In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 355 OF 2017 &
IA NO. 50 OF 2019 & IA NO. 289 OF 2019

Dated: 15th March, 2019

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:

M/s JSW Energy Ltd.
JSW Centre, Bandra Kurla Complex,
Bandra (E), Mumbai – 400051 …. Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
World Trade Centre, Centre No. 1
13th Floor, Cuff Parade,
Mumbai- 400005 …. Respondent No.1

2. **Maharashtra State Electricity Distribution Company Ltd.**
G-9, Prakashgadh, Anand Kanekar Marg
Bandra (E), Mumbai- 400051 …. Respondent No.2

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Aman Anand
Mr. Aman Dixit
Mr. Pratik Das
Mr. Suraj Guru
Ms. Geet Rajan

Counsel for the Respondent(s) : Mr. Varun Pathak
Ms. Rimali Batra
Ms. Shruti Awasthi
Ms. Saroj Bala for R-2

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. **The Appellant has presented the instant Appeal seeking the following reliefs:**

   a) Admit the present Appeal;

   b) Set aside the Impugned Order dated 29.08.2017 passed by the Respondent No. 1 Commission;

   c) Hold and declare that the incentive has been paid to the Appellant in accordance with the PPA;

   d) Direct the Respondent No. 2 to refund an amount of Rs. 21.37 Crore, along with interest, being the amount deducted by it, in pursuance of the directions contained in the Impugned Order; and

   e) Pass such further orders or directions as the Hon'ble Tribunal may deem just and proper in the circumstances of the case.

1.1 **The Appellant has presented this Appeal for considering the following Questions of Law:**

a. Whether the Appellant is entitled to incentive for early commencement of Supply of power up to December 2012 in terms of Article 4.4.7 of the PPA?

b. Whether the Respondent No. 2 is estopped from taking a position that the incentive paid to the Appellant was paid as a result of inadvertent interpretation of the PPA terms?

c. Whether as per the settled principles of interpretation of contractual clauses, an explicit term of the PPA can be given a complete go bye, simply labeling it as an "aberration"?

Facts of the instant Appeal are as follows:

1.2 M/s. JSW Energy Ltd. (hereinafter referred to as the **"Appellant"**) is a generating company owns and operates amongst others a 1200 MW (4x300 MW) Generating Station at Jaigad, Ratnagiri in the State of Maharashtra.

1.3 The Respondent No. 1 i.e. Maharashtra Electricity Regulatory Commission (hereinafter referred to as the **"State Commission"**) is the Electricity Regulatory Commission in the State of Maharashtra.

1.4 The Respondent No. 2, Maharashtra State Electricity Distribution Company Ltd. (hereinafter referred to as the **"MSEDCL"**) is a Distribution licensee in the State of Maharashtra.

1.5 The **Appellant** being aggrieved by the order dated 29.08.2017 (hereinafter referred to as the **"Impugned Order"**) passed by the State Commission filed this instant Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**)

The State Commission dismissed the petition of the Appellant, filed under section 86(1)(f) of the Electricity Act, 2003; and has permitted the Respondent No. 2 to adjust a sum of Rs. 21.37 crore (being the amount of incentive paid by the Respondent No. 2 to the Appellant

for the period October 2010 to December 2012) from the tariff bills of the Appellant.

1.6 The Respondent No. 2 in the year 2007 initiated a competitive bidding process for procurement of electricity under Section 63 of the Act. The Appellant emerged as one of the successful bidders and after due process, entered into a PPA dated 23.02.2010 with the Respondent No. 2 for supply of 300 MW of power.

1.7 The Respondent No. 2 had issued the initial Bid Documents (including the PPA), under the competitive bidding process. As per PPA the bidders were to commence supply of power in 48 months from the date of signing of the PPA.

However, due to acute power shortage in Maharashtra, the Bid Documents, including the PPA, were modified by the Respondent No. 2 and a provision for payment of incentive for early supply of power to Respondent No. 2/MSEDCL, before the stipulated 48 months, was incorporated in the Bid Documents including the PPA, with the approval of the State Commission.

1.8 State Commission recorded following regarding approval of revisions in the Bidding Documents:

"*MSEDCL in its reply submitted that considering the acute demand supply deficit in the State of Maharashtra, MSEDCL intends to provide incentive to Sellers who are willing to supply power to MSEDCL earlier than the Scheduled COD (end of 4 years from the date of signing the PPA). Incentive will be provided on a quarterly basis at a decreasing rate of one paise/unit starting with 16 paise/unit for the first quarter. For example, if the PPA between MSEDCL and the Seller is signed in April 2008 and bidder is willing to provide the supply*

of power at the same rate as the winning price quote to MSEDCL from any time between April 2008 and June 2008 (which will be the First Quarter of the period) then the Seller will be eligible for an incentive of 16 paise/unit on the actual supply of units to MSEDCL. In all the cases the incentive shall be payable to the Seller on the actual sale of units to MSEDCL and not on the contracted amount. MSEDCL further clarified that the incentive will not form part of evaluation and MSEDCL shall off-take the energy supplied prior to scheduled COD only if the transmission capacity is available."

1.9 On the basis of these submissions of Respondent No. 2/MSEDCL, the State Commission in its Order dated 24 January, 2008 approved the revised Bid Documents and observed as follows:

"*In the revised Bidding Documents submitted by MSEDCL to the Commission for approval, there was no provision towards incentive for Commencement of Supply to Power to MSEDCL earlier than the Agreed Schedule. However, considering the suggestions made by the stakeholders, MSEDCL has now incorporated an incentive mechanism for early commencement of power supply linked to the quarter in which supply of power will commence from the date of signing of PPA. MSEDCL further submitted that incentive shall be payable to the Seller on the actual sale of units to MSEDCL and not on the contracted amount. Considering the acute power deficit scenario in the State of Maharashtra, the Commission approves the incentive mechanism proposed by MSEDCL for early commencement of power supply under this bidding process*."

1.10 On the basis of the aforesaid approval of the revised bidding documents (more particularly the inclusion of the incentive clause), the Appellant submitted its bid to the Respondent No. 2 for supply of 300 MW of Power. After negotiations the Appellant and Respondent No. 2 initialed the PPA on 15.01.2009 subject to Regulatory Approvals. The Board of Directors of Respondent No. 2 vide resolution dated 16.04.2009 authorized the Respondent No. 2 to procure power from the Appellant at the Tariff quoted by the Appellant.

1.11 Thereafter, the State Commission vide its order dated 27.11.2009 approved the PPA with certain modifications. The following are the relevant terms of the PPA as approved by the State Commission vide order 27.11.2009:

"Article 1.1

"Scheduled COD" or "Scheduled Commercial Operation Date" means (i) for the first Unit, 1st October 2010 or such other dates from time to time specified in accordance with the provisions of this Agreement; in case some unit other than the first unit is synchronized/commissioned then the power from such unit shall be supplied till such time the first unit specified in this definition achieves the COD. However, the Seller (Petitioner herein) shall make best efforts to supply power from 1st October, 2009."

4.4.7 "Procurement of power earlier than Scheduled Commercial Operation Date, as envisaged in Article 4.4.6 would be subject to Maharashtra STU's ability to evacuate from the Delivery Point.

Procurer shall provide incentive to Sellers who are willing to supply power to Procurer earlier than the Scheduled Commercial Operation Date. The incentive rates are as given in the table below:

Period	*Quarter No.*	*Applicable Incentive per unit of supply*
Jan 09- Mar 09	*Q1*	*16*
Apr 09 – Jun 09	*Q2*	*15*
Jul 09 – Sep 09	*Q3*	*14*
Oct 09 – Dec 09	*Q4*	*13*
Jan 10 – Mar 10	*Q5*	*12*
Apr 10 –Jun 10	*Q6*	*11*
Jul 10 – Sep 10	*Q7*	*10*
Oct 10 – Dec 10	*Q8*	*09*
Jan 11 – Mar 11	*Q9*	*08*
Apr 11 – Jun 11	*Q10*	*07*
Jul 11 – Sep 11	*Q11*	*06*
Oct 11 – Dec 11	*Q12*	*05*
Jan 12 – Mar 12	*Q13*	*04*
Apr 12 – Jun 12	*Q14*	*03*
Jul 12 – Sep 12	*Q15*	*02*
Oct 12 – Dec 12	*Q16*	*01*

However, Procurer shall off-take such early energy only if transmission capacity is available for evacuation.

If COD of a unit or of the Contracted Capacity is delayed beyond the Scheduled Commercial Operation Date as offered by the Selected Bidder in response to the RFP, the Selected Bidder shall be liable to pay to Procurer liquidated damages as per the terms in Article 4. To avoid such liquidated damages, the Selected Bidder shall have the option of supplying the contracted power to the Procurer from alternate sources. Delay in Commercial Operation Date due to non-availability of Open Access on the CTU network shall be considered to be a Force Majeure Event. In case the landed cost of supply of alternative power at Maharashtra STU boundary is higher than Quoted Tariff, the Selected Bidder will have to bear such additional cost including Open Access Charges, Transmission Charges, Transmission Losses, RLDC Charges, SLDC Charges etc.

1.12 The Appellant was paid incentive for the period September 2010 to December 2012 by the Respondent No. 2, for early commencement of power supply, in accordance with Article 4.4.7 of the approved Power Purchase Agreement dated 23.02.2010 ('PPA'). The entire incentive was paid by the Respondent No. 2 to the Appellant, without any dispute or reservation, during FY 2010-2013.

On 29.06.2015, the Respondent No. 2 took a stand that the applicable provisions of the PPA in relation to payment of incentive had been 'inadvertently interpreted' by it, owing to which incentive paid for the period October 2010 to December 2012 now deserved to be refunded.

1.13 The letter dated 29.06.2015 was duly replied to by the Appellant on 13.07.2015. However, after a period of about 1 year, the Respondent No. 2 on 11.07.2016 threatened the Appellant to unilaterally adjust a sum of Rs. 21.37 crore from the tariff bills, being the amount of incentive paid inadvertently, as per the Respondent No. 2.

1.14 The Appellant approached the State Commission with its petition under section 86(1)(f) and prayed for urgent interim protection. The State Commission, vide its order dated 22.07.2016 was pleased to restrain the Respondent No. 2 from making any adjustment/recoveries of the disputed amount of Rs. 21.37 Crore, till disposal of the Petition.

1.15 The State Commission however, on 29.08.2017 has dismissed the petition of the Appellant and decided that under the terms of the PPA dated 23.02.2010, the Appellant is entitled to incentive, only for the month of September 2010, and that the table in Article 4.4.7 of the PPA which expressly recognizes payment of incentive upto December 2012 is only an 'aberration'.

1.16 The Respondent No. 2 without any justification has deducted an amount of Rs. 21.37 Crore from the Tariff Bills of the Appellant, after passing of the Impugned Order.

1.17 Being aggrieved by the Impugned Order dated 29.08.2017 passed by the State Commission the Appellant has presented this Appeal.

2. The learned senior counsel Shri Basava Prabhu S. Patil appearing for the Appellant submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

2.1 The present dispute relates to payment of incentive for commencement of early supply in terms of Article 4.4.7 of the Power Purchase Agreement (PPA) executed between the Appellant and the Respondent No. 2.

"4.4.7Procurement of power earlier than Scheduled COD as envisaged in Article 4.4.6 would be subject to Maharashtra STU's ability to evacuate from the Delivery Point.

Procurer shall provide incentive to Sellers who are willing to supply power to Procurer earlier than the Scheduled Commercial Operation Date. The incentive rates are as given in the table below:

Period	*Quarter No.*	*Applicable Incentive per unit of Supply (Ps/Unit)*
Jan 09 – Mar 09	*Q1*	*16*
Apr 09 – Jun 09	*Q2*	*15*
Jul 09 – Sep 09	*Q3*	*14*
Oct 09 – Dec 09	*Q4*	*13*
Jan 10 – Mar 10	*Q5*	*12*
Apr 10 – Jun 10	*Q6*	*11*
Jul 10 – Sep 10	*Q7*	*10*
Oct 10 – Dec 10	*Q8*	*09*
Jan 11 – Mar 11	*Q9*	*08*
Apr 11 – Jun 11	*Q10*	*07*
Jul 11 – Sep 11	*Q11*	*06*
Oct 11 – Dec 11	*Q12*	*05*
Jan 12 – Mar 12	*Q13*	*04*
Apr 12 – Jun 12	*Q14*	*03*
Jul 12 – Sep 12	*Q15*	*02*
Oct 12 – Dec 12	*Q16*	*01*

The incentive will be payable to Seller on the actual units supplied to Procurer. However, Procurer shall off-take such early energy only if transmission capacity is available for evacuation.

……"

2.2 It may be noticed that the incentive mechanism spanned over 16 quarters (i.e. 48 months) starting from January, 2009 right up to December, 2012.

2.3 The Appellant, admittedly, achieved commercial operation and started supplying power from 01.09.2010; and in accordance with Article 4.4.7 became entitled to payment of incentive for the period September 2010-December 2012.

2.4 The Respondent No. 2, acting in accordance with the terms of the approved PPA paid the said incentive to the Appellant upto December 2012. Total incentive paid was Rs. 22.60 Crore.

2.5 It may be noteworthy that the charges for incentive were billed to the Respondent No. 2 by the Appellant and payment against the same bills was made by the Respondent No. 2 without any issue or protest whatsoever. The last payment of incentive as per the table at Article 4.4.7 was received in December, 2012.

2.6 In addition to the above, the stand of the Respondent No. 2 before the CAG in November 2013, justifying its action of having acted in terms of the provisions of the approved PPA is most relevant. It is stated that the CAG had raised an audit query regarding payment of incentive to the Appellant up to December, 2012. The relevant

portion of the stand taken by Respondent No. 2 before the CAG is reproduced here below for ready reference:

"The decision of preponement of delivery of power supply had been taken to mitigate the load shedding. Had the decision of preponement of Scheduled CoD not been taken, MSEDCL would have to resort to short term power purchase for the period June 2010 (i.e. Synchronization date) to Dec 2012. The power purchased from JSW during this period is 4731.1 MUs & due to Short term power purchase, there would have been financial implication to the tune of Rs. 240.61 Crs. As shown below –

Units for the period June 2010 to Dec 2012 (In MUs)	*Amt as per Rs. 3.5/- per kwh i.e. Average STPP rate (Rs. In Crs.)*	*Amount paid to JSW for the period June 2010 to Dec 2012 @ avgRs. 3.07/kwh (Rs. In Crs)*	*Excess Amount (Rs. In Crs.)*
4731.1	*1656.94*	*1452.33*	*240.61*

…….

Amendments to the initialled PPA were made in consultation with both the consultants i.e M/s Little & Co. and M/s. PWC. As per the amendment, Scheduled CoD is termed as "1st Oct 2010" and also the seller shall make best efforts to supply power from 1st Oct 2009. Board of Directors of MSEDCL has approved the amended PPA, subject to submission of the same to MERC. The PPA was submitted to MERC for

approval. MERC vide Order date 27th Nov 2009, has approved amendment to Clause 4.4.6, as "the seller has offered Scheduled Commercial Operation Date, for whichever Unit that comes earlier for whole or part of the capacity before expiry of 1st Oct 2010.

Accordingly, the PPA approved by MERC was signed by MSEDCL & JSWEL on 23rd Feb 2010 with Scheduled CoD 1st Oct 2010. As such, Scheduled CoD against PPA is treated as 1st Oct 2010. In effect, MSEDCL is benefitted by availing the power at cheaper rate in preponed delivery period when there was critical need of the power.

As per Article 4.4.7 of the PPA, "Procurer shall provide incentive to Sellers who are willing to supply power to Procurer earlier than the Scheduled Commercial Operation Date." JSWEL has started supplying the power since 1st Sep 2010.

Since, JSWEL has supplied the energy earlier than the Scheduled Commercial Operation Date considered at the time of bidding (as per RFP document) i.e 15th Jan 2013; MSEDCL has paid incentive as per rates prescribed under PPA till Dec 2012.

Also, MSEDCL was in dire need of power at that time and JSW has started supplying power earlier than Scheduled CoD. Had JSW not preponed the power supply, MSEDCL would have to resort to short term power purchase and the rates prevailing during the period Sep 2009 to Dec 2012 was in the range of Rs. 3.5/- to 4/- per Unit. Whereas, the rate at which MSEDCL paid to JSW for this period Was below Rs. 3.5/- per unit.

Therefore, MSECDL has paid incentive to M/s JSW Energy (Ratnagiri) Limited in accordance with the Scheduled CoD as per of RFP documents and PPA provision for the period Sep 2010 to Dec 2012. (as MSEDCL was benefitted from earlier CoD by JSWERL).

…….

……. Thus, there is no undue payment of incentive of Rs. 22 Crs. To JSWEL.

In view of this, the audit para may be closed."

2.7 It is much after the performance of the Contract in the manner that it was understood and acted upon by the contracting parties in relation to payment of incentive, that the Respondent No.2 vide letter dated 29.06.2015 sought a refund from the Appellant stating that it had 'inadvertently interpreted' the contractual terms and therefore had paid excess incentive to the tune of Rs. 21.37 Crore to the Appellant. This letter was clearly prompted by the CAG's objection.

2.8 The Appellant responded to this letter on 13.07.2015 disputing the incorrect stand taken by Respondent No. 2, attempting to resile from its promise. The Appellant vide its letter dated 13.07.2015, therefore, called upon the Respondent No. 2 to withdraw its unjustified demand.

2.9 hereafter, Respondent No. 2 kept silent on the abovementioned issue for almost for a period of one year.

2.10 It was only on 11.07.2016, that the Respondent No. 2 telephonically informed the Appellant that it will make an adjustment of the said sum (Rs. 21.37 Crore representing the incentive paid from October 2010 to December 2012) from the pending bills of the Appellant.

2.11 In the above circumstances, the Appellant was constrained to file a petition before the State Commission under Section 86 (1)(f) (Case no. 90 of 2016) to inter-alia, restrain the Respondent No. 2 from making any deductions/adjustment on this score. A reply to this Petition was filed by Respondent No. 2 asserting its claim of refund before the State Commission only on 21.07.2016.

2.12 The State Commission by the Impugned Order has dismissed the Petition of the Appellant and permitted the Respondent No. 2 to deduct a sum of Rs. 21.37 Crore from the pending dues bills of the Appellant. After passing of the Impugned Order, the Respondent No. 2 as adjusted the said amount. Therefore, the Appellant before this Tribunal seeks a refund of this sum of Rs. 21.37 Crore along with interest, as the Impugned Order is totally unsustainable in law and in facts of the present case.

2.13 The learned counsel appearing for the Appellant vehemently contended that the State Commission ought to have considered these two relevant aspects of the matter:

i) Having understood and acted upon the incentive mechanism in exactly the same manner as was understood by the Appellant, the Respondent No. 2 cannot be permitted to raise a plea of

misinterpretation of the contractual terms, almost after four and a half years of conclusion of the transaction relating to payment of incentive; and

ii) That the entire amount of incentive having being paid in the year 2012, the claim of recovery by Respondent No. 2, made before the State Commission in the reply filed on 21.07.2016 is barred by limitation.

As such, the petition of the Appellant should have been allowed by the State Commission.

2.14 However, the State Commission in the Impugned Order without addressing any of the submission of the Appellant, has proceeded in a totally erroneous, unjustified and unsustainable manner and has resorted to adding to the terms of the order dated 24.01.2008, by which order, the State Commission had approved the inclusion of the incentive mechanism in the RFP document almost 10 years ago. It may be noted that such an approach has been adopted by the State Commission while deciding a Petition under section 86(1)(f) of the Act, which, as per settled law is a purely adjudicatory jurisdiction of the State Commission. As such, the State Commission, could not have given a decision/clarification, regarding the 'purpose and the intention' of the Commission while passing the order dated 24.01.2008 while exercising adjudicatory jurisdiction under section 86(1)(f) of the Act. This is clearly a jurisdictional error committed by the State Commission. Further, and in any event, the bench that passed the order dated 24.01.2008 was different from the bench that has passed the

Impugned Order almost a decade ago and therefore the 'intention' of the earlier bench could not have been adjudged afresh by a totally new bench.

2.15 Further, the State Commission, despite having found that because of the insertion of the table at Article 4.4.7 of the approved PPA there is scope for a different interpretation, has completely varied the written terms of the approved PPA by labeling the table at Article 4.4.7 as an "aberration" without giving any consideration to the intention and the conduct of the contracting parties. The State Commission has still further, while completely taking away the table at Article 4.4.7 has wrongly held that it has harmoniously construed the PPA terms. Far from a harmonious construction, the State Commission has in fact destroyed/eschewed a material term (i.e. the incentive table at Article 4.4.7) of the written contract between the Parties. This is impermissible and the Impugned Order deserves to be set aside.

2.16 The Appellant submits that the only construction/interpretation that could have been accepted by the State Commission was the manner in which the Appellant and the Respondent No. 2 meant and understood the terms of the PPA regards payment of incentive i.e. if the SCOD was achieved any time prior to 1.10.2010, the Appellant would be entitled to incentive for the balance unelapsed period, in accordance with the table at Article 4.4.7 of the approved PPA. This interpretation is consistent with the intention and conduct of the Parties to the approved PPA; and the correct purport of the order dated 24.01.2008 of the State Commission

approving the incentive mechanism. This aspect has been further detailed herein below.

2.17 The State Commission has completely failed to appreciate that the Contract is to be interpreted as it was understood by the contracting parties and it is not for the court to make a new contract, however reasonable, for the parties. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the case of Polymat India (P) Ltd. and Anr v. National Insurance Co. Ltd. and Ors (2005) 9 SCC (174), wherein it is held as under:

"19. In this connection, a reference may be made to a series of decisions of this Court wherein it has been held that it is the duty of the court to interpret the document of contract as was understood between the parties. In the case of General Assurance Society Ltd. v. Chandumull Jain [(1966) 3 SCR 500 : AIR 1966 SC 1644] , SCR at p. 510 A-B it was observed as under:

"In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves."

20. Similarly, in the case of Oriental Insurance Co. Ltd. v. Samayanallur Primary Agricultural Coop. Bank [(1999) 8 SCC 543] , SCC para 3 at p. 546f it was observed as under:

"The insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it."

21. Therefore, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of parties adversely."

2.18 The Appellant further submits that when the parties to a contract had put a particular interpretation to the PPA terms and acted upon it accordingly, there was no need at all for the State Commission to inquire as to whether such interpretation was correct or not. As such, the State Commission has erred in venturing into an interpretative exercise of what the terms of the PPA should mean, years after conclusion of the transaction regarding payment of incentive. This approach is completely against the law as laid down in *Gedela Satchidananda Murthy (dead) by LRS. V. Dy. Commr. Endowments Deptt., A.P. and Others* (2007) 5 SCC 677and further affirmed in *Transmission Corporation of Andhra Pradesh Limited and others v. GMR Vemagiri Power Generation Limited and Another*(2008) 3 SCC 716), wherein the Hon'ble Supreme Court of India approved the following principle:

"The principle formulated by Lord Denning, M. R. in *Amalgamated Investment & Property Co. Ltd. v. Texas-Commerce International Bank Ltd.*, [1982] 1 QB at p. 121:

"*If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it-on the faith of which each of them-to the knowledge of the other-acts and conducts their mutual affairs-they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not-or whether they were mistaken or not-or whether they had in mind the original term s or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."*

2.19 Further, the State Commission failed to appreciate that, the claim of recovery/adjustment was/is beyond the period of limitation; and therefore barred under the law. The Appellant admittedly received the last incentive payment in December 2012 and Respondent No. 2 filed its reply in Case no. 90 of 2016 asserting its claim for adjustment only on 27.07.2016 which is clearly beyond the limitation period of 3 years. The law of limitation is applicable to a proceedings under section 86(1)(f) as held by the Supreme Court in the case of *A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd. reported at (2016) 3 SCC 468*.

In this regard the provisions of Article 11.6.1 of the approved PPA may also be relevant which are reproduced herein below for ready reference :

***"**11.6.1 If a Party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other*

Party within thirty (30) days of receiving it, such bill shall be taken as conclusive."

It is stated that none of the bills for incentive payments were ever disputed by the Respondent No. 2 and thus in terms of the provisions of Article 11.6.1 of the PPA, the same became conclusive and binding on the Respondent No. 2. This, coupled with the fact that undisputed payment has been made against the said bills by Respondent No. 2 long back, clearly bars the Respondent from disputing the same after an unexplained delay of approximately 4.5 years.

2.20 The Respondent No. 2 before this Tribunal has next contended that it had made a mistake in interpreting the terms of the PPA and it has the authority to rectify the mistake at any time. The contention of the Respondent No. 2 is totally untenable and runs contrary to all principles of finality, attached to concluded transactions. The Appellant submits that the circumstances of the case clearly reveal that the so called mistake of the Appellant is not a mistake but only an afterthought. This is clearly borne out from the stand of the Respondent No. 2 itself, before the CAG in November, 2013.

2.21 Further, and in any event even if there has been a mistake as contended by Respondent No. 2, the law does not permit the Respondent No.2 to unilaterally undo the same at any time, especially when the said mistake is pointed out after conclusion of the transaction relating to the payment of incentive. Reference in this regard may be made to the decision of the Hon'ble Supreme

Court in the case of Oriental Insurance Co. Ltd. v. Mantora Oil Products (P) Ltd., (2000) 10 SCC 26 , wherein the Hon'ble Supreme Court has held as below:

> *5. If it was a mistake, the same should have been pointed out to the respondent during the period of the policy but the appellant did not raise this objection at any time during the continuance of the policy cover. The respondent also fulfilled its obligations under the policy and paid the premium as was agreed to between the parties. If there was a mistake on the part of the appellant in collecting the premium, the same should have been pointed out at the time of entering into the contract or immediately thereafter. After having received the benefit under the policy of insurance from the respondent by way of premium, it is not open to the appellant to contend that there was a mistake on their part in charging the premium at a rate lower than the rate at which it should have been charged by them. If the parties were not ad idem on this vital part of the contract of insurance, it would have an adverse effect on the contract itself. Since the period of policy is over, the appellant is under an obligation to refund the extra premium in terms of the policy. It cannot itself unilaterally make any adjustment from the amount of unutilised premium and retain a part of it on the ground that the premium charged was less than what it should have been charged.*

2.22 The reliance by Respondent No. 2 on the 'no waiver' clause is completely misplaced in the present scenario. The case of the

Appellant is not that the Respondent No. 2 has waived any of its rights. The case of the Appellant is that the Respondent No. 2, as an afterthought, is resiling from the terms of the written PPA, after having acted upon the same. In any event, the provisions of the No Waiver clause will have to be read and understood with the provisions of Article 11.6.1 which clearly state that if a party does not dispute a bill within 30 days of receiving it, the same shall be taken as conclusive. Article 11.6.1 being a special provision regarding payment of bills will override the general provisions of Article 18.3.

2.23 The Respondent No. 2 has contended that since the Appellant, in response to the revised RFP documents, offered the SCOD of 1.10.2010 i.e. a date prior to the expiry of the 48 months from the date of signing of the PPA (which period of 48 months admittedly was until 15.01.2013 in the present case), it had lost its right to payment of any incentive beyond the SCOD offered by it.

The Respondent No. 2 is estopped in law from taking this stand which is totally in contradiction to the terms of the PPA and the manner in which the Parties had already acted upon the incentive mechanism long ago. Further, the said stand is also in complete contradiction to Respondent No. 2's stand before the CAG, on its understanding of the incentive mechanism.

2.24 However, the Appellant is placing the following background in which the incentive mechanism came to be incorporated and approved by the State Commission in the PPA, for clarity, and to

demonstrate that the position now taken by the Respondent No. 2 is wholly misconceived:

- The original standard request for proposal (RFP) document defined the scheduled commercial operation date (SCOD) as being a date not less than 4 years (48 months) from the date of signing of the PPA.

- In view of the power deficit scenario in the State of Maharashtra, Respondent No. 2 proposed deviations in the RFP document to, inter-alia;
  a. Allow early commencement of supply of power before expiry of 48 months of signing the PPA; and

  b. Inclusion of an incentive mechanism in the RFP document for incentivizing the commencement of supply before the 48 months period..

The incentive mechanism provided for incentive of 16 paise/unit for the 1st quarter and thereafter tapering by 1 paise/unit for every subsequent quarter. This incentive mechanism as is, is captured in Article 4.4.7 of the approved PPA, as aforesaid.

2.25 The reason and the intention of Respondent No. 2 for inclusion as also the working of the incentive mechanism can be found in the submissions made by it before the State Commission in case no. 38 of 2007 (which case was filed for approval of deviations in the bid documents by Respondent No. 2). The relevant submissions of

Respondent No. 2, as recorded in the order dated 24.01.2008 are as under:

"14. During the Public Hearing, Shri Umesh Agarwal, consultant to MSEDCL, made a presentation on the salient features of the Bidding Documents. During the course of the presentation, the following key issues were discussed:
(a)MSEDCL submitted that considering the acute demand supply deficit, it is proposed that an incentive will be provided for commencement of supply before the targeted 48 months on a quarterly basis at a decreasing rate of one Paise/unit with 16 paise/unit for the first quarter. (Emphasis Supplied)
……."
"…..
"21.(f)……..

MSEDCL Reply
MSEDCL in its reply submitted that considering the acute demand supply deficit in the State of Maharashtra, MSEDCL intends to provide incentive to Sellers who are willing to supply power to MSEDCL earlier than the Scheduled COD (end of 4 years from the date of signing the PPA). Incentive will be provided on a quarterly basis at a decreasing rate of one paise/unit starting with 16 paise/unit for the first quarter……."(Emphasis Supplied)

Based on the above submissions made by Respondent No. 2 before the State Commission, the State Commission approved the

incentive mechanism, as was proposed by Respondent No. 2. The relevant portion is as under:

> *"(f) Incentive for Early Commencement of Power Supply*
> *In the revised Bidding Documents submitted by MSEDCL to the Commission for approval, there was no provision towards incentive for Commencement of Supply to Power to MSEDCL earlier than the Agreed Schedule. However, considering the suggestions made by the stakeholders, MSEDCL has now incorporated an incentive mechanism for early commencement of power supply linked to the quarter in which supply of power will commence from the date of signing of PPA. MSEDCL further submitted that incentive shall be payable to the Seller on the actual sale of units to MSEDCL and not on the contracted amount.*
> *Considering the acute power deficit scenario in the State of Maharashtra, the Commission approves the incentive mechanism proposed by MSEDCL for early commencement of power supply under this bidding process." (Emphasis Supplied)*

2.26 That accordingly the incentive mechanism was built into the revised RFP and the revised model draft PPA floated by Respondent No.2.

2.27 The Appellant made its bid against the revised RFP document as floated by Respondent No. 2 and offered to start supply of power earlier than the expiry of 48 months from the date of signing of the PPA. The achievement of SCOD was stated by the Appellant in its

bid as 01.10.2010, without in any manner, sacrificing its right of receiving incentive as per the table at Article 4.4.7 of the revised draft model PPA. As the Appellant was one of the successful bidders in the L-1 basket, negotiations were conducted by the High Power Committee with the Appellant and post negotiations, the PPA was initialed along with certain amendments, by the Appellant and the Respondent No. 2, on 15.01.2009..

2.28 This initialed PPA dated 15.01.2009, incorporating the amendments, was presented for approval by Respondent No. 2 to the State Commission. It is stated that this initialed PPA also contained the table of incentives at Article 4.4.7. The State Commission vide order 27.11.2009 in Case no. 39 of 2009 approved the amendments in the following terms:

"9. MSEDCL requested for the Commission's approval to the following changes in the PPA made with JSW:

i) Definition of Scheduled COD Original : "means (i) for the first Unit, 1st October 2010 or such other dates from time to time, specified in accordance with the provisions of this agreement"

Amendment : "means (i) for the first Unit, 1st October 2010 or such other dates from time to time, specified in accordance with, the provisions of this Agreement; in case some unit other than the first unit is synchronized / commissioned, then the power from such unit shall be supplied till such time the first unit specified in the definition achieves the COD. However, the Seller shall make best efforts to supply power from 1st October 2009."

ii) Clause 4.4.6 : Original : "The Seller may offer Scheduled Commercial Operation Date, for whole or part of the capacity offered, before expiry of 48 calendar months from the date of signing PPA."

iii) Amendment: "The Seller has offered Scheduled Commercial Operation Date, for whichever unit that comes earlier for whole or part of the capacity before expiry of 1st October 2010."

"11.1 Amendment to the PPA

The Standard bidding documents for Case-I, Request for proposal, issued by the Ministry of Power recently, stipulates as follows:

"In case of Requisitioned Capacity being equal to or greater than 500 MW, the Procurer/Authorized Representative shall have the option in to decide the Scheduled Delivery Date which shall not be less than four (4) years from the Effective Date. For Requisitioned Capacity less than 500 MW, the Scheduled Delivery Date shall be decided by the Procurer/Authorized Representative. However, the Scheduled Delivery Date can be preponed on mutual consent of the Seller and the Procurer(s)."

In the present case, the Commission has observed that the amendment proposed by MSEDCL the PPA is in line with the above stipulation. Further, as implied through the same, it is observed that for any sequence of unit commissioning followed by JSWL, MSEDCL with the proposed amendment

stands to receive the power from the first commissioned unit, instead of needlessly staying tied down to Unit 1 as may be construed through the original clauses of the PPA. In view of this, the Commission approves the above mentioned amendment in the PPA initialed with M/s JSWL as proposed by MSEDCL.

……

Accordingly, the Commission approves the procurement of 300 MW power by MSEDCL from M/s JSW Energy as above on long term basis as proposed and directs MSEDCL to submit the PPA signed with M/s JSW Energy Ltd."

2.29 Thus, apart from the two amendments detailed herein above, no other amendments were carried out and the State Commission approved the rest of the PPA as is including the incentive table at Article 4.4.7 vide its order dated 27.11.2009. It is stated that the terms of the order dated 27.11.2009, approving the PPA have attained finality and have not been disputed by anybody. It is thus stated that at no point did the Appellant give up its right to receive incentive in accordance with Article 4.4.7, by agreeing to commence supply of power before the expiry of 48 months from the date of signing of the PPA. The presence of the table at Article 4.4.7 of the approved PPA is clear evidence of the same.

2.30 Thus, the understanding, that having achieved commercial operation before 01.10.2010, the Appellant became entitled to incentive for the entire unelapsed period of upto December 2012, is clear, beyond any doubt from the following:

- Submissions of the Respondent No. 2 before the MERC in case 38 of 2007, for approval of insertion of an incentive mechanism ;
- Bare reading of Article 4.4.7 of the approved; and
- The conduct of Respondent No. 2 in making payment of the said incentive without any protest or issue.
- The subsequent conduct of the Respondent No. 2 in justifying the entire incentive payment before the CAG, relying upon and expressly stating the intention with which it had entered into the contract and acted upon it

2.31 The Appellant submits that the much belated change in stand of Respondent No. 2 regarding interpretation of the PPA terms is nothing but an attempt by the Respondent No. 2 to resile from its commitment and obligations under the PPA induced only at the behest of a third party to the Contract i.e. CAG. As such, the Respondent No. 2 cannot be permitted to resile from its agreement, that too much after the same has been acted upon by it. If such a course is permitted, there will never be any finality to any transaction.

2.32 The only other contention raised by the Respondent No. 2 is that payment of incentive has led to unjust enrichment of the Appellant. This contention in the respectful submission of the Appellant has got no basis whatsoever. In fact, the truth of the matter is that by offering and acting upon the incentive mechanism, the Respondent No. 2 has saved expenses to the tune of Rs. 240 Crore as stated by the Respondent No. 2 itself, while justifying the payments to the CAG. The Appellant submits that it was only paid what was due to

it under the terms of the PPA. Further, the Respondent No. 2 has already recovered the incentive paid to the Appellant in its ARR long back.

2.33 The learned counsel for the Respondent No. 2 during the course of his submissions before this Tribunal has relied on the following judgments of the Hon'ble Supreme Court. The portion relied upon the Respondent No. 2 from each of these judgments in reproduced herebelow for ready reference:

"Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470

IV. Interpretation of the terms of contract

23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the

nature of the contract, as it may affect the interest of either of the parties adversely. [Vide United India Insurance Co. Ltd. v. Harchand Rai ChandanLal [(2004) 8 SCC 644 : AIR 2004 SC 4794] and Polymat India (P) Ltd. v. National Insurance Co. Ltd. [(2005) 9 SCC 174 : AIR 2005 SC 286]]

DLF Universal Limited v. Director, Town and Country Planning Department, Haryana, (2010) 14 SCC 1

Interpretation of contract

13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

Vishnu v. State of Maharashtra, (2014) 1 SCC 516

35. Before concluding, we may observe that the circulars issued by the State Government may provide useful guidance to the authorities involved in the implementation of the project but the same are not conclusive of the correct interpretation of the relevant clauses of the agreement and, in any case, the Government's interpretation is not binding on the courts. In the result, the appeals are dismissed."

2.34 A perusal of the aforesaid judgments would only show that the judgments cited by the Respondent No. 2do not take their case any further and in fact supports the case of the Appellant, in as much as, in Para 23 of the judgment in the case of *Rajasthan State Industrial Development*, the Hon'ble Supreme Court has categorically held that it is not permissible for the court to make a new contract however reasonable if the parties have not made it themselves and that the contract has to be interpreted in such a way that its terms are not varied. The State Commission in the present case has clearly made a new contract by completely destroying the express provisions of Article 4.4.7 calling it an aberration. Thus the ratio of this Authority supports the case of the Appellant.

2.35 As far as the decision of the Hon'ble Supreme Court in *DLF Universal Limited* is concerned, the same lays emphasis on purposive interpretation and to determine the ultimate purpose of the contract primarily by the joint intent of the parties at the time the contract is so formed. In the respectful submission of the Appellant, it is clear that the purpose behind allowing the bidders to commence supply prior to the expiry of 48 months and of

offering incentive for any supply made prior to the expiry of the 48 months period was only to start supply as early as possible in view of the severe power shortage in the State of Maharashtra. In the respectful submission of the Appellant the entire purpose of the Incentive clause would be defeated if the interpretation now proposed by the Respondent No. 2 is accepted. Thus the ratio of this authority also supports the case of the Appellant.

2.36 The decision of the Hon'ble Supreme Court in the case of *Vishnu v. State of Maharashtra* has been cited to say that the Government's interpretation is not binding on courts. The said proposition supports the Appellant on all fours. It is an admitted position that the Respondent No. 2 and the Appellant at the time of making of the Contract and during the performance thereof were ad idem on the position that incentive has to be paid for early commencement of supply for the entire unelapsed period of 48 months. This is clear beyond any doubt from the subsequent stand of Respondent No.2 taken by it in response to the objection raised by the CAG in the November, 2013. It is the Respondent No. 2 which has now changed its stand completely based only on the understanding or the interpretation of the CAG (i.e. the Government and a third party to the contract). Therefore the ratio of the aforesaid case would support the contention of the Appellant that the interpretation of the contractual terms by the Government i.e. CAG is not binding on this Tribunal and the interpretation of the contractual terms has to be gathered from the contract itself, the intention of the contracting parties and manner in which the contracting parties have understood and acted upon the contract.

Therefore as stated supra the Impugned Order passed by the State Commission is liable to be set aside.

3. **Submissions of the learned counsel Mr. Varun Pathak appearing for the 2nd Respondent are as follows:-**

3.1 The crux of the dispute is the additional amount to the tune of Rs. 21.37 crores approx. paid to the Appellant by the answering Respondent, i.e. Maharashtra State Electricity Distribution Company Limited.

3.2 In terms of the order dated August 29, 2017 (hereinafter "Impugned Order") passed by Maharashtra Electricity Regulatory Commission (hereinafter "MERC") in Case No. 90 of 2017 MSEDCL is entitled to the refund of the incentive amount paid erroneously and inadvertently.

3.3 The principle issue is the entitlement of the Appellant to the incentive in question under Articles 4.4.6 and Article 4.4.7 of the Power Purchase Agreement dated February 23, 2010. If the Tribunal comes to the conclusion that the Appellant is entitled to the said incentive in terms of the PPA then other issues do not arise for consideration, however, if this Tribunal comes to the conclusion that the said incentive is not payable to the Appellant in terms of the PPA then the consequences, in lights of the admitted facts of the instant case, will have to be considered by this Tribunal.

3.4 The propositions adumbrated below are being relied upon by the Counsel for the Respondent No. 2.

3.5 In the facts of the instant case following landmark dates are important:

(i) November 17, 2006– MSEDCL initiated a two-stage bid for procuring 2000 MW).

(ii) Price bid was to be submitted in January, 2008.

(iii) Order dated January 24, 2008 passed by MERC in Case No. 38 of 2007.

(iv) Order dated November 27, 2009 passed by MERC approving the amended agreement which eventually resulted in the PPA in the present form.

(v) January 15, 2009 the agreement for power purchase was initialled between the parties.

(vi) February 23, 2010 was the date of signing of the PPA.

(vii) Demand letter dated June 29, 2015 raised on the Appellant by MSEDCL.

(viii) Interim Order dated July 22, 2016 passed by MERC in Case No. 90 of 2016 restraining MSEDCL from adjusting/deducting the wrongly paid incentive amount to the Appellant.

(ix) Impugned Order (dated August 29, 2017) which permitted MSEDCL to deduct/adjust the amount of Rs. 21.37 crores (approx) against the bills of the Appellant.

(x) August 31, 2017 when the Rs. 21.3723357 crores were recovered from the Appellant by MSEDCL.

A. The Appellant is not entitled to the incentive paid erroneously by MSEDCL for the period beyond October 1, 2010:

3.6 Reliance is placed on order dated January 24, 2008 passed by MERC in Case No. 38 of 2007. During the public hearing Emco Energy Ltd. suggested that since the state of Maharashtra was in a state of deficit therefore, some incentive be provided to the generators to encourage early Commercial Operation Date and the same should mirror the mechanism of liquidated damages for delay in achieving COD. MSEDCL submitted its comments and stated that some incentive for advancing of COD from the original date will be given. It is submitted that as the power was being procured from various bidders, an outer date of 48 months had been provided for achieving COD from the date of signing of the power purchase agreements. This provision was made for all bidders and all bidders were expected to achieve their COD prior to the expected period of 48 months contemplated under the bidding documents. The MERC approved the incentive mechanism proposed by MSEDCL for commencement of early power under the bidding process.

3.7 Further reliance is placed upon order dated November 27, 2009 passed by MERC in Case No. 39 of 2009 wherein MERC approved the power purchase agreement entered into between the Appellant and MSEDCL. It is pertinent to note that the PPA which was eventually entered into by the Appellant and MSEDCL was an approved document and therefore, the freedom to contract and negotiate the terms of the contract were not available in the traditional sense (electricity being a regulated sector). Therefore, the terms of the PPA will have to be interpreted in light of the fact that the power sector is a regulated sector.

3.7.1 It is evident from the 2nd Order that:

(i) After the bids were opened and evaluated, a High Power Committee, involving the Government of Maharashtra, was formed to negotiate the tariff with the three bidders in the L1 basket, namely, Adani Power Maharashtra Ltd., Lanco Mahanadi Power Ltd., and JSW Energy Ltd..

(ii) Based on the report of the negotiating committee and order of the GoM dated July 28, 2008, power purchase agreements were signed with Lanco and Adani respectively, the copy of which was submitted to MERC by letter dated October 16, 2008.

(iii) Negotiations were further conducted by the High Power Committee with JSWL for procurement of 300 MW power. JSWL confirmed their commitment for supply as follows :

(a) Penalty clause to be applicable if scheduled COD is delayed beyond October 1, 2010;

(b) Power shall be given to MSEDCL from whichever Unit is commissioned first.

(c) No penalties to be imposed for scheduled COD before October 1, 2010.

(d) Adoption of the tariff quoted in the bid document.

(e) Based on the above, MSEDCL and JSW initialled the PPA for 300 MW supply of power on January 15, 2009, subject to approval of the GoM, the Board of Directors of MSEDCL and MERC.

(f) The GoM, by letter dated February 16, 2009, accorded approval for 300 MW power purchase on long term basis from JSW Energy Ltd at the tariff offered in the bid document under Case -1 Bid.

(g) The Board of MSEDCL by board resolution passed in the meeting held on April 16, 2009 authorised MSEDCL to procure power from JSWL at the tariff quoted in the bid document. It approved the terms and conditions of the initialled PPA, subject to the approval of the Commission.

(h) Certain new amendments as compared to the Standard Bid Document were incorporated in the PPA which had been submitted to MERC for approval.

(iv) The approval of MERC was sought for seeking amendments on the following aspects:

(a) Definition of Scheduled COD:

Original: "means (i) for the first Unit, 1st October 2010 or such other dates from time to time, specified in accordance with the provisions of this agreement"

Amendment: "means (i) for the first Unit, 1st October 2010 or such other dates from time to time, specified in accordance with, the provisions of this Agreement; in case some unit other than the first unit is synchronized / commissioned, then the power from such unit shall be supplied till such time the first unit specified in the definition achieves the COD. However, the Seller shall make best efforts to supply power from 1st October 2009."

(b) Clause 4.4.6:

Original: "The Seller may offer Scheduled Commercial Operation Date, for whole or part of the capacity offered, before expiry of 48 calendar months from the date of signing PPA."

Amendment: "The Seller has offered Scheduled Commercial Operation Date, ~~for whole or part of the capacity offered, before expiry of 48 calendar months from the date of signing PPA~~for which ever unit that comes earlier for whole or part of the capacity before expiry of 1st October 2010."

3.7.2 The amendment of the PPA wi-th the scheduled COD was approved by MERC by the 2nd Order. It is pertinent to note that the scheduled COD in both the original agreement and the amended agreement was October 10, 2010 and therefore, the Appellant had offered to supply power from October 1, 2010 which was in clear contradistinction to the other bidders Lanco and Adani for whom the 48 month period was pertinent and therefore, the reference to the 48 month period was left out from the clause 4.4.6.

3.8 Now in light of the fact that the electricity is a regulated sector and that the PPA was approved by MERC, reference is made to the terms of the PPA which make it clear that the incentive was payable to the Appellant only till the Scheduled COD. Reference is made to definition of "Effective Date" of the paper book. The Effective Date of the PPA was January 15, 2009.Further reference

is made to the definition of "Revised Scheduled COD" of the paper book which makes it clear that the PPA contemplated supply of power from October 1, 2010 and the said supply could be preponed with the Appellant making best efforts to commence supply from October 1, 2009. Further, reference is made to the definition of "COD" of the paper book. The definition of COD makes it clear that the supply of power was to commence from October 1, 2010 under the PPA.

3.8.1 A bare perusal of clause 4.4.6 and 4.4.7 makes it clear that the reference to the 48 month period in clause 4.4.6 is cut and specifically there is reference to fact that the Seller may offer supply of power from the Scheduled COD, i.e. October 1, 2010. It is clear that an incentive can be paid only for doing something which is in addition to something already promised. In the present case the Appellant started supply of power from September 2010 which was just one month in advance from October 1, 2010 and therefore, the Appellant cannot be given incentive for doing something which it had already offered in the first place. The 2nd Order clearly recorded the fact that the supply of power under the PPA was to commence from October 1, 2010.

3.8.2 In this regard reference is made to paragraphs 10.7 to 10.11 of the Impugned Order wherein the MERC correctly interprets the PPA.

3.8.3 As the PPA has statutory/regulatory flavour, the terms of the PPA have to be construed accordingly.

B. Limitation Act, 1963 not applicable to proceedings before Maharashtra Electricity Regulatory Commission:

3.9 Firstly, in light of the judgment of the Hon'ble Supreme Court in T.N. Generation & Distribution Corpn. Ltd. *v*. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53, the provisions of the Limitation Act, 1963 are not applicable. The relevant para is reproduced below for ease of reference:

"*64. The next submission of Mr Nariman is that the claim of the respondents would have been held to be time-barred on reference to arbitration. We are not able to accept the aforesaid submission of Mr Nariman. On the facts of this case, in our opinion, the principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO basis. The procedure adopted by the respondent, as observed by the State Commission as well as by Aptel, would be covered under Sections 60 and 61 of the Contract Act. Aptel, upon a detailed consideration of the correspondence between the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part-payment of the invoices. During the course of the hearing, Mr Salve has pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. The learned Senior Counsel also pointed out that there was no complaint or objection ever raised by the appellant. The objection to the method adopted*

by the respondents on the method of FIFO, was only raised in the counter-affidavit to the petition filed by the appellant before the State Commission. According to the learned Senior Counsel, the plea is an afterthought and has been rightly rejected by the State Commission as well as Aptel. We also have no hesitation in rejecting the submission of Mr Nariman on this issue. In any event, the Limitation Act is inapplicable to proceeding before the State Commission."

3.10 Secondly, even otherwise the claim of MSEDCL is not time barred. In this regard reference is made to the following dates:

(i) September 2013 – Mistake of payment of incentive to the Appellant pointed out in audit.

(ii) June 29, 2015 - Demand raised by MSEDCL on the Appellant.

(iii) July 22, 2016 - MERC in Case No. 90 of 2016 restrained MSEDCL from adjusting/deducting the wrongly paid incentive amount to the Appellant.

(iv) August 31, 2017 – MSEDCL adjusted Rs. 21.3723357 crores.

3.10.1 In the present case, as per section 17 of the Limitation Act, 1963 the limitation period will start running from the date of discovery of the mistake and not from 2010 when the payments towards incentive were inadvertently made. In the facts of the present

case, the mistake was admittedly discovered only in September, 2013 and the demand was duly raised in June, 2015, i.e. with two years. The 3 year period limitation would have expired on September, 2016, however, as there was an interim order which had been passed by MERC in June, 2016 till August, 2017, the said period would be excluded and therefore, the adjustment made on August 31, 2017 by MSEDCL would be within the period of limitation.

3.11 In the facts of the present case, the Impugned Order has been correctly passed by MERC and there is no reason for this Tribunal to set-aside the same.

3.12 The judgements relied upon by the Appellant are not applicable, as differentiated during the hearing. Further, reliance is placed upon the following judgements by the answering Respondent:

(i) 2010 (14) SCC 1 – Para 13 – Contract to be interpreted purposively.

(ii) 2014 (1) SCC 516 – Para 35 – Government interpretation not binding on courts. Circulars not conclusive on interpretation of the contract between the parties.

(iii) 2013 (5) ACC 470 – Para 23 – Party cannot claim more than what is covered under the contract.

The learned counsel appearing for the 2nd Respondent forcibly submitted that the 1st Respondent/State Commission after due deliberation of the matter and after appreciation of the oral

documentary evidence available on file has rightly justified in denying the relief sought by the Appellant. Therefore, interference of this Tribunal does not call for.

5. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent No.2 at considerable length of time and after careful consideration of the Impugned Order passed by the State Commission and after going through the written submission and rejoinder filed by the counsel appearing for both the parties and after critical analysis of entire relevant material available on records and the pleadings available on the file, the only issue which arises for our consideration in the instant Appeal is:-

i) Whether the State Commission has erred in permitting MSEDCL/ the Respondent No. 2 to adjust a sum of Rs. 21.37 crore (being the amount of incentive paid by the Respondent No. 2 to the Appellant for the period October 2010 to December 2012) from the tariff bills of the Appellant."

6. **Our considerations and analysis:**

On the basis of the facts and circumstances of the case in hand and the material available on record issue that arises for our consideration and analysis is as follows:-

i) The State Commission in its order dated 24.02.2018 approved the revised bid document and observed as follows:-

"*In the revised Bidding Documents submitted by MSEDCL to the Commission for approval, there was no provision towards incentive for Commencement of Supply to Power to MSEDCL earlier than the Agreed Schedule. However, considering the suggestions made by the stakeholders, MSEDCL has now incorporated an incentive mechanism for early commencement of power supply linked to the quarter in which supply of power will commence from the date of signing of PPA. MSEDCL further submitted that incentive shall be payable to the Seller on the actual sale of units to MSEDCL and not on the contracted amount. Considering the acute power deficit scenario in the State of Maharashtra, the Commission approves the incentive mechanism proposed by MSEDCL for early commencement of power supply under this bidding process*."

ii. On the basis of the aforesaid approval of the revised bidding documents (more particularly the inclusion of the incentive clause), the Appellant submitted its bid to the Respondent No. 2 for supply of 300 MW of Power. After negotiations the Appellant and Respondent No. 2 initialed the PPA on 15.01.2009 subject to Regulatory Approvals. The Board of Directors of Respondent No. 2 vide resolution dated 16.04.2009 authorized the Respondent No. 2 to procure power from the Appellant at the Tariff quoted by the Appellant.

iii. Thereafter, the State Commission vide its order dated 27.11.2009 approved the PPA with certain modifications. The following are the relevant terms of the PPA as approved by the State Commission vide order 27.11.2009:

"Article 1.1

"Scheduled COD" or "Scheduled Commercial Operation Date" means (i) for the first Unit, 1st October 2010 or such other dates from time to time specified in accordance with the provisions of this Agreement; in case some unit other than the first unit is synchronized/commissioned then the power from such unit shall be supplied till such time the first unit specified in this definition achieves the COD. However, the Seller (Petitioner herein) shall make best efforts to supply power from 1st October, 2009."

4.4.7 "Procurement of power earlier than Scheduled Commercial Operation Date, as envisaged in Article 4.4.6 would be subject to Maharashtra STU's ability to evacuate from the Delivery Point.

Procurer shall provide incentive to Sellers who are willing to supply power to Procurer earlier than the Scheduled Commercial Operation Date. The incentive rates are as given in the table below:

Period	*Quarter No.*	*Applicable Incentive per unit of supply*
Jan 09- Mar 09	*Q1*	*16*
Apr 09 – Jun 09	*Q2*	*15*
Jul 09 – Sep 09	*Q3*	*14*

Period	*Quarter No.*	*Applicable Incentive per unit of supply*
Oct 09 – Dec 09	*Q4*	*13*
Jan 10 – Mar 10	*Q5*	*12*
Apr 10 –Jun 10	*Q6*	*11*
Jul 10 – Sep 10	*Q7*	*10*
Oct 10 – Dec 10	*Q8*	*09*
Jan 11 – Mar 11	*Q9*	*08*
Apr 11 – Jun 11	*Q10*	*07*
Jul 11 – Sep 11	*Q11*	*06*
Oct 11 – Dec 11	*Q12*	*05*
Jan 12 – Mar 12	*Q13*	*04*
Apr 12 – Jun 12	*Q14*	*03*
Jul 12 – Sep 12	*Q15*	*02*
Oct 12 – Dec 12	*Q16*	*01*

However, Procurer shall off-take such early energy only if transmission capacity is available for evacuation.

If COD of a unit or of the Contracted Capacity is delayed beyond the Scheduled Commercial Operation Date as offered by the Selected Bidder in response to the RFP, the Selected Bidder shall be liable to pay to Procurer liquidated damages as per the terms in Article 4. To avoid such liquidated damages, the Selected Bidder shall have the

option of supplying the contracted power to the Procurer from alternate sources. Delay in Commercial Operation Date due to non-availability of Open Access on the CTU network shall be considered to be a Force Majeure Event. In case the landed cost of supply of alternative power at Maharashtra STU boundary is higher than Quoted Tariff, the Selected Bidder will have to bear such additional cost including Open Access Charges, Transmission Charges, Transmission Losses, RLDC Charges, SLDC Charges etc.

iv. The Appellant was paid incentive for the period September 2010 to December 2012 by the Respondent No. 2, for early commencement of power supply, in accordance with Article 4.4.7 of the approved Power Purchase Agreement dated 23.02.2010 ('PPA'). The entire incentive was paid by the Respondent No. 2 to the Appellant, without any demor or reservation, during FY 2010-2013.

v. On 29.06.2015, the Respondent No. 2 took a stand that the applicable provisions of the PPA in relation to payment of incentive had been 'inadvertently misinterpreted' by it, owing to which incentive paid for the period October 2010 to December 2012 now deserved to be refunded.

6.1 In view of the above it is established beyond doubt that

(i) The Respondent No.2/MSEDCL and the Appellant/JSW entered into a Power Purchase Agreement which included provisions for the payment of incentives for early commissioning of generating units.

(ii) The PPA with provisions of incentives was approved by the Respondent No.2/MSEDCL and the Government of Maharashtra and the same was approved by the State Commission as well.

(iii) The Respondent No.2/MSEDCL paid incentives to JSW as per the approved PPA.

(iv) The incentives mechanism came to be incorporated and approved by the State Commission in the PPA in view of the power deficit scenario in the State of Maharashtra. The Respondent No.2/MSEDCL proposed deviation in the RfP document to allow early commencement of supply of power before expiry of 48 months of signing the PPA and inclusion of incentives mechanism in the RfP document for incentivising the early commencement of power supply to meet with the power deficit scenario in the State.

This fact has also been recorded by the State Commission in their order dated 29.02.2017 while approving the revised bid document.

As such the submissions of the Respondent No.2/MSEDCL that it had made a mistake in interpreting the terms of PPA is afterthought and this is also clear from the stand taken by the Respondent No.2/MSEDCL before the CAG in November, 2013.

(v) The State Commission in their Impugned Order took up interpretation of the Power Purchase Agreement which was approved by them earlier and only on the basis of this approval, PPA was signed by both the parties i.e. the Respondent No.2/MSEDCL and JSW. As per the PPA, incentives were also paid

by the Respondent No.2/MSEDCL to JSW for the period October 2010 to December 2012.

(vi) It is settled principle of law that if parties to a contract, by their course of dealing, put a particular interpretation on the terms of it-on the faith of which each of them-to the knowledge of the other-acts and conducts their mutual affairs-they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not-or whether they were mistaken or not-or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

(vii) As such the State Commission has committed grave error by interpreting the PPA contrary to the well settled principle of law.

(viii) The last incentive payment was made in December, 2012 and the Respondent No.2/MSEDCL asserted its claim for adjustment only on 27.07.2016. As per clause 11.6.1 of the PPA if a party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other Party within thirty (30) days of receiving it, such bill shall be taken as conclusive. As none of the payment made by the Respondent No.2/MSEDCL were disputed within 30 days, therefore, they became conclusive and binding on the Respondent No.2/MSEDCL. As such it clearly bars the Respondent No.2/MSEDCL from disputing the same after more than 4 years. Hence, not sustainable in law.

7. **Conclusion**

i) The Power Purchase Agreement including the relevant provision for payment of incentives and also the incentive table were approved by the State Commission and the Respondent No.2/MSEDCL paid incentives to the Appellant/JSW as per the approved Power Purchase Agreement.

ii) The payment by the Respondent No.2/MSEDCL to JSW was thoughtful decision and was not a mistake.

iii) The claim of recovery by the Respondent No.2/MSEDCL from the Appellant/JSW is beyond the period of limitation and therefore barred under the law.

iv) The State Commission does not have exclusive jurisdiction for the interpretation of the contractual clauses of the Power Purchase Agreement.

ORDER

For the foregoing reasons, as stated supra, the instant Appeal filed by the Appellant is allowed in part.

The Impugned Order dated 29.08.2017 passed in Case No. 90 of 2016 by the first Respondent/the State Commission is hereby set aside. The matter stands remitted back for consideration afresh with the direction to the 1st Respondent/State Commission to pass appropriate order in accordance with law after affording reasonable

opportunity of hearing to the Appellant and the 2nd Respondent/MSEDCL and dispose of the matter as expeditiously as possible at any rate within a period of six months from the date of appearance of the parties.

The Appellant and the 2nd Respondent/MSEDCL is hereby directed to appear before the 1st Respondent/the State Commission personally or through their counsel on 3rd April, 2019 without further notice.

In view of the Appeal No. 355 of 2017 being disposed of, the relief sought in IA No. 50 of 2019 and IA No. 289 of 2019 do not survive for consideration and, hence, stand disposed of.

No order as to costs.

Pronounced in the Open Court on this ***15th day* of March, 2019.**

(Ravindra Kumar Verma)
Technical Member

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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