BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 74 of 2007

Dated this 09th day of May, 2008

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Ajmer Vidyut Viteran Nigam Ltd.
Hathibhata Power House,
AJMER – 305 001. … Appellant

Versus

1. **Rajasthan Electricity Regulatory Commission**
   Vidyut Bhawan, Jyoti Nagar,
   JAIPUR – 302 005.

2. **Rajasthan State Mines & Minerals Ltd.**
   4, Meera Marg,
   UDAIPUR – 313 004

3. **Jaipur Vidyut Vitran Nigam Ltd.**
   JAIPUR

4. **Jodhpur Vidyut Vitran Nigam Ltd.**
   JODHPUR … Respondents

For the Appellant	:	Mr. Shyam Moorjani along with Mr. Pratibha Moorjani, Mr. Hem Raj, Mr. Sachin Datta, Advocates Mr. H. G. Gupta, Sr. A.O., JVVNL Mr. Chander Goklani, Sr. A.O., AVVNL Mr. Shankar D. Asudani, Ex.Eng.,AVVNL Mr. P. C. Sharma, DA Mr. B. L. Sharma, Sr. Account Officer (Comml.)
For the Respondents	:	Mr. P. N. Bhandari, Ms. Supriya M. Mahajan, Ms. Shuchi Jain and Mr. Nitish Nair, Advocates for Resp. No.2, RSMML Mr. R. C. Sharma, Dy. Secy. RERC for Resp. No.1 Mr. S. C. Jain, AAO, JVVNL Mr. Gopal Gandhi, DGM, RSMM

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1) The present appeal is directed against the order dated 04.11.2006 in Petition No. 100 of 2006 and the subsequent order dated 13.04.2007 declining to review the order dated 04.11.06. The appellant, Ajmer Vidyut Vitran Nigam Ltd. (AVVNL), is the successor in interest of the Rajasthan State Electricity Board (RSEB).

The background facts:

2) The respondent No.2, which runs the Jhamarkotra Mines in District Udaipur, has been a consumer of electric energy in bulk. The first agreement for High Tension supply by the Rajasthan State Electricity Board (PSEB for short) to the respondent No.2 i.e. Rajasthan State Mines and Minerals Ltd. (RSMML for short) is of 15th April, 1984. The respondent No.2 continues to be a consumer of High Tension electricity of the appellant and the contract dated 15th April, 1984 has been renewed from time to time. The agreement will be referred to as the HT agreement and electricity supply under the agreement as HT supply. The respondent No.2 set up various wind energy power plant at Barabagh in Jaisalmer District of Rajasthan. The Government of Rajasthan has been promoting generation of wind energy for which the Government issued a policy on 04.02.2000 and 03.04.2003. Having set up the wind energy power plant, on account of such encouragement, the respondent No.2 entered into a wheeling and banking agreement with the appellant on 29.08.2001. Banking of electricity is a facility to help small generating stations based on non-conventional energy sources to produce power by maximizing utilization of available fuel stock without demand restrictions. The purchaser i.e. the transmission licensee or distribution licensee, purchases the entire power generated by the plant and to the extent it is in excess of the need of the purchaser or the demand of the third parties, the same is, so to say, deposited or banked with the licensee which can be

later released or returned to the generator as and when the generator may require. The policy paper dated 04.02.2000 issued by Rajasthan Energy Development Agency incorporated the clause that the State Electricity Board will permit the power generated in a financial year by eligible producers to be banked for the period up to 31st March of the said financial year and that the banked energy, if not consumed within this period would be treated to have been sold to the RSEB at 60% of the prevailing valid HT rates. The policy paper also includes wheeling or transmission clauses requiring RSEB to transmit on its grid the power generated by eligible producers and make it available to them for their captive use or to third party nominated by eligible producer for sale at a uniform wheeling charge of 2% of energy wheeled. The same provisions reappear in the next policy paper with the only amendment that the wheeling charges would be 10% of the energy wheeled. By the time the second policy paper was issued in 2003, the three distributing companies known as Jaipur Vidyut Vitaran Nigam Ltd., Jodhpur Vidyut Vitaran Nigam Ltd. and Ajmer Vidyut Vitaran Nigam Ltd. had come into existence as successors of the RSEB for the function of distribution of electricity. They were briefly described as Jaipur DISCOM, Jodhur DISCOM and Ajmer DISCOM in the policy paper. The wheeling and banking agreement was entered into by the respondent No.2 or RSMML with the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. or the RVPN which was the transmission licensee at the time and with the Jodhpur DISCOM and Ajmer

DISCOM (the appellant). This agreement was entered into for an initial term of 20 years. The RSMML, under the agreement, is entitled to make use of the power generated by it for its captive consumption at its industrial units or to sell to third parties after paying wheeling charges @ 2% to RVPNL and to wheel the energy to any place within the jurisdiction of the appellant or the Jodhpur DISCOM. RVPN was obliged to bank in a financial year up to 31st March of the financial year. The respondent No.2, RSMML was to bear the entire cost of grid interfacing including laying of HT lines from the point of generation to the nearest HT line of the Jodhpur DISCOM i.e. up to the technically feasible point. RSMML required energy at the wind farm for back up purposes. Meters were stipulated to be installed at the point of export of power to the grid and another for import from the grid. The meter for measuring outgoing energy i.e. power delivered by RSMML to RVPN was required to be installed at delivery point. Banking provision is as under:

> *"2.2 (iii) The energy supplied by RSMML at the delivery point shall be considered as the energy supplied to RVPN and deemed banking to RVPN after adjustment of Units for captive use and/or sale to third party by RSMML in case the total generation is more than the captive*

consumption and/or sale to third party plus wheeling charges.”

3) The main metering system and back up metering system were required to be sealed in the presence of the parties. Since billing provision is of importance in this case the same needs to be reproduced in its entirety.

“3.4. Billing Provision.

The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use and/or sale to third party by RSMML. The detailed account of units generated & used for captive use and/or sale to third party shall be kept in a pass book & or subsidiary pass books and such pass books shall be used for adjustment of bills. It is clarified that the users shall continue to be the consumer of Ajmer/Jodhpur Discom and shall be billed for the fixed charges and minimum charges as applicable for large industrial service as per the tariff determined by RERC. The Energy Charges shall be worked out on the net energy drawl from the grid (Total energy drawn less captive generation less losses & wheeling charges).

In the event the received Energy plus the banked energy so available for supply to the User(s) in any month is less than the Energy consumption of the User(s) in that month, the Energy supplied to each User from the plant shall be in the ratio, as intimated by RSMML two months in advance and such intimation shall be restricted to once a year and the balance of Energy consumed by each User will be deemed to have been supplied by the Jodhpur Discom/ Ajmer Discom to the User(s) at the applicable Energy Charges of Large Industrial Service Tariff."

4) Annexure-'A' to the agreement showed location of RSMML's industries which were in Jhamarkotra (District Udaipur), Sanu (District Jaisalmer) and Rishabdev (District Udaipur) and the third party user is at Debari (District Udaipur). Subsequent amendment to the wheeling and banking agreement was effected vide a letter dated 16.04.03, thereby fixing the price of energy supplied by RSMML to RVPN at Rs.3.18 per unit with provision to raise the rate annually. A fresh agreement was entered into on 19th February, 2004 between the same parties when the power producer i.e. RSMML intended to set up a 5 MW power plant at Village Pohara, District Jaisalmer. In this agreement, the power

purchaser was to sell 95% of electric energy produced by it for commercial purposes to RVPN and to DISCOMs and consume 5% as captive use. This agreement also had a wheeling and banking condition. The RSMML was allowed to use the energy to its industrial units anywhere in Rajasthan after paying wheeling charges @ 10% of energy fed into the grid commensurate to the captive use to RVPN/DISCOMs. Banking was also allowed in the same terms as in the previous agreement. The billing provision in this agreement was as under:

> *"7.4 Billing Provision.*
>
> *The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use by Power Producer. The detailed account of units generated & used for captive use shall be kept in a pass book & or subsidiary pass books and such pass books shall be used for adjustment of bills.*
>
> *Concerned Discom shall prefer monthly bills as per applicable Tariff Rate for the electric power made available and energy supplied to the scheduled captive user out of their system after accounting for*

the energy delivered by Power Producer for captive use. It is clarified that the scheduled captive user shall continue to be the consumer of concerned Discom and shall be liable to pay minimum billing, fixed charges, excess demand surcharge, power factor surcharge and any other charges leviable and as may be applicable from time to time as per concerned Discom's Tariff for supply of electricity and General Conditions of supply."

5) The RSMML has been receiving power at Jhamarkotra mines as an HT consumer under the agreement which has been mentioned in the earlier part of this judgment. As an HT consumer RSMML was required to pay various charges including the minimum charge which has been mentioned in the billing provision. The two wheeling and banking agreements do not stipulate combining the two bills required to be served on the RSMML – one for consuming electricity as HT consumer and other for wheeling charges of the energy wheeled from its wind farms to its mining units. The two agreements however stipulate a pass book to be maintained and it appears that the parties did maintain a pass book. There was no dispute till the appellant Ajmer DISCOM/AVVNL changed the billing pattern in Nov. '05. The new billing pattern led to increase in the amount payable by the RSMML

to the appellant Ajmer DISCOM. RSMML challenged the new billing pattern before the Commission in Case No. 100/06 in which the impugned order dated 04.11.06 was passed.

6) Before going into the dispute it will be necessary to understand the why billing pattern makes such a substantial difference that may lead to a dispute. The power production was done at Barabagh and Pohara within District Jaisalmer. The point of consumption by RSMML was at Jhamarkotra within District Udaipur. The HT connection from the grid of the DISCOM to the Jhamarkotra mines already existed. The power produced by wind farm and Barabagh and Pohara was fed into the grid. It was from this grid that power was supplied to the RSMML. The grid had power from the wind farms of Barabagh and Pohara as well as from the other sources from which the power was received by the State transmission utility and the DISCOMs. When RSMML drew power from this grid, it can be said, it drew power from both or any of the two sources. How much of power consumed by RSMML from the supply of DISCOM and how much from the power produced by wind farm cannot be distinguished. One can only notionally attribute the power consumed as coming from one or both of the sources. For drawl from the DISCOM's HT supply, RSMML was required to pay 'minimum charges' and other charges like all other HT consumers. Minimum

charge is in the nature of fixed charge which a consumer has to pay whether or not he draws or consumes energy equivalent to the contracted minimum. The parties resorted to a composite billing for wheeling charges as well as for the HT charges, an important component of which is the minimum charge. In the bills, minimum charge was represented in terms of minimum energy required to be consumed. In the initial method followed, such minimum amount of energy was presumed to have been always consumed, whereas in the subsequent method it was presumed that RSMML paid the minimum charges but did not consume the HT supply unless the wheeled energy from wind farms was less than total consumption of electricity. Thus in the subsequent method, RSMML was shown liable for minimum charges without corresponding consumption from the HT source. This increased the liability of RSMML.

The pleas of the parties before the Commission:

7) RSMML disclosed in its complaint that it has been using wind power generated by it in the following manner:

- *Phase – I & II (9.80 MW)*
  75% of generated power sale to Discom.
  25% of generated power for its captive use at Jhamarkotra Mines.

- *Phase – III (5.9 MW)*

  95% of generated power sale to Discom

  5% of generated power for its captive use at Jhamarkotra Mines, Udaipur.

8) In the complaint to the Commission, RSMML complained that:

> "*5) Ajmer Discom used to adjust the wheeled power of wind farm in monthly energy bills from captive consumption after adjusting the minimum charges. The balance wheeled units of wind farm were adjusted towards captive consumption of the Petitioner. If in any month, the balance units were not sufficient then the same used to be adjusted in future months up till the end of the calendar year. By the end of the calendar year; if the banked units could not be adjusted then the same were treated as sale to Discom at 60% of the applicable tariff as per the wind power policy. Photocopy of a sample statement duly signed by the officers of Ajmer Discom is enclosed as Annexure V. This clearly*

shows that from the very beginning, adjustment was first made towards minimum charges.

6) From November 2005 Ajmer Discom has suddenly changed the procedure of adjustment of wheeled power in energy bills. Now they have started first adjusting the wheeled power of wind farm from captive consumption and then the balance units, if any, are calculated towards minimum charges and in case the same is not enough to cover the minimum charges, then Ajmer Discom levies minimum charges in the monthly energy bills."

9) The appellant, which was the respondent before the Commission, filed a reply before the Commission. It did not dispute that it had changed the pattern of billing in the manner alleged, but justified the same on the plea that this was necessary to meet an audit objection. The relevant part of the reply is as under:

"*5. That the contents of para 5 of the petition is not admitted in the manner stated. It is however submitted that as per the audit objection it was revealed that as per provision of agreement dated*

29.8.2001 energy generated and fed in grid by the Rajasthan State Mines & Minerals Ltd. from their wind farm for their captive use was to be deducted after deduction of wheeling charges and net consumption should have been charged qua Rajasthan State Mines & Minerals Ltd. during same month but by way of inadvertence the answering respondent adjusted energy of captive generation equal to the consumption of consumer recorded over and above minimum consumption charges unit and remaining units were treated as unused and banked which was to be adjusted in subsequent month or upto closing of that year i.e. December of that year.

Thus this contention of the petitioner is incorrect that answering respondent was carrying out the instructions in consonance with the agreement but by way of inadvertence the same was deviated."

The view of the Commission and the impugned order:

10) The Commission after hearing the parties passed the order dated 25th July, 2006. The Commission found that the provision of billing suffers from lack of clarity in respect of mechanism for banking and utilization of banked energy. It also observed that even GoR does not specify it. It also

observed that generator i.e. RSMML as owner of the generated energy has right to declare at any step before meter reading as to how much energy to be banked or how much energy to be utilized for wheeling. This, however, was not done by the generator in actual practice. The Commission had examined the question involved in the case of M/s. Balakrishna Industries and had analysed the situation as under:

> *"14. In absence of such an declaration, distribution licensee has considered, entire energy generated and that banked as available to be utilized for wheeling for captive use and accordingly supplies to petitioner's individual unit, is first adjusted for that available for wind generated captive use and balance is billed at HT large industrial service tariff. If entire energy (so wheeled) cannot be adjusted balance is banked. Unutilised banked energy as on 31st December is considered as deemed sale to Discom under clause 5(ii). This mechanism under certain contingency can result in HT supply billing at minimum billing. This is elaborated by the example. M/s. Balkrishna Industries as Consumer have contract demand of 3000 kVA. For billing demand of say 2952*

kVA during a month, the minimum billing consumption will be 316549 kWh ('minimum energy'). If total consumption of the consumer ('consumption') is 388080 kWh that if delivered plus banked energy, duly adjusted for wheeling charges of 10% (i.e. wheeled energy) is more than 71531 kWh (i.e. 388080 – 316549). Say it is 2,00,000 kWh then out of consumption of 388080 kWh wheeled energy of 2,00,000 kWh would be adjusted and HT supply billed for 1,88,080 kWh. As this is less than minimum billing, so consumer would be billed for minimum billing (equivalent to energy consumption of 316549 kWh). Thus, consumer, in facts, gets benefit of 3,88,080 – 3,16,549 = 71,531 kWh only against 2,00,000 kWh supplied by him. In other words, these units go to Discom free of cost. If, wheeled energy is more than consumption, say wheeling energy is 4,01,320 kWh against a consumption of 3,85,080 kWh, then wheeled energy cannot be fully adjusted and these are adjusted upto consumption and balance (in this case 16,240 kWh) are banked. But in this process, consumer gets no benefit for energy wheeled

upto 'minimum energy'. This is precisely the case cited for the billing month of April 05 cited by the petitioner in their letter dated 26.4.2005 (Annexure-4 of the petition). This mechanism in such extreme cases would not definitely encourage / promote wind energy generation."

11) In the impugned order dated 04.11.06, the Commission found that if the adjustment is done as per audit para then it may not result in banking as envisaged in the agreements which were entered into in accordance with the GoR policy. This position has been elaborated by giving a table showing energy consumption as fixed at 300 kWh per kVA of contract demand and having a wind energy generator supplying wind energy of 280 kWh per month in the first six months and 120 kWh during the rest of the months and monthly minimum consumption required by the HT agreement being equal to 107 kWh (the energy generation is not uniform through out the year and generally about 70% is generated in the 1st and 2nd quarter and 30% in the 3rd and 4th quarter of the year). We need not reproduce the entire table to understand the impact of the two methods of billing which was cited for appreciation of the problem assuming that the consumption is 300 kWh and contract demand and minimum charge represented by 107 kWh/kVA.

12) The first two rows showing the disputed billing pattern of the table are reproduced below:

Billing as per audit para

Month	Energy consump-Tion	Wheeled energy	Banked energy at month beginning	Total wheeled + banked energy	Supply by Vitran Nigams #	Energy banked at month end#
I	Ii	Iii	Iv	v	vi	Vii=iii-ii+ve
1st month	300	280	0	280	107	0
2nd month	300	280	0	280	107	0

equal to ii-v or minimum billing, whichever is higher

13) However, if the billing as per the practice followed by the two parties till the audit objection was adopted the situation can be as depicted in another table given in the impugned order. We reproduce the first two rows hereunder:

Billing considering adjustment of wheeled energy beyond minimum billing

Figures in kwh/kVA

Month	Energy consump-Tion	Wheeled Energy	Banked energy at month beginning	Total wheeled + banked energy	Supply by Vitran Nigams #	Energy banked at month end#
I	Ii	Iii	iv	V	vi	Vii=v+vi -ii
1st month	300	280	0	280	107	87
2nd month	300	280	87	367	107	174

equal to ii-v or minimum billing, whichever is higher

14) As per the method earlier followed, it was being taken that the RSMML was consuming 107 kWh/kVA of contract demand as was required by the minimum charge term and

was meeting further requirements of power from its own generation. In this process if the RSMML consumed 107 kWh/kVA from the HT supply of DISCOM then out of the wind energy of 280 kWh/kVA 87 remains unused and could be banked. The audit paragraph suggests that the RSMML be presumed to have first used the wind power generated by it and wheeled upto its mining industries and only requirements beyond such wind energy be taken to have been met from the DISCOMs under the HT agreement.

15) The Commission noted its earlier orders in the case of M/s. Balakrishna Industries raising similar issues wherein it had found that the billing clause was not in line with the GoR policy and also suffers from lack of clarity. It also found that even the GoR policy does not specifically say how in such situations billing will be done. The Commission then said :

> *"21. ... In absence of such provision, obviously generator, as owner of generated energy has right to declare at any stage before meter readings, as to how much generated energy to be banked or how much banked energy to be utilized for wheeling. It also established that by enforcement of minimum billing for April 05), M/s. Balakrishna (as consumer) get benefit of 3,88,080- 3,16,549 = 71,531 kWh only*

against 2,00,000 kWh supplied by him (as generator). In other words these units went to discom free of cost. In this process, consumer gets no benefit for energy wheeled up to minimum (billing) energy. This mechanism (of billing for minimum charges) in some extreme cases would not definitely encourage/promote wind energy generation. The Commission held that in view of the anomalies indicated (in said order) the provision of clause 7 is not proper and requires review by JVVNL….."

16) The Commission noted further :

"22. …. The "generator" is the owner of generated energy and by any interpretation of agreement, no part of energy generated by him and wheeled, can be utilized free of cost by the distribution licensee. The conclusion of the Commission in case of Balakrishna Industries and examples given in the preceeding paras in this order and the method of adjustment of delivered energy adopted by JVVNL & AVVNL, being not conducive to banking and use of delivered energy free of cost by discom is also corroborated by the consumption and

adjustment for the month of June, ’03 and billing month of Aug’03 in case of RSMML…..”

17) The Commission tested the two methods on the RSMML’s production and consumption in the bills of certain months and found that subsequent method of billing which was based on the audit para provided the DISCOM with energy, supplied by RSMML, free of cost. The Commission observed:

> *“27. Thus, the billing procedure, as per the audit para, adopted by AVVNL is not based on harmonious interpretation of provisions of WBA & GoR policy and is not only against the policy of banking but also against natural justice to the generator. The procedure adopted in consequence of the audit para is, therefore, set aside.”*

18) The Commission ended with the following direction:

> *“30. Although we have already directed the JVVNL to review the provisions of clause 7 of the agreement with M/s. Balakrishna Industries and similar clauses of other wheeling & banking agreements, we also direct AVVNL &*

JdVVNL and reiterate our direction to JVVNL to review the provisions of all wheeling and banking agreements in line with this order and confirm in writing to the Commission within 30 days.”

19) The Commission also noted that some part of the arrears claimed by the Ajmer DISCOM had become barred under section 56(ii) of the Electricity Act 2003. The Commission also made a reference to the doctrine of estoppel. The Commission however, did not examine the applicability of doctrine of estoppel in the case in much detail as it had concluded to allow RSMML’s petition on grounds mentioned above.

20) The appellant AVVNL/the DISCOM filed a Review Petition, being No. 124. The respondent No.2, RSMML, also filed a petition No.125 requesting the Commission to refer the matter for arbitration to settle the dispute. RSMML contended that inspite of repeated reminders AVVNL had not acted upon the Commission’s order dated 04.11.06. The Commission refused the prayer of RSMML on the ground that the dispute between the generation company and a licensee could not be referred to arbitration and RSMML as a consumer could lodge a complaint in the forum for redressal of grievance constituted under 42(5) of the Electricity Act 2003. RSMML has not

challenged this part of the order and we need not go into the details of the issues involved in RSMML's petition for reference to arbitration. Directions were given to AVVNL to comply with the Commission's order dated 04.11.06 in respect of amending the clause by way of clarifying the model of the adjustment of wheeled energy and also settle the dispute in its corporate level grievance redressal forum within a period of 30 days.

Decision with reasons:

21) The appellant has challenged both the orders of the Commission. In the appeal, the question of jurisdiction of the Commission has also been raised to which I will come shortly. On merits the appeal challenges the finding of the Commission on the ground that the Commission has failed to appreciate the meaning of banking. The appellant reiterates its stand that there can be no banking so long as the consumption is not more than the wheeled energy and that in coming to this calculation the quantum of minimum consumption under the HT agreement has no relevance. The appellant also disputes the finding of the Commission as part of the claim being barred by section 56(2) of the Electricity Act 2003. Further the appellant challenges the Commission's jurisdiction to direct an amendment in the PPA.

Jurisdiction:

22) So far as the jurisdiction is concerned suffice it to refer to section 86(i)(f) which endows the Commission with the function to adjudicate upon the disputes between the licensees and the generating companies and to refer any case to arbitration. The present dispute is a dispute between the licensees and the generating company. RSMML is a generating company. Although its consumption under the HT agreement, the dispute relates to its business as a generating company. Even the question of banking is a part of the banking wheeling agreement which is between the generating company and the licensee. Therefore, the Commission had the jurisdiction to adjudicate the dispute.

The contract & The Principle of Estoppel:

23) Coming to the merits of the case, the Tribunal has to begin by saying that the dispute related to the contract between parties and the respondent No.2, RSMML had approached the Commission for enforcement of the contract and therefore the first thing to be determined is the terms of the contract. The contract itself needs to be interpreted in order to give effect to it. The Commission has examined the question by keeping in view the GoR policy for promotion of non-conventional energy. The Commission has found that unless the billing is done in the method which was initially

adopted the wind farm generator will be made to part with the power generated by it without getting the return of it which will not be in consonance with the policy to promote non-conventional energy and therefore it will be appropriate that first method be adopted. The Commission did make a mention of the plea of estoppel but did not go into the details of it as it had already settled the question on the basis of the policy for promotion of non-conventional energy.

24) The moot question is whether the respondent No.2 is entitled to treat the minimum consumption, as mandated by the HT agreement to be a part of the total consumption, while calculating whether the consumption from the energy delivered from the wind farm is less or more than the energy consumed. As said earlier, it will be a matter of contract as there is no way of distinguishing the energy coming from the DISCOM from the energy coming from the wind farm. The Commission has said that the RSMML being the generator of power could declare as to how much of its power is needed to be wheeled to its industry in another District. If the RSMML had done it, it would certainly have taken note of its liability to pay the minimum charges and would have assessed its requirements for energy from the wind farm accordingly. In other words RSMML would certainly have presumed that upto a minimum point of consumption energy would be drawn from

the HT sources leaving the rest to be drawn either from the HT sources or from the wind farm depending upon which was cheaper. It appears that in the bill initially drawn nothing more than the minimum consumption is seen as having been drawn from the DISCOM under the HT agreement. The rest is shown to have been drawn from RSMML's wind farm.

25) Now recalling the billing provision in the agreement as reproduced in paragraph 3 we find that the same is totally silent as to how billing should be done if the RSMML is assumed to have consumed the minimum mandated by the HT agreement. Now in this situation, the contract or the intention of the parties can be gathered by immediate subsequent conduct of the parties.

26) The natural conduct of RSMML would be to consume the minimum required under the HT agreement because it will have to pay for it any way. So far as its own production is concerned the same was not to go waste even if left unconsumed for it could be banked. The first method adopted namely to presume the minimum under the HT agreement to have been consumed and therefore to form part of the total consumption was in no way contradictory to the banking and wheeling agreement. Therefore, the first method was not repugnant to the contract. Further this would have left more

amount of energy to be banked compared to the second method of billing and would have been inline with the GoR policy which provided for banking as a means to promote electricity generation from non-conventional sources. This first method of billing therefore cannot be said to be wrong. Since both the parties also followed this method for several years it will be reasonable to presume that the parties understood the agreement to be the same, both parties therefore have to adhere to the contract as understood by them. Any other method will be violative of contract and therefore will be incorrect and impermissible. I have no hesitation to hold that the contract as evidenced by the conduct of the parties was to necessarily include the minimum consumption under the HT agreement within the total consumption at the industrial units of the RSMML.

27) The Commission has not gone into the applicability of the doctrine of estoppel in detail. However, doctrine of estoppel is undoubtedly attracted to this case. The parties have adopted a method of billing giving RSMML some benefit in terms of banking. Based on the billing method adopted, RSMML has planned its consumption of electricity as well as its production of electricity. Had the second method been initially adopted RSMML could have changed either its consumption of electricity or its production of electricity. Assuming energy

requirements of RSMML and RSMML's liability to pay minimum charges as given and further assuming that the minimum charges be taken note of only after deducting the power consumed from its share of power generation under the two banking and wheeling agreements, RSMML would stand to gain by reducing its production so that the production is equal to its share in it plus the minimum charges. Assuming the total consumption to be 300 and wheeled energy equal to 280, the consumption from DISCOM i.e. HT supply would only be equal to 20 thereby making RSMML paying for 107 units which would mean that RSMML pays for 87 units without actual consumption. If RSMML reduces the wheeled energy by 87 units and actually gets only 193 units wheeled it would pay equal to what it was paying while generating 280 units for wheeling to its industries. In this situation, it would pay the same amount but would save itself all the cost of generating 87 units. Therefore, it can be said that RSMML has acted upon the agreement as held out by the bills and has changed its position to its disadvantage and therefore the appellant cannot now go back and say that the methodology adopted by it was wrong.

28) Since the parties by their conduct, in the course of their dealing have put a particular interpretation to the terms of contract and both have acted on such understanding of the

contract both are bound to continue to give the same meaning to the contract and any deviation would be barred by the doctrine of estoppel. This proposition could not have been said better by anyone other than Lord Denning in *Amalgamated Investment & Property Co. ltd. (in liquidation) v Texas Commerce International Bank Ltd. 1981 All England Law Reports 577..* In that case there was in fact a mistake committed by the parties in construing the terms of the contract. Yet it was said that since they had given one particular meaning to the contract for several years both were bound to treat the contract at such. It will be proper to reproduce the following part from the judgment which would bring out the effect of conduct which follows a written contract:

> "*….There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete:* see Brogden v *Metropolitan Railway (1877) 2 App Cas 666 at 682 per Lord Hatherley. It may be used so as to introduce terms and conditions into a contract which would not otherwise be there: See J Spurling Ltd. v Bradshaw [1956]2 All ER 121, [1956] I WLR 461, and Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd. [1966] I All ER 309 at*

322, 327-329, [1966]I WLR 287 at 308, 316, CA; [1968]2 All ER 444 at 462, 474-475, 481, [1969]2 AC 31 at 90, 104, 113 (per Lord Morris, Lord Guest and Lord Pearce in the House of Lords all disapproving the dictum of Lord Devlin in McCutcheon v David Macbrayne Ltd. [1964]I All ER 430 at 437, [1964]I WLR 125 at 134) and Hollier v Rambler Motors Ltd. [1972]I All ER 399 at 403-404, [1972]2 QB 71 at 77-78 per Salmon LJ. If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. 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 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 the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

……

So I come to this conclusion: when the parties to a contract are both under a common mistake as to the meaning or effect of it and thereafter embark on a course of dealing on the footing of that mistake, thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.

Conclusion

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150years in a sequence of separate developments; proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel

cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

29) In view of the above analysis of law, the appellant is estopped from changing its way of billing RSMML for wheeling and for minimum consumption and for banking the power available for that purpose. Thus we find that :

i) The contract was in fact as was evidenced by the billing method adopted immediately after the banking and wheeling agreements and the conduct that continued for years thereafter.

ii) We find that the appellant is not entitled to the subsequent method of billing, being estopped by conduct and on principle enunciated in the judgment *Amalgamated Investment & Property Co. ltd. (in liquidation) v Texas Commerce International Bank Ltd. 1981 All England Law Reports 577* (supra)

Bar of Section 56(2) Electricity Act :

30) The Commission has found that the claim for the period of July 2002 to August 2003 is barred by section 56(2) of the Electricity Act 2003. The appellant on the other hand says that the period of two years under section 56(2) starts running after the first bill is raised. I feel that neither the Commission nor the appellant has properly understood the import of section 56(ii) of Electricity Act 2003.

31) Clause (1) & (2) of 56 have to be read together to understand the import of the second sub section. The Section is extracted below:

> ***"56. Disconnection of supply in default of payment.*** *–(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply,*

transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,-

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated n the basis of average charge for electricity paid by him during the preceding six months,

whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

32) Section 56 has the caption "Disconnection of supply in default of payment". Section 56 is not prescribing the period of limitation. It is prescribing a procedure of disconnection of supply in default of payment. It is a tool of recovery of dues. 56(1) says that the dues towards electricity supply can be recovered by a licensee or a generating company by disconnecting electric supply line. This procedure is without prejudice to the right of licensee or the generating company to recover such charge by the legal process of filing a suit. The consumer can save himself such consequences of default by making the payment as prescribed in (a) and (b) to the proviso to 56(1). if the electricity company intends to file a suit it will have to file a suit within the time prescribed by the Limitation

Act. However, even without resorting to a suit, the company is allowed to use the coercive method of disconnection of electricity to force the consumer or purchaser of electricity to make the payment.

33) The sub section (2) then proceeds to say that this coercive method shall not be available if after the sum has become due the same has not been shown for two years continuously in the bills. For this purpose it will be proper to dissect section (2) as under:

i) notwithstanding anything contained in any other law for the time being in force,

ii) no sum due from any consumer,

iii) under this section shall be recoverable after a period of two years from the date when such sum became first due,

iv) unless such sum has been shown continuously as recoverable as arrears of charges for electricity supplied and

v) licensee shall not cut off the supply of electricity

34) The second sub section has to be necessarily read with the first sub section. This is the general rule of interpretation. However, in this case it is all the more important because the second sub section has the words "*under this section*". 56(1) is not creating any dues. It is creating a method of recovery. This method of recovery is disconnection of supply albeit after 15 days notice. 56(2) says that this process of recovery is subject to certain restrictions. So we can find the first important part of section 56(2) namely no sum due from any consumer, under this section shall be recoverable after the period of two years. It is important to notice the comma after the word consumer and absence of the comma after the word section. So "under this section" has to relate to the subsequent words "*shall be recoverable*" and not to "*no sum due*". Therefore, it follows that sub section (2) says that no sum shall be recoverable under this section after two years under this section.

35) The two years period starts when such sum became 'first due' which is another important term to notice here. Now the protection given to a consumer (not to others purchasing electricity) is that the electricity shall not be disconnected for recovery of dues which are more than two years old or after the lapse of two years from the time the sum became first due. Now this has to be read with the interest of the consumer in

view. Vis-à-vis a consumer a sum becomes due towards his electricity consumption when a bill is raised by the distributing company. In that sense, the words "*first due*" may be read to mean when the sum was first billed.

36) However, there is another exception which is for the protection of the distribution company which comes from the following words "*unless such sum has been shown continuously as recoverable as arrears of charges for electricity supplied*". In another words, if the sum has been shown continuously as arrears of charges for electricity supplied then the method of recovery given in 56(1) can be used even after the lapse of two years.

37) The last words "*and the licensee shall not cut off the supply of electricity*" has to be read with the first clause of the sentence i.e. "*no such .... shall be recoverable*". The sub section, thus, says that the licensee shall not cut off electricity after a lapse of two years from the date the sum became due unless the dues have been continuously shown for two years.

38) When the two sub sections are read together we find that for recovery of dues from a consumer 15 days clear notice will have to be given but at the same time a bill should have been raised specifying the amount due.

39) The section 56 read as a whole does not at all give any period of limitation for recovery of dues in the usual legal process which is through a civil suit. Limitation of two years is only for the method of recovery given in section 56(1). This does not mean that the distributing company can raise a bill even after the dues have become barred by limitation. Nor does it say that limitation vis-à-vis the distributing company or the creditor, will start running only after the bill is raised. The appellant however, says that only after November 2005 when it raised the bill, the limitation shall start running.

40) The appellant seeks support to its view the judgment rendered by this Tribunal in the case of *Ajmer Vidyut Vitran Nigam Ltd. Vs. M/s. Sisodia Marbles & Granites Pvt. Ltd.* Appeal No. 202 & 203 of 2006, decided on 14.11.2006.

41) I have carefully gone through the judgment. The judgment in appeal No. 202 and 203 have been passed by applying the opinion expressed by the High Court of Delhi in the case of *H.D.Shourie Vs. Municipal Corporation of Delhi 1987 Delhi 219*. This judgment of the High Court, rendered in the case of *H.D.Shourie Vs. Municipal Corporation of Delhi*, was subject to a letter patent appeal and the Division Bench of the

High Court dismissed the appeal (which is reported in 1994(1) AD Delhi 105).

42) That judgment deals with three sections which are as under :

(i) Section 455 of the Municipal Corporation of Delhi Act
(ii) Section 24 of the Indian Electricity Act 1910 and
(iii) Section 26(6) of the Indian Electricity Act 1910.

None of these sections have anything similar or analogous to the provisions of sub section 92) of section 56 of Electricity Act 2003. Section 455 of Municipal Corporation of Delhi Act provides for a method of recovery of certain dues. The Corporation has been empowered to recover certain dues as arrears of tax. This coercive provision has a proviso namely "*that no proceeding for recovery of any sum under this section shall be commenced after the expiry of three years from the date of which such sum becomes due*". It is in the context of 455 that the Delhi High Court said that so far as the person liable to pay is concerned the sum will become due when the bill is raised. If the coercive method is not adopted for three years even after such a bill is raised the coercive method will no more be available to Municipal Corporation. There can be no quarrel with this proposition. However, if we say that

Municipal Corporation of Delhi is not subject to any law of limitation that will not be correct. One cannot say that Municipal Corporation of Delhi can wait and wait even after a sum has become due to it and raise a bill after many many years and say that it has now become due on account of the bill being raised and therefore take the coercive method of recovery as arrears of tax unless the Corporation was prevented, by some reason, from raising the bill on time.

43) In the judgment in the appeal, the DB of the High Court said that the liability to pay may arise when the electricity consumed by the consumer nevertheless it becomes due and payable when the liability is quantified and a bill is raised. This was said in the context of the case which was one of defective meter. The bill for the connection could be raised only after the defect was detected and the arrears assessed. The period of limitation starts running only when the fraud on mistake could, with reasonable diligence, have been discovered by the creditor. This principle is incorporated in section 17 of the Limitation Act which is as under :

> *"**17. Effect of fraud or mistake.** – (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act, -*

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to

recover or enforce any charge against, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the

expiry of the said period extend the period for execution of the decree or order.

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be."

44) Section 24 of the Indian Electricity Act 1910 has a caption "Discontinuance of Supply to consumer neglecting to pay charge". This section also gives power to a licensee in respect of supply of energy to cut off supply after giving seven days clear notice. This also prescribes that this right to disconnect for the purpose of recovery of its charges will be without prejudice to its right to recover dues through a civil suit. No time limit is prescribed therein. The Section 24 is reproduced below:

"24. Discontinuance of supply to consumer neglecting to pay charge.-

[(1)] Where any person neglects to pay any charge for energy or any [sum, other than a charge for energy,] due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in

writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and re-connecting the supply, are paid, but no longer.”

45) Section 26(6) prescribes a time limit for raising a revised bill in case the meter was defective. This period is six months. The relevant provision is extracted below :

*“**26. Meters.**- (1) …*

(2) …

(3) …

(4) …

(5) …

(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of

such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as a foresaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity;

(7) ...”

46) This provision is merely about revision in a bill. It has no relation to mode of recovery of dues or with disconnection of supply as a method of recovery. This provision is again for the protection of the consumer which is clearly brought out in the judgment of single Judge, extracted in the judgment of this Tribunal in the aforesaid appeal No.202 & 203 of 2006:

“*The maximum period for which a bill can be raised in respect of a defective meter under S. 26 (6) is six months and no more. Therefore, even if a meter has been defective for, say, a period of five years, the revised charges can be for a period not exceeding six*

months. The reason for this is obvious. It is the duty and obligation of the licensee to maintain and check the meter. If there is a default committed in this behalf by the licensee and the defective meter is not replaced, then it is obvious that the consumer should not be unduly penalized at a later point of time and a large bill raised. The provision for a bill not to exceed six months would possibly ensure better checking and maintenance by the licensee".

47) The judgment in the case of *H.D.Shourie Vs. Municipal Corporation of Delhi 1987 Delhi 219* first says that the provisions of section 455 would come into play after detection of the defect and consequent submission of the bill for electricity charges and not earlier.

48) The appeal No. 202 & 203 of 2006 was also a case of defective meter. The meter was replaced but the bill for the dues had not been immediately raised. The bill was raised after two years. Till then the claim of the Electricity Distributing Company had not become barred by limitation on account of application of section 17 of the Limitation Act. Therefore, the appeal deserved to be allowed. This Tribunal did allow the appeal although on a different analysis. It will not be correct to say that the judgment in Appeal Nos. 202 &

203 of 2006 lays down a law that the period of limitation shall not run even if the DISCOM is negligent in raising the bill and allows three years to pas even after the defect in the meter was discovered.

49) Applying the above analysis to our case the amount claimed by the AVVNL is subject to the general law of limitation and anything falling due prior to three years from the date on which the claim is made would be barred by limitation as prescribed by the Limitation Act 1963.

Other issues:

50) The appellant has also challenged the jurisdiction of the Commission in making the direction to review the provisions of clause 7 of the agreement with M/s Balakrishna Industries and similar agreements of banking and wheeling agreements in line with the order. It is contended that when the parties have concluded the contract the Commission cannot direct the parties to review that contract. It will be re-opening of the already concluded contract. The respondent relies upon two earlier judgments of this Tribunal and claims that section 86 (i)(e) allows the Commission to reopen a contract dealing with generation of electricity from renewable sources of energy. Section 86(i)(e) is as under:

*“**86. Functions of State Commission.**- (1) The State Commission shall discharge the following functions, namely:-*

(a) ….
(b) ….
(c) ….
(d) ….
(e) Promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;
(f) ….
(g) ….
(h) ….
(i) ….
(j) ….
(k) ….”

51) Apparently this section, directs the Commission to promote cogeneration from renewable sources of energy. But the clause also mentions the method for promotion that is by providing suitable measures for connectivity with the grid and sale of electricity to any person. Apart from promoting

generation from renewable sources of energy the Commission has also to specify purchase of electricity from such sources, a percentage of total consumption of electricity in the area of a distribution licensee. The power to reopen a concluded PPA of wind energy does not directly flow from this section.

52) The proposition that the Commission under the aforesaid clause can reopen the concluded PPA, may be a disputable proposition. However, in the present case it is sufficient to say that the agreement as it exists has to be interpreted in the manner described in this judgment. If at all the parties so want this interpretation can be included in a fresh contract. If the parties agree to the second method of billing they cannot be barred from entering into another agreement to do so. The parties are under certain obligations on account of the GoR policy. Subject to those obligations, the parties can enter into any agreement according to their own volition and suiting their respective commercial interests. Nothing more is required to be said by this Tribunal in this regard. In the facts of the case it is no more necessary to enter into an anlysis of several provisions of Electricity Act 2003 to examine the jurisdiction of the Commission in passing the order for reviewing the wheeling and banking agreements.

53) Before parting with the judgments one can also refer to the plea raised by the RSMML in reply to the appeal. In its written submission RSMML, referring to certain Supreme Court judgments, says that contracts have to be interpreted in favour of the weaker party. In my opinion this plea does not arise for consideration in this appeal. At no point of time RSMML based its case on respective strength of the two parties. It will not be proper to stereotype all wind generating companies as weaker and all distributing and transmission licensees as stronger.

54) In view of the above analysis the appeal is dismissed. The petition filed RSMML before the Commission is allowed. During the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified by the parties, the appellant will bill the respondent No.2 in the method applied before November, 2005.

55) Before parting with the judgment I have to say that I had the privilege of going through the judgment of my learned brother Shri A. A. Khan. We have disagreed on the merit of the matter namely the methodology for composite billing as also on the question of application of principle of estoppel. Both the question will now be dealt with by another member of this Tribunal. The respondent had

prayed for waiver of the provision of minimum charges which the Commission has not considered and by implication has rejected. The respondent has not challenged this part of the impugned judgment by filing any appeal / cross appeal and therefore I do not think it necessary to remand the matter to the Commission for consideration of the respondent's plea for abolition of minimum charges.

56) Pronounced in open court on this ***09th day of May, 2008.***

(Ms. Justice Manju Goel
Judicial Member

The End