# Before the Appellate Tribunal for Electricity
# (Appellate Jurisdiction)

## Appeal No. 77 of 2009 and Appeal No. 86 of 2009

Dated: 22nd February 2010

**PRESENT: HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**
**HON'BLE MR. H.L. BAJAJ, TECHNICAL MEMBER**

## Appeal No. 77 of 2009

In the matter of
**Gujarat Urja Vikas Nigam Ltd. … Appellant**

**Versus**

**Essar Power Limited … Respondent**

Counsel for Appellant — Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for Respondent — Mr. C.S. Vaidyanathan Sr. Adv.
Ms. Shikha Sarin &
Mr. Mahesh Aggawal

## Appeal No. 86 of 2009

In the matter of:
**Essar Power Limited … Appellant**

**Versus**

**Gujarat Urja Vikas Nigam Ltd ... Respondent**

| | |
|---|---|
| Counsel for Appellant | Mr. C.S. Vaidyanathan, Sr. Advocate<br>with Ms. Shikha Sarin &<br>Mr. Mahesh Aggawal |
| Counsel for Respondent | Mr. M.G. Ramachandran,<br>Mr. Anand K. Ganesan<br>Ms. Swapna Seshadri |

**AS PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

## JUDGMENT

**1. Both these Appeals No. 77 of 2009 and 86 of 2009 have been heard together and Common Judgment is being rendered as both the Appeals would arise out of the Common Order passed by the Gujarat Electricity Regulatory Commission (State Commission) on 18.02.2009.**

**2. Gujarat Urja Vikas Nigam Ltd, the erstwhile Electricity Board, is the Appellant in Appeal No. 77 of 2009 and Essar Power Ltd. is the Appellant in Appeal No. 86 of 2009. The short facts are as under:**

**3. Gujarat Urja Vikas Nigam Limited is the successor of the Electricity Board of Gujarat (Electricity Board). The erstwhile Electricity Board had entered into a Power Purchase Agreement (PPA) dated 30.05.1996 with the Essar Power Limited (EPL) for the purchase of power for a period of 20 years. In the same year, on 29.06.1996, the Essar Power Limited entered into another PPA with its sister concern Essar Group of Companies. Under the PPA which was entered with the Electricity Board, the Essar Power Limited as generating company was required to declare availability of electricity to the Electricity Board to the extent of 300 MW. Under the other PPA which was entered with the Essar Group of Companies, the EPL was required to declare availability of electricity to the extent of 215 MW to Essar Group of Companies.**

**4. As per the original notification which was issued by Government of India on 30.03.1992, the generating company**

**was entitled to deemed generation incentive. However, the Central Government, on 06.11.1995, issued a notification with the modification cancelling the deemed generation incentives to the generating company which was using Neptha as a fuel.**

**5. As indicated above, the EPL has to declare availability of electricity to the extent of 300 MW to the Electricity Board and 215 MW to its sister concern, Essar Steel. The Electricity Board felt that instead of showing the availability of 300 MW to the Electricity Board, the EPL had been supplying more power to its sister concern, i.e. Essar Group of Companies in contravention of the PPA entered with the Electricity Board. In view of the said situation with regard to the contravention of the PPA and with the issue of the fresh notification issued on 06.11.1995 by the Central Government, the Electricity Board held a meeting with the EPL in respect of both the issues i.e. in respect of the diversion of power as well as in respect of the**

**payment towards the deemed generation incentives. In the said meeting, the Electricity Board claimed both compensations from EPL on account of such wrongful diversion of more power to its sister concern and also claimed for the return of the deemed generation incentive which was not payable to the Essar Power Limited which is Naptha based power plant. The Electricity Board sought adjustment of the said deemed generation incentive already paid by it to the EPL. However, there were no fruitful results. Under those circumstances, the Electricity Board on the advice of the State Government approached the State Commission and filed a petition before the State Commission for the required reliefs.**

**6. After hearing the parties, the State Commission ultimately allowed the Application filed by the Electricity Board by the order dated 18.02.2009, and granted the reliefs in respect of both the prayers, sought for by the Electricity**

**Board. However, the claim in respect of the compensation and return of the deemed generation incentive in respect of the period prior to 3 years from the date of filing of the application was rejected on the ground of limitation. But, it allowed the said claim for 3 years for the subsequent periods i.e. 3 years period i.e. prior to the date of filing of the petition before the State Commission.**

**7. Aggrieved by the rejection of the claim in respect of the earlier period prior to 3 years from the date of filing of the petition, the Electricity Board i.e. at present Gujarat Urja Vikas Nigam Limited has filed the Appeal No. 77 of 2009. Aggrieved by the very same order, the EPL, with regard to the claim of the Electricity Board in respect of compensation and to the adjustment of the incentive for 3 years, has filed the Appeal No. 86 of 2009 before this Tribunal.**

**8. Let us now first take the Appeal No. 77 of 2009 which has been filed by the Gujarat Urja Vikas Nigam Limited (GUVNL) The Gujarat Urja Vikas Nigam has challenged the following findings rendered by the State Commission as against the erstwhile Electricity Board.**

**(i) The State Commission on the ground of limitation did not allow the claims of the Electricity Board consequent to the decision taken with regard to the compensation and the adjustment of deemed generation incentive in respect of the period prior to 14.09.2002.**

**(ii) The State Commission held that the settlement by the payment of Rs. 64 crores made by the EPL to the Electricity Board in November 2004 would amount to full and final settlement of the claims of the Electricity Board in respect of diversion.**

**9. These two findings have been challenged in this Appeal No. 77 of 2009 by the Electricity Board. The Appellant would urge the following contentions.**

**(i) The EPL is a generating company. The Electricity Board is a deemed licensee. The PPA between the EPL and the Electricity Board relates to the generation station of EPL with an installed capacity totaling 515 MW. The two PPAs; the first between the EPL and Electricity Board at 30.05.1996 and the second between the EPL and its sister concern, Essar Steel dated 29.06.1996 cover those entire 515 MW capacity. Both the PPAs specifically provide not only the capacity allocated to the Electricity Board but also the capacity allocated to its sister concern. Both the PPAs are in identical terms i.e. 300 MW of electricity to the Electricity Board and 215 MW of power to Essar Steel in the combined cycle operation. In terms of the PPA between the EPL and the Electricity Board, the EPL would recover full fixed charges including Return on Equity proportionate to 58% from the Electricity Board on annual basis at 70% Plant Load Factor (PLF) As per PPA dated**

**30.05.1996 and dated 29.06.1996 entered into with both the parties, the EPL was required to make available electricity generated or proposed to be generated to the Electricity Board as well as to its sister concern in the proportion of 58:42 percent i.e. 300 MW and 215 MW respectively. In this case, the EPL in contravention of the PPAs declared the availability of electricity to the Electricity Board less than 300 MW and on the other hand declared the availability of electricity to its sister concern Essar Steels Ltd. more than the permitted limit of 215 MW and supplied the same. This is the finding of the State Commission. Having found so, the State Commission ought to have imposed compensation for the entire period. This was not done on the ground of limitation. This is not legal.**

**(ii) There was no full and final settlement when the letter dated 19.12.2003 was written by the Electricity Board to the EPL settling the claims. A supplemental agreement was signed in December 2003. Again another supplemental agreement was signed in October with the Electricity Board. These supplemental agreements dealt only with the issues**

**which required amendment of the PPA. It did not deal with the issues which required any other amendments. The amount of Rs. 64 crore settled in October 2004 was limited to quantum of electricity declared available by EPL in favour of the Essar Steels Ltd. in excess of the 215 MW in absolute terms and not for any other claims. In fact, through their letter dated 22.10.2003, the Electricity Board wrote to EPL raising a claim of Rs. 537 crores after fuel adjustments for deemed generation incentive and deemed non-generation relating to the power from 1996-97 to 1998-99 involving 165 million units diverted in favour of Essar Steels Ltd.. Through its letter dated 29.07.2004, the Electricity Board claimed from the EPL Rs. 64 crores only in regard to the supply made by the EPL to the Essar Steels Ltd. more than 215 MW during the 3 months. Again the Electricity Board wrote another letter dated 13.10.2004 claiming Rs. 64 crores from the EPL for the energy diverted to the Essar Steels Limited by the EPL in excess of the 215 MW. Thus, it is clear that this would not relate to the entire settlement of overall package, and as such there is no question of**

**settlement of Rs. 64 crores being treated as full and final settlement of all claims of the Electricity Board. Therefore, the findings by the State Commission are wrong.**

**10. These contentions urged by the Ld. Counsel for the Appellant i.e. the Electricity Board are strongly refuted by the Ld. Senior Counsel of the Respondent (Essar Power Limited) in justification of the findings rendered by the State Commission in favour of EPL, by showing the reasoning given in the impugned order.**

**11. We have heard the counsel for the parties and we have given our anxious consideration to their rival contentions.**

**12. As mentioned above, the State Commission by the impugned order dated 18.02.2009 had accepted the contention of the Appellant on merits with reference to the claim on both the issues namely in regard to the entitlement of Electricity**

**Board to get proportionate share of 300 MW of power out of the total 515 MW capacity and on the issue of inadmissibility of deemed generation incentive to the EPL which is Neptha plant. However, the State Commission has held against the Appellant, the Electricity Board on the following issues.**

**(i) the claim for alleged wrongful diversion of power for the period prior to 14.09.2002 is barred by limitation;**

**(ii) The claim of inadmissibility of deemed generation incentive for the period prior to 14.09.2002 was barred by limitation;**

**(iii) The Appellant had fully and finally settled all its claims in regard to wrongful diversion of power in excess of 215 MW by the EPL to its sister concern Essar Group Companies up to the year 2004.**

**13. These findings are being challenged in this Appeal.**

**14. In the light of the respective contentions urged by the Learned Counsel for the parties, the following questions may arise for consideration in this Appeal:**

**(i) Whether the State Commission was right in holding that the claim of the Appellant with reference to the deemed generation incentive as well as wrongful allocation of the capacity for the period prior to 14.09.2002 could be said to be barred by limitation;**

**(ii) Whether the State Commission was right in considering the letters dated 30.10.2004, 11.11.2004 and 30.11.2004 as amounting to full and final settlement in respect of wrongful allocation of capacity by the EPL in favour of its sister concern Essar Group Companies for the period till September 2004 in excess of 215 MW was settled by the parties against Rs. 64 crores as claimed by the EPL?**

**15. The short and simple point urged by the Appellant in the present Appeal is that the State Commission has erred in disallowing the claims of the Appellant with respect to the deemed generation incentive and wrong allocation of power for the period prior to 14.09.2002 on the ground that the same are barred by limitation even though it was held that the Appellant would be entitled to claim as against the EPL (R-2).**

**16. It is not in dispute that there was a PPA dated 30.05.1996 made between the erstwhile Electricity Board, the predecessor of the Appellant and the Essar Power Limited, respondent herein. Under this PPA, the EPL agreed to sell electricity to the Electricity Board up to allocated capacity of 300 MW on the terms and conditions contained in the PPA. In the same very year i.e. on 29.06.96 the EPL entered into another PPA with its sister concern i.e. Essar Steel Limited. Under this PPA, the EPL agreed to sell to Essar Steel Limited, its sister concern up**

**to the allocated capacity of 215 MW on the terms and conditions contained in the said PPA.**

**17. It is the case of the Appellant, that EPL is liable to declare and supply power in the ratio of 300:215 MW to the Appellant and to the Essar Steel Limited respectively. It is the further case of the Appellant that the EPL has not declared and supplied power in the said ratio to the Appellant, but on the other hand, the EPL has supplied more power to its sister concern Essar Steel Limited than its entitlement under the PPA by diverting the power meant for supply to the Appellant and thereby caused loss to the Appellant for which the Appellant would be entitled to compensation. It is the further case of the Appellant that as per notification dated 06.09.1995, the demands made by the Appellant to the EPL towards deemed generation incentive during the eligibility period of 10**

**years i.e. from 01.07.1996 to 30.05.2006 is refundable to the Appellant by the EPL as the EPL was a Neptha based plant.**

**18. Let us now discuss these issues.**

**19. It is not in dispute that when the claim towards compensation for wrong allocation of power as well as the claims for refund of deemed generation incentive were made by the Electricity Board through the letter dated 29.10.2003 the EPL refuted the same immediately through, the letters dated 01.11.2003 and 01.12.2003. Despite that, the Appellant approached the State Commission and filed a petition only on 14.09.2005 for recovery of the said amounts due on account of the 2 claims. In those circumstances, the question arises as to whether the said claims by the Appellant against EPL was barred by the limitation?. Though EPL submitted before the State Commission that all the claims of the Appellants are**

**barred by limitation, but at the end, the EPL confined itself to the question of limitation only to the claims of the Appellant in respect of the period prior to 14.09.2002 i.e. before 3 years prior to the date of petition i.e. 14.09.2005. This contention urged by the Respondent EPL was upheld by the State Commission holding that the Appellant would be entitled to get the amount refunded only to its claim for the 3 years period prior to the date of filing of the petition and not for the earlier period.**

**20. Admittedly, the petition had been filed by the Appellant before the State Commission seeking compensation on account of alleged breach of contract. According to the Appellant the terms of the contract contained in PPA have been broken from the date of the alleged failure on the part of EPL to declare and supply power in the ratio of 300:215 MW to the Appellant as well as to its sister company. Even according to the Appellant**

**such a breach had not taken place once but several times. It is thus a case in which contract has been breached successively.**

**21. It cannot be disputed that the provisions of Limitation Act 1963 applies to the present case. Article 55 of the Limitation Act is relevant. Article 55 provides for filing of the suit for compensation for the breach of any contract, express or implied. According to this Article the period of limitation is 3 years. This Article further says that when the contract is broken or where there are successive breaches, then the breach in respect of which suit is instituted occurs. Under these circumstances, the above Article applies to the present case and as per the same, the period of limitation for compensation for breach of contract is 3 years from the date when the contract is broken or where there are successive breaches. It is a settled law that once a period of limitation prescribed for suit begins to run, it is not stopped.**

**22. The claim made by the Appellant (Electricity Board) for the payment of Rs. 537 crores from EPL for the period from 01.07.1996 to 31.03.1999 through their letter dated 29.10.2003 was specifically denied by the EPL through their letters dated 01.11.2003 and 01.12.2003. Thus, it is clear that the cause of action for compensation on account of alleged diversion of power arose in July 1996 itself and at any rate it arose when the Demand Notice dated 29.10.2003 was issued and the same was refuted on 01.11.2003 and 01.12.2003. Under those circumstances, the State Commission in our view rightly held that the claims of the Appellant for the said compensation and for the refund of the said deemed generation incentive pertaining to any period prior to 3 years from the date of the filing of the petition before the State Commission i.e. on 14.09.2005 are clearly barred by limitation.**

**23. It is a settled law that mere correspondence with the parties would not extend the cause of action or suspend the period of limitation. The discussions and negotiations held between the parties for a possible settlement even by way of conciliation as a prelude to arbitration will not stop the cause of action accruing to the party by the reason of denial of a claim, nor such cause of action once accrued gets extended or suspended by the period during which the efforts for an amicable settlement were in progress. The State Commission held so in the light of the facts admitted by the parties and also in view of the well settled legal principle on computation of compensation.**

**24. It is contended by the Appellant that the State Commission has erred in distinguishing the principle laid down by the Supreme Court in the case of *Hari Shanker Singhania v. Gaur Hari Singhania (2006) Vol-4 SCC 658* and**

***Shree Ram Mills v. Utility Premises Ltd. (2007) Vol-IV SCC 599*** **wherein it was held that where the negotiations were still on there would be no question of starting of the limitation period. These decisions relied upon by the Appellant do no deal with the case in which a cause of action to suit had already accrued to a person before the negotiations were held. As mentioned above, the limitation once commences to run, it does not stop. The cause of action once accrued is neither extended nor suspended due to such negotiations or conciliations. Such cause of action occurs when a claim made by one party against another and the same is denied or refuted by the other. Therefore, it cannot be contended that the cause of action for the Appellant for approaching the State Commission continued till the order was passed by the Government of Gujarat on 27.07.2007 advising the Appellant to resolve this dispute through the State Commission.**

**25. Further, the decisions cited by the Ld. Counsel for the Appellant under article 137 of the Limitation Act would apply only to the Application and not to the suit. The petition in question filed before the State Commission being one in the nature of a suit would attract Article 55 and as per the same, the petition is barred by time with respect to the claims made by the Appellant, with regard to the period prior to 3 years prior to the filing of the petition on the alleged wrong allocation of power and deemed generation incentive.**

**26. In view of the discussions made in the foregoing paragraphs we feel that there is no merit in this Appeal. In our considered opinion, the State Commission has given a clear and categorical finding with reference to the period of limitation and has rightly held that the Appellant's claim against the EPL for any period up to 14.09.2002 i.e. 3 years period prior to filing of the petition are barred by time except**

**to the extent of Rs. 64 crores paid by the EPL to the Appellant pursuant to the full and final settlement of ll claims for the period from 1998 up to September 2004. In this context, we would like to mention that in regard to the full and final settlement, we would make further discussion in the other Appeal.**

**27. Therefore there is no merit in this Appeal and as such the Appeal No. 77 of 2009 filed by Gujarat Urja Vikas Nigam Ltd. is dismissed as devoid of merits.**

**No costs.**

**<u>Appeal No. 86 of 2009</u>**

**28. Let us now deal with the other Appeal No. 86 of 2009. This Appeal has been filed by Essar Power Limited, as Appellant, as against the impugned order dated 18.02.2009 holding in favour of the erstwhile Electricity Board (R-1) in respect of 2 issues. It is better to again recall and reiterate the**

**minimal facts which are required for understanding the issues that arise in this Appeal.**

**29. Essar Power Limited, the Appellant, is a generating company. As mentioned above on 30.05.1996, the Appellant entered into a Power Purchase Agreement (PPA) with the erstwhile Gujarat Electricity Board (Electricity Board) (R-1). It also entered into a separate PPA on 29.06.1996 with its sister concern, Essar Steels Ltd. The terms of these PPAs meant that the Appellant, out of the total generating capacity of 515 MW would allocate 300 MW to the Electricity Board (R-1) and 215 MW to the Essar Steel Limited, its sister concern. The said Electricity Board felt aggrieved that the Appellant did not maintain the ratio of 300:215 to be allocated to the Electricity Board (R-1) and its sister concern and on the other hand the Appellant supplied less than the allocated ratio to the Electricity Board but supplied electricity more than its**

**allocated ratio to its sister concern. The Electricity Board (R-1) claimed compensation on that account. It also demanded for return of the deemed generation incentive which was earlier paid to the Appellant since the Appellant was not entitled to get the incentive, as per the Notification dated 06.11.1995. On these issues the Electricity Board (R-1) filed a petition before the State Commission. The State Commission, after hearing the parties, gave the following findings in favour of the Electricity Board (R-1)**

**(i) The total capacity of the Appellant is 515 MW. The Appellant is liable to make allocation of available power in the ratio of 300 MW and 215 MW to the Electricity Board (R-1) and Essar Steel Ltd. respectively. This has not been done. On the contrary the Appellant supplied more than the allocated ratio to its sister concern and supplied less than the allocated ratio to the Electricity Board. Hence the**

**Appellant is liable to pay compensation for a period of 3 years prior to the date of filing of the petition before the State Commission.**

**(ii) On the issue of inadmissibility of deemed generation incentive, the State Commission held that the Notification dated 06.11.1995 issued by the Government of India would apply to the Appellant's company as this is based on the use of Naptha as fuel and as such they are not entitled to the deemed generation incentive and the same is liable to be returned.**

**30. Assailing these grounds, the Ld. Senior Counsel for the Appellant EPL would make the following contentions:**

**(i) There is no specific provision in the PPA dated 30.05.1996 entered into between the EPL and the Electricity Board (R-1) which obligates the Appellant**

**to declare and supply electricity in the ratio of 300 MW to the Electricity Board and 215 MW to its sister concern.**

**(ii) The PPA signed between the Appellant and the Electricity Board (R-1) is independent of the PPA signed between the Appellant and its sister concern, Essar Steels Ltd. Therefore, the supply of electricity under these 2 PPAs needs to be considered separately. The PPA signed between the EPL and the Electricity Board has to be interpreted, construed and implemented as per its own terms.**

**(iii) The only obligation of the Appellant under the PPA in question is to supply upto 300 MW of electricity to the Electricity Board (R-1) when called upon to do so. The Electricity Board had always given Despatch Instructions for the supply of electricity less than the capacity declared as available with the Appellant.**

**(iv) The Appellant is only under obligation to supply electricity to the Electricity Board (R-1) up to the allocated capacity of 300 MW as and when called upon to do so. The reference to the allocated capacity to the Electricity Board in the PPA dated 30.05.1995 does not mean that the Appellant is bound and liable to declare and supply electricity in the said ratio to the Electricity Board.**

**(v) The Appellant had declared the capacity available to the Electricity Board and further supplied electricity to the Electricity Board in accordance with the Despatch Instructions given by the Electricity Board to the Appellant. Whenever the Appellant had supplied less quantum of electricity than what was demanded by the Electricity Board, the Appellant had compensated the Electricity Board by making payment of non-deemed generation charges as**

**stipulated in the PPA. This is the only penalty leviable under the PPA and no other charges or damages or compensation are payable for the same.**

**(vi) The Electricity Board (R-1) had already accepted the amount of Rs. 64 crores on 30.11.2004 as a full and final settlement of its claim and thereby waived all its claims made against the Appellant for compensation of alleged breach of contract.**

**(vii) The Notification dated 06.11.1995 prohibiting the payment of deemed generation incentive to the company which uses Napatha as a fuel has no application to the Appellant's case for the reason that the PPA was entered into between the Appellant and the Electricity Board (R-1) on 30.05.1996 and even on that date the Notification dated 06.11.1995 was in force and even then, there was no reference made in**

**the PPA about the applicability of the said Notification.**

**(viii) For the deviations from norms, the approval of the Government of India is required and the Electricity Board (R-1) was to apply for and obtain approval of deviation from the Government of India on payment of deemed generation incentive contained in the Notification. Admittedly, the said approval had not been obtained.**

**31. In reply to the above contentions, the Ld. Counsel for the Electricity Board (R-1) in justification of the impugned order would make the following submissions:**

**(i) The State Commission by its impugned order has given clear and categorical findings that in terms of the PPA dated 30.05.1996 entered into by the Electricity Board (R-1) and PPA dated 29.06.1996**

**entered into with the Essar Power Ltd, the Appellant was required to make available electricity generated or proposed to be generated in the proportion of 300:215 MW and as such there is no ambiguity in this finding especially when the combined reading of both the PPAs would clarify the above position.**

**(ii) By the letter dated 11.01.1995, the Central Electricity Authority sought a clarification on the status of the EPL as to whether it is a generating company or a captive plant. In its reply dated 19.01.1995, the EPL sent intimation to the CEA stating that it is a generating company and not a captive power plant. On this basis, the Government of Gujarat by its letter dated 05.06.1995 accepted the status of EPL as a generating company and confirmed the same to the CEA as well as to the Electricity Board. Only on this basis the EPL agreed to supply to the Electricity**

**Board (R-1) 60% of Power and 40% to its sister concern. Thereafter the PPA on 30.05.1996 was entered into with the Electricity Board and the PPA dated 29.06.1996 was entered into with its sister concern Essar Steel Ltd. with a commitment to supply power to both the Electricity Board and Essar Steels Ltd. in the proportion of 300:215 MW. Therefore, the Appellant cannot go back from its commitment made in the PPA in pursuance of the various consultations which both the parties had with the Government as well as with the CEA.**

**(iii) As regards the deemed generation incentive claims, the parties had already agreed on the inadmissibility of the same as per the minutes of the meeting dated 30.03.2000. Further, the EPL established the generating station principally based on Naptha as a fuel and not gas as a primary fuel. This is clear from**

**the communication dated 31.08.1994. Therefore, the findings rendered by the Stat Commission. We have heard the learned counsel for the parties and carefully considered their rival contentions.**

**33. In the light of the above pleas made by the respective parties, the following questions may arise for consideration:**

**(i) Whether under the PPA I and II the supply of electrical output to be made by the Appellant shall be in the ratio of 300:215 MW, the allocated capacity of the Electricity Board (R-1) and Essar Steels Ltd. respectively?**

**(ii) Whether the Appellant, which failed to declare the entire capacity of its generating station to the Electricity Board made the supply of electricity to its sister concern Essar Steels Ltd. in excess of the said ratio is liable to be held responsible for the breach of**

**the terms of PPA and consequently the Appellant is liable to compensate the Electricity Board (R-1)**

**(iii) Whether the Electricity Board (R-1) is entitled to get the refund from the Appellant for the deemed generation incentive paid to the Appellant in view of the amended Notification dated 06.11.1995?**

**34. Let us now deal with these issues.**

**35. To resolve this dispute, it would be necessary to refer to the various articles in the PPA dated 30.05.1996 (PPA-1) entered into between the Appellant (EPL) and the Electricity Board (R-1).**

**36. Under Article 3.2, a positive obligation has been imposed on the Appellant (EPL) to deliver power to the Electricity Board at the delivery point in accordance with its dispatch**

**instructions issued by the Electricity Board under the dispatch procedures as specified under Schedule-VI.**

**37. Article 3.3 deals with the Electricity power availability. It provides that the EPL shall submit to the Electricity Board from time to time Declared Available Generation Capacity as per the procedures set forth in Schedule-VI.**

**38. Article 6.1 of Schedule-VI states that the EPL will submit to the Board Load Despatch Centre a Weekly Schedule indicating the time and capacity which will be available from the generating station, and if not available, it shall mention the reason for the same.**

**39. It is significant to point out the words "corresponding to the allocated capacity" as found in Article 3.1 are not appearing in this article. In such circumstances, the question**

**would arise as to whether the EPL is obliged to declare available capacity in the said ratio to the Electricity Board 300 MW and Essar Steels Ltd. 215 MW, in the absence of these words in this article?**

**40. "Declaring available generating capacity" has been defined in Article 1 of PPA. It means the generating capacity expressed in MW at the Delivery Point as declared by the company, i.e. EPL pursuant to Schedule VI to be made available to the Electricity Board up to the allocated capacity.**

**41. Schedule-VI to the PPA-1 contained provision in regard to Despatch Procedures. As per Article 6.1, as indicated above, the EPL is required to submit to the Board Load Despatch Centre Weekly Schedules. There is nothing in this article to suggest that the declaration of capacity is to be on a proportionate basis to the Electricity Board as well as to the**

**Essar Steel Ltd. After the EPL submitted its Weekly Schedule, the Electricity Board shall issue to the EPL a Schedule of its requirement vide article 6.2.**

**42. Thereafter as per Article 6.3 the Board may issue Despatch Instructions at any time after the issue of Schedule of its requirement.**

**43. Article 6.4 provides that the EPL shall operate the generating station in accordance with the relevant Despatch Instructions given by the Board from time to time subject to Article 3.3.**

**44. As aforesaid Article 3.3 deals with the availability of declared capacity which also does not oblige the EPL to declare on proportionate basis.**

**45. From these provisions of Schedule-VI, it is clear that there is no provision, express or implied, to suggest that the EPL is liable to declare the available capacity in the said ratio to the Board and the Essar Steels Ltd. All these provisions would only say that the EPL has to first give Weekly Schedules to the Electricity Board indicating the time and capacity which would be available and the Electricity Board shall thereafter issue its requirement schedule through Despatch Instructions and thereupon EPL is liable to operate generating station in accordance with the Despatch Instructions given by the Electricity Board and supply.**

**46. On a combined reading of Articles 1 and 3 and Schedule-VI of the PPA-1, it is clear that EPL has to declare available capacity up to the allocated capacity to both the Electricity Board as well as to Essar Steels Ltd. and not on proportionate theory basis.**

**47. As a matter of fact, Article 5.2 of the PPA-1 obligates the Electricity Board to pay to the Appellant its Annual Fixed Charges including the cost of the project on the level of generation achieved up to the allocated capacity and not on the allocated capacity itself. The Electricity Board has accordingly paid the Annual Fixed Charges on monthly basis on the level of generation achieved up to the allocated capacity.**

**48. It is pointed out by the Ld. Senior Counsel for the Appellant that so far as the payment towards cost of the project is concerned, the Electricity Board had agreed to pay Rs. 945 crores out of the total cost of the project amounting to Rs. 2061 crores which only comes to approximately 46%, i.e. less than 58% of the total project cost.**

**49. In such circumstances, the Electricity Board (R-1) cannot claim that by reasons of it's making payment for the Annual Fixed Charges up to the allocated capacity, it was always obligatory on the part of the EPL to supply power to the extent of 58% to the Electricity Board and that since EPL has sold a part of Electricity Board's share in the power generated by the EPL to its sister concern, EPL is liable to compensate the Electricity Board for the same by treating such power which sold by EPL to Essar Steel Ltd. as if it was sold by the Electricity Board itself to Essar Steel Ltd. after purchasing the same from the EPL.**

**50. On the basis of letters dated 17.02.2000 and 04.10.2001, it is contended on behalf of the Electricity Board (R-1) that EPL has conceded to its proportionate theory basis and as such it cannot go back. This contention is not tenable. EPL in those letters merely expressed its willingness to agree to the**

**proportionate theory basis subject to the condition that Electricity Board should commit default in making the payment of dues payable under the PPA-1 to EPL and also subject to the condition that the Electricity Board shall comply with other conditions of the PPA-1.**

**51. Admittedly, the stipulated conditions in those letters were neither accepted nor complied with by the Electricity Board. Hence the offer made by the EPL to the Electricity Board for agreeing to the proportionate theory basis would not be construed to be conceding and as such it is binding on it.**

**52. In the second letter dated 04.10.2001 also, EPL stipulated the condition of making prompt payments by the Electricity Board to EPL and for establishment of Letter of Credit to secure payments under PPA-1. Even this condition, the Electricity Board was not ready to comply with. As such the**

**proposal made by the EPL to the Electricity Board regarding proportionate theory subject to the conditions is not binding on the Appellant.**

**53. Furthermore, when there is an amendment to the PPA-1 on 18.12.2003, there is no reference about these amendments for declaration of supply of power in the ratio of 58:42 to the Electricity Board as well as to the Essar Steels Ltd. respectively. The preamble of the said Supplemental Agreement dated 18.12.2003 clearly establishes that EPL is only obliged to generate the electricity up to 300 MW allocated to the Electricity Board and nothing more. In other words, there is no amendment with regard to the declaration of electricity generated on proportionate basis in the said Supplemental Agreement dated 18.12.2003.**

**54. Under such circumstances, it is not open to the Electricity Board to rely upon the aforesaid letters dated 17.02.2000 and 04.10.2001 to advance the plea of its proportionate theory.**

**55. It is an admitted fact that the Electricity Board through its letter dated 29.10.2003 demanded from EPL the payment of an aggregate amount of Rs. 537 crores on account of alleged diversion of power by EPL to Essar Steels Ltd for the period commencing from 01.07.1996 to 31st March 1999. It is also an admitted fact that the parties thereafter held several rounds of discussions and as a result of those discussions, a settlement was actually arrived at by the parties in October 2004. Pursuant to the said settlement, the Electricity Board recalculated the amount, due on the basis of power supplied by the EPL to Essar Steels Ltd in excess of the allocated capacity of 215 MW shall alone be treated as sold and supplied by the Electricity Board. On this basis, the Electricity Board itself**

**furnished a statement to the Appellant, EPL showing that a sum of Rs. 64 crores is payable for the aforesaid period and on the aforesaid basis, the EPL accepted the same as a part of overall package and authorized the Electricity Board to recover the same on a condition that the same methodology would be adopted in future also. Thereafter, through their letter dated 13.10.2006, the Electricity Board accepted to receive Rs. 64 crores for diverting the electricity to the Essar Steels Ltd.**

**56. Under those circumstances, it is clear that the claim of the Electricity Board against the EPL with respect to the alleged diversion of power by the EPL to Essar Steels Ltd. for the period from 01.07.96 had already been settled by the payment and this settlement is final, conclusive and binding on the parties. As correctly observed by the State Commission, the same is not liable to be reopened at this stage.**

**57. Admittedly, it is not established that there is any breach of the contract as the part of the Appellant under PPA-1 on account of non-declaration of available capacity to the Electricity Board on proportionate basis. The compensation can be claimed only when there is a breach and due to the same there was a loss or damage caused by the said breach of contract. This has to be pleaded and proved. Unless this is done, no compensation can be claimed. This is a settled law as held by the Supreme Court in *(1974) Vol-2 SCC 231 – Raman Foundry V/s Union of India*.**

**58. In the present case, the Electricity Board has not pleaded and proved the actual loss or damage caused to it due to the alleged breach of contract. The principle enshrined in section 73 of the Contract Act has been incorporated in Article 10.1 of the PPA-1 which reads as follows:**

**"……neither Party shall be liable to the other Party in contract, trot, warranty, strict liability or any other any other legal theory for any indirect, consequential, incidental, punitive or exemplary damages. Neither Party shall have any liability to the other Party except pursuant to, or for breach of this Agreement, provided, however, that this provision is not intended to constitute a waiver of any rights of one Party against the other with regard to matters related to this Agreement or any activity contemplated by this Agreement".**

**59. Similarly, the explanation to Section 73 of the Indian Contract Act provides that in estimating the loss or damage arising from breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. It is the duty of the court to take into account whether the party affected by breach**

**of contract has performed its duty to mitigate the loss while estimating the loss or damage arising from the breach of contract. In the present case, the Electricity Board merely pleads that EPL has failed to declare and supply the available capacity of electricity on proportionate basis to the Electricity Board and nothing more.**

**60. As indicated above, as per Article 3.2 of PPA-1, the EPL becomes liable to deliver the capacity to the Electricity Board at the delivery point in accordance with the Despatch Instructions. The Despatch Instructions are instructions for delivery of electricity. The principle contained in Article 3.2 of PPA-1 is in terms of the provisions of Section 35 of the Sale of Goods Act, 1920. Section 35 of the Sale of Goods Act declares that the seller of goods is not bound to deliver until the buyer applies for the delivery.**

**61. As mentioned above, the explanation of Section 73 casts a duty to mitigate loss on the person affected by breach of contract committed by another.**

**62. In other words, assuming that the EPL has committed a breach of contract, the Electricity Board as the purchaser of electricity was under duty-bound to mitigate the loss arising from such a breach.**

**63. It is the case of the Electricity Board that it was aware of the breach of the contract by EPL from inception of the PPA-1. Such being the position, the Electricity Board was obliged to apply to the Appellant for delivery of electricity calculated on the proportionate theory basis so as to mitigate the loss. The Electricity Board has not even attempted to establish that it had done so.**

**64. Let us now refer to some of the decisions on this aspect cited by the learned senior counsel for the Appellant.**

**65. Hon'ble Supreme Court has held in (1977) 3 SCC 474 – *Timblo Irmaos Ltd., Margo versus Jorge Anibal Matos Sequeira and Another* - as follows:**

> **"When the appellant itself had committed breaches of its obligations, it is difficult to see how the respondents could be made responsible for the delay in loading. We think that the Judicial Commissioner had rightly disallowed this part of the claim".**

**66. In AIR 1936 Privy Council 236 – *Tsn Ah Boon Versus State of Johore* – The Privy Council has held as under:**

> **"The plaintiff claiming damage for breach of an alleged contract cannot maintain the action unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract."**

**"Where certain land granted to the plaintiff by the State on condition of his paying rent is sold by the State by reason of his failure to pay rent, and, the plaintiff brings a suit for breach of contract, he is not entitled to any damages owing to his default in payment of rent."**

**67. In AIR (1964) Madras 508 – *State of Madras Versus Venkataraman,*. – the court has held as follows:**

**"This apart, even assuming that there was a valid contract, it will be seen that the defendant himself was in breach, not having paid for the price of the good within the stipulated time. In fact, he was in arrears to a considerable extent. A purchaser of goods like the defendant who commits default in his obligation to pay for the good within 15 days of the delivery thereof cannot be heard to complain that the plaintiff committed breach in withholding supply."**

**68. The Ld. Counsel for the Appellant cited another decision AIR (AP) 1958 - 533 – *Dhulipudi Namayya Versus Union of India* – to show that no compensation claim for any remedy or indirect loss. The relevant portion is as follows:**

> **"The plaintiff is entitled to recover from the defendant in the words of S. 73 of the Contract Act, compensation for any loss or damage caused to him by the breach, which naturally arose in usual course of things from such a breach or which the parties knew, when they made the contract, to be likely to result from the breach of it, <u>but not for any remote and indirect loss of damage sustained by reasons of the breach</u>."**

**69. The Appellant cited two more decisions to substantiate the plea that measure of damages cannot be the profit which the defendant might have made.**

**70. AIR (1950) Madras 289 – *M. Maniappa Pillai Versus I. Anthanisami Mudaliar and others* – The relevant observation of Madras High Court is as follows:**

> **"What then is the relief that the plaintiff is entitled to? He is entitled to damages for breach of contract. <u>The measures of such damages cannot be the profit which defendant might have made by trading with the goods he obtained as the quota for the firm. Damages for breach of contract are intended to recompense the plaintiff to the pecuniary loss that he has sustained and do not depend upon the gain that the other party might have made.</u> There is no material furnished by the parties to the Court to assess damages for this standpoint, namely, the loss sustained by the plaintiff."**

**71. In (1962) 1 SCR 653 – *Murlidhar Chiranjilal Versus Harishchandra Dwarkadas*, the Supreme Court has held as follows:**

> **"The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; <u>but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his neglect to take such steps.</u>"**

**72. Another decision cited is in AIR 1974 (2) SCC 231 – *Raman Iron Foundry Vs. Union of India* to show the claim for un-liquidated damages does not give rise to a debt until**

**liability adjudicated. The relevant portion of the decision is as follows;**

> **"It, therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for un-liquidated damages. Now the law is well settled that a claim for un-liquidated damages not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority.**

**73. The ratio propounded in these decisions, in our view, would squarely apply to the present fact of the case, in the light of the fact that Electricity Board has failed to satisfy the Mandatory requirements to claim compensation.**

**74. One more aspect needs to be mentioned. The arrangement in relation to supply of electricity up to the**

**allocated capacity of 300 MW between the Appellant EPL and the Electricity Board under the PPA-1 and between the EPL and its sister concern Essar Steels Ltd. under PPA-2 read with Fuel Management Agreement dated 18.10.1996 are materially different. The Essar Steels Ltd supplies fuel to EPL for conversion into electricity, whereas the Electricity Board is under no obligation to supply fuel to EPL. Admittedly, the EPL has to procure fuel from outside and use it for generating electricity for sale to the Electricity Board.**

**75. The PPA-1 is a contract between the EPL and the Electricity Board containing reciprocal promises. In consideration of EPL supplying electricity to the Electricity Board up to the allocated capacity in accordance with the Despatch Instructions, the Electricity Board had agreed and undertaken to pay the EPL the tariff as mentioned in the PPA-1. It is an admitted fact that the Electricity Board has**

**committed default in making payment when due to be made to the EPL under the PPA-1. In fact, the EPL, the Appellant has produced materials to show that at one point of time in March 2008, the aggregate amount due to EPL was to the tune of Rs. 519 crores. EPL has produced documents to show that the Electricity Board is a defaulter in making payment of its due under the PPA-1 right from the inception of it.**

**76. It is also an admitted fact that EPL had written several letters to the Electricity Board to establish Letter of Credit to secure the payment of the amount payable under PPA-1 and also pay the amounts when due. But the Electricity Board did not heed to the request made by the EPL in this behalf and as a result of it the ability of EPL to purchase the fuel for generating electricity meant for sale to the Electricity Board got impaired.**

**77. As mentioned above, the claim for compensation made by the Electricity Board against EPL in the present case is due to the alleged breach of contract by EPL in declaring and supplying the power to the Electricity Board in the proportion of 300MW out of the total capacity 515 MW. The grievance is that EPL has supplied less power than what is due to the Electricity Board under the PPA-1. As aforesaid, Article 3.2 of the PPA-1 obliges the Appellant to supply electricity to the Electricity Board only in accordance with the Despatch Instructions given by the Electricity Board from time to time. As a matter of fact, there is no provision in the PPA-1 which restricts the right of the Electricity Board to demand for supply of electricity only up to the declared available capacity of the EPL. Admittedly, many a times the Electricity Board asked for supply of more quantum of electricity than what was declared as available to it by the EPL by revising its Despatch**

**Instructions and immediately thereafter the EPL met this demand.**

**78. Whenever EPL was not able to meet such revised demand, the EPL compensated the Electricity Board by paying Deemed non-Generation Charges.**

**79. Under PPA-1, the liability of the Appellant is only to pay penalty by way of Deemed Non-Generation Charges for the non-supply of the quantum of the demand. No other penalty or charges or compensation is leviable for any shortfall in the supply of electricity under the provision of PPA-1. The claim for compensation made in the petition is not for the recovery of the unpaid Deemed Non-Generation Charges.**

**80. It is also to be pointed out in this context that admittedly there is no tripartite agreement between these 3 parties which**

**binds all these parties. As such, there is no restriction on the EPL for supply of power to the Essar Steels Ltd in excess of the maximum allocated capacity of 215 MW. In fact, Article 6.10.2 provides a right to EPL to sell electrical output to other utility/utilities in the event the Electricity Board does not cure its Event of Default before the expiry of the Cure Period.**

**81. In the light of the above position, the direction given by the State Commission with reference to reimbursement of Annual Fixed Charges to the Electricity Board when the Electricity Board has not secured energy to the extent allocated under the proportionate principle is not correct as the same is misconceived. In this case we are of the view that the Annual Fixed Charges are not refundable for the surrendered portion of the electricity to the person in whose favour such electricity is surrendered. Hence, in regard to the issue relating to the liability to pay compensation we hold that, in Electricity Board**

**is not entitled to get the compensation as claimed and as such the Appellant EPL succeeds in this issue. Consequently the findings given by the State Commission on this issue are set aside.**

**82. Now we will deal with the question whether the Electricity Board has a right to demand refund of the Deemed Generation Incentive as per Notification dated 06.11.1995.**

**83. The argument advanced by the Appellant is that the Notification applies only to a Naptha based generating station and not to a gas based generating station and as such the Notification dated 06.11.1995 will not apply to a generating station like the Appellant station where Naptha is used only as an alternative fuel. We are unable to accept this contentions. Admittedly, the EPL had established its generating station principally based on the gas and Naptha as fuel. This is clear**

**from the communication dated 31.08.1998, 09.02.1998 and 21.03.1998. The main contention urged by the Learned Senior Counsel for the Appellant is that Notification was issued on 06.11.1995 and Agreement was entered into between the parties only thereafter on 30.05.1996 and despite the same, the said PPA-1 did not refer to the prohibition of payment for the Deemed Generation Incentive on Naptha as referred to in Notification dated 06.11.1995. This contention also does not merit acceptance for the following reasons.**

**84. The Notification dated 06.11.1995 is statutory in nature issued under section 43A(2) of the Electricity (Supply) Act, 1948. Any PPA entered into has to be consistent with the statutory notification.**

**85. It is a settled law that rights and obligation of the parties under the PPA have to be read subject to the statutory**

**provisions. The provisions of the PPA which are contrary to the statutory provision cannot be given effect to. This is a well established law as held in *(2000 Vol-3 SCC 379 – India-Thermal Power Ltd. V/s State of Madhya Pradesh*.**

**86. One more contention raised by the Appellant is that by virtue of the Supplemental Agreement dated 18.12.2003 the EPL agreed to reduce incentive and therefore on an overall basis Electricity Board had been benefited and the same is consistent with the Notification dated 30.03.1992. This contention also is wrong because the prohibition contained in the Notification dated 06.11.1995 cannot be construed to be a norm. There is a valid public interest involved in prohibiting the Deemed Generation Incentive under the statutory notification. What has been prohibited directly cannot be permitted indirectly based on the Supplemental Agreement dated 18.12.2003.**

**87. Therefore, with reference to the issue of the refund of the Deemed Generation incentive we confirm the order of the State Commission. As such the contention of the Appellant in regard to this issue would fail. However, as indicated in earlier paragraphs, we accept the contention of the Appellant with regard to the first issue and as such the finding given by the State Commission in regard to the liability to pay the compensation is liable to be set aside. Accordingly, the same is set aside.**

**88. in the result, the Appeal No. 77 of 2009 filed by Gujarat Urgja Vikast Nigam Ltd. is dismissed and the Appeal No. 86 of 2009 filed by Essar Power Ltd. is partly allowed. No costs.**

**(H.L. Bajaj) (Justice M. Karpaga Vinayagam)**
**Technical Member Chairperson**

**Dated : 22nd February, 2010**

**INDEX: REPORTABLE/NON-REPORTABLE**