Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 91 of 2010

Dated : 27th September, 2011

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

In the matter of:

M/s Ind-Bharath Energies (Maharashtra) Ltd
Plot No. 30 A, Road No. 1,
Film Nagar, Jubliee Hills
Hyderabad-500033. ….Appellant

Versus

1. Maharashtra State Electricity Distribution Co. Ltd.
   Parakashgad, Bandra (East), Mumbai - 400051.
2. Maharashtra State Electricity Transmission Co. Ltd.
   Hong Kong Bank Building, 3rd Floor
   M G Road, Fort, Mumbai – 400023
3. Maharashtra Electricity Regulatory Commission.
   WORLD Trade Centre, 13th floor,
   Cuffe Parade, Colaba,
   Mumbai – 400005 …….Respondents

Counsel for Appellant: **Mr. A N Haksar, Sr Advocate**
Ms Puurnima Sapra

Counsel for Respondents: **Mr. Vikas Singh, Sr Advocate for R-1**
Mr. Abhishek Mitra
Ms. Amrita Narayan
Ms. Mullapadi Rambabu for R-2

J u d g m e n t

Per Hon'ble Shri V.J. Talwar, Technical Member:

1. The Appellant, M/s Ind-Barath Energies (Maharashtra) Ltd. is a generating company having a 20 MW Biomass based power plant in Nanded district of Maharashtra.

2. 1st Respondent Maharashtra State Electricity Distribution Co. Ltd. is the Distribution Licensee in the state of Maharashtra. 2nd Respondent is the State Transmission utility (STU) in Maharashtra. The Maharashtra Electricity Regulatory Commission (State Commission) is the 3rd Respondent.

3. Aggrieved by the impugned Order of State Commission dated 07.01.2010, the Appellant, the generating company has filed this Appeal.

4. The short facts leading to the filing of this Appeal are as follows:-

I. The Appellant being a generating company has setup a biomass based power plant having an installed capacity of 20 MW at Nanded district of Maharashtra. On 18.10.2006 the Appellant entered in to a Biomass Energy Purchase Agreement (BEPA) with the 1st Respondent the Distribution Licensee.

II. Article 3 of the BEPA contained certain Conditions Precedent, which were required to be fulfilled and complied by the parties to the Agreement. Clause 3 of Article 3 of BEPA required the project developer to provide a Bank Guarantee for penalty for non-compliance on use of fossil fuel. Clause 9 of Article 3 provided that non-fulfillment of any of the Conditions Precedent within 12 months from signing of BEPA would render the BEPA terminated automatically.

III. The Appellant did not furnish the said Bank Guarantee. On 6.10.2008 the Appellant informed the 1st Respondent that since it did not furnish the Bank Guarantee, one of the Conditions Precedent, has not been fulfilled by it the BEPA stands automatically terminated as per Article 3(9) of BEPA.

IV. After informing 1st Respondent about termination of BEPA, the Appellant approached the 2nd Respondent Transmission Licensee for grid connectivity to facilitate him to run the power plant as Independent Power Project (IPP) on merchant basis. The Appellant also expressed that till open access is provided, it would deliver energy into the 2nd Respondent's grid.

V. Before granting open access to the Appellant, the 2nd Respondent asked the Appellant for confirmation from 1st Respondent regarding termination of the BEPA. The Appellant objected to the insistence of confirmation

regarding termination of BEPA from 1st Respondent. Even after several rounds of correspondence between the Appellant, 1st Respondent and 2nd Respondent there was no breakthrough.

VI. The Appellant's power plant was ready for synchronization and it was incurring heavy losses due to non-availability of grid connectivity and open access. The Appellant, therefore, filed a Writ Petition before the High Court of Bombay praying, inter alia, for declaration that the said BEPA was terminated and that no right had accrued or survived on the parties thereto; and to order the 1st Respondent to issue the letter of confirmation to the Appellant that the BEPA stood automatically terminated.

VII. On 22.11.2008 the Appellant again wrote to the 1st Respondent indicating its desire to sell power to the 1st Respondent for initial 15 days, without prejudice to the outcome of pending writ petition, at tariff approved by the State Commission and requested to allow synchronization of its plant with the grid.

VIII. Thereafter several letters were exchanged and several meetings were held between the parties for discussing the synchronization without any positive outcome. Finally the Appellant agreed to supply power to 1st Respondent pending adjudication of disputes at the rates applicable to all biomass producers in the State of Maharashtra.

IX. On 27.1.2009 the Appellant withdrew the writ petition with liberty to file a petition before the State Commission for adjudication of its disputes with the Respondents.

X. Accordingly, the Appellant filed a petition before the State Commission under Section 86(1)(f) of the Electricity Act 2003 read with Regulation 19 of MERC (conduct of Business) Regulations,2004 seeking for a declaration that the BEPA stood automatically terminated and consequently the Appellant was entitled to supply power generated by it to any person of its choice under Open Access Regulations.

XI. However, the State Commission, vide its impugned order dated 7.1.2010 dismissed the petition filed by the Appellant. Aggrieved by the impugned order of the State Commission, the Appellant has filed this Appeal.

5. The main contention of Learned Sr. Counsel for the Appellant rests on the plain interpretation of Article 3 of BEPA. He submitted the following in support of his claim:

i. Article 3 of the BEPA relating to Conditions Precedent categorically stipulate that the obligations in the BEPA would govern the parties to the BEPA only on the satisfactory and full compliance of the Conditions Precedents set in Article 3.3 of BEPA. Article 3.3 of the BEPA provides for the furnishing of a Bank Guarantee by the Appellant for the penalty amount on non-compliance on the use of fossil fuel. Admittedly, the Appellant has not furnished the said Bank Guarantee and had, therefore, not complied with the Condition Precedent stipulated under Article 3.3 of the BEPA. Thus, it is clear beyond all reasonable doubts that there is non-fulfillment of one of the Conditions Precedent as provided for in BEPA.

ii. Further, Article 3.9 of the BEPA clearly contemplates that upon non-fulfillment of the conditions precedent within 12 months from the date of signing of the BEPA, the BEPA shall automatically stand terminated.

iii. The said BEPA was executed on October 18, 2006 and the twelve (12) month period expired on October 17, 2007. The condition precedent, as regards furnishing of bank guarantee, had not been fulfilled. Consequently, on October 17, 2007, the BEPA stood automatically terminated. As a result of the same, the Appellant has no outstanding obligations towards 1st Respondent Distribution Licensee under the BEPA or otherwise and it is free to conduct its business in any manner it deems fit.

iv. The finding of the State Commission that the words “unless agreed in writing by MSEDCL” as appearing in Article 3.9 would mean that the termination of the BEPA is subject to confirmation in writing by 1st Respondent and that 1st Respondent has the right, to waive any “Conditions Precedent” which has not been fulfilled by the Appellant at any point in time even after 12 months period, is erroneous & vitiated both in law and in fact.

v. Moreover, Article 23.4 of the BEPA provides that any waiver by any party must be in writing. Had the intention of the Maharashtra Distribution Licensee (R-1) been to waive off the condition relating to the furnishing of the Bank Guarantee, the same must have been done before the expiration of period of 12 months from the execution of the BEPA, in writing. Admittedly, the same is not the situation in the present case..

vi. It is trite law that judicial forums/authorities cannot read beyond the explicit terms of the contract between the parties. It is a well settled legal position that a court of law will read an agreement as it is and cannot rewrite or rearrange a contract. The existence of specific clauses in an agreement cannot be ignored or overlooked. Therefore, in view of the clear and explicit terms of the BEPA, that non-fulfillment of the conditions precedent within twelve months from the execution of the same, the BEPA shall stand terminated automatically without any further reference to any party of any kind whatsoever.

vii. It is a well settled legal proposition that words in a contract should be given their natural, ordinary and literal meaning and the Court ought not to add to or subtract from the words actually used by the parties. The parties to the BEPA consciously entered into the agreement which provided for an automatic termination on the non fulfillment of certain conditions precedent

viii. The plain language .of the BEPA makes it clear that no affirmative action from either party is required to terminate the BEPA in the event of a condition precedent thereto not having been fulfilled within 12 months of its execution. The BEPA provides for an automatic termination without any need for the Respondent No. 1's consent or notice of such termination from the Appellant.

ix. Further, now it is not open to any party or by the court of law to give a meaning which is not only contrary to the explicit understanding of the parties at the time of execution of the contract but also not warranted by the plain language of the contract.

6. In reply to above submissions made by the Appellant, the Learned Sr. Counsel for the Respondent relied on two principles viz., (i) a contract has to be read as a whole and (ii) no one can take benefit out of his own wrong. He made the following submissions in support of his plea:

i. As per the terms of the said BEPA, which is still in existence, the Appellant was to sell the power generated by its plant, to 1st Respondent for a minimum period of 13 years. Under the BEPA, the 1st Respondent has provided the Appellant a number of facilities, including connectivity with the grid at public expense, start-up power at preferential rates, synchronization, and most importantly, an obligation to purchase the power at preferential rates, as determined by the Commission.

ii. Under its obligation to promote renewable energy generation under section 86(1)(e), the State Commission had determined a higher tariff than market rate for renewable generators such as the Appellant. The 1st

Respondent Distribution Licensee was then compelled to purchase this expensive power under Renewable Purchase Obligation (RPO). To this end, the Commission had specified a minimum percentage of its total yearly requirement which the distribution licensee would necessarily have to purchase from renewable sources such as the Appellant. Failure to adhere to this minimum purchase mandate invites penalties which are levied vis-à-vis the shortfall.

iii. Instances such as the present case where the generator decides to unilaterally terminate the BEPA have become chronic. This has in fact become the modus operandi of the renewable energy generation facilities, where the generator executes a long term BEPA with Distribution Licensee, then, on the basis of this BEPA, the generator avails financing of its project from the lenders, secures preferential tariff from the Commission, secures public financing of the interconnection facilities through Distribution Licensee, and once the plant is up and running, on some or the other rather 'artistic' interpretation of the BEPA will decide to terminate the agreement simply because it is capable of getting a little higher rates from some other purchaser. The sanctity of contractual arrangements has been given a complete go-by such generators.

iv. The Appellant herein is relying on its own non-compliance with a particular provision of the BEPA, which was provided to secure the interests of 1st Respondent, to terminate the BEPA, when very clearly, the said clause cannot be used in the manner being canvassed by the Appellant. It is also a well settled principle of contract law that it is only the non-breaching party who has the right to terminate for default. In other words One cannot take benefit out of its own wrong. If the breaching party is permitted to terminate the contract for its own default, it will destroy the essence of contractual arrangements and no contract will have any sanctity.

7. In the light of the rival contentions, the following comprehensive question would arise for consideration:

Whether the BEPA stood terminated automatically on non-fulfillment of one of the Conditions Precedent by the Appellant in not furnishing stipulated Bank Guarantee within 12 months from date of BEPA?

8. We have heard the Learned Senior Counsel for the parties on this comprehensive question and have given our anxious consideration to their respective submissions.

9. Having regard to the materials available on record and having considered the impugned order and the respective submissions, we are of the view that the grounds urged by the Learned Senior Counsel for the Appellant assailing the impugned order, are not legally sustainable. The reasons for our above conclusion are as follows:

i. The Appellant has relied only on the interpretation of clause 3 and 9 of Article 3 of BEPA to hold that in view of its own admitted default of not having provided the bank guarantee as stipulated at clause 3.3, the BEPA stood terminated.

ii. Let us quote Article 3 of BEPA:

The obligations under this Agreement are subject to the satisfaction in full of the following conditions precedent.

1. *The Project holder shall have provided a detailed project report (DPR) in respect of the Facility to MSEDCL.*
2. *The Financial closure shall have occurred:- The Project holder shall achieve the Financial Closure within 12 (twelve) months from the date of signing of this Agreement.*
3. *Project holder shall have provided a Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. (Amount equivalent to annual generation corresponding to 80% PLF multiplied by penalty of Rs. 0.30 per unit) as specified under Article -11, Section 4 of this agreement.*
4. *The Project holder shall have provided 50% of the cost of evacuation facility as interest free advance to MSEDCL.*
5. *The Project holder obtaining the necessary licenses/sanctions /approvals/clearances from government agencies inter-alia, including all recommendations and clearances from the Maharashtra Energy Development Agency MEDA, Government of Maharashtra, as are required.*
    - *Vetting by MEDA on desired quality and quantity of fuel availability and fuel procurement plan.*
    - *MEDA"s recommendation on forwarding note for coal linkages.*
    - *MEDA's Final Clearance.*
    - *Land Documents.*
    - *Geology and Mining permission, if applicable.*

- *NA permission from development commissioner (industries) for use of Land for Industrial purpose, if applicable.*
- *Detailed project report (DPR).*

6. *Statutory approval of Single Line diagram (SLD) from the electrical inspector.*
7. *Connectivity permission from the MSETCL/MSEDCL and EHV evacuation approval including approval of the single line diagram of proposed connectivity with MSEDCL'S system and protection logic and any other statutory permissions as may be required.*
8. *The Project holder shall have ensured that the design and construction of the facility shall be in line with the provisions of permission from GOI/CIN/MEDA/MSEDCL and shall be as per the requirements of any government guidelines and standards prescribed.*
9. *Non-Fulfillment of Conditions Precedent within twelve (12) months from the date of signing of this agreement shall terminate this agreement automatically unless agreed in writing by MSEDCL.*

iii. Perusal of Article 3 of BEPA makes it clear that clause 1 and 2 requires the Appellant to submit Detailed Project Report (DPR) and financial closure. Clause 3 requires the Appellant to furnish Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. Clause 4 requires the Appellant to provide 50% of cost of evacuation system as interest free loan. As per clause 5 and clause 6, the Appellant was required to obtain certain statutory clearances/approvals. Clause 7 requires the Appellant to obtain connectivity permission from transmission licensee. In terms of clause 8 of Article 3, the Appellant was required to ensure that the design and construction shall be in line with the various permissions. Clause 9 provided that non-fulfillment of any of Conditions Precedent within 12 months from execution of the agreement shall terminate the agreement automatically. Thus all the Conditions Precedent specified in Article 3 of BEPA (reproduced above) were for the Appellant to fulfill and comply with. Therefore, the right to terminate for default of any of these conditions would only be available with the other party to the agreement i.e. the 1st Respondent Distribution Licensee and not the Appellant.

iv. If one party in a contract breaches any condition of the contract the right to terminate the contract is acquired by the other party. However, before terminating contract, the other party is required to issue terminating notice

to breaching party. As per clause 9 of Article 3, the agreement would terminate automatically in case of breach of any condition precedent. The effect of word 'automatically' is limited to non-issuance of termination notice only. In other words because of automatic termination, the 1st Respondent was not required to issue termination notice. The right to terminate on breach of any of the Conditions Precedent remained with the 1st Respondent only and cannot be said to have been acquired by the Appellant simply by the presence of word 'automatically'. In our opinion the words "unless agreed in writing by MSEDCL" in Clause (9) of Article 3 means that the right to terminate the BEPA on non-fulfillment of condition precedent by the Appellant lies with the Respondent Distribution Licensee only. It was for the Distribution Licensee to terminate the agreement on default of the Appellant or waive off the said default. It is in this context that the State Commission held in the impugned order that:

> "…*termination of the BEPA is subject to confirmation in writing by MSEDCL. This also means that MSEDCL has the right to waive any "Conditions Precedent" which has not been fulfilled by the Petitioner within twelve (12) months from the date of signing of the BEPA. Admittedly, MSEDCL has not confirmed that the BEPA stands terminated due to non-fulfillment of the condition to furnish a Bank Guarantee as referred to in Clause (9) of Article 3. In fact, MSEDCL has opposed the termination on the ground of non-fulfillment of the said condition by the Petitioner."*

v. Even otherwise, the reasons provided by the Appellant are not sustainable. Bare reading of Clause 3 in Article 3 of BEPA would reveal that its operation is subjected to Article 11 of the BEPA. Let us reproduce clause 3 of Article 3.

> *"3. CONDITION PRECEDENT*
>
> *The obligations under this agreement are subject to the satisfaction in full of the following conditions precedent.*
>
> *…*
>
> *3.3 Project holder shall have provided a Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. (Amount equivalent to annual generation corresponding to 80% PLF multiplied by penalty of Rs. 0.30 per unit)* ***as specified under Article-11 Section 4 of this agreement****.*

…

….”

vi. It is a well established principle that the Articles and Clauses of an agreement cannot be read in isolation and these must be read harmoniously along with other provisions of the Agreement to gather the true intention of the parties to the agreement and as such, the quasi-judicial/ administrative authority must ascertain the intention of the parties to the contract as a whole.

vii. In this context Article 6 and Article 11 of BEPA are relevant. Let us quote these Articles. The relevant Clause 3 of Article 6 read as under:

> *“6.3 **If designed to use fossil fuel also,** the power plant installation should incorporate adequate system/equipment for environmental management and pollution control and comply with extant regulating regarding environmental emissions.*

viii. Clause 4 of Article 11 of BEPA read as under:

> *11.4 **Before commissioning of the project such Project holders who are proposing to use fossil fuels** shall furnish a Bank Guarantee covering the penalty amount (i.e. amount equivalent to annual generation corresponding to 80% PLF, multiplied by penalty of Rs. 0.30 per unit) to MSEDCL.”*

ix. It is evident from holistic reading of these articles that the requirement to furnish a bank guarantee, as per the conditions precedent under Article 3.3, is subject to the provisions of Article 6.2.3 and 11.4. As a result, the bank guarantee under Article 3.3 would be required to be furnished only if: (i) the project is designed to use fossil fuel also; **and** (ii) the Project Holder must indicate, before commissioning of the project, that it proposes to use fossil fuel.

x. From the records made available to us, it is clear that prior to giving information of automatic termination of BEPA on 6.10.2007, the Appellant did not indicate that it proposes to use fossil fuel. It is for the first time in its letter dated 22.12.2008, the Appellant had indicated that owing to high price of biomass, running the plant only on biomass fuel has become unviable. Therefore, the Appellant planned to use fossil fuel also. Relevant

portion of the Appellant's letter to 1st Respondent dated 22.12.2008 is reproduced below:

> *"This is with reference to the meeting held on 20.12.2008 in your office in respect of the above subject matter. As discussed in our meeting, at present it has become commercially unviable to operate our plant solely as a Biomass Plant on account unprecedented and phenomenal increase in the cost of Biomass. We will also be required to use fossil fuel for generation of power in order to sustain our commercial operations.*"

xi. The wordings contained in this letter dated 22.12.2008, as reproduced above, would indicate that the Appellant contemplated to use fossil fuel only because the price of Biomass fuel has increased phenomenally and running of project solely of Biomass had become unviable. There is nothing on record to show that the Appellant had proposed to use fossil fuel prior to Commissioning of the project.

xii. On the other hand, the 1st Respondent has submitted that though the project has been commissioned and has been supplying power to the 1st Respondent since January 2009, the Appellant has till date had not opted for using fossil fuel in place of biomass. In the light of these facts it is concluded that the occasion to furnish the said bank guarantee had not arisen. The manner, in which the Appellant is reading the said clause 3.3 in isolation with complete disregard for the remaining provisions of the BEPA, is not permissible. A contract has to be read as a whole to determine the true intention of the parties.

xiii. This position of law is well settled in view of a number of judgments of the Hon'ble Supreme Court. Some of these are:

(i) Union of India v/s D N Revri and others: AIR 1976 SC 2257 (para 7);

(ii) Khardah Company Ltd. Vs. Raymon & Co. (India) Pvt. Ltd: AIR 1962 SC 1810 (Para 18);

(iii) Modi and Co. Vs. Union of India: AIR 1969 SC 9 (Para 8);

(iv) Amravati District Central Cooperative Bank Ltd. Vs. United India Fire and General Insurance Co. Ltd: (2010) 5 SCC 294 (Para 13);

(v) Delta International Ltd. Vs. Shyam Sundar Ganeriwalla and Another: (1999) 4 SCC 545 (para 17);

(vi) General Assurance Society Ltd. Vs. Chandmull Jain: AIR 1966 SC 1644 (para 11);

(vii) Polymat India (P) Ltd. and Another Vs. National Insurance Co. Ltd and Others: (2005) 9 SCC 174 (Para 21);

(viii) Strachey Vs. Ramage: (2008) EWCA Civ 384 (para 29);

(ix) Ganga Saran Vs Ram Charan Ram Gopal: AIR 1952 SC 9 (Para 9);

(x) State Bank of India Vs Mula Sahakari Sakhar Karkhana Ltd: (2006) 6 SCC 293 (Para 22,23 and 32);

(xi) Her Highness Maharani Shanti Devi P. Gaikwad Vs. Savjibhai Haribhai Patel & Others (2001) 5 SCC 101 (Para 56);

(xii) Classic Motors Limited Vs. Maruti Udyog Limited: 65 (1977) DLT 166 (para 70,71);

xiv. It is also pertinent to note that the project of the Appellant M/s Ind Bharat has received public funding for setting up of interconnection and power evacuation facilities. As per Clause 4 of Article 3 the Appellant was required to provide 50% of the cost of evacuation system as interest free loan. Balance 50% was to be provided by the 1st Respondent distribution Licensee.

xv. Further, in accordance with clause 9.1 of the BEPA, the start-up power supplied to the Appellant is at HT-Industrial tariff. This is significantly lower than the HT-Commercial tariff which is charged to other generators who are operating their plants on a purely commercial basis.

10. In view of our detailed discussion, it is to be concluded that Article 3 is to be read with other provisions of the BEPA. Since the Appellant did not propose to use fossil fuel any time before commissioning of the project in terms of Article 11.4, the requirement of furnishing Bank Guarantee as penalty for use of fossil fuel would not arise. As such provisions of clause 9 of Article 3 of BEPA would not become operational and the BEPA would not terminate automatically.

11. Let us now examine this issue from yet another angle. Assuming that the condition precedent for furnishing bank Guarantee as penalty for non-compliance on use of fossil fuel specified under Article 3.3 has not been duly satisfied by the

Appellant and therefore, the BEPA stood automatically terminated as per clause 9 of the Article 3 of BEPA. It is to be stated that admittedly, it is the Appellant who has not furnished the Bank Guarantee. There was no default on the part of the 1st Respondent Distribution Licensee; on the other hand, there was a default on part of the Appellant. The Appellant cannot, therefore, claim that the BEPA stood automatically terminated and the Appellant has no outstanding obligations towards 1st Respondent, Distribution Licensee under the BEPA. The Appellant cannot take advantage of its own wrongful act of non-fulfillment of Conditions Precedent relating to Bank Guarantee. It is well settled principle that no person can take advantage of its own wrong. In Broom's Legal Maxim (10th Edition) at Pg. 191 it is stated;

> *'……it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.*

12. Let us refer to some of the judgements wherein this principle has been made:

(i) Three Bench Judges of the Hon'ble Supreme Court in Union of India vs. Major General Madan Lal Yadav [1996 (4) SCC Pg.127] observed as under:

"the maximum nullus commodum capere potest de injuria sua propria – meaning no man can take advantage of his own wrong – squarely stands in the way of avoidance by the respondent and he is stopped to plead bar limitation contained in Section 132 (2)."

(ii) In B.M. Malani Vs. Commissioner of Income Tax and Anr. 2008 (10) SCC Pg.617, the Hon'ble Supreme Court observed as under:

"For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case".

(iii) In Kushweshwar Prasad Singh Vs. State of Bihar (2007) 11 SCC:

"In this connection, our attention has been invited by the Learned Counsel for the Appellant to a decision of this Court in Mrutunjay Pani and Anr. Vs. Narmade Bala Sasmal and Anr. [1962 (1) SCR Pg.290], wherein it was

held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim 'Commodum ex injuria sua nemo habere debet' (No party can take undue advantage of his own wrong)."

(iv) Nirmala Anand Vs Advent Corporation (P) Ltd (2002) 5 SCC 481:

"The Appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The Appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The Respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the Appellant".

(v) Ashok Kapil Vs. Sana Ullah (1996) 6 SCC 342:

"7…..The maxim "Nulls commode copier potest de injuries sua propriety" (No one can take advantage of his own wrong) is one of the salient tenets of equity. Hence, in the normal course, respondent cannot secure the assistance of a court of law for enjoying the fruit of his own wrong.

12……..We are inclined to afford such a liberal interpretation to prevent a wrong doer from taking advantage of his own wrong"

(vi) Eureka Forbes Vs. Allahabad Bank (2010) 6 SCC 193

"Maximum Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case, Respondent Nos. 2 & 3 and the Appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon Respondent Nos. 2 &3 and in any case on the Appellant".

(vii) Panchanan Dhara Vs. Monmatha Nath Maity (Dead) through LRs. (2006) 5 SCC 340

"Performance of a contract may be dependent upon several factors including grant of permission by the statutory authority in appropriate cases. If a certain statutory formality is required to be complied with or

permission is required to be obtained, a deed of sale cannot be registered till the said requirements are complied with. In a given situation, the vendor may not be permitted to take advantage of his own wrong in not taking steps for complying the statutory provisions and then to raise a plea of limitations"

13. In the light of the above judgements of Hon'ble Supreme Court, it is to be held that the Appellant cannot take advantage of its own wrong contending that the condition precedent for penalty for non-compliance on use of fossil fuel specified under Article 3.3 has not been duly satisfied and therefore, the BEPA stood automatically terminated as per clause 9 of the Article 3 of BEPA.

14. Therefore, we are of the view that the Biomass Energy Purchase Agreement has not been terminated automatically and consequently hold that the State Commission has correctly set aside the same. Thus, question is answered accordingly.

15. Summary of our Findings

a. It is well established principle that the Articles and Clauses of an agreement cannot be read in isolation and these must be read harmoniously along with other provisions of the Agreement to gather the true intention of the parties to the agreement and as such, the quasi-judicial/ administrative authority must ascertain the intention of the parties to the contract as a whole.

b. Holistic reading of Articles 6.3 and 11.4 of the Agreement reveal that the requirement to furnish a bank guarantee, as per the conditions precedent under clause 3.3, is subject to the provisions of these Articles. As a result, the bank guarantee under clause 3.3 would be required to be furnished only if: (i) the project is designed to use fossil fuel also; and (ii) the Project Holder must indicate, before commissioning of the project that it proposes to use fossil fuel.

c. The project has been commissioned and has been supplying power to the Respondent since January 2009. The Appellant till this date had not opted for using fossil fuel in place of biomass. In the light of these facts, it is concluded that the occasion to furnish the said bank guarantee had not arisen. The manner, in which the Appellant is reading the said clause 3.3 in isolation with complete disregard for the remaining provisions of the BEPA, is not permissible. A contract

has to be read as a whole to determine the true intention of the parties.

d. It is to be concluded that Article 3 is to be read with other provisions of the BEPA. Since the Appellant did not propose to use fossil fuel any time before commissioning of the project in terms of Article 11.4, the requirement of furnishing Bank Guarantee as penalty for use of fossil fuel did not arise. As such provisions of clause 9 of Article 3 of BEPA would not become operational and as such the BEPA would not terminate automatically.

e. The Appellant cannot take advantage of its own wrongful act of non-fulfillment of Conditions Precedent relating to Bank Guarantee. It is well settled principle that no person can take advantage of its own wrong. As such, the grounds urged by the Appellant are not substainable in law.

16. In view of our above findings, we conclude that there is no merit in the Appeal as the impugned order does not suffer from any infirmity. The Appeal is dismissed as the grounds urged by the Learned Counsel for the Appellant are not sustainable in law.

17. However, there is no order as to cost.

(V J TALWAR)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 27th Sept, 2011

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REPORTABLE/~~NON-REPORTABALE~~