IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.250 OF 2022 & IA No.937 OF 2022 & IA No.22 OF 2023

Dated: 02.05.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/S. INTEROCEAN SHIPPING COMPANY … Appellant(s)
(*Through its Authorised Representative)*
A-17, Mohan Cooperative Industrial Estate
Near Sarita Vihar Metro Station
Mathura Road, New Delhi-110044
Email- ashish.11.singh.@gmail.com

Versus

1. **MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**
(*Through its Chief Engineer (Commercial),*
5th Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai – 700051
Email- ceremsedcl@gmail.com

2. **MAHARASHTRA ENERGY DEVELOPMENT AUTHORITY**
(*Through its Chairman)*
MHADA Commercial Complex
II Floor, Opposite Tridal Nagar
Pune, Maharashtra – 411006
Email- manrd@mahaurja.com

3. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
(*Through its Secretary)*
World Trade Centre, Centre No. 1

13th Floor, Cuffe Parade
Mumbai – 400005
Email- anilkumar.ukey@merc.gov.in … Respondent(s)

Counsel for the Appellant(s)	:	Ashish Singh
Counsel for the Respondent(s)	:	G. Umapathy Sr. Adv. Udit Gupta Anup Jain Akshat Goel Prachi Gupta Vyom Chaturvedi for Res.1 Pratiti Rungta for Res. 3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, a wind power generator operating a wind mill with an installed capacity of 0.85MW located at Gut No.190, Village Altur, Tal-Shahuwadi, District Kolhapur, Maharashtra, is aggrieved by the order dated 04.05.2022 of the 3rd respondent Maharashtra Electricity Regulatory Commission whereby its claim for compensation for energy injected by it into the grid from its wind mill as well as other ancillary prayers made in petition No.157/2021 under Section 94 of Electricity Act, 2003, have been denied.

2. The 1st respondent Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "MSEDCL") is a company incorporated under the provisions of the Companies Act, 1956, and engaged in the business of distribution of electricity in the State of

Maharashtra. It is a distribution licensee as envisaged under the Electricity Act, 2003.

3. The 2nd respondent Maharashtra Energy Development Authority (hereinafter referred to as "MEDA") is the state nodal agency designated by the Government of Maharashtra as well as the 3rd respondent Commission under Regulation 9.1 of MERC RPO REC Regulations, 2010. Its objective is to undertake development of renewable energy and facilitate energy conservation in the State of Maharashtra as a state nodal agency.

4. The 3rd respondent is the Maharashtra Electricity Regulatory Commission (hereinafter referred to as "MERC" or the "Commission").

5. The facts which are germane for the disposal of the instant appeal are as under: -

(i) On 14.10.2008, the Government of Maharashtra issued a policy for "power generation from non-conventional source of energy, 2008" which contemplated certain benefits to wind power projects up to a capacity of 2,000MW.

(ii) M/s Gamesa Wind Turbines Private Limited, a wind power developer, approached the appellant in the month of February 2014 with a proposal to set up a turnkey project relating to the establishment of 0.85Mw wind power project for commissioning G/58/859kW wind turbine generator (WTG) at Bhendawade Wind Park, Kolkapur District, Maharashtra (hereinafter referred to as "project site").

(iii) Vide order dated 07.02.2014, passed in case No.100/2014, the 3rd respondent determined the generic tariff for renewable energy sources for Financial Year (FY) 2014-15.

(iv) On 30.03.2015, the 2nd respondent issued provisional infrastructure clearance to the appellant with the directions to it to commission the wind turbine on or before 31.03.2015, the failure to do so would automatically render such clearance as cancelled.

(v) The appellant commissioned the windmill with a capacity of 0.85MW at the above referred project site on 31.03.2015 and had been supplying power to the grid since the date of commissioning till 02.06.2020 when the wind turbine was disconnected by the 1st respondent.

(vi) On 20.07.2015, the Government of Maharashtra notified the new renewable energy policy under which 1500MW of wind power capacity was to be developed for meeting the RPO. Subsequently, the government notified “methodology for installation of projects under the new RE Policy 2015” on 09.09.2015.

(vii) Thereafter, the appellant, through M/s Gamesa called upon the 2nd respondent MEDA to register its project. However, upon failure to get the PPA/EPA executed, which was the obligation of M/s Gamesa, the appellant terminated its contract with M/s Gamesa vide letter dated 31.03.2018 and also invoked the arbitration clause provided in the contract between the two for seeking refund of investment made by it in the project, loss of profit and return of the project to M/s Gamesa. The appellant also claimed from M/s Gamesa the amount towards the power injected by the appellant

which had remained unpaid on account of failure to sign the EPA/PPA.

(viii) Thereafter, on 20.08.2019, the second respondent MEDA issued registration certificate thereby registering the project under the GOM Policy dated 20.07.2015 as well as methodology dated 09.09.2015 with registration No.002/2014-15. In response dated 09.01.2020 under the Right to Information Act also the 2nd respondent admitted that it had included the name of appellant's wind turbine at Sl. No.455 under the said GOM Policy of 2015.

(ix) The Arbitration proceedings initiated by the appellant against M/s Gamesa culminated in passing of award dated 12.07.2021 in its favour wherein the arbitral tribunal upheld the allegation of misrepresentation and concealment levelled by the appellant against M/s Gamesa and allowed the termination of the contract as well as refund of investment made by the appellant. So far as the claim for payment with regards to the electricity supplied by the appellant from the said wind turbine, it was held by the arbitral tribunal that the cause of action for the same would be against the MSEDCL i.e. 1st respondent herein for the reason that electricity was supplied by the appellant to the said discom and the discom also has been raising credit notes in favour of the appellant with regards to the same. The said arbitral award has been assailed by M/s Gamesa under section 34 of the Arbitration and Conciliation Act, 1996, before the Delhi High Court by way of O.M.P. (COMM) No.354/2021 in which order dated 07.12.2021 has been passed to the effect that in the event of any amount being recovered from the 1st respondent herein, the same shall be

deposited in the court without prejudice to the rights and contentions of the parties.

6. It is in this backdrop that the appellant had approached the 3rd respondent Commission by way of petition No.157/2021 claiming compensation from the 1st respondent for the power injected by it from its wind turbine generator from the 31.03.2015 till 02.06.2020 as per the tariff applicable to the appellant along with interest @18% per annum as well as other ancillary reliefs.

7. Vide its order dated 04.05.2022, which has been impugned in this appeal, the Commission has denied the claims of the appellant on the ground that it has been compensated for its capital expenditure investment in the project to the tune of Rs.5,62,98,063/- by the arbitral tribunal vide award dated 12.07.2021 along with interest @7% per annum and therefore, granting additional compensation to it for the energy injected from its wind turbine generator would lead to its unjust enrichment. We find it profitable to quote the relevant paragraphs of the impugned order i.e. Para 11.8 and 11.9 hereunder:

> *"11.8 However, facts of present matter are different from the Wind Generators involved in above order. Petitioner has already been compensated for its capital expenditure investment in the project valued at Rs. 5,62,98,063 by the Arbitral Tribunal vide its award dated 12 July 2021. Further, such compensation is allowed with Interest at the rate of 7% for the delayed refund of the capital Investment and the Gamesa has been allowed to take over the land and assets*

created under the Project. Granting additional compensation for energy injected by Wind Generators whose Capital cost has already been returned the Petitioner would lead to unjust enrichment beside the fact that no additional amount has apparently been incurred (invoice raised by Gamesa but not clear whether paid by Petitioner) by Petitioner on O&M of the wind turbine during that period. Wind Generator in Case No. 28 of 2020, did not get such compensation for capital cost through arbitration award and only compensation they got is for energy used by MSEDCL for meeting RPO. Therefore, the Commission is of the view that the Petitioner's case is different from the Bothe's case in Case No. 28 of 2020 and hence not eligible for the similar relief.

11.9 Having ruled as above and denied the compensation for energy injected by Petitioner's Wind Generators for the reasons stated above, the Commission also notes that MSEDCL cannot be allowed to use such free energy for meeting its RPO. RPO Regulations mandates obligated entity to procure such RE for meeting RPO. However, as RPO compliance proceedings of relevant period has already been completed, without going back and reopening all settled accounts but at the same time to ensure that MSEDCL pays for RPO, the Commission directs MSEDCL to procure equivalent amount of energy which it has considered for RPO from any other eligible RE source and report the compliance in next RPO verification process."

8. Another ground on which the claim of the appellant for the power injected from its wind turbine generator was rejected by the Commission, which has been given in the impugned order, is that an entity injecting any energy into the grid without a valid contract is not entitled to any compensation. Upon referring to judgments of this Tribunal in *M/s Indo Rama Synthetics v. MERC* (decided on 16.05.2011) and in appeal No.120/2016 (decided on 08.05.2017) the commission has held as under:

> *"11.4 The spirit of these Judgments is important to understand, as it deals with injecting energy into the Grid without valid contract. The Commission would like to specifically mention that the Infirm nature of Wind creates serious problems for the grid operator when it is being injected without any identified buyer/procurer. As stated by the APTEL, such injected energy without valid contract would lead to deviation in drawal or injection into grid and levy of corresponding penalty under Deviation Settlement Mechanism (DSM) in force for ensuring grid discipline. Further in States like Maharashtra where multiple Distribution Licensees and Open Access users are connected to an interconnected Intra-State Transmission network, it would be difficult to identify or pinpoint a single Distribution Licensee / OA user who has consumed such energy injected into the grid. Therefore, to maintain grid discipline and grid security, such injection of energy without any valid EPA or a contract cannot be allowed. Hence, such injected energy should not get any compensation."*

9. In rejecting the claim of the appellant for compensation in respect of the energy injected into the grid which was used by the 1st respondent for RPO compliance, the Commission referred to its earlier order dated 01.07.2020 passed in case No.28 of 2020 titled *M/s Bothe Windfarm Development Pvt. Ltd. v. Maharashtra Electricity Regulatory Commission and Ors.* wherein it had directed the MSEDCL to compensate the petitioner M/s Bothe for the energy used for meeting the RPO compliance but distinguished it from the case of the appellant saying that the appellant herein had been compensated for its capital expenditure investment by the arbitral tribunal, and therefore, it is not eligible for the similar relief as granted to M/s Bothe.

10. We note that admittedly the appellant had set up the wind turbine in question in pursuance to policy for "Power Generation from Non-conventional Sources of Energy-2008" notified by the Government of Maharashtra whereby certain benefits were contemplated for the wind power project upto the capacity of 2000MW.

11. 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. …"

12. Thus, certain benefits were assured to the developers of wind power along with an assurance that entire electricity generated shall be purchased by the state discoms subject to the undertaking to be given for corresponding obligations to sell. Certain planning and approvals were required from the 2nd respondent during the entire process.

13. 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 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]

14. It is evident that RE policy of 2015 was in continuation of RE Policy-2008. A new target of 1350MW was set apart for RPO regime and a renewed assurance was held out for the projects which were planned and

in the process of being developed under the previous policy of 2008 but could not be accommodated thereunder, if they had been commissioned after the expiry of previous policy.

15. Before the issuance of RE Policy-2015, a circular dated 03.06.2014 captioned as "New Policy for Wind Power Projects to be Commissioned in Financial Year 2014-15 and Onwards" was issued by the 1st respondent MSEDCL wherein, apart from providing guidelines on the subject of grid connectivity, procedure was prescribed on the subject of commissioning of projects, execution of PPAs/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

o WPP is as per guidelines issued by MNRE / C-WET

o WPP location is within 10 km radius of declared wind site

o Land of project and land for evacuation arrangement being in legal possession of the developer

o Micro-sitting is as per micro-sitting guidelines of MEDA

o 100% of generated electricity will be sold to MSEDCL only

o 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. …"

16. A clarification of this circular was issued by the 1st respondent on 26.09.2014, the relevant part of which is 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."

17. A conjoint reading of the above noted circular of 2014 as well as subsequent clarification dated 26.09.2014 would reveal that 1st respondent MSEDCL was inclined to enter into EPA with the wind power developers provided the latter were inclined to sell entire generated electricity to it.

18. 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 (nonconventional 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]

19. Thereafter on 21.12.2016, the State Government by a notification on the subject "To give permission for Registration of mutually implemented Wind Power Projects by MAHAVITARAN Company after checking technical issues and regularizing" clarified as under: -

> *"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."*

20. In the instant case, the appellant commissioned its wind power generator on 31.03.2015, was given connectivity and had started injecting electricity into the grid to MSEDCL from that very date. This is indicative of the fact that the appellant's wind power turbine generator had achieved commercial operation during the FY 2014-15 and much prior to the issuance of the above noted methodology order dated 09.09.2015. It is not in dispute that the appellant's wind turbine generator had been granted grid connectivity from the date of its commissioning itself i.e. 31.03.2015 after necessary inspections and approvals and it has been injecting power into

the grid from the said date. It is also not disputed that the 1st respondent MSEDCL availed the electricity thus injected by the appellant's wind turbine generator into the grid and in turn has been selling the same to its consumers for consideration. The methodology order assured that such a wind power project would get priority over the project commissioned later in time in the matters of execution of EPA.

21. Here we may note that in previous case bearing case No. 28/2020 (Bothe case) and other similar cases, the Commission rejected the contention of wind power projects regarding their claim for compensation for the power injected into the grid from the date of commissioning on the basis of implied contract / agreement existing between the parties, with the following reasoning:-

> *"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."

22. However, the Commission awarded the compensation to M/s Bothe for the electricity generated and injected in the FY 2014-15 to 2016-17 on the following reasoning: -

"21.8 <u>The Commission however would like to also consider the conduct of MSEDCL and BWDPL. It has been accepted</u>

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."

[Emphasis supplied]

23. We may further note that the above noted order of the Commission in Bothe case was assailed before this Tribunal by way of appeal No.119/2020 which was decided along with the batch of identical appeals vide judgment dated 18.08.2022 setting aside the Commission's order and holding the appellants entitled to tariff for the electricity generated and supplied from the respective dates. It has been further held that the conduct of the parties leaves no room for doubt that the contracts had come into being with the MSEDCL permitting not only commissioning but also connectivity as well as enjoying the electricity injected into the system without demur, accounting it towards its RPO obligations and indisputably reaping financial gains by receiving corresponding tariffs from its consumers. It has further been held that signing of an EPA, model of which had already been approved by MERC, was only a matter of formality and the MEDA registration would relate to the respective dates with the application for registration by appellants. For clarity, we find it apposite to quote the relevant Paragraphs of the judgment of this tribunal hereunder: -

"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 parties and such approval then must relate back to the date of the agreement between the parties. 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 IndoAfghan 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 IndoAfghan 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 adinterim basis at Rs. 2.52 per kWh for the wind energy injected into the Grid by wind energy generators belonging to GroupII 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."

24. In our opinion, the instant case is squarely covered by the above referred judgment of this Tribunal in Bothe's case (Appeal No.119/2020 decided on 18.08.2022) and see no reason for making any departure from the findings arrived at therein.

25. Undisputedly, the appellant has set-up and commissioned its wind power project under the RE Policy-2015. It was commissioned on 31.03.2015 i.e. during the Financial Year 2014-15, and has been injecting power into the grid since that date which was being utilized by the 1st respondent by selling it to its consumers and even showing it in its account as part of the fulfilment of renewable power purchase obligations. With regards to such power, the 1st respondent has also issued credit notes in the name of the appellant. Manifestly, the appellant never intended to supply electricity gratuitously. Therefore, in view of the law laid down by this Tribunal in above noted Bothe's case, a contract had already come into exitance between appellant and 1st respondent and signing thereof was only a formality. Further, it is evident from the records that the appellant had, vide letter dated 21.11.2015, requested the 2nd respondent MEDA to grant registration to their project as per the RE Policy-2015 which was delayed by MEDA and ultimately the project was registered on 20.08.2019. As per the above noted judgment of this Tribunal in Bothe's case, the

registration granted by MEDA in 2019 would relate back to the date when the appellant had submitted its application for registration of the project i.e. 21.11.2015.

26. Hence, the appellant too is entitled to tariff for the electricity generated and supplied by it from the date on which it fulfilled all the eligibility requirements i.e. a date on which it had applied to MEDA for registration i.e. 21.11.2015.

27. The observation of the Commission that granting compensation to the appellant for the energy injected from its wind turbine generator would lead to its unjust enrichment for the reason that the appellant has been already compensated for its capital expenditure investment in the project to the tune of Rs.5,62,98,063/- by the arbitral tribunal vide award dated 12.07.2021 along with interest, is absolutely flawed as well as unconscionable. It is for the reason that the issue regarding liability of MSEDCL to compensate the appellant for power injected into the grid was not before the Learned Arbitrator. Perusal of the said arbitral award would reveal that the arbitral tribunal had not taken up the issue regarding the entitlement of the appellant for payment with regards to the electricity supplied by the appellant from its wind turbine generator saying that cause of action for the same would be against MSEDCL i.e. 1st respondent herein which was not a party before the arbitral tribunal. Further, it is to be noted that vide order dated 07.12.2021 passed by the Hon'ble High Court in OMP (COMM) No.354 OF 2021 filed by M/s Gamesa under Section 34 of Arbitration and Conciliation Act, 1996, assailing therein the said arbitral award dated 12.07.2021, it has been directed that in the event of any

amount being recovered by the appellant from the 1st respondent herein, the same shall be deposited in the Court without prejudice to the rights and contentions of the parties. Therefore, the amount payable by the 1st respondent for the electricity supplied by appellant from its wind turbine generator from 21.11.2015 till 02.06.2020 shall have to be deposited by the appellant in the Hon'ble High Court and Hon'ble High Court would later on decide whether the appellant or M/s Gamesa is entitled to receive the same. Be that as it may, there is nothing in the arbitral award which would disentitle the appellant from the compensation for the power injected into the grid.

28. In the light of the above discussion, the impugned order of the 3rd respondent Commission is not sustainable and is hereby set aside.

29. The appellant is held entitled to be compensated for the electricity injected by its wind turbine generator into the grid with effect from 21.11.2015 till 02.06.2020 along with carrying cost.

30. The appeal stands allowed and pending applications disposed of accordingly.

Pronounced in the open court on this 2nd day of May, 2024.

(Virender Bhat) Judicial Member	(Sandesh Kumar Sharma) Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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