Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 20 of 2011

13th February, 2012

Coram: **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**
HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

In the matter of

Yash Agro Energy Limited,
'Sahas' First Floor,
64, Bajaj Nagar, Nagpur-440 010,
Maharashtra ... Appellant

VERSUS

1. Maharashtra Electricity Regulatory Commission
   Prakashgad, 5th Floor,
   Bandra(East),
   Mumbai -400 051

2. Maharashtra Electricity Regulatory Commission
   World Trade Centre No. 1, 13th Floor,
   Cuffe Parade, Colaba,
   Mumbai -400 001 … Respondents

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

Yash Agro Energy Limited, a company that operates biomass cogeneration plant in the district of Chandrapur in the State of Maharashtra preferred this appeal against the order dated 30.12.2010 passed by the Maharashtra Electricity Regulatory Commission, the respondent No. 2 herein,in case No. 24 of 2010 whereby it dismissed the claim of the appellant for compensation for loss on account of the breach of Energy Purchase Agreement (EPA) dated 25.10.2004 allegedly committed by Maharashtra State Electricity Distribution Company Ltd.(MSEDCL), the respondent No. 1 herein.

2. Before setting up the generating plant, the appellant had entered into an EPA with the Maharashtra State Electricity Board, the predecessor in interest of the respondent No.l herein on 25.10.2004 pursuant to the orders dated 15.7.2002 and 16.8.2002 passed by the State Commission for promotion of cogeneration of electricity from non-conventional energy sources. In terms of the agreement the appellant was entitled to a tariff of Rs. 3.05 per KWH in case the appellant would opt to sell electrical energy to the

Board. There is a clause, 7.4 of the EPA that entitled the appellant to effect third party sale to any person provided such right was exercised by the appellant from the very beginning, i.e. prior to effecting sale to the respondent No.1. According to the appellant, the appellant opted to effect third party sale at the very beginning of the installation of the generation plant without commencing energy supply to the respondent No.1 who in case of such third party sale was required to allow open access because of the fact that the appellant's generation was connected to the grid of the respondent No.1. But the respondent No.1 by the order dated 21.5.2008 declined to consent to the appellant to effect third party sale and instead advised the appellant to inject electrical energy to the grid of the respondent No.1. This refusal led the appellant to file a petition, being No. 25 of 2008 before the State Commission some time in May, 2008 seeking redressal of the grievances. Even at that time the appellant's generating station was not yet ready for synchronization and commercial operation. At or about that time the appellant entered into an agreement with M/s. Reliance Energy Ltd. for sale of electricity upon commissioning the commercial operation of the plant and in terms of that agreement the appellant was entitled to a tariff of Rs.7/- per KWH. But the Commission dismissed the petition on 8.8.2008 on the ground that

in terms of the EPA with the respondent No.1 the appellant was required to supply electrical energy to the respondent No. 1 without any option for the third party sale. This dismissal order led the appellant to prefer an appeal being 95 of 2008 before this Tribunal which by order dated 24.3.2009 allowed the appeal and set aside the order of the Commission dated 8.8.2008 holding that in terms of the EPA the appellant had a right to effect third party sale from the very beginning as a result of which the respondent No . 1 was without any jurisdiction to deny open access to the appellant so as to effect sale to the Reliance Energy Ltd. But in between, the Tribunal passed an interlocutory order on 10.9.2008 on the application of the appellant whereby it permitted the appellant to inject electricity from its 8 MW Biomass based Cogeneration Power Plant at Kolari and that in that case the respondent No.1 would pay as per the rates as may be specified by the MERC and this would be without prejudice to the rights and contentions of either of the parties to the appeal. According to the appellant, the allowance of the appeal had bolstered the appellant to claim and say that because of denial of open access by the Commission or MSEDCL the appellant suffered substantial loss of the difference between the tariff at which the MSEDCL was subjected to pay under the order of the Commission and the tariff

at which the appellant was entitled to supply to the Reliance Energy between the period from 15.9.2008 to 24.3.2009. The MSEDCL committed breach of the agreement and is thus liable to compensate the appellant for the loss caused on account of such action. The appellant sent a legal notice dated 12.2.2010 to the MSEDCL claiming compensation of Rs.6,02,15,775/- together with interest @ 15% annum but in vain. Then again the Commission was approached by the appellant on 22.6.2010 through a petition being No.24 of 2010 under section 86(1) (f) of the Electricity Act praying for compensation with interest in the amount as was claimed in the legal notice. The Commission again dismissed the petition by the order dated 30.12.2010 on the ground that refusal of the MSEDCL to deny compensation was the outcome of erroneous interpretation or bonafide mistake in the understanding of the legal agreement. According to the appellant, the ground advanced by the Commission is far from being tenable because contractual right of a party flows from the agreement and in the event of the breach of the contract the party at whose interest the breach was committed is liable to pay compensation on account of such breach of the contract and the consequence of the breach of the contract follows from the law of contract and has not to be necessarily provided for in the agreement itself. The order of the

Tribunal dated 24.3.2009 passed in appeal No. 95 of 2008 did not create any fresh right in favour of the appellant but simply declared the rights available to the appellant under the law in the event of a party to the agreement committing a breach thereof.

3. The respondent No. 1, Maharashtra State Electricity Distribution Co. Ltd. filed a counter affidavit justifying the order of the Commission which as respondent No. 2 in this appeal preferred not to file any counter in support of its decision. The appellant's claim for damages is completely frivolous and unfounded. The order dated 6.5.2008 passed by the Commission in case No. 93 of 2007 made the EPA , clause 7.4 to be invalid and unenforceable which led the respondent No.1 to refuse the request for third party sale by the letter dated 21.5.2008. The order dated 6.5.2008 passed in case No. 93 of 2007 remained in force till the Tribunal in its order dated 24.3.2009 limited the operation of the order only to the EPA to be executed in future and directed to give effect to the clause 7.4. of the EPA to the extent possible without violating the statutory provision. In the order dated 24.3.2009 the Tribunal did not find the respondent No .1 to be guilty of the breach of contract. The refusal of the respondent No. 1 to the effect that the appellant was not entitled to any third

party sale is based on the order of the Commission and the interpretation of the respondent No.1 in respect of the clause 7.4 is a bonafide interpretation. There was no breach of EPA. The electricity was injected into the grid pursuant to the interim order dated 10.9.2008 passed by this Tribunal and that order was only at the instance of the appellant through an interim application being IA No. 128 of 2008. No compensation can be awarded for any remote loss or damage sustained by reason of breach. The appellant has already recovered the tariff (cost plus reasonable return) for injecting electricity into the grid as per its own suggestion, as such the damages claimed by the appellant are damages in the nature of loss of remote profits not foreseeable by either of the parties at the time of entering into EPA. In fact, the appellant is seeking in the instant proceeding excess profit which is not permissible. Any compensation payable to the appellant by the respondent No. 1 would be tantamount to imposition of penalty only for acting in compliance with the orders dated 6.5.2008 and 8.8.2008 passed by the Commission and the order dated 10.9.2008 passed by the Tribunal.

4. On the pleadings as aforesaid the points that arise for consideration are as follows:-

a) Whether the impugned order of the Commission is justifiable?

b) Whether on the facts and in the circumstance of the case the respondent No. 1 is legally answerable to pay compensation on alleged breach of contract?

5. This is a comprehensive treatment covering all the issues. The Electricity Act, 2003 has brought about a radical change in the business of the power sector. There has been de-licensing in respect of generation of power and a generator is under the law free to supply the power to any entity or person and the functions of the State Commission have been expressly provided for in section 86 of the Act . Power sector has been placed in the open market and under the Act the transmission utilities are obligated upon to provide non -discriminatory open access to its transmission system when a generator in order to supply power approaches transmission utilities for such open access. Section 39 (2) (d) provides as follows:

` *The functions of the State Transmission Utility shall be-*

*a,) *“*

*b) *,*

*c) **

d) to provide non-discriminatory open access to its transmission system for use by –

i) any licensee or generating company on payment of the transmission charges; or

ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of the section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.

Provided that such surcharge shall be utilized for the purpose of meeting the requirement of current level cross subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced (***) in the manner as may be specified by the State Commission."

Again, in section 40 we inter alia find the following:-

"It shall be the duty of a transmission licensee

*a) **

*b) **

c) to provide non-discriminatory open access to its transmission system for use by –

i) any licensee or generating company on payment of the transmission charges; or

ii) any consumer as and when such open access is provided by the State Commission under sub-section 2 of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Further, section 42 casts an obligation upon the State Commission to introduce open access in these words:-

Section 42 (2) *"The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and the specifying extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determine by the State Commission".

6. The above are the fundamentals in the realm of law that guide our consideration of the case. Facts though they are not in dispute require recapitulation. The appellant's project is a cogeneration project which the law encourages for its installation and development and section 86 (1) (e) of the Act directs the State Commission to promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. It was the Commission that passed orders on 15.7.2002 and 16.8.2002 concerning promotion of cogeneration of electricity and generation of electricity from non-conventional energy sources. On 25.10.2004 the appellant entered into an agreement with the respondent No. 1 for sale to the said respondent No.1 electrical energy of 7.18 MW during off season and 5.62MW during season after self consumption by the appellant to the tune of 0.82 MW during off season and 2.38 MW during season, at a tariff of Rs.3.05 per KWH for a period of thirteen years from the date of commercial operation which, though it was expected to be available on 31.10.2006 in terms of the EPA was not so available until some time in the year of 2008. There is a clause in the agreement namely 7.4 which is quoted below:

"7.4 *Third party sale:*

The generator of the co-generation projects can be allowed to sell the energy generated by the co-generating project to third parties from the beginning itself, if they choose to do so. However, in such a situation, there will be no liability on the part of the MSEB to compulsorily off-take the energy either in part or full generated by the project"

7. It is not in dispute that the agreement with respondent no. 1 could not be acted upon because of the project being not ready for being commercially commissioned and the agreement remained in the book but with no dispute between the parties for a period of 4 years or more when the appellant entered into a similar agreement with a third party namely, M/s. Reliance Energy Ltd. on 13.6.2008 for sale to the Reliance at the delivery point at Kolari, Maharashtra 7.00 KWH from 16.7.2008 to 31.3.2009, and in terms of annexure I to such agreement the tariff would be based on sale of power by RETL on best effort basis minus the applicable trading margin subject *to minimum of the rate decided by MERC for purchase of renewable power by the Maharashtra State Distribution utilities.* The italicised words as above were omitted by amendments to the agreement dated

30.6.2008. In the agreement with the Reliance there was stipulation *like* this:-

"Open Access

ii) Open Access for transmission of power shall be obtained by RETL as per the relevant MERC Regulations fro m time to time.

iii) YAEL will take the consent of Maharashtra-SLDC and that of MSEDCL as may be required for transfer of power through Maharashtra State Distribution/Transmission System. Any charges applicable for obtaining concurrence shall be borne by YAEL.

8. It is evident, therefore, that the project was ready to be commissioned for commercial operation by mid- July, 2008. This agreement with RETL contains no reference to the appellant's earlier agreement with the respondent No.1. Alongside the clause 7.4. we may now cite a default clause as follows:-

Default provisions- Third party sale*:*

In case of any default by the MSEB, the Generator shall be entitled to sale of energy to the third party consumers. The MSEB shall facilitate such third party sale and enter into an

Energy Wheeling Agreement with the Generator to enable such third party sale.

9. A month before the agreement with the RETL was executed, the appellant approached the respondent No. 1 who also acted as State Transmission Utility for connectivity and open access to effect third party sale. Meanwhile, it is pertinent to mention that as far back as January 30, 2008 the appellant before approaching the respondent No. 1 on 19.5.2008 filed a petition being petition No . 93 of 2007 before the Commission exactly praying for open access as was prayed for in the petition of May 19, 2008. The Commission by the order dated 6.5.2008 disposed of the petition holding clause 7.4 of the EPA dated 25.10.2004 to be invalid, inoperative and unenforceable on the ground that if the Developer had opted to sell to third party from the beginning itself then it would have not entered into the EPA which is binding to both the parties. The Commission observed:-

" It is admitted by MSEDCL that the cause of concern for the Petitioner is the higher tariff, which the Petitioner would receive if it were to supply to the third party instead of supplying to MSEDCL ion terms of the tariff Order dated August 16, 2002 and August 8, 2005 (In case No. 37 of 2003). It is acknowledged that since the Petitioner

is yet to commence operations of the plant and it yet to effect the sale of power generated the tariff that is determined earlier may become unviable to receive in the year 2008 due to various economic factors. If after signing the EPA the developer is of the view that it is no longer viable for him to sell power to MSEB on account of rate or any other term of EPA, he should initiate proceedings to terminate the contract as provided in EPA.

Clause 7.4 (Third Party Sale) of the EPA provides that the "Generator of the cogeneration project can be allowed to sell the energy generated by the co-generation project to third parties from the beginning itself, if they chose to do so". Looking at it from another perspective, in view of the Commission, Respondent No.1 that is MSEDCL has truly reflected the provisions and principles contained in the Commission's order dated July 15, 2002 and August 16, 2002 in the EPA which it has executed with the Petitioner.

In view of the above findings, the Commission holds that Clause 7.4 of the EPA dated October 25, 2004 is invalid, inoperative and unenforceable as it is inconsistent with

the Principles of EPA approved by the Commission in its Order dated August 16, 2002"

10. The `respondent No. 1 by communication of May 21, 2008 refused permission to the appellant to effect third party sale and advised the appellant to sell electricity to the respondent No.1. Then the appellant filed a petition before the Commission on or about May 27, 2008 being petition No. 25 of 2008 praying for a declaration of the appellant's right to effect third party sale under the agreement in the EPA itself. It is to be noted that when such petition was pending before the Commission the agreement with RETL came into being wherein price for sale to the RETL was agreed between the parties at Rs.7/- per KWH. The State Commission by the order of August 8, 2008 dismissed the petition reiterating what it held in its earlier order dated May 6, 2008 in case No. 93 of 2007. The argument of the respondent No. 1 to the effect that since the order passed on 6.5.2008 on the self-same matter in petition No . 93 of 2007 was never challenged before this Tribunal the said order has become conclusive and binding does not matter much in view of the fact that the Commission on the petition of the appellant passed an order on August 8, 2008 which was carried into the appeal before this

Tribunal being appeal No. 95 of 2008. This Tribunal disposed of the said appeal in favour of the appellant by judgment and order dated 24.3.2009 which we will extensively consider as we proceed with the merit of the appeal. For the present, it is to be stated here that following the allowance of the appeal which in fact has settled the matter at rest and which has not been challenged further the appellant argues that it had suffered a substantial loss on account of the supply made to the respondent No. 1 as against the supply that the appellant was scheduled to make to RETL under the agreement with the said RETL. Then on 12th February, 2010 the appellant made a petition before the Commission praying for compensation against the respondent No. 1 to the tune of Rs. 6, 02,15,775 together with interest @15% per annum but the Commission by the impugned order dated 30.12.2010 dismissed the petition holding that the ground on which the respondent No. 1 refused to pay compensation is the outcome of bonafide interpretation of the agreement howsoever wrong that interpretation might be. Hence the appeal before us.

11. The very thesis of the respondent no. 1 as also of the Commission that the clause 7.4 in the EPA dated 25.10.2004 should not have been incorporated in the agreement because with

that clause remaining intact the EPA dated 25.10.2004 bears no meaning and that the appellant had really intended to have a better of the worlds might be not absolutely without force because, as it is argued, apparently the clause 7.4 appears to be inconsistent with the tenor of the contract. This did not go unnoticed with this Tribunal (corum:Hon'ble Chairperson and Hon'ble Mr. A. K. Khan) which is why the Tribunal in the order dated 24th. March, 2009 which we presently will quote extensively observed: *"We are of the view that the above findings of the Commission may be applied for future agreements ………"* The law, however, permits a generator to effect third party sale and the law casts an obligation upon the state transmission utility to allow non-discriminatory open access and the duties are cast upon the Commission to introduce such open access. There is no dispute with this legal proposition. Noticeably, it is not in the agreement with the respondent no 1 that after satisfying the respondent no1 with the requisite amount of supply of electricity the appellant would be free to effect third party sale. Significantly, the agreement dated 25th. October,2004 does not speak expressly, save indemnification clause applicable to one against the other, of compensation against the appellant in case the appellant would commit breach of the contract. The judgement and order dated 24th

March,2009 passed by this Tribunal in Appeal No. 95 of 2008 (with appeal no. 02 of 2008) has dealt with all the issues in details and it is better to reproduce the paragraphs 23 to 29 in so far as it deals with the clause 7.4 of the EPA dated 25th April,2004.

"23.0 However, the key words are 'from the beginning itself'. According to the Appellant, PSKL the term 'from the beginning itself' signifies, beginning with the commercial supply from the project. The Appellant, PSKL has contended that the supply during the period from 18.03.2007 to 05.04.2007 was during the testing and commissioning period and does not amount to commercial supply. Per contra, MSEDCL has submitted that the commissioning of the plant achieved on 18.03.2007; and supply of power generated during the period from 18.03.2007 to 06.04.2007 was commercial power and not testing power. The Commission has held the said supply to be commercial in nature.

24.0 The Appellant, PSKL also referred to paragraph 2.24 (quoted earlier) of the Order dated 16.08.2002 of the Commission. The said paragraph also does not throw

light on the meaning of the term 'from the beginning itself'.

25.0 Clause 7.4 of the EPA does not differentiate between the nature of supplies i.e. whether the supply is prior or post commissioning of the project insofar as the rights of the Appellant, PSKL to opt for third party sale are concerned. In our view, after the Appellant, PSKL has started supplying electricity to the Respondent no. 5, MSEDCL in accordance with the EPA, the Appellant PSKL has lost the right to opt for a third-party sale, available under clause 7.4 of the EPA, without the mutual consent of the Respondent. The term 'from the beginning itself' under the circumstance would mean before any supply of electricity to the buyer begins from the plant. It is inconsequential as to when the Appellant, PSKL wants to commence supply to third-party after COD of the project.

26.0 Looking at from another angle, if we were to construe that 'from the beginning itself' implies beginning anytime before the commercial operation of

the project commences without any consent of the MSEDCL, it would mean that the buyer, MSEDCL cannot be sure of its sources of purchases till the commercial operations actually begins. This would make the EPA one-sided in the sense that till the last moment, only the developer would be in a position to decide whether to supply the commercial generation to the buyer as per the EPA or not. In such a situation the buyer can not make arrangements to forecast its sources for purchase of electricity. Such a scheme is not reflected from the provisions of the EPA.

27.0 Where the developer has not started supplying any energy under the EPA, the developer can opt to choose for a third party sale without the consent of MSEDCL. The reason for this is that if in a situation the developer is not having the option for a third party sale, then effectively the clause no. 27.4.3 providing for option to choose for third party sale is inconsequential qua the parties and then why such a clause would be retained in the agreement.

28.0 It may be pertinent to note that in case of Commission's order dated 08.08.2008 in respect of Yash Agro the following observations have been made: "This undoubtedly goes on to prove that Clause 7.4 of the EPA should not have been there at all as the EPA was supposed to be and required to be in accordance with the orders passed by the Commission dated July 15, 2002 and August 16, 2002.

….

That Clause 7.4 in the EPA has been incorrectly introduced. If a developer had opted to sell to the third party from the "beginning itself" then the developer would not have entered into the EPA itself since EPA is a contract to buy and sell binding both the parties.

….

That Clause 7.4 of the EPA dated October 25, 2004 is invalid, inoperative and unenforceable as it is inconsistent with the Principles of EPA approved by the Commission in its Order dated August 16, 2002.

29.0 we are of the view that the above findings of the Commission may be applied for future agreements but

not in the instant cases where the parties have already executed the EPAs. Once the clause has been brought on to the EPA, the remedy is not merely to delete the same to the detriment of one party. Now the remedy is to give effect to the clause to the extent possible without violating any of the statutory provisions.

30.0 Therefore, in our opinion, where the developer has not started supplying any energy under the EPA, the stage is still before 'the beginning itself', and the developer can opt to choose for a third party sale without the consent of MSEDCL. However, where the developer has started supply of energy to MSEDCL in terms of the EPA, regardless of it being infirm (during testing and commissioning phase, prior to achieving commercial date of operation for the project) or otherwise, the developer has given up its right of third-party sale.

31.0 In view if the above, Appellant, PSKL is not having the right of sale of power to third party, available to them as they have already started supply of power from the

project to MSEDCL. Appellant, Yash Agro can choose to opt for third party sale option as given to them in the EPA since any supply from the project has not yet commenced. Accordingly, Appeal No. 95 of 2008 is allowed and Appeal No. 02 of 2008 is liable to be dismissed.”

12. It must be made clear that the purpose of this appeal is not to reach a conclusion as to whether the clause 7.4 in the EPA was validly incorporated or not or whether really the parties deliberately incorporated the clause with clear understanding of possible consequence in the event of the said clause being ignored by a party to the contract. We cannot allow ourselves to hear in repetition of what was argued before this Tribunal by the respondents of this appeal in Appeal no 95 of 2008 as we are not in appeal over the decision in the Appeal no.95 of 2008. However, we will not miss to note as to the source of the clause and how the words in the clause 7.4 of the EPA were derived from because that will not be wholly irrelevant when we will proceed to consider as to whether the appellant is entitled to compensation as against the MSEDCL, the respondent no 1 of this appeal because of the appellant having been denied the right to effect third party sale

minus the total injection of electrical energy in favour of the respondent no 1. The question, therefore, is whether the whether the respondent no. 1 of the appeal is liable to pay compensation.

13. Argument was advanced that it was the appellant who filed an interim application being IA No. 128 of 2008 suggesting permission to inject electrical energy from its cogeneration plant into the grid of the respondent at the rates specified by the Commission and the Tribunal allowed the same which implies that the appellant agreed to injection of electrical energy to the respondent No. 1's grid. The further argument was that in course of hearing of interim application the appellant did not raise any issue of damage and non- raising of the issue at that point of time amounted to waiver.

14. The argument was advanced also by the respondent no. 1 that the order dated 24.3.2009 passed by the Tribunal while disposing of the appeal No. 95 of 2008 was simply a direction to give effect to the clause 7.4 of the EPA to the extent possible and the appellant was prospectively given an option to choose to sell electricity without holding the respondent No. 1 guilty of the breach of the terms of EPA. This argument is countered by the appellant with the argument that such an argument fails to yield to any

positive result in favour of the respondent No.1 because the order dated 24.3.2009 explicitly held that the appellant was entitled to effect third party sale in terms of clause 7.4 to which the respondent No.1 in terms of the EPA was bound by.

15. The law of compensation for loss and damage caused by breach of contract has been laid down in section 73 of the Contract Act which we reproduce below:

> " **73:** ***Compensation for loss or damage caused by breach of contract:*** *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
>
> *Compensation for failure to discharge obligation resembling those created by contract- when an obligation resembling those created by the contract has been incurred and has not been discharged, any person injured by the failure to*

discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account".

16. A bare reading of section 73 of the Contract Act connotes that a party to the contract is entitled to compensation for loss or damage only when there is breach of contract. The question of paying compensation under section 73 of Indian Contract Act arises only when there is a contract existing between the parties and a contract necessitates performance by each of parties of its part of the contract. Thus, when performance by one of the parties to the contract takes place there is no breach of contract. When performance ceases, breach arises; consequently when breach arises the question of compensation follows.

17. With this understanding of the fundamental of the law let us proceed to consider as to whether and how far breach has been caused by the respondent no. 1. It must not be lost sight of the

fact that the breach must relate to the contract between the parties. The contract between the parties was that the appellant would supply to the respondent no.1 5.62 MW of power during season and 7.18 MW of power during off season and this would be a sale of surplus power generated by the generator to the Board. The Board in terms of the contract agreed to purchase this amount of electrical energy from the appellant . Then the conditions followed and upon supply of such amount of electrical energy the Board was obligated upon to make payment as consideration for such supply for a period of 13 years as per tariff structure as contained in clause 7 of the agreement . The question of compensation would arise when the respondent no. 2 commits breach of this contract. It is nobody's case that breach of this contract has happened . There are 18 illustrations below the Explanation to section 73 of the Act and all such Illustrations relate to non performance or inadequate performance or bad performance of one's part of the contract towards the other. The very essence of the provision of section 73 does not signify that question of compensation would be legitimate to the facts and circumstance of the present case.

18. Secondly, in the agreement there is clause 10 dealing with events of default and termination but this clause bears no reference to clause 7.4. This clause 10 refers to failure or refusal by the Board to perform its obligations under the agreement but the obligation has to relate to performance of contract on the part of the Board.

19. Thirdly, there is clause 8.4 dealing with default provisions. This clause clearly specifies that in case of any default by the MSEB, the generator shall be entitled to sale of energy to third party consumers and the MSEB shall facilitate such third party sale and enter into an energy wheeling agreement with the generator to enable such third party sale. Evidently, the 'default' necessarily relates to non performance on the part of the MSEB of its part of the contract. This default cannot be co-related to clause 7.4.

20. Fourthly, there is no default clause attached to clause 7.4 which could be attributable to the respondent no.1 . This clause is unattached to any consequence that may ensue in case the MSEB declines not to perform its obligation of making payment so as to facilitate transfer of electrical energy to a third party through open access . As there was a default clause in 8.4 there is no such

default clause dealing with penalty or compensation or damage in case the MSEB does not allow the appellant to effect third party sale.

21. Fifthly, amount of compensation is ordinarily determinable with reference to the differential price , i.e. the contract price payable by the MSEB and the price which the appellant would have fetched by selling power to RETL. The contract with the MSEB took place on 25.10.2004, while contract with the RETL took place on 13.6.2008 and the gap between the two periods is 3 years 7 months and 18 days. It was not to the knowledge of the MSEB, as it could not be so, that on 25.10.2004 if, the appellant would have entered into a similar contract with RETL then the appellant would have fetched a sum of Rs. 7/- per kWh . It is not the case of the appellant that on or about 25.10.2004 the possible tariff in case supply was made to RETL was near about Rs. 7/- per kWh. Matter of the fact is that the agreement with MSEB was signed on 25.10.2004 but the plant was ready to be commissioned in or about May,2008 although, in clause 2 of the EPA it was mentioned that the expected commercial operation date was 31st October,2006. Therefore, it cannot be said that on 25.10.2004 or on 31.10.2006 it was made clear by the appellant to the

respondent no.1 that it would not honour the contract made with respondent no.1 and that in order to fetch more tariff in would enter into an agreement with a third party for sale of power through open access subject to payment of wheeling and banking charges.

22. Sixthly, therefore, the contract with RETL dated 13.6.2008 was a non-event on 25.10.2004 or 31.10.2006 and as a result of which it could not be said that during this period the tariff structure in case of third party sale would have been a differential amount of Rs. 7 – Rs. 3.05 per kWh.

23. Seventhly, the contract with RETL took place on 13.6.2008 which is posterior in time to the contract with the respondent no.1 dated 25.10.2004, clause 7.4 notwithstanding. It is only when the project was ready to be commissioned that the appellant finding a prospective buyer willing to pay higher price entered into with RETL an agreement on 13.6.2008 so as to effect third party sale.

24. Eighthly, the order of the Tribunal dated 24.3.2009 in Appeal no. 95 of 2008 may not be construed as a creation of a right but a declaration of existence of a right to effect a third party sale, but the order does not at all deal with the question whether the

respondent no 1 committed a breach of the contract and/or whether the appellant is entitled to compensation. The Tribunal did not absolutely nullify the finding of the Commission that the clause 7.4 in the EPA has been incorrectly introduced because if a developer had opted to sell to the third party from the beginning itself then the developer would not have entered into the EPA itself since EPA is a contract to buy and sell binding both the parties. The Tribunal instead of saying that the finding is erroneous observed that the Commission's finding may be applied for future agreements because such a clause has been in the contract.

25. In the circumstances, the observation of the Commission that the respondent no 1 had suffered from a bonafide interpretation of the contract howsoever incorrect that interpretation might be cannot be thrown away to be a flimsy excuse. Certain dates are relevant. The first order of the Commission which was passed at the instance of the appellant is dated 6.5.2008 in case no 93 of 2007 wherein the Commission held the clause 7.4 in the agreement to be invalid and inconsequential. That order was not challenged by the appellant presumably because on that date the contract with RETL did not come into being. The agreement with the RETL was executed on 13.6.2008 and then the Commission

passed a similar refusal order again on the prayer of the appellant on 8.8.2008 against which the appellant preferred the Appeal no 95 of 2008 which was disposed of on 24.3.2009 by an order which basically dealt with the interpretation of clause 7.4 of the agreement with the respondent no 1. In the Appeal no 95 of 2008 the very question involved for interpretation was whether in the contract between the appellant and the respondent no 1 the clause 7.4 which is ex facie contradictory to the contract itself carried any meaning. The Tribunal in disposing of the Appeal observed that in future agreements such type of clause may not be incorporated but in the instant case as the parties had incorporated such clause it has to remain to apply when from the very beginning third party sale is intended to be effected upon.

26. Section 73 provides that compensation is not awardable for any remote or indirect loss or damage sustained by one party to the contract by reason of the breach. The dates between 25.10.2004 and 13.6.2008 are not proximate to each other . It is not a case that either the appellant or the respondent no. 1 knew on 25.10.2004 as to the extent of damage that would ensue if, on 31.10.2006 which was the possible date of commissioning of the

project the appellant would have fetched tariff by sale to third party.

27. The decision in *Union of India & Others V Sugauli Sugar Works, (1976) 3 SCC 32, Union of India v Commercial Metal Corporation and Another, 1982 RLR 163, Kamala Devi v Khushal Kanwar & Another, AIR 2007 SC 663* cited by the learned counsel for the appellant no doubt dealt with determination of compensation or damages but in all the cases the facts related to breach of performance of one party of its part of the contract. We mean to say that the contract between the appellant and the respondent no. 1 was not that the respondent no. 1 would perform its part of the contract by according permission to facilitate the appellant to fetch money through a tariff by effecting sale to a third party and there would be nothing for the appellant to perform its part of the contract towards the respondent no. 1.

28. The question of compensation becomes inconsequential the moment in terms of the contract between the appellant and respondent no. 1 power is supplied to the respondent no. 1.

29. At this stage it may not be out of context to trace out the origin of clause 7.4 of the EPA. An order dated 16.8.2002 passed by the Commission is a voluminous order determining power procurement process, price of such procurement and auxiliary issues. The order was passed on hearing a good number of organisations and members of the public. On behalf of certain organisations a suggestion was made to the Commission that if a co-generator intends to effect third party sale he may be given such permission . One such organisation was The Mumbai Grahak Panchayat who suggested contrary to the suggestion of Prayas that the power should be given to the co-generator to effect third party sale in which case MSEB should not be bound to enter into Energy Purchase Agreement for off take of the entire generated power. It was the suggestion of Prayas that if the Commission considers third party sale as desirable and feasible then the promoter should be given a choice to opt for third party sale in the initial stage itself and under such cases MSEB should not be allowed to enter into PPAs with the developers. Clause 7.4 is an exact re-production of the Commission’s ruling without mentioning anything further in relation to the parties to the contract in question.

30. Given our anxious consideration to the facts and circumstances of the case we are of the opinion that it is not a case where the respondent no. 1 should be saddled with compensation.S

31. In the result we find the appeal to be not maintainable. Accordingly, we dismiss the appeal but without costs.

(P.S. Datta) (Rakesh Nath)
Judicial Member Technical Member

KS

REPORTABLE /NON - REPORTABLE