

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 20th October. 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V.J. Talwar, Technical Member,

Appeal No. 19 of 2010

In The Matter Of

M/s. Dwarikesh Sugar Industries Ltd,
Dwarikesh Dham,
Faridpur, Bareilly,(UP)Appellant

Versus

1. M/s.Madhyanchal Vidyut Vitran Nigam Ltd,
4-A, Gokhle Marg,
Lucknow (UP)
 2. M/s. UP Power Corporation Ltd
Shakti Bhawan,
Ashok Marg,
Lucknow (UP)
 3. M/s UP Power Transmission Corporation Ltd
Shakti Bhawan,
Ashok Marg,
Lucknow (UP)
 4. UP Electricity Regulatory Commission,
Kishan Mandi Bhawan, IInd Floor,
Gomti Nagar,
Lucknow – 226010
- Respondents

AND

Appeal No. 20 of 2010

In The Matter Of

M/s. Dwarikesh Sugar Industries Ltd,
Dwarikesh Puram,
Bahadarpur, Bijnor (UP)Appellant

Versus

1. M/s.Paschimanchal Vidyut Vitran Nigam Ltd,
Victoria Marg,
Meerut (UP)
 2. M/s. UP Power Corporation Ltd
Shakti Bhawan,
Ashok Marg,
Lucknow (UP)
 3. M/s UP Power Transmission Corporation Ltd
Shakti Bhawan,
Ashok Marg,
Lucknow (UP)
 4. UP Electricity Regulatory Commission,
Kishan Mandi Bhawan, IInd Floor,
Gomti Nagar,
Lucknow – 226010
- Respondents

Counsel for Appellant(s): **Mr.Buddy Ranganadhan,**

Counsel for Respondent(s): **Mr. Pradeep Misra**

JUDGMENT

PER MR. V J TALWAR, TECHNICAL MEMBER

1. These appeals involving similar questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. The short and interesting question which has been raised for consideration in the present Appeals is as follows:-

Whether under the PPA, executed between the Appellant and the 1st Respondent, the Appellant is entitled for any compensation/damages for delay in construction of evacuation line by the 2nd and/or 3rd Respondent.

3. The Appellant in both the Appeals, M/s Dwarikesh Sugar Industries is the Generating Company.
4. 1st Respondent in Appeal No. 19/2010, Madhyanchal Vidyut Vitran Nigam Ltd (DISCOM) is the distribution Licensees in the Central part of state of Uttar Pradesh. 1st Respondent in Appeal No. 20/2010, Pashchimanchal Vidyut Vitran Nigam Ltd (DISCOM) is the distribution Licensee in western part of the state of UP. 2nd Respondent in both the Appeals, UP Power Corporation Ltd (Corporation is Bulk Supplier in the State. 3rd Respondent in both the Appeals, UP Power Transmission Corporation Ltd is STU and Transmission Licensee in the state of UP. 4th Respondent is Uttar Pradesh Electricity Regulatory Commission (State Commission).
5. The present Appeals are directed against the State Commission's separate orders dated 12th November 2009 in Petition No. 614 & 615 of 2009 whereby the State Commission dismissed the petitions of the Appellant for recovery of damages against the Respondents No. 1 and 2 herein.
6. Aggrieved by the impugned Orders of State Commission dated 12.11.2009, the Appellant, the generating company has filed these Appeals.

7. We shall first deal with the Appeal No.19 of 2010.
8. The short facts leading to the filing of this Appeal are as follows:-
 - 8.1. The Appellant Dwarikesh Sugar Industries Limited established a Greenfield Project of 7500 TCD Sugar Mill at Faridpur, Bareilly along with Cogeneration facility with ability to sell surplus 24 MW power. The Appellant executed a Power Purchase Agreement (PPA) dated 17.5.2006 with 1st Respondent DISCOM for sale of 24 MW power produced from the Appellant's Sugar Mill's Cogeneration Plant. This PPA dated 17.5.2006 was approved by the State Commission on 25.5.2006 with the direction to execute final PPA in accordance with Regulations. Thus the final PPA was executed on 15.11.2006.
 - 8.2. The 1st Respondent DISCOM had authorized 2nd Respondent M/s U.P. Power Corporation Limited (Corporation) to execute the said Power Purchase Agreement and to do all the necessary relevant works on behalf of them. As such all the obligations under the said power purchase agreement were under taken by 2nd Respondent Corporation on behalf of the 1st Respondent DISCOM.
 - 8.3. The date of Commissioning of the Co-generation plant as per the PPA was to be December 2007.
 - 8.4. Under clause 8.1 of the PPA, the Power from the generating plant was to be transmitted at 132 kV through a 132 kV line from generating plant to STU's grid substation located at Faridpur after its construction.

- 8.5. Under clause 8.3 of the PPA, the construction of the Transmission Line and other supporting works for the evacuation of power was to be undertaken by the Appellant. However, the Appellant, under the said clause had the option to require the Respondent No. 3 STU to construct the said line and other works at the cost of the Appellant.
- 8.6. On 30.10.2006, the Appellant paid Rs 3.01 Crore to the 3rd Respondent STU towards the cost of 132 kV evacuation line and 132 kV line bay at Faridkot Substation of STU.
- 8.7. The construction work for the 132 KV transmission line was being done by 3rd Respondent STU on deposit work basis
- 8.8. The Appellant commenced its crushing operations on 17.12.2007 and was in a position to export power to the State Grid. However, the evacuation line, being constructed by the 3rd Respondent, was not ready and thus the Appellant was not in position to feed it into the grid.
- 8.9. On 15.01.2008 the 2nd Respondent informed the Appellant that the transmission line work was under progress and could be completed only by March 2008.
- 8.10. Even though the Appellant Generating Company had commenced its crushing operations and was in a position to evacuate power to the grid, it was not possible for 3rd Respondent to take the power due to non-commissioning of Transmission line which was likely to be completed only in March, 2008. Hence the Appellant filed a Petition No.515/2008 before the State Commission for permission for temporary arrangement

- by 'solid tapping' of existing 132 kV Shajahanpur – Dohna line. The State Commission, vide its order dated 6.2.2008 permitted the proposed temporary arrangement for evacuation of power from the Appellant's generating station up to 30.04.2008.
- 8.11. The temporary arrangement approved by the State Commission was energized on 9.2.2008 and power from the Appellant's generating station could be evacuated and supplied to the 1st Respondent DISCOM from 9.2.2008.
- 8.12. Due to inordinate delay by the Respondents in construction of the transmission line and other facilities, the Appellant had suffered substantial losses. The Appellant, therefore, filed a petition being no. 615 of 2009 before the State Commission seeking claim of damages against Respondent No. 1 & 2.
- 8.13. However, the State Commission through its impugned order dated 12.11.2009 dismissed the petition of the Appellant.
9. Aggrieved by this impugned Order dated 12.11.2009, the Appellant generating company has filed this present appeal.
10. Learned Counsel for the Appellant has raised the following contentions in support of his claim:
- 10.1. The State Commission has not entered into the merits of the Appellants claims for compensation / damages. The State Commission has non-suited the Appellant on the sole ground that since the absolute

responsibility to construct the Line was on the Appellant, the Appellant would not be entitled to claim any damages etc from the Respondents.

- 10.2. The transaction between the Appellant and the Respondent Corporation was a contract, pure and simple. Though there were no detailed and separate “written” terms between the Appellant and the Respondents for the construction of the Line and associated facilities, such terms are contained in Clause 8.3 of the PPA itself read with the letter of the UPPCL demanding the cost of the same and the letter of the Appellant depositing the same.
- 10.3. There is no principle of law which mandates that every contract must be in writing. A transaction between two parties, as long as it fulfills the criterion of a “contract” under the Indian Contract Act would be a “contract” whether it were in writing or verbal.
- 10.4. Under Section 73 of the Contract Act, obligations “*..resembling those created by contract*” are recognized and provides for damages for breach even of such obligations which resemble those created by contract.
- 10.5. Under the PPA entered into between the Appellant and the Respondents, the Respondents were well aware that the co-generation plant had to be commissioned by December 2007.
- 10.6. Assuming that the responsibility to build the line was with the Appellant, since the Appellant had contracted its construction to the Respondent, if the obligations under such contract were breached by

the Respondent, the Appellant is entitled to receive compensation by way of damages.

- 10.7. In the facts of the present case, the Appellant has contracted with the Respondents to set up a Co-generation plant, transmission line and associated facilities under the PPA. In the very same PPA, with the very same Respondents, the Appellant enters into a contract for the Respondents to construct the Line and associated facilities. The Impugned Order of the Commission essentially stipulates that since the responsibility of constructing the line was on the Appellant, the Appellant cannot claim damages from the Respondents who had admittedly/ undisputedly broken their contract with the Appellant.
- 10.8. The Impugned Order of the Commission, therefore, cannot be supported on any principle of law or equity and is liable to be set aside.
- 10.9. As regards the jurisdiction of the Commission, it is inter alia, submitted as under:-
- (i) The State Commission has not disallowed the petition of the appellant on the ground that it did not have the jurisdiction to entertain such petition.
 - (ii) The State Commission has not given any finding on its jurisdiction, on the other hand, it has gone on to consider the petition of the Appellant on the principal issue of liability (without going into the merits of the claim), albeit on an erroneous basis and without considering any of the Appellants contentions.

- (iii) Even on first principles, the dispute between the Appellant and the Respondents No. 1-3 is squarely covered by the Dispute Resolution clause of the Power Purchase Agreement which vests the Commission with the powers to adjudicate such disputes.
11. The learned counsel for respondent refuted the allegations made by the Appellant and submitted in reply as follows:
- 11.1. The present Appeal is not maintainable and the Petition filed by Appellant was rightly dismissed by the State Commission as it has no jurisdiction to decide the Petition filed by Appellant.
- 11.2. Section 86 of Electricity Act, 2003 enumerates the functions of the State Commission. However, there is no provision in this section under which damages can be granted for alleged breach of contract for erection of transmission line. Thus the Petition filed by Appellant before UPERC was not maintainable and has been rightly dismissed. The Appellant has the remedy to seek the redressal of grievance before any appropriate Forum/Court hence the present Appeal is liable to be rejected.
- 11.3. That the construction of transmission line by Respondent No. 2 STU on behalf of Appellant is not a function which has to be regulated by the UPERC hence the UPERC has no jurisdiction to entertain or decide the Petition filed by Appellant.

- 11.4. The PPA for sale of power by the Appellant to 1st Respondent has nothing to do with construction of transmission line. Hence the present Appeal is liable to be rejected.
- 11.5. Under Clause 8.3 of the PPA the responsibility to construct a transmission is of Appellant under the supervision of STU on payment of 15% of cost. However, it has been provided that the Appellant may also opt to entrust the transmission line work to UPPCL on deposit work basis. A perusal of this Clause of PPA would reveal that there was no agreement between the Appellant and the Respondent Corporation that it will construct the 132 KV Line. The Appellant was free to get it constructed from anyone; however the Appellant approached the 2nd Respondent Corporation to construct the line on deposit work basis even prior to execution of the PPA.
- 11.6. That construction of transmission line is separate and distinct activity unrelated with the Power Purchase Agreement and the two cannot be mixed up only for the reason that the Appellant got construction of transmission line through 2nd Respondent Corporation. As per the PPA as well as U.P. Electricity Regulatory Commission (Terms and Condition for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Cogeneration, Renewable Source of Energy and other Non-Conventional Sources of Energy Based Plants to Distribution Licensee) Regulations, 2005 (herein referred to as the Regulations) it was the responsibility of Appellant to get constructed transmission line to grid substation.

- 11.7. These provisions would make it crystal clear that construction of transmission line was not a part of PPA. It was the responsibility of the Appellant who had opted to get the said line constructed by the 2nd Respondent Corporation. The test about the jurisdiction of State Regulatory Commission is had the Appellant opted to get the said line constructed by any other licensed contractor, would be the Appellant entitled to claim damages for delay in construction of transmission line from that contractor by filing a Petition before UPERC and the answer would be in negative. The role of 2nd Respondent Corporation was limited to an execution agency.
- 11.8. That Appellant has claimed damages for the period from 17.12.2007 till 08.02.2008 by stating that due to delay in construction of line it has suffered damages. It has been alleged that actual crushing started on 17.12.2007, hence the Appellant was entitled for damages as in the absence of transmission line it could not evacuate its power to the grid.
- 11.9. However, the Appellant has not shown on what date its generating plant was commissioned. The Records available with the Respondent Corporation would show that the co-generating plant was ready for commissioning only by 4.2.2008.
- 11.10. Upon getting communication from the Appellant dated 4.2.2008 that the co-gen plant has become ready, necessary testing etc. was carried out and evacuation of power started w.e.f. 09.02.2008.

- 11.11. That the facts stated hereinabove would demonstrate that there was no delay so to say an intentional delay on the part of Respondent and thus in the facts of the present case also the Appellant is not entitled for any damages and the Petition filed by it was rightly dismissed.
12. In the light of the rival submissions made by the respective parties, question referred to above would arise for consideration.
13. Let us now quote the main and comprehensive question that arises for consideration.

‘Whether under the PPA, executed between the Appellant and the 1st Respondent, the Appellant is entitled for any compensation/damages for delay in construction of evacuation line by the 2nd and/or 3rd Respondent.’

14. We have heard the learned counsel for Appellant and the learned counsel for Respondents. We have also examined the various orders passed by first Respondent as well as material papers placed before us, besides the statutory provisions of the Electricity Act 2003 and the relevant Regulations framed by the first respondent. We have also considered the written submissions submitted by Respondents. It would be appropriate to advert to the relevant statutory provisions of the Electricity Act 2003, the Regulations framed there under and relevant clauses of the PPA.
- 14.1. Section 10 of Electricity Act 2003 provide for the duties of a generating company. Section 10 is reproduced below:

“10. Duties of generating companies.—(1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2)...”

- 14.2. Dedicated Transmission line has been defined in Section 2(16) of the Act as under:

“(16) “dedicated transmission lines” means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to ... in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;”

- 14.3. Again according to Regulation 35 of the U.P. Electricity Regulatory Commission (Terms and Condition for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Cogeneration, Renewable Source of Energy and other Non-Conventional Sources of Energy Based Plants to Distribution Licensee) Regulations, 2005 (2005 Regulations) it was the responsibility of Appellant to get constructed transmission line to grid substation. The relevant Regulation 35 of the said Regulations is quoted below for ready reference:-

“35. Evacuation of Power

- (1) The generating plant shall supply power to the Distribution Licensee of its area through a 33 KV or higher voltage line terminating at the nearest 132 KV Sub-station as per the voltage and capacity as given below:-*

(i) upto 10 MW on 33 KV,

(ii) above 10 MW on 132 KV;

Provided that in case of existing plants, the connectivity shall be the same as existing on the date of these regulations coming into effect:

Provided also that in case of plants where the scheme for connectivity has already been approved and the same are commissioned after the date of these regulations coming into effect, the connectivity as per that approved scheme shall be allowed:

Provided further that in case of generation for non-conventional energy sources other than bagasse based cogeneration like wind, solar, hydro, municipal waste, industrial waste (including solid, semi solid, liquid and gaseous wastes) and bio gas, the Commission may allow evacuation of power at 11 KV.

(2) *The cost of laying the transmission line to the substation, the required bay, terminal equipments and associated synchronization equipment, shall be borne by the generating plant and such work shall be undertaken under the supervision of the Licensee of the area in which the plant is located.*

Provided also that the construction of the power evacuation system for transmission at 132 KV or higher voltage shall be carried out under the approval and supervision of the State Transmission Utility.

...
(3) *In case the generating company elects to get the dedicated transmission line constructed by other than STU/distribution licensee, the supervision charges shall be payable to distribution licensee or STU as the case may be.* {emphasis added}

14.4. The Power Purchase Agreement between the Appellant and the 1st Respondent was executed on dated 15.11.2006. Under clause 8.3 of the PPA, the construction of the Transmission Line and other supporting

works for the evacuation of power was to be undertaken by the Appellant. However, the Appellant, under the said clause had the option to get the construction of line done through the Respondent No. 2 Corporation. The cost of line along with associated works had to be borne by the Appellant. Clause 8 of the PPA is reproduced below:

"8. INTERCONNECTION FACILITIES.

8.1. Power from the Generating Plant shall be transmitted at 132 KV through a 132 KV line from the Generating plant located at Dwarikesh Dham, Tehsil Faridpur, District Bareilly. The power so transmitted shall be interfaced with UPPCL's grid substation located at Faridpur after its construction.

8.2. The cost of the dedicated transmission line from the Generating Plant to the designated grid substation Faridpur of STU and the cost of interfacing at both ends (the Generating Plant and grid substation) including work at the STU Sub Station, cost of bay, tie-line, terminal equipments and associated synchronizing equipments, shall be borne by the Generating Plant.

*8.3. **The construction of transmission line and other supporting works for evacuation of power shall be undertaken by the Generating Company under approval and supervision of STU on payment of 15% of the cost of the work as per Corporation's estimate towards the supervision. The Generating Company may also opt to entrust the transmission line work to UPPCL on deposit work basis as per Corporation rule. UPPCL will construct the bay at Grid Sub Station as per Corporation's estimate at the Generating Company's cost.***

..." {emphasis Added}

- 14.5. It is, therefore, clear that in terms of the Act (Section 10), the State Commission's Regulations (Regulation 35) and as well as under the PPA, (Clause 8.3) the responsibility of establishing the dedicated

transmission line for evacuation of power from the Appellant's generating plant to the grid substation of the 3rd Respondent was that of the Appellant himself. Under clause 8.3 of the PPA, the Appellant had option to construct the line either by himself or through the Corporation (R-2). The Appellant, on his own volition opted for the 2nd alternative and entrusted the work of construction of line to 2nd Respondent Corporation. The Appellant could have as well entrusted this work to any competent licensed contractor as per requirement of Indian Electricity Rules 1956. Thus the construction work for the 132 KV transmission line was being done by 2nd Respondent on deposit work basis and the role of 2nd Respondent in construction of line was limited to that of an execution agency only. The Appellant while entrusting the works related to construction of line should have entered into a separate execution agreement with 2nd Respondent Corporation incorporating appropriate indemnifying clause safeguarding its interests in the event of delay in construction of line.

- 14.6. Learned Counsel for the Respondents contended that whereas, the PPA was executed between the Appellant and 1st Respondent, the construction of line was entrusted to the 2nd Respondent. The construction of transmission line is separate and distinct activity from the Power Purchase Agreement and the same cannot be mixed up only for the reason that the Appellant got construction transmission line by U.P. Power Corporation Ltd.

14.7. Learned Counsel for the Appellant argued that admittedly the PPA was executed by the 2nd Respondent Corporation on behalf of the 1st Respondent DISCOM. The 1st Respondent had authorized the 2nd Respondent M/s U.P. Power Corporation Limited to execute the said Power Purchase Agreement and to do all the necessary relevant works on behalf of them. As such all the obligations under the said power purchase agreement, including construction of line, were under taken by 2nd Respondent on behalf of the 1st Respondent.

14.8. We are of the view that although the 2nd Respondent has signed the PPA on behalf of the 1st Respondent and has assumed all the obligations of the 1st Respondent, the 2nd Respondent Corporation cannot be held responsible for construction of line. The question now arises as to whether the 1st Respondent was under obligation to construct the 132 kV dedicated transmission line under the PPA. Admittedly, the line in question is a transmission line. Section 42 of the Act provide for the duties of a distribution licensee. Relevant portion of Section 42 is quoted below:

“42. Duties of distribution licensees and open access.—(1) It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.....”

14.9. Thus under the Act the 1st Respondent is responsible to develop and maintain distribution system in his area of supply. Establishment of transmission lines is not the function of a distribution licensee.

Therefore, Construction of 132 kV transmission line cannot be held to be the responsibility of the 1st Respondent under the PPA. Since the 1st Respondent cannot be held to be responsible for construction of line under the PPA, the 2nd Respondent UPPCL, who signed the PPA on behalf of 1st Respondent, cannot be held responsible for construction of line and for consequent delay.

14.10. Further, bare reading of PPA would reveal that in every clause of PPA the 1st Respondent has been referred to as 'Discom'. At some places it is mentioned that UPPCL on behalf of 'Discom'. However, in clause 8.3 of PPA wherein the option of getting the construction of line through UPPCL was provided to the Appellant, the term UPPCL has been used. Let us revisit the clause 8.3 of PPA which is reproduced as under:

*"8.3. The construction of transmission line and other supporting works for evacuation of power shall be undertaken by the Generating Company under approval and supervision of STU on payment of 15% of the cost of the work as per Corporation's estimate towards the supervision. **The Generating Company may also opt to entrust the transmission line work to UPPCL on deposit work basis as per Corporation rule.** UPPCL will construct the bay at Grid Sub Station as per Corporation's estimate at the Generating Company's cost."*

14.11. The mention of UPPCL in above clause was as STU/transmission licensee and not on behalf of DISCOM the 1st Respondent. The 2nd Respondent UPPCL had taken the construction of line as STU/transmission licensee and not as representative of the 1st Respondent DISCOM.

14.12. Thus, it is clear that the Appellant had option to construct the line either by himself, through any licensed electrical contractor competent to carry out such works as per provisions of Indian Electricity Rules 1956, or through UPPCL on deposit work basis. The Appellant on his own volition opted to get it done through 2nd Respondent Corporation as STU. Entrusting the work to Corporation did not relieve the Appellant from its prime responsibility of completion of line on time. In this connection, we would like to point out another important factual aspect of the case.

14.13. Admittedly, the Appellant Generating Company had commenced its crushing operations in December 2007 and was in a position to evacuate power to the grid, and it was not possible due to non-availability of evacuation system. Hence a Petition No.515/2008 was filed by the Appellant before the State Commission for permission for temporary arrangement. The State Commission, vide its order dated 6.2.2008 permitted the proposed temporary arrangement for evacuation of power from the Appellant's generating station up to 30.04.2008. While permitting the temporary arrangement for evacuation of power, the State Commission had made the following observations in regard to the responsibility of the Appellant and the Respondents:

"We find that final agreement between the parties was made on 15.11.06 in compliance to Order dt.25.5.06. However, prior to it the parties had agreed to commission the plant by Dec,07 and to transmit power through a 132 KV line connected with 132 KV grid substation at Faridpur. There is no change on these conditions in the

agreement executed on 15.11.06. It is awful to note that the petitioner has approached the Commission with this petition on 22.1.08 after the commissioning of the plant in Dec,07 and as such has miserably failed on the commitments made in the PPA. The urgency so created by the Petitioner could have been avoided had the progress of transmission system monitored. The construction of the dedicated transmission line is the responsibility of the Petitioner under the provisions of CNCE regulations as such primary responsibility of such delay lies on the Petitioner. Incidentally, the construction of the transmission system has been assigned by the Petitioner to UPPTCL which is also a State Transmission Utility (STU) with statutory duty to carry electricity from the generating stations to the load centers. Having committed to schedule of construction of the transmission system, it has also failed to execute the work in time as execution agency....” {emphasis added}

14.14. Thus the State Commission in its order dated 6.2.2008 had held the Appellant to be primarily responsible for the construction of the line as well as for the delay in its construction. This order of the State Commission dated 6.2.2008 has not been challenged by the Appellant and has, therefore, attained finality. In other words by not challenging this order of the State Commission, the Appellant had accepted its responsibility for delay and therefore cannot claim any damage suffered on account of that.

14.15. Finally, the Appellant had contended that in terms of clause 24.2 of PPA, the Respondents are liable to indemnify him from any loss/damage occurred due negligence of the Respondent. Let us quote relevant portion of clause 24.2 of the PPA.

“24. INDEMNIFICATION

24.1 The Generating Plant shall indemnify.....

24.2 DISCOM/STU shall indemnify and render the Generating Plant,..... harmless from and against any liability, damages, costs,.....which directly or indirectly result from or arises out of or in connection with negligence or willful misconduct by DISCOM”

- 14.16. Bare reading of this clause would suggest that the Appellant is entitled to be indemnified by the Respondents only in the event of negligence or willful misconduct by the 1st Respondent (DISCOM). In the present case there had not been any negligence or willful misconduct by the 1st Respondent DISCOM. Therefore the Appellant is not entitled to be indemnified.
15. In view of above conclusion, we are of the view that the other issues raised by the Respondents in regard to jurisdiction of the State Commission and actual date of commissioning of generating plant as irrelevant at this stage.
16. Now we shall deal with Appeal NO. 20 of 2010.
17. The facts of this appeal are almost similar to the facts of Appeal no 19 of 2010 except locations of generating station and injection point and dates of occurrences. Even the arguments advanced by the learned counsels of the Appellant and the Respondents were almost same. However for completeness the facts of the case are given below:
- 17.1. The Appellant Dwarikesh Sugar Industries Limited established a Greenfield Project of 7500 TCD Sugar Mill at Bahadarpur, Bijnor along with Cogeneration facility with ability to sell surplus 24 MW power. The Appellant executed a Power Purchase Agreement (PPA) dated 28.4.2006 with 1st Respondent DISCOM for sale of 24 MW power

produced from the Appellant's Sugar Mill's Cogenrating Plant. This PPA dated 17.5.2006 was approved by the State Commission on 25.5.2006 with the direction to execute final PPA in accordance with Regulations. Thus the final PPA was executed on 15.11.2006. The 1st Respondent DISCOM had authorized the 2nd Respondent M/s U.P. Power Corporation Limited to execute the said Power Purchase Agreement and to do all the necessary relevant works on behalf of them. As such all the obligations under the said power purchase agreement were under taken by 2nd Respondent on behalf of the 1st Respondent.

- 17.2. The date of Commissioning of the Co-gen plant as per the PPA was to be 15th October, 2007.
- 17.3. Under clause 8.1 of the PPA, the Power from the generating plant was to be transmitted at 132 kV through a 132 kV line from generating plant to STU's grid substation located at Dhampur after its construction.
- 17.4. Under clause 8.3 of the PPA, the construction of the Transmission Line and other supporting works for the evacuation of power was to be undertaken by the Appellant. However, the Appellant, under the said clause had the option to require the Respondent No. 3 to construct the said line and other works at the cost of the Appellant.
- 17.5. On 28.4.2006, the Appellant paid Rs 4.70 Crore to the 3rd Respondent towards the cost of 132 kV evacuation line and 132 kV line bay at Dhampur Substation of STU.

- 17.6. The construction work for the 132 KV transmission line was being done by 3rd Respondent on deposit work basis.
- 17.7. The Appellant commenced its crushing operations on 26.11.2007 and was in a position to export power to the State Grid. However, the evacuation line, being constructed by the 3rd Respondent, was not ready and thus the Appellant was not in position to feed it into the grid.
- 17.8. Due to inordinate delay by the Respondents in construction of the transmission line and other facilities, the Appellant had suffered substantial losses. The Appellant, therefore, filed a petition being no. 614 of 2009 before the State Commission seeking claim of damages against Respondent No. 1 & 2.
- 17.9. By the Impugned Order, the State Commission rejected the petition of the Appellant as also the claim for damages/compensation as claimed by the Respondent.
- 17.10. Aggrieved by this Order dated 12.11.2009, the Appellant generating company has filed this present appeal.
18. From the above it is clear that the facts of this case are similar to the facts in Appeal No 19 of 2010 discussed in foregoing paragraphs above. Accordingly our findings in Appeal NO. 19 of 2010 would apply squarely to this Appeal also.

19. Summary of our findings

- a. In terms of the Section 10 of Electricity Act 2003, the State Commission's Regulations and as well as Clause 8.3 of the PPA, the responsibility of establishing the dedicated transmission line for evacuation of power from the Appellant's generating plant to the grid substation of the 3rd Respondent was that of the Appellant himself. Under clause 8.3 of the PPA, the Appellant had option to construct the line either by himself or through the Corporation (R-2). The Appellant, on his own volition opted for the 2nd alternative and entrusted the work of construction of line to 2nd Respondent Corporation. The Appellant could have as well entrusted this work to any competent licensed contractor as per requirement of Indian Electricity Rules 1956. Thus the construction work for the 132 KV transmission line was being done by 2nd Respondent on deposit work basis and the role of 2nd Respondent in construction of line was limited to that of an execution agency only.
- b. 1st Respondent DISCOM is responsible to develop and maintain distribution system in his area of supply under Section 42 of the Act. Establishment of transmission lines is not the function assigned to a distribution licensee under the Act. Therefore, Construction of 132 kV transmission line cannot be held to be the responsibility of the 1st Respondent under the PPA. Since the 1st Respondent cannot be held to be responsible for construction of line under the PPA, the 2nd Respondent Corporation, who signed the PPA on behalf of 1st Respondent, cannot be held responsible for construction of line and for consequent delay.

- C. The Appellant had option to construct the line either by himself, through any licensed electrical contractor competent to carry out such works as per provisions of Indian Electricity Rules 1956, or through 2nd Respondent Corporation on deposit work basis. The Appellant on his own volition opted to get it done through 2nd Respondent Corporation as STU. Entrusting the work to Corporation did not relieve the Appellant from its prime responsibility of completion of line on time.**
- d. The State Commission in its order dated 6.2.2008 had held the Appellant to be responsible for the construction of the line as well as for the delay in its construction. This order of the State Commission dated 6.2.2008 has not been challenged by the Appellant and has, therefore, attained finality. In other words by not challenging this order of the State Commission, the Appellant had accepted its responsibility for delay and therefore cannot claim any damage suffered on account of that.**
- e. Bare reading of this Indemnifying Clause 24.2 of PPA would suggest that the Appellant is entitled to be indemnified by the Respondents only in the event of negligence or willful misconduct by the 1st Respondent (DISCOM). In the present case there had not been any negligence or willful misconduct by the 1st Respondent DISCOM. Therefore the Appellant is not entitled to be indemnified.**
- f. The Appellant while entrusting the works related to construction of line should have entered into a separate execution agreement with 2nd**

Respondent Corporation incorporating appropriate indemnifying clause safe guarding its interests in the event of delay in construction of line.

20. In view of our above findings, we do not find any ground to interfere with the impugned orders of Uttar Pradesh Electricity Regulatory Commission dated 12.11.2009.
21. Hence, the Appeals being devoid of merit are dismissed. However, there is no order as to cost.
22. Pronounced in the open court today the 20th October, 2011.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 20th October, 2011

REPORTABLE/NON-REPORTABLE