IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 46 OF 2018 &
IA NOS. 233 OF 2018 & 35 OF 2019

Dated: 15th March 2022

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

In the matter of:

SAI WARDHA POWER GENERATION LTD.
[Previously Sai Wardha Power Limited]
8-2-293/82/A/431/A
Road No. 22, Jubilee Hills
Hyderabad – 500 033 ... Appellant(s)

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
[Through its Secretary]
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400 005

2. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD.**
[Through its Chairman and Managing Director]
5th Floor, Prakashgad
Bandra (East)
Mumbai – 400 051 … Respondents

Counsel for the Appellant (s): Mr. Anand K. Ganesan
Mr. Ashwin Ramanathan
Ms. Swapna Seshadri

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

Mr. Rahul Sinha
Mr. Samir Malik
Ms. Nikita Choukse
Mr. Sahil Sood for R-2

J U D G M E N T

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

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appeal at hand instituted under Section 111 of Electricity Act, 2003, preferred by a generator of electricity seeks to assail the Order dated 01.02.2018 passed by the first respondent *Maharashtra Electricity Regulatory Commission* (hereinafter referred to as 'MERC' or 'State Commission') in Petition no. 206 of 2014 instituted by the second respondent *Maharashtra State Electricity Distribution Company Limited* ('MSEDCL" or "the second respondent") directing the appellant *Sai Wardha Power Generation Limited* ("SWPGL" or "the appellant") to refund the amounts paid by the second respondent to the appellant for electricity injected and supplied by the appellant during the Financial Year (FY) 2012-13 under *Electricity Purchase Agreement* ("EPA") that had been entered into by the said set of parties, it being a tripartite agreement wherein open access consumers of the appellant had also joined.

3. The generating units of the appellant were declared for commercial operation in 2011. On 11.01.2012, it was granted open access for supply to its consumers for the year 2011-12 from its generating units described as *Captive Generation Plant* ("CGP). On 13.06.2012, the respondent MSEDCL, the distribution licensee, issued a Commercial Circular no. 170

providing terms on which it was inclined to procure over injected units of electricity from CGPs.

4. The Electricity Purchase Agreements (EPAs) were executed against the above backdrop on 08.08.2012, *inter-alia,* noting the consent given by MSEDCL to the appellant on grid connectivity and synchronization of their 270 MW CGP, by letters dated 01.04.2011 and 05.04.2011, open access permission given by MSEDCL on 11.01.2012 to the appellant for wheeling of power from their said CGP to its open access consumer, such open access having been extended by subsequent communications for period ending up to 31.03.2013, restricting the wheeling of power under the EPA to certain levels for purposes of the open access consumer, and the request made on 16.01.2012 for sale of power not credited to open access user in the fifteen minutes time block to MSEDCL in terms of the specifications set out in the EPA.

5. Clauses 1.0 and 1.1 of the said EPA are important for the present discussion and may be extracted thus:

> *"**1.0 Various clearances**:*
> *M/s WPCL (Party 1), shall be fully responsible for obtaining and maintaining the validity of any and all licenses and permits, if required, by the law and shall abide by the Law, the Rules, Regulations or any notification or order issued there under by the Central Govt. Or Local Authority or any other Authority including MERC's (Maharashtra Electricity Regulatory Commission) license, for sale of power up to a maximum of 24.62 MW per Month but subject to the mandatory provisions of Electricity Rules (Amendment) 2005.*

1.1 *M/s Mahindra Ugine Steel Company Limited (Party 2) shall comply the CPP Criterion as per Electricity Rule, 2005 i.e. Captive consumption by all captive users shall not be less than 51% of aggregate electricity generated on an annual basis. In case of non-compliance of Electricity Rules – 2005 in respect of captive power plant the project holder will be liable for all consequential actions including but not limited to payment of Cross Subsidy Surcharge (CSS) with retrospective effect."*

6. In terms of Section 2(8) of Electricity Act, "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.

7. The subject of captive generation is governed by the provision contained in Section 9 of Electricity Act, 2003 which reads thus:

"Section 9. (Captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

[Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licencee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.]

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right

to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission."

8. Rule 3 of the Electricity Rules, 2005 framed by the Central Government under Section 176 of the Electricity Act, 2003 lays down the pre-requisites for a power plant to qualify as a CGP, the twin criteria, generally speaking, being inclusive of the requirement of ownership of such power plant to be held by the captive users being not less than 26% and it being incumbent on such captive users to consume "not less than 51% of the aggregate electricity generating in such plant" determined "on an annual basis". It is not in dispute that a generator fulfilling the criteria to be accepted as a CGP is entitled to exemption from payment of Cross Subsidy Surcharge (CSS), in terms of fourth proviso to Section 42(2) of the Electricity Act, 2003.

9. It is well settled that the issue as to whether a generator has met the criteria for qualifying as CGP or not can be determined only at the end of the financial year and not in advance either at the beginning or midterm.

10. The dispute herein relates to Financial Year 2012-13 during which the appellant could not fulfil the criteria mainly of minimum consumption of

electricity as CGP. This was so held by MERC by its Order dated 28.08.2013 in Case no. 117 of 2012, the State Commission having clarified at the same time that CSS invoices could be raised by MSEDCL after the close of the year once the captive status of the generating unit had been determined. The said Order dated 28.08.2013 of MERC was upheld by this Tribunal by judgment dated 17.05.2016 in appeal no. 316 of 2013. It appears, MSEDCL continued to raise CSS billing on monthly basis in the following Financial Year 2013-14 and the matter having reached the State Commission, *inter-alia,* in Case no. 164 of 2013 followed by a Review Petition, by its Orders dated 17.01.2014 and 26.03.2014, it was *inter-alia,* ruled that the issue of over injected units could not be mixed up with the claim of CSS.

11. Against such backdrop as above, the matter relating to levy of CSS was taken before Bombay High Court in Civil Writ Petition no. 1859 of 2014, MSEDCL having been directed to refund to the appellant CSS collected on monthly basis in the subsequent year (FY 2013-14). That part of the dispute between the parties is not subject matter of the present appeal, the appeal of the appellant pressing for captive status statedly being pending before Hon'ble Supreme Court.

12. Meanwhile, MSEDCL had approached the State Commission by Petition no. 206 of 2014 seeking refund of the amount paid to the appellant towards over injected power claiming primarily that since the appellant had

not qualified as CGP during FY 2012-13, there was no liability under the EPA on the part of MSEDCL to pay for such supply. This claim has been upheld by the State Commission through the impugned order.

13. MSEDCL defends the order under challenge contending that the appellant not having met the essential qualification of minimum consumption by captive consumers, its captive consumers having failed to discharge their obligations as a CGP, it makes the appellant liable, *inter-alia,* to refund the amount of payment made for supply. During FY 2012-13, reliance primarily being made on Clause 1.1 of the EPA, as quoted earlier. It is the contention of MSEDCL that it had agreed to purchase under the EPA the over injected power on the premise that the appellant would be meeting the eligibility criteria of the CGP.

14. Reliance is placed by MSEDCL on the following observations of the Commission in the impugned decision:

> *"19. Thus, under the EPA provisions, SWPL was obliged to meet the CGP qualifying criteria stipulated in the Electricity Rules, 2005, and SWPL and its consumers were liable for all consequential actions, including but not limited to the payment of CSS, with retrospective effect, if the concerned SWPL Units were found not to qualify for CGP status. The OA permissions for FY 2012-13 also expressly stated that they are based on a presumption of the CGP status of SWPL, failing which the consequential liabilities would be attracted. It is evident from both a conjoint and an independent reading of these documents that MSEDCL had entered into EPAs with SWPL and its consumers for purchasing over-injected units of electricity entirely on the basis that SWPL would meet the CGP requirements stipulated in Rule 3 (2) of the Electricity Rules, 2005. The purchase of over-injected units by entering into the EPAs was intended only from CGPs, in the background of the Commission's 2004 CGP Order*

and in terms of MSEDCL's Commercial Circular No. 170 dated 13 June, 2012.

20. This is also clear from the fact that, ordinarily, EPAs are bilateral agreements between the Procurer (the Distribution Licensee) and the Seller of power (the Generator); the present EPAs, however, are tripartite arrangements which include the consumers since they hinge on the CGP matrix. The case laws cited by SWPL do not impinge on this position considering the jurisdiction of the Commission under Section 86(1) (f) of the EA, 2003, and the provisions and context of the EPAs. The Commission also notes that, in the normal course, MSEDCL would not have entered into EPAs for purchase of such varying and uncertain quantum of surplus power were it not for the particular context and background set out above."

15. MSEDCL contends that purchasing of over injected units by entering into Power Purchase Agreement (PPA) was a promotional measure exclusively for CGPs and since the appellant did not qualify as a CGP during 2012-13, it cannot claim any right or payment against unscheduled injection of power, the direction for refund by the impugned decision being one of the consequences flowing from Clause 1.1 of EPA, quoted earlier.

16. The appeal at hand does not require any scrutiny of the rival contentions on the claim for exemption from CSS during 2012-13. The decision on appeal against the earlier decision of MERC holding that the appellant had not fulfilled the captive criteria during 2012-13 presenting holding the field, this Tribunal must proceed to examine the claim for refund of charges paid for the power injected by the appellant on the premise that the appellant had not met the requirements of Clause 1.1 of the EPA. On scrutiny of the said Clause 1.1 of the EPA, however, we are unable to

uphold the conclusion of the MERC by the impugned decision that liability to pay for the electricity procured under the EPA also came to an end as a consequence of the appellant not fulfilling the CGP criteria within the meaning of Clause 1.1.

17. There is no express provision in the EPA that the liability to pay for the over injected power availed of by MSEDCL was contingent upon the appellant fulfilling the CGP criteria or that in the case of default on that front the amount received would be liable to be refunded. The only consequence expressly provided in Clause 1.1 is the liability to pay CSS "with retrospective effect". Though the clause does use the expression "the project holder will be liable for all consequential actions", it is difficult to read into this an exemption for the procurer to pay for the electricity supplied by the generator. To put it simply, no case is made out for liability to refund being implied in the contractual terms set out in the EPA.

18. It is admitted fact that MSEDCL had started levying CSS on the supply made by the appellant to its captive users during FY 2012-13 on the premise that the appellant was non-captive generator. Crucially, even while levying CSS, MSEDCL continued making payments for the energy injected by the appellant and consumed by MSEDCL under the EPA. From this it has to be inferred that it was a matter of mutual understanding of the parties to the contract that the electricity procured had to be paid for. And was not free. The relevant period having come to an end, it cannot be said

that EPA had become null and void. Even if it were to be assumed that nonfulfillment of the captive criteria is a fundamental breach of the obligations of the appellant under the EPA, it can at most be said to have the effect of terminating the EPA.

19. The fact remains that excess electricity injected by the appellant was actually consumed by MSEDCL under a contract, monetary benefit having been derived therefrom by the latter during FY 2012-13. Since the electricity procured from the appellant under the EPA must be assumed to have been utilized by MSEDCL for distribution to its consumers against financial gain, directing refund of payment made to the appellant would result in unjust enrichment which cannot be permitted. It is not in dispute that the supply was taken, *albeit* under a promotional scheme for CGPs, at a time when State of Maharashtra was facing severe power shortage. The parties having entered into the EPA had arranged their affairs on its basis. The supply by the appellant was not intended to be gratuitous nor received by MSEDCL on the understanding that it was gratuitous. Having taken benefit of such supply on the terms settled in the EPA, it is not open – rather it being unconscionable - for MSEDCL to seek such supply to be treated as free of cost on a retrospective basis.

20. In this context, it is apposite to refer to Section 70 of the Indian Contract Act which reads thus:

> *"**70. Obligation of person enjoying benefit of non-gratuitous act** – Where a person lawfully does anything for another person,*

or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

21. We agree with the submission of the appellant that even if the contract is to be treated as null and void, the benefit taken and the consideration paid thereunder will have to be governed by the provisions of Section 70 of the Contract Act. At the cost of repetition, we may say that excess electricity injected by the appellant having been consumed under a valid contract by MSEDCL, it having been utilized for monetary gain by supply for consideration to its consumers during FY 2012-13, the liability to compensate to the supplier continues to subsist.

22. However, we cannot ignore the fact that the EPAs were executed as part of the general scheme to promote CGPs though also to the advantage of the MSEDCL because of acute power shortage faced at the time in the State. Since the appellant could not fulfill the conditions for CGP status, it cannot derive monetary benefit at the promotional cost from the discoms/consumers. After all, from the perspective of the appellant the power supplied by it to MSEDCL was available being in excess of the requirements of its own consumers. In these circumstances, we feel it would be fairer if the payment for the power supplied to the MSEDCL during FY 2012-13 under the EPAs is restricted to the average power

purchase cost ("APPC") prevalent during the said period. We order accordingly.

23. For the forgoing reasons, we are unable to uphold the impugned decision. The claim of the respondent MSEDCL for refund in entirety of amount paid for supply during FY 2012-13 under the EPAs cannot be allowed. The MERC is directed to calculate the differential, bearing in mind the observations made, and abiding by the directions, in the preceding para. The amount received by the appellant over and above the APPC, as determined by the MERC, shall be refunded forthwith. The impugned order dated 01.02.2018 passed by MERC in Petition no. 206 of 2014 is modified accordingly. The MERC shall pass the consequential order, after hearing the parties and in accordance with law, within four weeks hereof and ensure due compliance in time-bound manner.

24. The appeal and the pending applications are disposed of in above terms.

PRONOUNCED IN THE VIRTUAL OPEN COURT THROUGH VIDEO CONFERENCING ON THIS 15TH DAY OF MARCH, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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