

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO.313 OF 2018

Dated: 22nd February, 2024

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

1. M/S GADRE MARINE EXPORT

Sandesh Salvi, Authorized Representative,
3298-A, Mirkarwada,
Ratnagiri - 415612

... Appellant No.1

2. GADRE MARINE EXPORT PRIVATE LIMITED

Sandesh Salvi, Authorised Representative,
Plot No.FP-1, MIDC, Mirjole Block,
Ratnagiri - 415639

... Appellant No.2

VERSUS

1. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

Secretary,
13th Floor, Centre 1,
World Trade Centre, Cuffe Parade,
Mumbai - 400005

... Respondent No.1

**2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION
COMPANY LTD.**

The Chief Engineer (Power Purchase)
Plot No.G-9, Anant Kanekar Marg,
Prakashgad, Bandra (East),
Mumbai - 400051

... Respondent No.2

3. GOVERNMENT OF MAHARASHTRA,

The Principal Secretary,
Industry, Energy and Labour Department,

- Government of Maharashtra, 3rd Floor,
Mantralaya, Mumbai - 400032 ... Respondent No.3
4. **MAHARASHTRA ENERGY DEVELOPMENT AGENCY**
The Director General, MEDA,
MHADA Commercial Complex - II Floor,
S.No.191, Opp: Tridal Nagar,
Yerwada, Pune -411006 ... Respondent No.4
5. **PRAYAS (ENERGY GROUP)**
Shantanu Dixit, Group Coordinator,
Unit III A & B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,
Kothrud, Pune - 411038 ... Respondent No.5
6. **MAHARASHTRA CHAMBER OF COMMERCE, INDUSTRY &
AGRICULTURE**
Santosh Mandlecha, President,
Oricon House,
6th floor, 12 K. Dubash Marg,
Fort, Mumbai - 400001 ... Respondent No.6
7. **VIDARBHA INDUSTRIES ASSOCIATION,**
Atul Pande, President,
1st Floor, Udyog Bhavan,
Civil Line,
Nagpur - 440001 ... Respondent No.7
8. **THANE BELAPUR INDUSTRIES ASSOCIATION**
The General Secretary
Rabale Village, Post Ghansoli,
Plot P-14, MIDC,
Navi Mumbai - 400701 ... Respondent No.8
9. **MUMBAI GRAHAK PANCHAYAT**
Shirish Deshpande, Chairman,
Grahak Bhavan, Sant Dynaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (West),
Mumbai - 400056. ... Respondent No.9

10. CHAMBER OF MARATHAWADA INDUSTRIES & AGRICULTURE

Ram Bhogale, President,
Bajaj Bhavan, P-2,
MIDC Industrial Area,
Railway Station Road,
Aurangabad - 431005.

... Respondent No.10

11. SHRI HEMANT ARUNCHANDRA KAPADIA

25, Shantiniketan Colony,
Near Shani Mandir,
Aurangabad - 431001.

... Respondent No.11

Counsel on record for the
Appellant(s)

: Divya Chaturvedi for App. 1 & 2

Counsel on record for the
Respondent(s)

: Udit Gupta
Anup Jain
Vyom Chaturvedi
Prachi Gupta for Res. 2

J U D G M E N T

(PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER)

1. The Appellants have initiated the present Appeal to contest the Order dated 20.07.2018, passed by the Maharashtra Electricity Regulatory Commission in Case No. 193 of 2017 (“**impugned order**”). The said order disallowed the Appellants' plea for transitioning from Independent Power Producer (IPP) status to Captive Power Producer (CPP) subsequent to the execution of the Long-Term Energy Purchase Agreement (EPA) dated 9.11.2011. This transition was sought in accordance with the comprehensive Renewable Electricity

Policy dated 20.07.2015 promulgated by the Government of Maharashtra.

2. The Appellant No. 1, Gadre Marine Export (for short "**GME**") is a proprietary concern and is engaged in the business of packaging of fish and fish products.

3. The Appellant No. 2, Gadre Marine Export Private Limited (hereinafter "GMEPL"), is a corporate entity recognized as the exclusive manufacturer of Crab Sticks within India. The Appellant No.2 operates two plants located in Ratnagiri and Chorwad.

4. The Respondent No. 1 is the Maharashtra Electricity Regulatory Commission (for short "**MERC**"), which is exercising its powers and discharging functions under the provisions of the Electricity Act, 2003 as a sector regulator. The Respondent No. 2 Maharashtra State Electricity Distribution Company Limited (for short "MSEDCL") is the State's deemed Distribution Licensee. The Respondent No. 3 is Government of Maharashtra, Water Resources Department (for short "**WRD**"). The Respondent No. 4 is the State Nodal Agency in renewable energy sector and state designated agency in energy conservation sector and it functions under the aegis of MNRE, Government of India and provides assistance to State and Central Government to promote and develop new and renewable sources of energy and technologies and to promote and implement energy conservation. Respondent Nos. 5 to 11, comprising Institutional Consumer Representatives and Individual Consumer

Representatives, have been included as party Respondents in the instant Appeal.

5. The appellants had set-up their 1.5 MW Small Hydro Projects (“**SHP**”) as Captive Power Plant under Government of Maharashtra (“**GoM**”) 2002 State Hydro Policy (“**2002 Policy**”). However, prior to the commencement of operations of the afore-mentioned SHP, GOM on 15.09.2005, promulgated the State Hydrel Policy for Development of Small Hydro Power Projects through Private Sector Participation (“**2005 Policy**”). In terms of Clause B-2 of the 2005 State Hydro Policy, Independent Power Plants (“**IPPs**”) & Captive Power Plants (“**CPP**”) are free to change their option in due course of time based on certain conditions. The Appellant’s SHP was commissioned on 03.07.2010 and subsequently, the Appellants, opted for the Change of option from CPP to IPP in 2010 on account of shortfall in captive consumption by the Appellant.

6. On September 9, 2010, a Short-Term Energy Purchase Agreement (EPA) was executed between the Appellant and Respondent No.2 (MSEDCL) for the procurement of Hydro Power over a duration of 8 months, spanning from July 2010 to February 2011, at a rate of Rs. 4.26 per unit (KWh) on a Real Time Continuous (RTC) basis. Subsequently, the Appellant GME, submitted a proposal to MSEDCL for the extension of the EPA to procure power for the subsequent 6 month period, commencing from March 1, 2011, to August 31, 2011. MSEDCL, through its letter dated February 21, 2011, extended the validity of the aforementioned EPA by 6 months,

facilitating the purchase of GME Power up to 1.5 MW on an RTC basis from March 2011 to August 2011, in accordance with the orders of the Maharashtra Electricity Regulatory Commission (MERC) and the rates approved therein, as specified in the order dated July 14, 2010, i.e., Rs. 4.26/- per unit. Consequently, a Short-Term Power Purchase Agreement was entered into between the Appellant GME and MSEDCL

7. Thereafter, on July 18, 2011, the Appellant submitted another proposal to MSEDCL, seeking an extension of the EPA for the subsequent 9 month period, from September 1, 2011, to June 1, 2012. MSEDCL, through its letter dated August 25, 2011, requested the Appellant to confirm their willingness to enter into a long-term EPA spanning 35 years, relying upon the Maharashtra Electricity Regulatory Commission Renewable Energy (RE) Tariff Regulations of 2010 and the MERC RE Tariff order dated July 14, 2010, at a Preferential Tariff. In accordance with this request, the Appellant provided confirmation to MSEDCL for a fresh proposal for the sale of power up to 1.5 MW (+ 20% tolerance) on an RTC basis from September 1, 2011, with the intention to enter into a long-term Power Purchase Agreement (PPA) for a duration of 35 years at Preferential Tariff. Subsequently, the Appellant GME, through its communication dated October 24, 2011, affirmed its readiness to execute the long-term EPA with MSEDCL. Consequently, on November 9, 2011, an Energy Purchase Agreement was executed between the Appellant GME and MSEDCL, covering a span of 35 years from September 1, 2011, for the procurement of 1.5 MW power from their Small Hydro Power facility.

8. Subsequently, GoM introduced the Comprehensive Policy for Grid Connected Power Projects based on New and Renewable (Non-Conventional) Energy Sources dated 20.07.2015 (“**2015 Policy**”), wherein Clause 8.2 provides the option to terminate the existing PPA with MSEDCL and opt for open access. Clause 8.2 reads as under:

“8.2 Renewable power projects will have the option to terminate their existing PPA with MAHADISCOM and opt for open access, if they so desire.”

9. Accordingly, the Appellants, in terms of Clause 8.2 of the 2015 Policy, vide its letters dated 04.02.2016 & 14.04.2016 to Managing Director, MSEDCL and Chief engineer MSEDCL, respectively, requested for termination of the EPA pursuant to their own consumption increasing and desired to change their option (entity) from IPP to CPP and for pre-mature termination of the EPA dated 09.11.2011.

10. However, on 27.07.2016, MSEDCL vide its letter no. CEPP/NCE/Hydro/EPA – Gadre/023635 informed to GME that the request of GME seeking permission for Captive Consumption by pre-mature termination of EPA could not be agreed upon and could not be considered. The said letter also informed that Clause 8.2 of GOM Policy 2015 is applicable to those projects which will be installed under the said Policy. The Appellants being aggrieved by the aforesaid action on the part of MSEDCL, approached MERC which was registered as case No. 193 of 2017. However, petition of Appellants

in case No 193 of 2017 (along with Miscellaneous Application 02 of 2018 in case no 193 of 2017) was not allowed and the Respondent No. 1, MERC passed the Impugned Order rejecting the claim of the Appellants for change of option to convert from IPP to CPP, after execution of the Long-term EPA dated 9.11.2011, in terms of the comprehensive Renewable Electricity Policy dated 20.07.2015 issued by the Government of Maharashtra. Aggrieved by the said order, the Appellant has preferred the instant appeal.

11. The Appellants contend that they are currently receiving compensation at the rate of Rs. 4.26/kWh from the Maharashtra State Electricity Distribution Company Limited (MSEDCL) pursuant to a long-term Electricity Purchase Agreement (EPA), while they are obligated to pay MSEDCL approximately Rs. 11/kWh for their own power consumption. The Appellants assert that the execution of the Long-Term EPA on 09.11.2011 stemmed from MSEDCL's erroneous assertion regarding the mandatory duration of 35 years for the EPA as purportedly envisaged under the Maharashtra Electricity Regulatory Commission (Renewable Energy) Tariff Regulations, 2010 ("Tariff Regulations") and the Suo Motu Tariff Order dated 14.07.2010 issued in Case No. 20 of 2010 ("Tariff Order"). Though the Appellants' made a prior request to MSEDCL for continuation of procuring power on a short-term basis, however, they had entered into the EPA based on the afore-mentioned misrepresentation by MSEDCL

12. As soon as the 2015 Policy was notified, wherein Clause 8.2 provided that the generating companies are entitled to terminate their

“existing” EPAs with MAHADISCOMS, Appellants approached MSEDCL.

13. Furthermore, it is highlighted that, MSEDCL itself had relied upon Clause B-2 of the 2005 Policy earlier and entered into short-term EPAs, despite the Appellants SHP having been set-up under the 2002 Policy. The 2005 Policy did not impose any limitations on the exercise of the option to change category. MSEDCL had created a legitimate expectation for the Appellants to rely upon the 2015 Policy for exiting long-term EPA as Short-term EPAs were also entered into between the parties only because of exercise of change of option under the 2005 Policy.

14. Appellants had submitted that the EPA was entered into by the parties on the basis of 2005 Policy, thereby with the implied term that the SHP can be converted into CPP/IPP. The 2005 Policy, followed by 2015 Policy are implied into the terms and conditions of the EPA. Thus, Clause 8.2 of the 2015 Policy remains available and exercisable at the option of the Appellants. In this regard, reliance is placed on **“Satya Jain &Ors. vs. Anis Ahmed Rushdie &Ors.” (2013) 8 SCC 131 (Para 35).**

“The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. In the present case not only the language of Clause (7) of agreement dated 22.12.1970 is clear and unambiguous there is no other clause in the agreement which had obliged Plaintiff 1 to make any further payment after the initial part-payment of Rs.50,000. The

obligation of Plaintiff I was to pay any further amount(s) to the Income Tax Authorities, at the request of the defendant, in order to facilitate the issuance of the tax clearance certificate. No payment to the defendant beyond the initial amount of Rs. 50,000 was contemplated by all. The above would appear to be consciously intended by the parties so as to exclude the possibility of any substantial monetary loss to the plaintiff in the event the defendant is to resile from his commitment to execute the sale document. The intent of the parties, acting as prudent businessmen, appears to be clear. An obvious intent to exclude any obligation of the plaintiff to pay any further amount (beyond Rs.50,000) to the defendant is clearly discernible. Consequently, resort to the principle of business efficacy by the High Court to read such an implied term in the agreement dated 22.12.1970, in our considered view, was not warranted in the facts and circumstances of the present case.”

15. Appellants submitted that MEDA [Nodal Agency in terms of Regulation 44 of Tariff Regulations, vide its reply dated 15.01.2018 before MERC, acknowledged that the Appellants have the option to exit the EPA as per Clause 8.2 of 2015 Policy. However, MSEDCL has erroneously taken a contrary view to the aforesaid view of MEDA. In this regard, the reliance is placed upon the judgment passed by the Hon'ble Supreme Court in **“Vadilal Chemicals Ltd. vs. State of A.P. & Ors.” (2005) 6 SCC 292 (Para 23)**, whereby the Hon'ble Supreme Court has held that the State, which is represented through its different departments, ought to speak in one voice.

“23. There is another reason why the action of DCCT cannot be upheld. The primary facts relating to the processes undertaken by the appellant at its unit were known to the Department of Industries and Commerce and DCCT. The only question was what was the proper conclusion to be drawn from these. The Department of

Industries and Commerce which was responsible for the issuance of the 1993 GO accepted the appellant as an eligible industry for the issuance of the 1993 GO accepted the appellant as an eligible industry for the benefits. Apart from the fact that it can be assumed that the Department of Industries was in the best position to construe its own order, we can also assume that in framing the Scheme and granting eligibility to the appellant all the Departments of the State Government involved in the process had been duly consulted. The State, which is represented by the Departments, can only speak with one voice. Having regard to the language of the 1993 GO it was the view expressed by the Department of Industries which must be taken to be that voice.”

16. In view of the above, the Appellants sought to be allowed to avail the Change of option from IPP to CPP and the Impugned Order dated 20.07.2018 passed by MERC may be set aside by this Tribunal.

17. On the other hand, MSEDCL, the Respondent No.2 submitted that Clause 8.2 of the 2015 Policy, relied upon by the Appellants, covers only new RE generators commissioned after the said Policy came into force. The MERC in its finding has rightly observed that the policy has been particularly framed for the development of new and renewable sources of energy in the State of Maharashtra in pursuance with 175 GW target given by the Government of India and overall target of 14400 MW to be achieved by the State of Maharashtra and hence the Appellants' request to "terminate their existing PPA" in terms of clause 8.2 (which is a general clause and cannot supersede the main clause) and to opt for change from IPP to Captive would defeat the purpose and intent of the policy besides affecting the RPO

obligations of the 1st Respondent. Reference is made to Clause 1.1, 4, 4.1, 4.2 and 8.3 of the 2015 Hydro Policy

“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 Bagasee – 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.”

“4. Small Hydro Power Projects:

“There is a large potential for generation of additional electricity from ‘small hydro power projects. This includes giving encouragement to projects up to 25 MW which are to be developed by private developers through the Water Resources Department, for this purpose all such projects up to 25 MW are included in this policy.

4.1 There is a large potential for generation of electricity from small hydro power projects in the state. In this context, 400 MW capacity of small hydro power projects of capacity up to 25 MW will be targeted for coverage under this policy.

4.2 It will be necessary for the project developers of small hydro power projects to sell power primarily to any distribution licensee in the state for fulfilling the Renewable Purchase Obligation at a preferential tariff fixed by MERC. After fulfilment of Renewable Purchase Obligation of the distribution licensee, the project developers will have the

option of captive use or third party sale within or outside the state. The option of Renewable Energy Certificate mechanism will be available.”

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.”

18. The Respondent No. 2 further submitted that the parties are contractually bound by the terms delineated therein. The Appellants having agreed to 35 year period vide its letter dated 29.08.2011 and having entered into long term contract for a period of 35 years vide EPA dated 09.11.2011, it is not open to wriggle out of the binding obligations. Notably, Clause 8.5 of the EPA provides for premature termination only in the event of force majeure which in any event solely entitles the procurer i.e. MSEDCL to prematurely terminate the EPA. Thus, it is submitted that since EPA is in force and there being no contractual provision in favour of the Appellants to prematurely terminate the same, there is no basis for the Appellant's to stand against MSEDCL, and as such, the Appellants' claim was rightly denied by MERC.

19. MERC had also rightly held that the Long Term EPA of 35 years as entered into by the Appellants with MSEDCL is not at all tainted by any misrepresentation and thus cannot be terminated prematurely. A unilateral termination of existing PPAs would seriously impact the power procurement plan of MSEDCL, especially when they are

mandated to meet the annual RPO targets. MERC held that it is not open to the Appellants to either terminate the PPA or change from IPP to CPP. In this regard, reliance is placed upon the following observation of the Hon'ble Supreme Court on the issue of mandate to honour the binding contractual terms in the case of "**Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd.,**" reported as **(2017) 16 SCC 498:**

20. Respondent No.2 also submitted that it is well settled principle of law that policies of State Government cannot alter or make inroads into the binding terms of the contract, much less not to the extent of taking away the entire basis/intent of the parties while entering into such agreement. Even otherwise, the only permissible mode for the State Government framed policies to be considered are limited within the parameters of Section 108 of the Electricity Act, 2003, wherein also the respective State Commissions are not bound to take into consideration such policies rather would only seek guidance from such policy, leaving the discretion of their decision upon themselves. Moreover, Section 108 of the Act is guided by the principles of 'Public Interest' for any policy to be considered by the State Commission, which in the present case would also not fall for consideration as permitting a premature termination of a binding and valid PPA/EPA, would tantamount to giving priority of 'Commercial Interest' over 'Public Interest'. Thus, there is no merit in the present Appeal.

Discussion and Analysis

21. After consideration of the arguments presented by counsel for both parties and a review of the impugned order and case records, the primary issue arises as to whether a state government policy can prevail over a contractual agreement between private entities. Additionally, whether the long-term Electricity Purchase Agreement (EPA) in question incorporates implied implications of Government of Maharashtra (GOM) policies and whether the Maharashtra Electricity Regulatory Commission (MERC) erroneously denied the Appellants right to exercise the option to transition from an Independent Power Producer (IPP) to a Captive Power Producer (CPP) and terminate the long-term EPA as provided under the Hydro Policy 2015.

22. Functions of the State commission are defined in Section 86 of Electricity act 2003, which, *inter alia*, covers the following:

“Section 86. (Functions of State Commission): ---

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry; (ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”

23. Section 108 of the Electricity Act 2003, provides for Directions by State Government, which reads as under:

“Section 108. (Directions by State Government): ---- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

24. The State commission works independently and have to carry out functions as stipulated in the Electricity Act and to take guidance from the National Electricity Policy, the National Electricity Plan and the Tariff Policy published under section 3 of the Act as well as guidance from the Directions issued by the State Government under section 108 of the Act in the matter of policy involving public interest. All the three hydro policies referred by the Appellants i.e. Hydro Policy 2002, Hydro policy 2005 and Hydro Policy 2015 have been issued mainly to promote generation of energy through non-conventional sources on the lines of Central Government policies to supplement ever increasing demand of electricity in the State. These policies have been issued by the State Government as part of Government resolution with as such no specific direction under Section 108 of Electricity Act 2003. This Tribunal in the case of ***“Polyplex***

Corporation Limited v. Uttrakhand Electricity Regulatory Commission” (2011 SCC OnLineAPTEL15) : (2011) APTEL 15) has held that Policy directions issued by the State Government are not binding on the commission. The relevant portion reads thus:

“Summary of our findings:

62.(1) The State Commission is independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Government in the matter of determination of tariff. The State Government may given any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff.”

25. Thus, it is not binding on the Commission to accept such a policy direction, which in the instant case the hydro policies that cannot be treated as directions under Section 108 of Electricity Act. Further, it is a fact that SHP of the Appellants was conceived as CPP under Hydro Policy 2002 and by the time it was commissioned in 2010, the Hydro Policy 2005 has been promulgated which provided the option of conversion from CPP to IPP or vice versa. The Appellants have submitted that it was allowed to exercise the option of converting from CPP to IPP and entered into two short term EPAs and thereafter long term EPA in 2011 for 35 years. We are not going into the analysis and

discussion on conversion of Appellant's project from CPP to IPP under 2005 Hydro Policy, though the project was conceived as per Hydro policy 2002, as the same is not the matter under consideration in the present appeal.

26. As submitted by the Appellants, subsequent to conversion of Appellants' project status from CPP to IPP, the Appellants requested for signing of short term EPA with the Respondent No.2. For two terms, namely, from July 2010 to February 2011 and from March 2011 to August 2011, such short term EPAs were signed and it is only at the time of third extension beyond 31.08.2011, Respondent No. 2 had asked for signing of long term EPA for 35 years relying upon MERC RE Tariff regulations 2010 and MERC RE Tariff order dated 14.07.2010 at Preferential tariff vide their letter dated 25.08.2011. In response, the Appellants vide their letter dated 29.08.2011 had accepted such contention and conveyed their acceptance for signing long term PPA. We find that in the said letter, no issue has been raised by the Appellants regarding the non-applicability of MERC RE tariff regulations 2010 and MERC RE Tariff order dated 14.07.2010 for signing long term EPA for 35 years. The long term EPA was signed on 09.11.2011 with detailed terms and conditions and with Appellants being aware of its liabilities clearly defined in various clauses. Clause 4.4 (C) of EPA provides as under:

“4.4c This agreement is a valid, binding and enforceable obligation of the Seller, except as the enforceability may be limited by applicable bankruptcy, insolvency, amalgamation, reorganization, moratorium or other similar laws affecting creditors' rights generally and to the extent that the remedies of specific performance, injunctive relief and other forms of

equitable relief are subject to equitable defenses, the discretion of the court before which any proceeding therefore may be brought and principles of equity in general”.

27. Further, in the long term EPA recital, only reference has been made regarding the acceptance of generating company the letter of permission of GOMWRD and plans to develop the 1X1.5 MW Deoghar Hydroelectric project as CPP/IPP with its own funding under the provisions of GOMWRD G.R.No (7/2004) HP dt 28.11.2002 and after signing of two short term EPA with Respondent No. 2, they have been asked to sign long term EPA for a period of 35 years as per the MERC RE tariff regulations and MERC tariff order dated 14.07.2010. However, applicability of hydro policy as announced from time to time has not been mentioned and agreed upon by the Appellants and Respondent No.2. Under long term EPA, there is no provision which specifies the consent of parties for applicability of future hydro policies of Government. In fact, Clause 8.5 of EPA provides for termination of agreement by procurer i.e Respondent No. 2 under the Force Majeure condition:

FORCE MAJEURE

“8.5 In case of Project Force Majeure, the Seller shall take recourse to recover its cost through insurance until the effect of such Force Majeure event ceases to exist. If such Project Force Majeure continues for a period of 180 days, then Purchaser shall have an option to terminate this Agreement provided the Seller establishes the continuance of the Project Force Majeure and approved by the commission”.

28. Even though MEDA has interpreted the Clause 8.2 of Hydro Policy 2015 to suggest that existing EPAs were also eligible for

change of option, but the Appellants could not place any evidence for such any confirmation from Government, though it would have as such not become binding on the Commission to accept it. In our opinion, reliance placed by the Appellants on “**Vadilal Chemicals Ltd. vs. State of A.P. &Ors.,**” (2005) 6 SCC 292 (Para 23) has no application to the present case.

29. Regarding the contention of the Appellants that Long term EPA had an implied implication of GOM policies and therefore in spite of signing a long term EPA, the Clause 8.5 of Hydro Policy was implied and option of termination of EPA is applicable to them, we would like to refer to the relevant portion of the judgment of this Tribunal in “**Talwandi Sabo Power Limited (TSPL) Village Banwala v. Punjab State Power Corporation Limited &Ors.**” (2016 SCC OnLine APTEL 64).

“18. PPA dated 9/1/2008 is the controlling document. It is a binding contract. Section 50 of the Indian Contract Act which we have reproduced hereinabove clearly states that the performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. Section 50 therefore embodies the oft quoted legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in a particular manner then it has to be done in that manner and in no other manner. Thus if Article 6.1.1 of the PPA prescribes notices to be given in a particular manner notices have to be given in that manner and no other manner. If Article 18.11 prescribes that notice to be served on the

Procurer has to be served on its authorised representative it has to be served on him and on no other person. There is no scope to urge that conduct of parties shows that there was substantial notice. When the contract contains express and unambiguous terms there can be no question of there being any implied term or reading the contract as a whole. Search for implied term on the specious ground that it is equitable is not permissible. In this context following extracts from Chitty on Contracts (Thirty First Edition Volume I) are material.

***“Where term not implied: A term ought not to be implied unless it is in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out convenient: the touchstone is always necessity and not merely reasonableness
..... A term will not be implied if it would be inconsistent with the express wording of the contract”***

30. In ***“Mosvolds Rederi A/S v. Ford Corporation of India”*** (1986 (2) Loyd’s Reports 68), Steyn, J. spoke of three categories of implied term. He said:—

“Sometimes it is said that a term is implied into the contract when in truth a positive rule of law of contract is applied because of the category in which a particular contract falls. Another type of implied term is a term in order to give business efficacy to the contract. The basis of such an implication is that the contract is unworkable without it.

There is, however, another form of implication. It is not permissible to imply a term simply because the Court considers it to be reasonable. On the other hand, it is possible to imply a term, if the Court or Arbitrator, as the case may be, is satisfied that reasonable men faced with the suggested term which ex hypothesis was not expressed in the contract, would without hesitation say: ‘yes, of course that is so obvious that it goes without saying.’”.

31. The Tribunal in its earlier orders have also emphasized the importance of honoring binding contractual terms and highlighted that the PPA was a legally enforceable agreement that could not be unilaterally terminated by the Appellants. We would like reiterate that the PPA holds a sacred status as the pivotal document governing the relationship between contracting parties and it is essential to uphold the agreed-upon terms of the agreement to maintain its sanctity and ensure compliance with the parties' original intentions. Therefore, PPA is the sacrosanct document between the contracting parties and no interpretation averse to the consensus *ad idem* can be given to the PPA. This Tribunal in the case of “***Uttar Pradesh Power Corporation Ltd. &Ors., vs. Uttar Pradesh Electricity Regulatory Commission***” (2021 SCC OnLine APTEL 31) has held as under:

“115. From a perusal of Para 11 (relied upon by the respondent) of the abovementioned judgment, it is evident that a PPA is a statutory contract only to the extent of tariff fixation as well as the conditions as mentioned in Section 43A (2). Thus, the contention of the respondent no. 2 is not only misplaced but also incorrect. Further, the appellant is well within his rights to raise a legal argument at any stage of the proceedings. Further, the Appellant has taken a specific ground under the grounds to appeal

whereby the appellant has contended that the State Commission while passing the impugned judgment and order dated 03.01.2018 has converted the PPA into a judicial direction without considering that the PPA is the sacrosanct document between the contracting parties and no interpretation averse to the consensus ad idem can be given to the PPA.

...

338.*PPA is a sacrosanct document since it is approved by a regulatory authority created under a statute after parties sign and submit the same for approval. Therefore, even a slightest change or modification to it (PPA) cannot be done without Commissions approval, hence it cannot be terminated without the prior approval of the State Commission”*

32. The Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited's** case (supra) on the issue of mandate to honour the binding contractual terms held as under:

“60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.”

33. In the present matter, the long term EPA has clearly specified the rights of parties for termination of EPA and applicability of future Hydro Policies has not been defined, the EPA has been actively

enforced since its establishment in 2011. Consequently, we disagree with the Appellants' argument that the previous allowance for conversion from CPP to IPP under Hydro Policy 2005, despite the project's origination under Hydro Policy 2002, implies the applicability of Hydro Policy 2015 within the EPA.

34. For the afore-stated reasons, we do not find any error or infirmity in the impugned order of the Commission i.e. the Respondent No 1. No merit is found in the appeal and the same is hereby dismissed. There shall be no order as to costs.

Pronounced in open court on this the 22nd February, 2024

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

ts/dk