

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANYLTD.
Through its Chief Engineer (Renewable Energy),
5th Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-700051 … Appellant(s)

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. **LALPUR WIND ENERGY PRIVATE LIMITED**
Through : the CEO
II&FS Financial Centre,
C-22, G-Block, Bandra Kurla Complex,
Bandra (East), Powai
Mumbai 400051

3. **MAHARASHTRA STATE LOAD DISPATCH CENTRE**
Through its Chief Engineer
Kalwa, Thane-Belapur Road,
P.O. Airoli,
Navi Mumbai – 400 708

4. **MAHARASHTRA ENERGY DEVELOPMENT AGENCY**
Through its Nodal Officer
2nd Floor, MHADA Commercial Centre,
Opposite Tridal Nagar, Yarwada
Pune 411006
Maharashtra **... Respondents**

Counsel for the Appellant (s)	:	Mr. Ravi Prakash Mr. Rahul Sinha Ms. Sheel Sood
Counsel for the Respondent (s)	:	Ms. Pratiti Rungta for R-1
		Mr. Sanjay Sen, Sr. Adv. Mr. Tushar Nagar Mr. Samikrith Rao for R-2
		Mr. Sudhanshu S. Choudhari Mr. Mahesh P. Shinde for R-3

APPEAL NO. 227 OF 2021

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
Through its Chief Engineer (Renewable Energy)
Prakashgad, Plot No. G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-700051 … Appellant(s)

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. **KHANDKE WIND ENERGY PRIVATE LIMITED**
Through : Its CEO
IL&FS Financial Centre,
C-22, G-Block, Bandra Kurla Complex,
Bandra (East)
Mumbai – 400 051
Maharashtra

3. **MAHARASHTRA ENERGY DEVELOPMENT AGENCY**
Through its Nodal Officer
2nd Floor, MHADA Commercial Centre,
Opposite Tridal Nagar, Yarwada
Pune 411006
Maharashtra

4. MAHARASHTRA STATE LOAD DISPATCH CENTRE
Through its Chief Engineer
Kalwa, Thane-Belapur Road,
P.O. Airoli,
Navi Mumbai – 400 708 **... Respondents**

Counsel for the Appellant (s) : Mr. Ravi Prakash
Mr. Rahul Sinha
Ms. Sheel Sood

Counsel for the Respondent (s) : Ms. Pratiti Rungta for R-1

Mr. Sanjay Sen, Sr. Adv.
Mr. Tushar Nagar
Mr. Samikrith Rao for R-2

Mr. Sudhanshu S. Choudhari
Mr. Mahesh P. Shinde for R-4

APPEAL NO. 269 OF 2022

In the matter of:

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.
5th Floor, Prakashgad, Plot No. G-9
Anant Kanekar Marg,
Bandra (East)
Mumbai-700051 … Appellant(s)

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
World Trade Centre, Centre No. 1
13th Floor, Cuffe Parade
Mumbai- 400005

2. BOTHE WINDFARM DEVELOPMENT PVT. LTD.
Through : the CEO
Registered & Corporate Office at:-
C/o Continuum Wind Energy,
102, "El Tara", Orchard Avenue,
Hiranandani Gardens, Powai,
Mumbai – 400 076,
Maharashtra

3. MAHARASHTRA STATE LOAD DISPATCH CENTRE
Through its Chief Engineer
Kalwa, Thane-Belapur Road, P.O. Airoli,
Navi Mumbai – 400 708

4. MAHARASHTRA ENERGY DEVELOPMENT AGENCY
Through its Nodal Officer
2nd Floor, MHADA Commercial Centre,
Opposite Tridal Nagar, Yarwada
Pune 411006
Maharashtra **... Respondents**

Counsel for the Appellant (s)	:	Mr. Ravi Prakash Mr. Rahul Sinha Ms. Sheel Sood
Counsel for the Respondent (s)	:	Ms. Pratiti Rungta for R-1
		Mr. Sanjay Sen, Sr. Adv. Mr. Tushar Nagar Mr. Samikrith Rao for R-2
		Mr. Sudhanshu S. Choudhari Mr. Mahesh P. Shinde for R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The *Wind Power Project* ("WPP") developers, having set up *Wind Turbine Generators* ("WTGs") at different locations in the State of Maharashtra, statedly in terms of the governmental policy for power generation from non-conventional sources of energy feel aggrieved by denial of direction to the distribution licensee to execute *Energy Purchase Agreements* ("EPAs") as also appropriate compensation for the electricity generated and injected by them from the date(s) of their respective commissioning and connectivity into the distribution network of the said licensee. The challenge is to different orders passed by the *Maharashtra Electricity Regulatory Commission* (hereinafter referred to variously as "MERC" or "the State Commission" or "the Commission") whereby partial relief in the matter of compensation appears to have been accorded, it having

been restricted to the period corresponding to the one wherein the distribution licensee had claimed compliance with its statutory *Renewable Power Purchase Obligations* ("RPOs"). The *Maharashtra State Electricity Distribution Company Limited* (hereinafter referred to as "MSEDCL"), the distribution licensee in question, is also in appeal questioning the correctness and propriety of the relief to the extent thus granted by the orders under challenge.

2. We may introduce the *dramatis personae* and the background facts at the outset.

3. *Bothe Windfarm Development Private Limited* (hereinafter referred to as *"Bothe"*), the appellant in the first captioned appeal (no. 119 of 2020), is a company duly incorporated, having its registered office in Mumbai. It had concededly set up several WTGs of the total capacity of 199.97 MW at different locations. Out of them, WTGs with total capacity of 101 MW were commissioned in 2014 and it had entered into EPAs in such respect with MSEDCL during the period March-August, 2014. It established certain other WTGs with additional total capacity of 98.7 MW from April 2014 to December 2014 and executed EPAs for 92.4 MW in such respect during March-September, 2017. The three of its WTGs with installed capacity of 6.3 MW (2.1 MW each) located at *(i) SP 27 @ Gat No.5 of village Khandyachiwadi; (ii) SP 25 @ Gat No.61 of village Garudachiwadi and (iii) SP 21 @ Gat No.31*

of village Uglyachiwadi were commissioned in December, 2014 (i.e. on 26.12.2014, 30.12.2014 & 30.12.2014 respectively). The grievances in the present proceedings relate to non-execution of EPA in their respect.

4. *Bothe* had approached MERC, by Case no. 28 of 2020, seeking directions, *inter alia,* for execution of EPA and for payment of tariff in sum of Rs.4,13,53,37,333/-, inclusive of interest/late *payment surcharge* ("LPS"), as compensation towards power supplied from the three WTGs during December, 2014 till 23.01.2020 and for payment of tariff at Rs.5.70/kWh for the power supplied for the period subsequent thereto along with interest/LPS. The Commission held, by its Order dated 01.07.2020, that MSEDCL cannot be compelled to sign the EPA and the appellant (*Bothe*) is not entitled for compensation for energy injected since April, 2017 in absence of valid EPA. MSEDCL, however, was directed to compensate *Bothe* for the energy injected from three WTGs during Financial Years (FYs) 2014-15 to 2016-17, at *Average Power Purchase Cost* ("APPC"), excluding renewable energy plus floor price of non-solar *Renewable Energy Certificate* (*"REC"*) as applicable during the period for the reason that the same have been considered for fulfillment of non-solar RPO targets. The Commission declined to grant carrying cost.

5. The appeal (no. 119 of 2020) of *Bothe* denying the reliefs to the extent mentioned above is opposed by MSEDCL alongside pressing its cross-

appeal (no. 269 of 2022) challenging the direction for compensation as above.

6. *WinIndia Ventures Pvt. Ltd*. (hereinafter referred to as "*WinIndia*") is similarly placed company having its registered office in Bangalore. It had set up a WTG with capacity of 1.5 MW in district *Sangli* (Maharashtra) which was commissioned on 23.12.2014. Feeling aggrieved, *inter alia,* by refusal to execute EPA on the part of MSEDCL, *WinIndia* had approached MERC by Case no. 24 of 2020 seeking various reliefs including, amongst others, a direction to MSEDCL to enter into the EPA with it w.e.f. 23.12.2014 and for compensation for the power injected during the period 23.12.2014 to December, 2019 in the sum of Rs.13,64,78,327/- (inclusive of interest). The said petition was decided by MERC by Order dated 03.07.2020 adopting the view taken in the case of *Bothe* (*supra*), declining the direction to MSEDCL to sign EPA though granting compensation to *WinIndia* for the energy injected during FY 2014-15 to FY 2016-17 for similar reasons, even while declining carrying cost.

7. During the period the Case no. 24 of 2020, decided by aforesaid Order dated 03.07.2020, was pending, MSEDCL disconnected (on 28.05.2020) the supply injected by *WinIndia*. This led to *WinIndia* filing another Case (no. 101 of 2020) praying, *inter alia,* for a declaration that the disconnection was illegal and bad in law, and for direction to MSEDCL to compensate/restitute

WinIndia from the date of disconnection till reconnection towards unwarranted loss of generation. The Commission, by its Order dated 07.07.2020, declined to grant any relief on the said petition (Case no. 101 of 2020).

8. The Order dated 03.07.2020 is challenged by *WinIndia* by the fifth captioned appeal (no. 194 of 2020). Similarly, the Order dated 07.07.2020 is challenged by *WinIndia* in the fourth captioned appeal (no. 193 of 2020). MSEDCL, by its cross-appeal (no. 227 of 2020), assails the relief to the extent granted by Order dated 03.07.2020.

9. *Khandke Wind Energy Private Limited* (hereinafter referred to as "*Khandke*") is another similarly placed company having its registered office in Mumbai. It has established two WTGs with capacity of 0.8 MW each at two different locations i.e. *(i) 15 @ Gut No.735, Satara and (ii) N15 @ Gut No. N16, Satara*, the said WTGs having been commissioned on 25.11.2014 and 02.02.2015 respectively. A petition (case no. 66 of 2020) with identical background as above, for similar reliefs, was presented by it before MERC which resulted in Order dated 04.07.2020. The MERC has followed the view taken in the cases of *Bothe* and *WinIndia* (*supra*) and declined a direction, as sought, to MSEDCL to sign the EPA though directing the licensee to compensate for the energy injected from the two WTGs aggregating 1.6 MW during FY 2014-15 to FY 2016-17 on similar lines and for identical reason as

in the case of *Bothe* and *WinIndia*, but without carrying cost, rejecting the claim for compensation for remainder. The developer (*Khandke*) has challenged the said decision by appeal (no. 125 of 2020), appeal no. 227 of 2021 being the cross-appeal of MSEDCL questioning the propriety of relief as granted.

10. *Lalpur Wind Energy Private Limited* (hereinafter referred to as "*Lalpur*") is the last WPP developer before us, it being a company having its registered office in Mumbai. It had set up seven WTGs, each having capacity of 0.8 MW, at different locations in the State of Maharashtra described as i.e. *(i) A11 @ Gut No. 26, Ahmednagar; (ii) A12 @ Gut No. 30, Ahmednagar; (iii) A26 @ Gut No. 186, Ahmednagar; (iv) A27 @ Gut No. 185, Ahmednagar; (v) N22 @ 159/1, Ahmednagar; (vi) N27 @ 118, Ahmednagar and (vii) N33 @ 445/B, Ahmednagar.* All the seven WTGs were commissioned on 05.11.2014. As in the case of other WPPs, MSEDCL had denied execution of EPA. *Lalpur* had approached MERC by Case no. 60 of 2020 for requisite reliefs. Its petition has received similar treatment as in the case of *Bothe, WinIndia* and *Khandke*. By Order dated 04.07.2020, MERC held that MSEDCL cannot be compelled to sign the EPA. Direction, however, has been given for compensation for the energy injected from the seven WTGs aggregating 5.6 MW during FY 2014-15 to FY 2016-17 for similar reasons, and on identical terms, as in the case of others, carrying cost and compensation for the remainder having been denied. *Lalpur* has brought a

challenge by the third captioned appeal (no. 132 of 2020), MSEDCL having come up with its own cross-appeal no. 226 of 2021 questioning the relief as granted.

11. As mentioned at the outset, it is not in dispute that the WTGs in question were set up by each of the WPPs (Bothe, *WindFarm, Khandke and Lalpur*) pursuant to, and in the wake of, the policy notified by the *Government of Maharashtra* (hereinafter referred to as, "the *State Government*") for power generation from non-conventional sources of energy. A certain role was given in that context, through the guidelines, to *Maharashtra Energy Development Agency* (for short, "*MEDA*"). The said agency, MEDA, has been impleaded as a party respondent in these appeals, *Bothe* having also included in the array the State Government amongst the respondents. In the process involved, there were certain approvals or certification required to be taken from *Maharashtra State Load Despatch Centre* (for short, "*the SLDC*") which is included in the fray in the appeals of the WPPs.

12. The State Government had notified, on 14.10.2008, its policy document described as "*New Policy for Power Generation from Non-Conventional Sources of Energy, 2008*" (hereinafter referred to as "*RE Policy-2008*"), which was partially amended by another notification issued on 03.08.2009. The government resolution mentioned in the said document

dated 14.10.2008, as amended on 03.08.2009, to the extent relevant, reads thus:

> *"**Government Resolution:***
> *1.0 Under the new policy, a target has been fixed to commission 2000 MW of Wind Power Projects, 1000 MW of Cogeneration projects / Electricity Generation projects based on Bagasse, 400 MW of Biomass based Electricity Generation projects, and 100 MW of Small Hydro Power Projects. Following facilities and Benefits will be extended to all these projects. These facilities will also be extended to all the projects established under Urjankur Nidhi. Once the fixed target under this policy is achieved, then the new policy shall be launched.*
>
> *1.1 It shall be binding on Promoters/Developers/Investors to sell 100% Electricity generated through non conventional energy source to Licensee or Client in the State. 100% electricity generated from small hydro project upto 25 MW under Irrigation Department is permitted to sell any licensee or a client.*
>
> *2.0 Under this policy, Government has the rights to approve Infrastructure Clearance letter needed to become eligible for availing all allowable benefits for all types and capacities of renewable energy projects. For this purpose, Promoters / Developers / Investors will have to submit a project proposal to MEDA. MEDA will examine the proposal and then submit it to Government along with its recommendations. Infrastructure Clearance letter will be issued after approval from the Government.*
>
> *2.01 Under this policy, MEDA shall prepare a Master Plan of developing 3500 MW capacity renewable energy projects and submit it for Government's approval. After the Government's approval, the Master Plan will be issued by MEDA independently. Similarly, the detailed methodology for commissioning the renewable energy projects, under this policy, shall be independently formulated by the Government.*
> *…"*
>
> *[Emphasis Supplied]*

13. What stands out from the above is that certain benefits were assured to the developers including an assurance that entire electricity generated (100%) shall be purchased by State Discoms subject, of course, to an undertaking to be given for corresponding obligation to sell, the process requiring planning and approvals by MEDA.

14. The *RE Policy-2008,* as notified, declared certain benefits for Wind Power Projects ("*WPPs*") of 2000 MW capacity and, *inter alia,* stated thus:

> *"3.11 All the facilities under this policy will be applicable to wind power projects installed after commissioning of 750 MW capacity under the wind power policy dated 26 February 2004 up to the declaration of this policy."*

15. It may be mentioned here itself that the target of commissioning 2000 MW of WPPs stipulated in RE Policy-2008 was exhausted during FY 2013-14, as is the finding recorded by MERC by the impugned decisions (*see* para 19.5 of the Order in case of *WinIndia*), the correctness of which conclusion is not under challenge.

16. The RE Policy-2008 was followed by a new policy document, styled as *Comprehensive Policy for Grid-connected Power Project based on New and Renewable (Non-conventional) Energy Sources-2015,* published on 20.07.2015 (hereinafter referred to as "*RE Policy-2015"*). The *Government Resolution,* as set out in RE Policy-2015, to the extent relevant, may be quoted as under:

"1. Overall Target:-

1.1. The policy envisages setting up of grid-connected renewable power projects as per the following capacities.
5000 MW of Wind Power Projects,
1000 MW of Bagasse –based Co-generation Projects,
400 MW of Small Hydro Projects,
300 MW of Biomass-based Power Projects,
200 MW of Industrial Waste-based Power Projects
7500 MW of Solar Power Projects,
Thus a total of 14,400 MW capacity power projects based on new and renewable energy sources are targeted to be installed in the next 5 years.

…
The source-wise policy is as follows:-

2. Wind Power Projects:-

2.1. In view of the potential and use of wind energy and the ongoing wind resource assessment programme, the target of commissioning of wind power projects of 5000 MW is being set. 1500 MW capacity would be developed for meeting the procurement requirement of distribution licencees under the Renewable Purchase Obligation (RPO) regime.

2.2. Considering the favourable scope at the windy sites, the re-powering of existing wind electric generators, with appropriate micro siting and the use of latest and improved technologies, will be allowed.

2.2.1. The repowering of projects will be done as per the guidelines issued by MNRE. Such projects will be considered for registration under this policy.

2.3. Deemed non-agricultural land status is being made applicable in respect of the land procured for wind power projects under this policy.

2.4. The wind power projects under this policy are exempted from obtaining NOC / consent from the Pollution Control Board.

2.5. The policy will applicable from the financial year 2015-16 with immediate effect. The capacity of about 1350 MW commissioned after the expiry of previous policy would be included in the procurement target of 1500 MW. MERC tariff prevailing at the time of commissioning of respective projects will be applicable for signing the PPAs. However, registration with MEDA will be mandatory for these projects.

2.6. Remaining 3500 MW capacity will be developed for captive/group captive use outside the state or for third party sale outside the state or for participating in the the Renewable Energy Certificate (REC) mechanism. The open access permission will be provided as per the regulation of the respective Electricity Regulatory Commission

2.7. The regulations and orders of MERC will be applicable to wind power projects under this policy in the matter of evacuation arrangement and expenditure. The supervision charges for setting up of evacuation arrangement will not be levied.

2.8. The wind power projects established under this policy can be registered as industrial units with the Industries Department, if they so desire.

2.9. The wind power projects established under this policy are required to be registered with Maharashtra Energy Development Agency (MEDA).

2.10. The provisions in respect of repairs to roads, as mentioned in the Government Resolution no. NCE - 2013/C.R.121/Energy-7 dated. 21.08.2013, will be applicable to the wind power projects established under this policy.

…

8.3. Apart from all provisions mentioned above, the orders relating to electricity tariff, energy purchase rate and agreement, banking and wheeling charges, transmission and distribution losses charges, cross subsidy surcharge and all related matters, issued by MERC from time to time will be applicable to the projects set up under this policy.

…"

[Emphasis Supplied]

17. Clearly, the RE Policy-2015 was in continuation of RE Policy-2008. Such projects as had been planned and in the process of being developed under previous policy but could not be accommodated there, possibly for reasons also of the targets having been exhausted, were held out a renewed assurance and by the new policy if they had been commissioned "*after the expiry of previous policy*" under the new Target of 1350 MW set apart for

RPO regime, this clearly implying commitment for procurement by the State Discoms.

18. It may be noted here that the focus of WPPs in appeals before us is on the capacity of 1350 MW, mentioned in para 2.5 quoted above, specified for WTGs *commissioned after expiry of the previous Policy* (i.e. RE Policy-2008), envisaged to be included in the additional target of 1500 MW meant for procurement requirement of the distribution licensee under the RPO regime. Concededly, in terms of RE Policy-2015, unlike under the previous Policy, the WPPs seeking to avail benefit were required to be *registered* with MEDA.

19. Whilst RE Policy-2015 was still in the making, the subject then being governed by the previous policy, MSEDCL had put it in public domain its own document on 03.06.2014 styled as "*New Policy for Wind Power Projects to be commissioned in FY 2014-15 and onwards"*. There have been some adverse comments on the use of the expression *"Policy*" in the said document issued by MSEDCL, it seemingly being the view taken by the State Commission that the distribution licensee could not have so projected it, formulation of policy being the prerogative of the State Government. The learned counsel for MSEDCL submitted that given the purpose of the said document, it will be appropriate that it is treated as a *"Circular".*

20. In the preface of the above said document (hereinafter referred to as, *"the MSEDCL Circular-2014"*), the distribution licensee expressed its resolve to promote development of the wind generation in the State of Maharashtra and stated that on the basis of consultation with major stakeholders and other coordinating authorities, such as MEDA and Transmission Utility, the procedure had been devised for simplifying and expediting various sanctions and permissions required by WTGs/WPPs. In this document, aside from detailed guidelines on the subject of grid connectivity, MSEDCL also prescribed the procedure on the subjects of commissioning of the projects, execution of EPAs and wind power scheduling, as under:

> ***"2) Commissioning of Projects:***
>
> - *The MSEDCL Circle office shall commission the project after observing all necessary formalities such as inspection by Electrical Inspector and issuance of charging permission thereof.*
> - *The MSEDCL Circle Office shall issue Commissioning Certificate after commissioning of the wind power project.*
>
> ***3) Execution of Energy Purchase Agreement (EPA):***
>
> - *MSEDCL shall execute the EPA with wind generators to the tune of capacity of MW to be declared by the GoM and as may be decided by MSEDCL Board considering the fulfilment of Renewable Purchase Obligation target.*
> - *The EPA shall be executed in chronological order on the basis of date of commissioning of WTGs (date of delivery of energy into state grid) i.e. EPA of First Commissioned project will be signed first.*
> - *The Wind Generator shall submit application to the CE, Commercial Office for Execution of long term EPA along with following documents:*
>
> *1. Commissioning Certificate issued by Circle Office.*
> *2. Grid Connectivity Permission*
> *3. Detailed Project Report*

4. Technical Specifications, Power Curve of WEG, Type Test approval, WEG model included in C-WET list.
5. Undertaking for:
WEG is brand new
- *WPP is as per guidelines issued by MNRE / C-WET*
- *WPP location is within 10 km radius of declared wind site*
- *Land of project and land for evacuation arrangement being in legal possession of the developer*
- *Micro-sitting is as per micro-sitting guidelines of MEDA*
- *100% of generated electricity will be sold to MSEDCL only*
- *Land being under 10 Hectors (if applicable)*

6. Affidavit that all submitted documents are true & correct
7. Wind Zone classification certificate issued by MEDA based on coordinates of commissioned WTD (Infrastructure Clearance (I/C) from MEDA is not required for issuing Wind Zone Classification)

All statutory clearances, as may be required & applicable, shall be obtained by the Wind Developer / Generator on his own such as Geology & Mining clearance, NOC from Development Commissioner (Industries), NOC from Forest Department (if applicable), NOC from Local Governing Body.

The Wind developer / generator shall be solely responsible for all consequences, if any dispute that may arise in future regarding the same. MSEDCL shall be indemnified against the same.

4) Wind Power Scheduling:

As per CERC order dated 16.01.2013, Scheduling and forecasting has been made mandatory for new Wind Power Projects (commissioned after May, 2010) of capacity 10 MW & above.

Therefore, it is necessary to form a co-ordination committee of all wind project developers / manufacturers / generators and MSEDCL, MSETCL & MSLDC authorities.

The committee will be responsible for scheduling of wind generation on daily basis for whole state. The schedule will be provided to SE, LM & CE, and MSLDC on daily basis.
…"

[Emphasis Supplied]

21. On 26.09.2014, MSEDCL issue a clarification *vis-à-vis MSEDCL Circular-2014*, the relevant part whereof may be quoted as under:

> *"For the Wind Generators Intending to sell wind energy to MSEDCL*
>
> *1) MSEDCL will proceed with the new wind policy and no MEDA infrastructure clearance will be required for issuing permission for commissioning of the WTG.*
>
> *2) All other statutory clearances, as may be required & applicable, shall be obtained by the Wind Developer/Generator on his own and only an undertaking shall be submitted to MSEDCL to that effect indemnifying MSEDCL.*
>
> *3) The MSEDCL field office will commission the WTG after observing all necessary formalities such as inspection by Electrical Inspector and issuance of charging permission thereof.*
>
> *4) The MSEDCL will issue Commissioning Certificate after commissioning of the WTG.*
>
> *5) For execution of EPA, the wind generator shall submit the commissioning certificate issued by the MSEDCL circle office and all other documents as mentioned in the MSEDCL's new wind policy.*
>
> *However, MSEDCL, at its sole discretion, will take a decision whether to enter into an EPA with the project at that point of time.*
>
> *However, it is to clarify further that the wind generators intending to sell the wind energy to any other entity (other than MSEDCL) and intending to avail the benefits as provided under the GoM Policy 2008 are required to complete all the formalities of GoM GR dated 14.10.2008 & 14.07.2010 including those through MEDA also."*

22. It is clear from conjoint reading of the MSEDCL Circular – 2014 and the clarification issued on 26.09.2014 that MSEDCL was inclined to enter into EPAs, with WPPs provided the latter were inclined to sell entire electricity to the former, the execution of EPA to be in order of commissioning

of the projects, MSEDCL having a proactive role in that event, the RPO targets to be the decisive factor.

23. It is stated that being cognizant that the State Government was in the process of formulating a new comprehensive policy for non-conventional energy sources, besides possibility of Government of India formulating a major policy for development of renewable energy, by its circular issued on 12.02.2015, MSEDCL decided to revisit and review the process and, therefore, instructed the concerned officials that MSEDCL Circular-2014 dated 03.06.2014, and the clarification dated 26.09.2014 issued thereupon, were being kept "*in abeyance*" with immediate effect from 06.02.2015, asking them "*not to take any further action*" at their level in such regard though clarifying that such instructions will be applicable *prospectively* from 06.02.2015.

24. The RE Policy-2015, notified by the State Government on 20.07.2015 was followed up by notification of a Government Resolution laying down source-wise methodology, *Annexure-A* to the notification dated 09.09.2015 thus issued being on the subject relevant to *Wind Power Projects* (hereinafter referred to as, "*the Methodology Order*"), relevant parts whereof may be quoted thus:

> *"This methodology is applicable to the wind power projects included in the composite policy for new and renewable (non-conventional energy sources) power projects dated 20th July*

2015. The policy prescribes a target of 5000 MW in respect of wind power projects.

1. The policy dated 20th July 2015 shall be applicable to all wind energy projects developed at locations declared by the Ministry of New and Renewable Energy / National Institute of Wind Energy (NIWE), Chennai and / or at locations where wind monitoring is done by private developers and data is certified by National Institute of Wind Energy (NIWE).

…

2. This methodology will be applicable to all the wind power projects set up after commissioning of 2000 MW of wind power projects under the earlier Government of Maharashtra policy dated 14th October 2008.

3. The following guidelines will be applicable for issuance of grid connectivity consent / permission to the wind power projects.

3.1 It will be necessary for the project developer to submit application for grid connectivity in the prescribed format to MEDA. The application should include, along with other details, details about the project capacity, project site location, details of nearest MSEDCL/MSETCL sub-station etc.

…

10. A separate methodology will be formulated by MEDA for commissioning of the wind power projects which have obtained infrastructure clearance after commissioning of 2000 MW target under the policy dated 14th October 2008, but which are not yet commissioned. The details of this first stage methodology will be communicated to MSEDCL / MSETCL for appropriate action. Accordingly, the projects which are recommended for commissioning and / or for which commissioning clearance is issued will be commissioned by MSEDCL.

11. The policy declared by Government of Maharashtra on 20th July 2015 lays down that 1500 MW of wind power projects will be commissioned for fulfilment of Renewable Purchase Obligation (RPO). For this purpose, the projects commissioned after the achievement of 2000 MW capacity under the previous policy and the projects commissioned in the first stage as per the point no. 10 above, will be first taken into account. The following methodology will be adopted for getting the wind power projects commissioned under the scope available in respect of the remaining capacity.

…

14. The project developer / project holder should connect their project to the grid with the consent / permission from MSEDCL / MSETCL and commission the project. After commissioning of the project, the commissioning report from the distribution licensee should be submitted to MEDA. This report should contain the unique number given by MEDA and information about feeder to which project is connected.
15. The project developer shall submit a copy of the power purchase agreement / open access approval of MSETCL/MSEDCL to MEDA office soon after it is executed / obtained by them. 15.1 MSEDCL should ensure that registration is being done of projects which are commissioned. Registration should also be ensured by MSEDCL in respect of those projects for which power purchase agreement is executed after the achievement of 2000 MW target under the policy dated 14th October 2008.
…"

[Emphasis Supplied]

25. The Methodology Order came after the subject WTGs had already been commissioned and had been given connectivity and had started generating and injecting electricity into the network of MSEDCL, which had participated and facilitated the whole process. To put it differently, it is clear from the material placed before us, as indeed from submissions of the parties, that the WTGs of WPPs in appeal had achieved commercial operation during FY 2014-15, all but one having been commissioned in November-December, 2014, one ("*Khandke"*) having been commissioned on 02.02.2015. Concededly, each of these WTGs was granted grid connectivity from date of commissioning, after necessary inspections and approvals. Again concededly, each of them started injecting electricity thereby generated into the grid/network of MSEDCL from respective date(s) of commissioning. Indisputably, MSEDCL availed of the electricity thus injected

by these WTGs into its network selling the same, in turn, to its consumers, for consideration. The Methodology Order assured that such WPPs would get priority over projects commissioned later in time in the matters of EPA (*see* para 11).

26. After the State Government had notified the RE Policy-2015 on 20.07.2015, the WPPs in appeal before us were informed by MSEDCL of the requirement of *infrastructural clearance* (IC) by, and registration with, MEDA. For illustration, reference has been made to letter no. Comm/CP/Wind/Notice/WinIndia/31837 dated 21.08.2015 and letter no. Comm/CP/Wind/Notice/WinIndia/10917 dated 18.04.2016, each of Chief Engineer (Commercial) of MSEDCL addressed to *WinIndia* pointing out, *inter alia,* that the State Government had published the RE Policy-2015, followed up by Methodology Order, in terms of which 1500 MW was meant for meeting RPO targets out of 5000 MW additional capacity to be developed in the wind sector, it being necessary for EPA to be executed that such registration certificate from MEDA be secured.

27. Crucially, on 21.12.2016, the State Government by a notification on the subject styled as "*To give permission for Registration of mutually implemented Wind Power Projects by MAHAVITARAN Company after checking technical issues and regularizing"*, with reference, *inter alia,* to RE Policy-2015 published Government Resolution clarifying thus:

> *"2. Under Government Policy dated 14.10.2008, the goal of setting up 2000 M.W. project was decided. Out of which projects of 1350 M.W. capacity were set. The said set up Wind Powers Project were included in this new policy and under policy of 20th July, 2015 it is binding to register the said projects. In these projects, Wind Power Projects of total 147.90 M.W. which are directly set-up by Mahavitaran Company however for which Mahaurja has not given infrastructure facility consent or consent for setting up the project are included. Since the said Wind Power Project of 147.90 M.W. has been set-up directly, the matter for regularizing the said project was under consideration of Government."*

28. The Government Resolution thus published reads as under:

> *"1. Pursuant to this Government Order, Government, is prescribing the procedure for granting approval to the said 147.90 M.W. Wind Power Projects mentioned in list submitted by Mahaurja pursuant to letter dated 30.11.2016 subject condition of complying and fulfilling the criteria mentioned in paragraph 2 herein and Mahaurja should take procedure to regularize the said projects accordingly."*
>
> *[Emphasis Supplied]*

29. It may be mentioned here that WPPs of total 147.90 MW included in the list appended to the above said Government Resolution, described as having been set up directly through MSEDCL, include the WTGs in question. The decision of the Government thus notified required the Committee appointed for purposes of inspection of the said projects to undertake the necessary exercise "*in order to regulate the said 147.90 MW Wind Power Projects*" and, further, that at the end of checking of projects, if the said projects were found to be complying with all the aforesaid norms, the said projects should be *regularized* and be *registered* as per the Government Order and the procedure given in Order dated 09.09.2015

30. Admittedly, after the promulgation of RE Policy-2015, and upon being informed of the requirements, *inter alia,* of registration with MEDA, the WPPs herein took steps for such clearances and registration. We shall come to the chronology of events with regard to such process, primarily of registration with MEDA, which eventually fructified in 2019, admittedly with delay, a little later. For the present, suffice it to note that in absence of registration with MEDA, MSEDCL declined to execute EPAs with these WPPs, though it had participated in the process leading to registrations with MEDA giving necessary recommendations, it having been expressly submitted before the MERC that "*post commissioning of project*" the MSEDCL "*was always hopeful*" that the WPP "*will complete this mandatory process of registration with MEDA and, thereafter, it would be able to sign EPAs*" (*see* para 20.5 of the impugned order in the case of *Bothe*).

31. Since it would become relevant in the context of reliance by MSEDCL on Order dated 06.12.2017 of MERC in Case no. 157 of 2017, which would be referred to a little later, for tracing the chronology of events it may be noted here that the Government of India through Ministry of Power, had notified the guidelines for procurement of *solar power* on long term basis through tariff based competitive bidding (e-reverse auction) on 03.08.2017. This was followed by notification of a resolution of the Government of India published in the Gazette of India on 08.12.2017 described as "*Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid*

Connected Wind Power Projects". The document clarified its applicability as under:

> *"3. APPLICABILITY OF GUIDELINES*
>
> *3.1. These Guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for long-term procurement of electricity through competitive bidding process, by the 'Procurer(s)', from grid-connected Wind Power Projects ('WPP') having, (a) individual size of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-state projects; and (b) individual size of 50 MW and above at one site with minimum bid capacity of 50 MW for inter-state projects."*

32. After the Tariff Policy had been notified by the Government of India on 28.01.2016 but before the issuance of guidelines for tariff based competitive bidding process for WPPs on 08.12.2017, MSEDCL had submitted a proposal before State Government on 09.07.2017 making out a case for adopting the tariff based competitive bidding route for fulfillment of RPOs by the distribution companies (*"Discoms"*) with the objective of reducing power purchase cost referring to the sharp fall noticed in such procurements on basis of competitive bid tariff rates. The State Government, by its response dated 27.07.2017, approved the proposal which concededly would have prospective effect.

33. As mentioned earlier, the MSEDCL relies on Order dated 06.12.2017 of MERC on the file of Case no. 157 of 2017 which was a petition of MSEDCL for approval of long/medium/short term procurement of renewable energy through competitive bidding under Regulation 5 of MERC (Terms and

Conditions for Determination of Renewable Energy Tariff) Regulations, 2015 (hereinafter referred to as "*the RE Regulations-2015)*. The Commission accepted the suggestion given and, *inter alia,* ordered as under:

> *"In line with above observations, the Commission rules that MSEDCL shall procure Wind, Solar & Bagasse based cogeneration RE power on Medium term and Long term basis, at the rate discovered through tariff based Competitive Bidding (e-reverse auction) by following the above said MoP's Long Term Guidelines dated 3 August, 2017 for Solar PV. The Commission rules that MSEDCL shall consider such power procured under Medium term and Long term basis forward fulfillment of its Solar and Non-Solar RPO target for the relevant period. MSEDCL's prayer w.r.t. power procurement from RE sources under Medium term and Long term basis is addressed accordingly."*

34. It is clear from the above observations that the guidelines of the Government of India, then available for solar energy, were adopted *mutatis mutandis* for medium-term or long-term procurements of Co-generation renewable energy from other sources including wind. It may be added that the WPPs in appeal point out that the guidelines dated 03.08.2017 for solar PV were applicable to purchase with minimum capacity of 5 MW.

35. Post the above development, MSEDCL declined to execute any further EPA leading to the disputes being taken by the WPPs in appeal taking the matter for adjudication to MERC with result as noted earlier. The decision in the case of *Bothe* is the first in chronology (rendered on 01.07.2020) and has been followed in the other cases

36. The delay in the process of registration with MEDA was examined by MERC on the basis of the chronology of events, the conclusion being that the WPP was "*equally responsible*" to follow up the matter of registration and further that if there was delay beyond reasonable limits it should have invoked its legal rights at such point of time only, it being improper to shift the blame to MEDA. We may quote the observations recorded by MERC in the case of *Bothe*, which view has been adopted *vis-à-vis* others, the relevant portion reading as under:

> *"19.15 BWDPL has also contended that there was delay in issuance of registration from MEDA. In case registration for these 3 WTGs of 6.3 MW was issued along with registrations of other WTGs in the same project, MSEDCL could have signed EPAs for these projects also. In this regard, the Commission notes that MEDA has issued registrations to around 184 MW capacity of BWDPL's project in phases starting from March 2016 to May 2017 and last registration for 3 WTGs of 6.3 MW capacity in April 2019. As per RE Policy 2015, MEDA has to ensure that all necessary documents have been received and project is complete in all aspect before issuance of registration to any project. MEDA has submitted details of activities undertaken before issuance of registration to these 3 WTGs of 6.3 MW capacity. The Commission is not inclined to go into details of the same as BWDPL was equally responsible to follow-up its registration process and if there was delay beyond reasonable limit it should have invoked its legal rights at that time only. Without taking actions at appropriate time, BWDPL now cannot shift the blame fully on MEDA for delay in registration and consequently non signing of EPA"*

37. The MERC has concluded by the impugned orders that MSEDCL cannot be directed to sign EPAs by reliance on RE Policy – 2015 and MSEDCL Circular–2014. It has rejected the contention of WPPs that an

implied contract/agreement exists between the parties, observing, *inter alia*, as under (*Bothe* has been referred to herein below as BWDPL):

> *"20.4 BWDPL has also cited various affidavits filed by MSEDCL before this Commission during RPO verification process wherein MSEDCL has stated that for meeting its RPO, it is signing EPAs at generic tariff with the project developer who is approaching it. In this regard, the Commission notes that there is nothing wrong in these affidavits as BWDPL itself has accepted that barring 6.3 MW disputed capacity, MSEDCL has signed EPAs for balance capacity of around 193.4 MW as per generic tariff applicable at the time of commissioning of the individual WTGs. The Commission also notes that most of these EPAs have been signed post 2 to 3 years of commissioning of the project. This was because, these projects were yet to be registered with MEDA as per mandatory requirement of RE Policy 2015. Post such registration, MSEDCL based on the prevailing policy of procurement at generic tariff, has signed EPAs with retrospective date i.e. for date of commissioning of the project. Thus, the principle of actions as per the prevailing policy has been uniformly followed by MSEDCL.*
>
> *20.5 Therefore, post commissioning of the project, MSEDCL was always hopeful that BWDPL will complete this mandatory process of registration with MEDA and thereafter it would be able to sign EPAs. Further as stated by the BWDPL itself in this Petition, MSEDCL has insisted for registration of the project before signing of EPAs and hence BWDPL has submitted application for registration with MEDA. Therefore, it is not correct to state that post commissioning of the project, MSEDCL has accepted the power without any conditions. In fact, MSEDCL put condition of registration with MEDA as per RE Policy 2015 before signing of EPA.*
>
> *20.6 BWDPL has also contended that post commissioning of the project, MSEDCL is regularly issuing credit notes certifying energy injected into the grid and hence recognized and accepted energy generated from the project. In this regard, the Commission notes that monthly credit notes issued by MSEDCL are an energy accounting document to demonstrate how much energy is being injected into the Grid. This credit notes are used for financial settlements*

when there is valid EPA or Open Access permission. In the present case, as agreed by BWDPL, when MSEDCL has entered into EPAs with its project with retrospective effect from the date of commissioning of the project, such credit notes are used to settle financial bills for the sale of power in past years. Therefore, in the opinion of the Commission, mere issuance of monthly credit notes does not bind MSEDCL to sign EPA with project.

20.7 Thus, in the opinion of the Commission, MSEDCL has communicated to BWDPL in clear terms before commissioning of the project that MSEDCL does not guarantee purchase of power and post commissioning that EPA can be signed only after registration of project with MEDA. MSEDCL has also acted in a fair and just manner by signing the EPAs for all project capacity of 191.7 MW, excluding 6.3 MW with BWDPL projects, where the Registration process was completed before December, 2017 and the policy was to procure power at generic tariff. Therefore, it cannot be considered that MSEDCL has provided free consent. Therefore, MSEDCL is in implied contract with free consent cannot be accepted."

38. The award of compensation for the electricity generated and injected, though it being restricted to FY 2014-2015 to 2016-2017, has been justified in the case of *Bothe*, the reasoning having been applied by later orders in the case of others, as under:

"21.8 The Commission however would like to also consider the conduct of MSEDCL and BWDPL. It has been accepted by MSEDCL that it has taken the benefits by considering this power for fulfilling its non- Solar RPO targets for three years i.e. from FY 2014-15 to 2016-17 i.e till such time the procurement methodology had not been changed to Competitive Bidding. The Commission thus feels that MSEDCL should compensate BWDPL for that limited period. As there was no valid EPA between the parties, generic tariff applicable at that point of time cannot be made applicable in the present matter. Only other method that can be considered is sale of power at Average Power Purchase

Cost (APPC) to Distribution Licensee which is akin to REC mechanism. Therefore, the Commission directs MSEDCL to compensate BWDPL for the period of FY 2014-15 to 2016-17 at rate of approved APPC (excluding renewable sources) for respective year. Further, as MSEDCL has used this energy for meeting its RPO, green attribute of the same also needs to be paid. Hence, in addition to APPC rate, MSEDCL should also compensate BWDPL for such energy at Floor price of non-solar REC prevailing at that point of time. Accordingly, the Commission direct MSEDCL to pay compensation for energy injected by BWDPL from 3 WTGs aggregating 6.3 MW capacity in the year FY 2014-15 to FY 2016-17 at the rate of APPC (excluding RE) plus floor price of non-solar REC applicable for respective year. However, such compensation would be without any carrying cost as MSEDCL was not responsible for delay in raising bills for FY 2014-15 to FY 2016-17.

21.9 Energy injected by BWDPL form FY 2017-18 onwards, which has not been utilized by MSEDCL for its RPO, needs to be treated as energy injection without a valid EPA and hence need not be compensated."

39. It is the contention of the appellant WPPs that the State Commission has fallen into error by assuming that registration with MEDA was a pre-condition for entering into an EPA for such WPPs as had already been commissioned prior to coming into force of RE Policy – 2015, and methodology order issued in its wake. It is submitted that the WPPs had been set up in terms of the government policy and had been commissioned after necessary approvals from all appropriate agencies, including MSEDCL and MEDA, before the close of FY 2014-2015. Amongst the formalities completed by the WPPs were the undertakings furnished, as required under the governmental policy, and upon insistence of MSEDCL, that the entire power generated (100%) would be sold to MSEDCL only. It is pointed out

that grid connectivity having been granted by MSEDCL, the power generated by the WTGs was started to be injected into the network of MSEDCL with its tacit consent, and availed of by MSEDCL for meeting its RPO targets. It is the argument of the appellant WPPs that the RE Policy – 2015 had created additional capacity target of 1350 MW in which these already commissioned projects deserve to be included, as was the decision of the State Government notified on 21.12.2016, the registration with MEDA being only a formality. It is their submission that delay in the registration process before MEDA was for reasons beyond their control, the stage having been set for execution of the EPA during 2014-2015 itself. The submission is that the denial of execution of EPA, in these facts and circumstances, is unfair and unjust, an implied contract having come into being attracting the provision contained in section 70 of the Contract Act. On the same reasoning, it is argued that the distribution licensee – MSEDCL is bound to pay the generic tariff determined by the State Commission, as was the assurance held out under the earlier documents, the resistance on the part of MSEDCL being unconscionable, particularly when it had derived monetary gains by sale of the power injected since the date of respective CODs, having even claimed benefit of compliance with RPO targets on such basis. The appellant WPPs submit that though the policy rested a *right of refusal* with MSEDCL, such right was never exercised, inclination to execute EPA instead having been all along expressed during submissions before the State Commission.

40. *Per contra*, MSEDCL contests the appeals of WPPs pressing its grievance about the direction by the impugned decisions to compensate for the period of FY 2014-2015 to 2016-2017 arguing that in absence of EPAs there is no obligation to pay on its part.

41. As mentioned earlier, it is not in dispute that, upon insistence of MSEDCL, in the wake of mandatory requirement under RE Policy-2015, the WPPs herein had applied for MEDA registration sometime in (January/February) 2016, such registrations having been granted in 2019. During the hearing on the petitions of these WPPs, MERC had gathered facts in such regard taking note, *inter alia,* of chronology of events that occurred post-submission of the applications till the stage of grant of registration by MEDA. The said chronology has been noted in the impugned orders and it is on that basis it has been observed by the Commission that the WPPs are "*equally responsible*" for the delays. The scrutiny of the reasons in such delay in registration with MEDA is essential in as much as it was a condition added to the required compliances to be made for execution of EPA after WPPs were ready post-commissioning of WTGs, having missed the bus because the competitive bidding guidelines had supervened in December, 2017, it not being permissible thereafter, according to MSEDCL, for EPA to be executed under Section 62 of Electricity Act, 2003 in terms of the regime prevailing anterior thereto.

42. From the impugned order in case of *Bothe*, we note that the applications for WTGs were submitted on 06.01.2016 and 08.01.2016. The Micro-siting inspections were carried out on 25.02.2016 and 02.02.2017. Thereafter, some explanations were called for and the scrutiny committee eventually recommended registration on 23.06.2017. Subsequently, under the directions of State Government, fresh inspections were carried out on 13.07.2018. The scrutiny committee again considered the case on 20.08.2018 and re-recommended the registration, the same receiving approval from the State Government in April, 2019, the registration occurring on 20.04.2019.

43. The impugned order in the case of *WinIndia* reveals that the application for registration of WTG was submitted on 20.01.2016 followed by the requisite documents being presented on 05.01.2017 resulting in Micro-siting inspection on 14.02.2017. The Screening Committee considered the matter on 05.05.2017 and 18.09.2017 but the matter was held up due to some representations from *Village Panchayat.* Eventually, the WPP secured confirmation from *Zilla Parishad* and local *Panchayat* about safe distance from road on 18.12.2018, the Screening Committee recommending the registration on 27.12.2018 which fructified in a formal registration by MEDA issued on 10.05.2019, post the approval by State Government in April-May, 2019.

44. The chronology of events concerning MEDA registration is almost parallel in the case of *Khandke* and *Lalpur.* For each of them, the applications for registration submitted on 26.02.2016 resulted in grant of registration on 25.11.2019. In between, Micro-siting inspections occurred in the case of *Khandke* in April-May, 2017, as also August, 2018, and in the case of *Lalpur* in February, 2017 & July, 2018. The Screening Committee having recommended the matter twice on 23.06.2017 and 20.08.2018, the final approval from the State Government came on 19.08.2019, after submission of the files on 07.09.2018.

45. In the above facts and circumstances, it seems unfair to us for the project developers to be accused of being "*equally responsible"* for delay MEDA Registration. It appears that the matter in each case got embroiled in bureaucratic, red-tape bound rigmarole, the agencies at each level having taken their respective leisurely time in decision-making.

46. We are unable to subscribe to the view expressed by MERC that the delay beyond reasonable limit should have been challenged at the time it was being caused. In the given process, the WPPs were virtually at the receiving end. They had already given undertaking, in terms of the government policy, to commit the entire capacity of their WTGs for supply to MSEDCL. They could not have anticipated at that point of time that competitive bidding guidelines would supervene or such new policy would

be used as the basis to deny to each of them the formal contracts with retrospective effect. They were, in fact, not in a position to take up cudgels with the agencies involved in scrutiny of the applications for registration. The default on their part to bring a challenge to the delay cannot be used as a reason to justify inaction and consequences flowing there-from. It is inherent in the observations of the Commission that it was conscious that the delay was *beyond reasonable limits*. In the case of such inordinate unexplained delay, the parties resultantly suffering cannot be asked to partake the blame or suffer unduly.

47. During the course of hearing on 18.07.2022, it was conceded to be an admitted position by all parties that the target for wind power energy set by the RE Policy-2008 of the State Government has been exhausted, as is the finding returned by the Commission which is not under challenge. The claim of the WPPs by their appeals before us is primarily under RE Policy – 2015 wherein additional capacity was added to the targets, 1350 MW having been specified under RPO obligations for projects which had been commissioned *after expiry of 2008 Policy*. During his submissions, the learned counsel representing MSEDCL took the position that no EPA was executed by MSEDCL after the last EPA had been executed under RE Policy – 2008 on 30.05.2013 till the RE Policy – 2015 was promulgated on 22.07.2015. He also submitted that thereafter EPAs were signed only under the tariff based competitive bidding guidelines which were notified by the Government of

India on 08.12.2017. The WPPs, in appeal, however, pointed out from the impugned order in the case of *Bothe* that the Commission has found (in para 16 of the impugned order) that EPAs of 101 MW capacity were signed during March, 2014 to August, 2014.

48. At the hearing on 18.07.2022, the learned counsel for MSEDCL handed across the bar a list of 1256 Wind EPAs which were executed by MSEDCL, under the RE Policy – 2008, of the total capacity of 1505 MW. It was felt that a similar tabulation of requisite information, also bringing out the date(s) of commissioning, the date(s) on which the application for MEDA registration would have been moved, the date(s) of MEDA registration followed by execution of EPAs entered into by MSEDCL, post expiry of RE Policy – 2008 would also require to be looked into. The learned counsel for MSEDCL agreed to provide such information and we directed discovery of requisite facts accordingly, by suitable directions given on 18.07.2022.

49. On the next date of hearing (19.07.2022), the learned counsel for MSEDCL presented across the bar a tentative tabulation of the EPAs executed under *RE Policy-2015*, the said list including 324 such contracts of the total capacity calculated as 1467.7 MW. It was noticed that the tabulation did not reflect the relevant information *vis-à-vis* application(s) and date(s) of registration with MEDA of such projects.

50. It was also found that in the above-said tabulation some EPAs (e.g. serial nos. 316 to 322 & 324) which were commissioned in March, 2017, and another (serial no.323) having been commissioned in December, 2016 had been also included. It was pointed out by learned counsel for WPPs that aside from the said nine, there were several projects included in the list, the commissioning whereof is subsequent to promulgation of RE Policy-2015, the capacity represented by such inclusions, as per the submissions, being approximately 245 MW. We were of *prima-facie* view that inclusion of such WPPs may amount to inappropriate or misleading presentation of facts. Upon the learned counsel for MSEDCL assuring to properly present requisite statistics so that no confusion prevails, we again directed by Order dated 19.07.2022 for the facts to be discovered on oath by an affidavit to be sworn by Managing Director of MSEDCL by next date (25.07.2022), also requiring the Managing Director of MSEDCL to depute an officer of appropriate rank, conversant with the facts and records, to remain present to answer further questions, if any, on the next date (25.07.2022).

51. Pursuant to the above directions, an affidavit sworn on 22.07.2022 by Mr. Vijay Singhal, Chairman-cum-Managing Director ("CMD") of MSEDCL was submitted. Along with the said affidavit, two charts were filed, they being described as *Annexure-A/1* and *Annexure-A/2*, the former giving details of EPAs that had been executed pursuant to RE Policy-2008 in respect of WGTs commissioned till 30.05.2013 with total capacity of 1505 MW and the

latter giving details of EPAs executed in terms of RE Policy-2015 also disclosing MEDA applications/registration/clearance dates. The second chart i.e. *Annexure-A/2* contains some typographical/clerical errors *vis-à-vis* ten EPAs, which corrections were submitted by another chart (*Annexure-A/3*) presented through additional affidavit of the CMD sworn on 25.07.2022. The chart *Annexure-A/2* relating to EPAs statedly under RE Policy-2015 was read at the hearing, and has been considered, as corrected by chart *Annexure-A/3*.

52. Upon perusal of the facts, as discovered through the above affidavits submitted pursuant to directions, it was noticed that the details have been presented, generally speaking, in chronology of the execution of 324 EPAs statedly governed by RE Policy-2015, there being lack of clarity concerning chronology of the commissioning date(s) of such projects, as was also relevant in view of the assurance held out to the effect in the MSEDCL Circular 2014 that "*EPA of first commissioned project will be signed first",* as indeed in the RE Policy-2015 (*see* para 11 quoted earlier).

53. Be that as it may, we do note that signing of EPAs statedly covered by RE Policy-2015 include 133 EPAs that were executed during 25.03.2014 and 10.10.2014, signed before the notification of RE Policy-2015 on 20.07.2015. The process of execution of such 133 EPAs statedly was regulated by MSEDCL Circular 2014 issued on 03.06.2014, as further expounded by

clarification issued on 26.09.2014 but kept in abeyance by circular issued on 12.02.2015, though stopped much earlier in October, 2014 itself, for reasons not shared. The EPAs disclosed to be covered by RE Policy-2015 include 191 (serial no. 134 to 324) which were signed during the period 20.03.2017 and 10.08.2017. The learned counsel for MSEDCL was at pains to submit that all these EPAs were executed prior to adoption of the competitive bidding route as per decision of the State Government, it being *arguendo* no more permissible for the WPPs awaiting MEDA registration till then to be accommodated in the target set by RE Policy-2015 under the route of Section 62 of Electricity Act, 2003, the said target (1350 MW) under RPO Obligations even otherwise having been exceeded. As per the oral submissions of MSEDCL, the total capacity for which contracts have been entered into by the said entity under RE Policy-2015 (*Annexure-A/2*) calculates to 1465 MW.

54. To say the least, we find that the facts as presented by MSEDCL are incorrect and misleading, this despite caution administered at the hearing on 19.07.2022. It was pointed out by the learned counsel for WPPs in appeal that the total capacity of 1465 MW shown covered by *Annexure-A/2* submitted with the affidavit includes capacity of 247.55 MW of such WTGs as had been commissioned *after issuance of RE Policy-2015* and consequently, cannot form part of 1350 MW contemplated by Clause 2.5 of such Policy. To specify, we note for record here that inclusion of EPAs of

entities at Sr. Nos. 142 (pg. 31), 175-190 (pg. 33), 191 (pg. 34), 201-210 (pg. 34), 218-231 (pg. 35), 233-237 (pg. 35), 238-240 (pg. 36), 248-253 (pg. 36), 265-267 (pg. 37), 272-278 (pg. 37), 290 (pg. 38), 316 (pg. 39) and 317-324 (pg. 40) of *Annexure-A/2* is not justified in as much as the WTGs thereby covered were commissioned *after* the promulgation of RE Policy-2015 on 20.07.2015, the relevant dates ranging from 30.09.2015 to 31.03.2017. In this view, the target of 1350 MW additionally set in terms of RE Policy-2015 for regularizing the WTGs commissioned after RE Policy-2008, set apart, *inter alia,* for RPO obligations has been exhausted by MSEDCL only to the extent of 1217 MW.

55. There are two more aspects of the discoveries made by the affidavit of the CMD of MSEDCL which need to be highlighted. As mentioned in different context earlier, EPAs under RE Policy-2015 seem to have been executed not in order of commissioning of the project but on the basis of *first come first serve*, the queue generated being controlled essentially by MEDA, the registration with which had been added as a pre-condition mid-stream the process. The handling of the registration process at the end of MEDA, appears (from the statistics and facts that have been presented) to have been virtually a *free-for-all*, unregulated exercise. The chart (*Annexure-A/2)* submitted with the affidavit of the CMD of MSEDCL is revealing. Some project developers were able to secure the registration within a month or so of the submission of the application for such registration (e.g. Sr. nos. 201 to

207). Most of the registration certificates have been issued in standardized formats wherein the date of application is clearly reflected but there are exceptions where the registration certificate would not even disclose the date of application submitted with MEDA (e.g. Sr.nos. 154, 174, 190, 191 and 290), making us wonder about possibility of the same having been entered by ante dating.

56. The process of scrutiny for MEDA registration seems to have been opaque and wholly unguided, seemingly dependent on the discretion as to the order of priority at the hands of the officialdom that would have handled it. Since certain rights or disqualifications statedly flow from such registration, this cannot be accepted. MEDA, despite notice, has chosen not to participate by any submissions before us. From the chronology of events concerning the registration of the projects of WPPs in appeal, we notice that it primarily depended on micro-siting inspections and the propriety of location chosen. Such considerations would have been relevant even for purposes of the projects to come up and be commissioned. Since setting up and commissioning of the projects was duly monitored, and under constant gaze of the MSEDCL, the connectivity given being contingent on the inspection and certificate of Electrical Inspector reporting to the said very entity, we fail to understand as to how MEDA registration process could come in the way of securing rights to the WPPs who had otherwise become eligible for execution of the EPAs under the promise held out through the RE Policy-

2015. It bears repetition to say that the delay in MEDA registration in the present cases were not for reasons attributable to these WPPs but beyond their control. At any rate, the registration granted in 2019 would refer back to the dates of their respective application which in each case here is of January-February 2016 vintage.

57. In the above context, it is advantageous to refer to certain case law. In *Joint Chief Controller of Imports and Exports, Madras v. Aminchand Mutha etc*. AIR 1966 SC 478, Hon'ble Supreme Court had ruled thus:

> **"11.** *The fact that in his letter of approval the Chief Controller usually says that the quota rights admissible to the dissolved partnership should in future be divided between the partners would not necessarily mean that the quotas for the partners were to take effect only after the date of approval. If the division of quota has to be recognised by the Chief Controller on production of evidence required by Instruction 72 and this division has to be in accordance with the agreement between the partners of a dissolved firm, the approval must relate back to the date of agreement, for it is the agreement that is being recognised by the Chief Controller. In such a case the fact that the Chief Controller says that in future the quota would be divided, only means that the original quota of the undissolved firm would from the date of the agreement of dissolution be divided between partners as provided thereunder.*
>
> **12.** *Further we should like to make it clear that quotas should not be confused with licences. Quotas are merely for the purpose of informing the licensing authority that a particular person has been recognised as an established importer for import of certain things. Thereafter it is for the licensing authority to issue a licence to the quota holder in accordance with the licensing policy for the half year with which the licence deals. For example, if in a particular half year there is an order of the Central Government prohibiting the import of certain goods which are within the quota rights,*

the licensing authority would be entitled to refuse the issue of licence for import of such goods whose import has been banned by the Central Government under the Act by notified order. Thus the approval of the Chief Controller under Instruction 71 is a mere recognition of the division made by the partners of a dissolved firm by agreement between themselves and in that view the recognition must clearly relate back to the date of the agreement. Further when the Chief Controller says in his letter that in future the division would be recognised in a certain ratio based on the agreement, it only means that the Chief Controller has approved of the division made by the partiesand such approval then must relate back to the date of the agreement between theparties. We therefore hold that the view taken by the Madras High Court that the approval by the Chief Controller relates back to the date of agreement is correct."

[Emphasis Supplied]

58. In the case of *UP Avas Evam Vikas Parishad & anr. v. Friends Coop. Housing Society Ltd & anr.* 1995 Supp (3) SCC 456, it was held as under:

"7. *It is seen that the approval envisaged under exception (iii) of s.59(1) (a), is to enable the Parishad to proceed further in implementation of the scheme framed by the Board. Until approval is given by the Government, the Board may not effectively implement the scheme. Nevertheless, once the approval is given, all the previous acts done or actions taken in anticipation of the approval gets validated and the publications made under the Act thereby becomes valid."*

[Emphasis Supplied]

59. The above view was reiterated in *Graphite India Ltd & anr v. Durgapur Projects Limited & ors.* (1999) 7 SCC 645.

60. The fact that MEDA registrations secured in 2017 in at least 32 cases (Sr. no. 292 to 324 in *Annexure-A/2*) have resulted in the appellant WPPs

being kept out of the fray, even though the applications of the latter were submitted earlier in 2016, they being ready in 2014-15, renders the denial of EPAs to these WPPs most unfair and inequitable, the entire process being vitiated by the arbitrary approach of MSEDCL and MEDA.

61. Promises were held out by the State Government through its RE Policy-2015, followed by methodology order, and subsequent notification of the government resolution issued on 21.12.2016 to accommodate and *regularize* the WPPs which had been commissioned after the targets of RE Policy-2008 had been exhausted for the purposes of new capacity added by RE Policy-2015, particularly in the own interest of MSEDCL for fulfilling its RPO obligations to the extent of 1350 MW. This gave rise to legitimate expectations for all WPPs then in the process of being established and commissioned.

62. In *M/s Motilal Padampat Sugar Mills,* (1979) 2 SCR 641 the doctrines of *legitimate expectation* and *promissory estoppel* were explained as under:

> *"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the*

law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negative in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it

would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court

> *would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable."*
>
> *[Emphasis Supplied]*

63. Expounding the doctrine further, the Hon'ble Court clarified that it was not necessary to show that the party in question had suffered any detriment, it being sufficient that it had relied upon the promise and representation held out and altered its position relying upon such assurance. It was further held thus:

> "*Of course, it may be pointed out that if the U.P. Sales Tax Act, 1948 did not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute, but since Section 4 of the U.P. Sales Tax Act, 1948 confers power on the Government to grant exemption from sales tax, the Government can legitimately be held bound by its promise to exempt the appellant from payment of sales tax. It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a*

trading or business activity of the Government, so far as the doctrine of promissory estoppel is concerned. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it. We are, therefore, of the view that in the present case the Government was bound to exempt the appellant from payment of sales tax in respect of sales of vanaspati effected by it in the State of Uttar Pradesh for a period of three years from the date of commencement of the production and was not entitled to recover such sales tax from the appellant."

[Emphasis Supplied]

64. In *Manuelsons Hotels Private Limited v. State of Kerala &Ors* (2016) 6 SCC 766, quoting with approval from the above decision in the case of *Motilal Padampat Sugar Mills* (*supra*) and following similar discourse in the judgment in the case of *State of Punjab v. Nestle India Ltd.* (2004) 6 SCC 465, the Supreme Court held thus:

"*19. In fact, we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party…"*

[Emphasis Supplied]

65. From the narrative of the factual background, it is clear that the subject WTGs were set up by the appellant WPPs in terms of RE Policy, the development and commissioning having been monitored by MSEDCL, the

intended beneficiary of the entire generation capacity thereby created. There is no denial as to the fact that the appellant WPPs had established, set-up and commissioned their respective projects, particularly the WTGs which are subject matter of the present dispute, on the promises made by RE Policy – 2008 read with RE Policy – 2015, as indeed assurances held out by MSEDCL Circular 2014. Promises were made and commitments taken including in the form of undertakings furnished by the WPPs, and accepted by MSEDCL, that their entire capacity would be sold to, and purchased by the latter (MSEDCL), as per the tariff regime put in position by MERC, MSEDCL having started taking the supply and accounting it towards RPO obligations issuing, at least in the case of *WinIndia,* even credit notes for such supply. The cases of such WPPs who, by then, had not been covered by formal EPAs were subjected to scrutiny by the State Government which resolved to have the same regularized and so recommended in December, 2016, the requirement of MEDA registration introduced around that time having deferred immediate action in that light. There is no case made out by MSEDCL of suffering any inequity by being held bound by its promise or the relief claimed being detrimental to public interest. The additional targets of RE Policy – 2015, as already found, are yet not exhausted. All the requisite ingredients for the doctrine of promissory estoppel to come into play are thus shown to exist, the argument of MSEDCL to renege on its promises being arbitrary, unfair and unconscionable.

66. The appellant WPPs contend that implied contracts exist between the parties, execution of EPAs being only a formality required to be completed. Reliance is placed on the decisions of the Supreme Court reported as *Haji Mohd. Ishaq v Mohd. Iqbal and Mohd. Ali & Co.,* (1978) 2 SCC 493 and *Bhagwati Prasad Pawan Kumar v Union of India,* (2006) 5 SCC 311.

67. In *Haji Mohd. Ishaq* (*supra*), the Supreme Court quoted (Para 10) with approval the following passage from *Chitty on Contracts, twenty-third Edn., pp. 9-10, para 12:*

> *"Express and implied contracts.—Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all."*
> *…"*
>
> *[Emphasis Supplied]*

68. In *Bhagwati Prasad Pawan Kumar* (*supra*), it was held thus:

> *"19. It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle. Each case must rest on its own facts. The courts must examine the evidence to find out whether in the facts and circumstances of the case the conduct of the "offeree" was such as amounted to an unequivocal acceptance of the offer made. If the facts of the case disclose that there was no reservation in signifying acceptance by conduct, it must follow that the offer has been accepted by conduct. On the other hand, if the evidence discloses that the "offeree" had reservation in accepting the offer, his conduct may not amount to acceptance of the offer in terms of Section 8 of the Contract Act."*
>
> *[Emphasis Supplied]*

69. We agree with the submissions of the WPPs herein that the conduct of the parties leaves no room for doubt that contracts had come into being MSEDCL permitted not only commissioning but also connectivity and has been enjoying the electricity injected into its system without demur, accounting it towards its RPO obligations, indisputably reaping financial gains by receiving corresponding tariff from its consumers.

70. The implied contract is in consonance with the principles enshrined under the Indian Contract Act, 1872. Lack of a written contract would not render the implied agreement between the parties illegal. There is merit in the argument of the appellant WPPs that by its ruling through Order dated

24.11.2003 in Case no. 17(3)3-5 of 2002 on the application of erstwhile Maharashtra State Electricity Board on the subject of "*procurement of wind energy & wheeling for third party sale and/or self-use"*, MERC had rendered formal exercise of approval under Section 86 of Electricity Act in cases covered by the RE Policy unnecessary, the relevant observations being as under:

> *"1.6.1 Energy Purchase Agreement (EPA) & Energy Wheeling Agreement (EWA)*
> *It is not the intention of the Commission to approve the EPA/EWA for each wind project individually. The Commission however has formulated the principles of EPA/EWA, which have been elaborated in the Order. The Commission directs the MSEB and other utilities/licensees to modify Draft EPA/EWA to reflect the tariff provisions and principles of EPA/EWA as approved in the Order before executing the EPA/EWA with developers. The Commission further directs the MSEB and other utilities/licensees to make all EPAs/EWAs public."*

71. Crucially, the above was reiterated by MERC in its Order dated 26.02.2009 in Case no. 89 of 2008 in the matter of petition of another entity (*Reliance Infrastructure Ltd.*) seeking approval of EPA for purchasing the entire energy generated from certain WTGs, the relevant para reading thus:

> *"15. The Commission, in its Order dated December 10, 2008 in Case No. 58 of 2008 has determined the tariff on ad-interim basis at Rs. 2.52 per kWh for the wind energy injected into the Grid by wind energy generators belonging to Group-II category until determination of Final Tariff as may be determined based on further regulatory process to be initiated pursuant to para 44 of the Commission's Order dated October 7, 2008 in Case 89 of 2007. Moreover, the Commission has*

already spelt out the provisions of the Model EPA in its Order dated 24.11.2003 in Case No. 17(3),3,4,5 of 2002, and the Petitioner should enter into EPAs in accordance with the approved Model EPA, since the Commission does not approve individual EPAs entered into by the distribution licensee with wind developers."

72. All the requisite ingredients are in place, they being valid offer, acceptance, express mutual consents, lawful object and consideration. In fact, the implied contracts (*qua* subject WTGs) between these WPPs on one hand and the MSEDCL, on the other, had even been acted upon by the latter (MSEDCL) commencing procurement of supply, showing it in its account as part of the fulfillment of RP obligations. Clearly, the WPPs did not intend the supply of electricity to be gratuitous.

73. On the forgoing facts and in the circumstances, we are not impressed with the reasons cited by MSEDCL for refusal to sign EPAs with the appellant WPPs. The reference to competitive bidding guidelines issued in 2017 is not correct. The contracts had already come into existence and the signing thereof, following the model EPA already approved by MERC, was only a matter of formality. The competitive bidding guidelines could not preclude such contracts to be formalized so as to be given retrospective effect. Such guidelines may have to be followed for future arrangements. The MEDA registrations granted in 2019 would relate back to the respective dates of application for such registration i.e. January-February, 2016. The appellant

WPPs had commissioned the WTGs in 2014-15 and had started injecting power thereby generated from the date(s) of commissioning into the system of MSEDCL. It bears repetition to note that the new targets created by RE Policy – 2015, particularly to the extent set apart for RP obligations, have not been yet exhausted, a finding returned by us on the basis of scrutiny of the facts discovered by CMD of MSEDCL. The claims of appellant WPPs herein, upon being allowed, will not result in the said target being exceeded. The WPPs thus are entitled to the execution of the formal EPAs from the date(s) they fulfilled all the eligibility requirements, i.e. date(s) on which they had applied for such registrations as have been granted later. The denial of a direction for EPAs to be executed thus cannot be upheld.

74. As a sequitur, the appellant WPPs are entitled to the tariff for the electricity generated and supplied from the respective dates on which they are entitled w.e.f. the date(s) from which the EPAs are to become effective. The restriction of compensation only for the period for which MSEDCL has claimed RPO compliances and consequent denial (of compensation) for the remainder is unjust and, therefore, incorrect. For these reasons, the appeals of MSEDCL grudging the restricted grant of compensation cannot be accepted.

75. In view of the above noted conclusions reached by us, it follows that the act by MSEDCL of disconnection of the electricity being injected by

WinIndia on 28.05.2020 was illegal and unconscionable. Therefore, the view taken by MERC through impugned Order dated 07.07.2020 cannot be approved.

76. In the result, the appeals of MSEDCL i.e. Appeal nos. 227 of 2020, 226 of 2021, 227 of 2021 and 269 of 2022 are found devoid of merit and liable to be dismissed. The appeals of *Bothe Windfarm Development Pvt Ltd.* (Appeal no. 119 of 2020), *Khandke Wind Energy Private Limited* (Appeal no. 125 of 2020), *Lalpur Wind Energy Private Limited* (Appeal no. 132 of 2020) and *WinIndia Ventures Pvt. Ltd.* (Appeal nos. 193 and 194 of 2020) deserve to be allowed with following directions:

(a) MSEDCL is directed to execute forthwith EPAs with *Bothe Windfarm Development Pvt Ltd.*, *Khandke Wind Energy Private Limited*, *Lalpur Wind Energy Private Limited* and *WinIndia Ventures Pvt. Ltd*. respecting wind turbine generators which are subject matter of the present cases, such EPAs to be made effective from the respective dates of submission of application for registration with MEDA, reference being made in this regard to the registration certificates issued by MEDA;

(b) MSEDCL will be obliged to pay to the respective WPPs compensation equivalent to the *average power purchase cost* from the date of COD as prevailing at the time of commissioning

of the respective projects and at generic tariff prevalent on the date on which the EPA is to become effective in terms of the above direction for the supply injected by the WPPs, the said supply/procurement being regularized, *post facto* in terms of the EPAs which have been directed to be executed as above, the liability on this account to be discharged by MSEDCL against invoices that shall be raised by the concerned WPPs; and

(c) MSEDCL shall restore the supply of electricity of the appellant WPPs, wherever the same has been disrupted, on the basis of impugned decisions without any delay.

77. We have found the action of MEDA and MSEDCL remiss. We are particularly disturbed over the fact that MSEDCL made an attempt to mislead this Tribunal by misrepresenting the facts. Its endeavor appears to have been to gain wrongfully at the cost of the WPPs which cannot be approved of, it being in the teeth of avowed objectives of the Electricity Act which mandates, *inter alia,* balancing of the interest of the consumers at large and recovery of cost of electricity in a reasonable manner besides encouraging competition, optimum investment as indeed promotion of generation of electricity from renewable sources of energy. Having invited entrepreneurs to make investments under the government policy, encouraging them to set up WTGs, denial of formal contractual arrangement constitutes an attempt to cause wrongful loss which adds the element of colorable exercise of

power. We condemn this approach but refrain from imposing any costs on this account in the hope that such liberties will not be taken in future.

78. We order accordingly.

79. The appeals are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 18TH DAY OF AUGUST, 2022

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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