Securities and Exchange Board of India

Informal Guidance on SEBI (Investment Advisers) Regulations, 2013

The Securities Exchange Board of India ("**SEBI**") issued an *Informal Guidance dated January 08, 2021* in connection with the SEBI ("**Investment Advisers**") Regulations, 2013 ("**Investment Advisers Regulations, 2013**") in response to a request from HDFC Securities Limited ("**HDFC"**).

HDFC is registered as an investment adviser with SEBI and as a stock broker with the primary business being stock broking. HDFC had sought informal guidance on whether a trading member could obtain broking income for execution services from advisory clients.

SEBI is of the opinion that, pursuant to Regulation 22A of the Investment Advisers Regulations, 2013, an investment adviser can provide its advisory clients with implementation services in the securities market. However, the client is under no obligation to make use of the implementation services and, thus, the investment adviser or group of investment advisers may provide such services only after the advisory client has consented to the receipt of the implementation services. Furthermore, no implementation fees shall be charged to the advisory client by that investment manager or party. Therefore, when offering execution services, a trading member or its group company cannot obtain any broking income from advisory clients where such execution occurs from the advice offered by the trading member as an investment adviser.

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Securities Exchange Board of India— Securities and Exchange Board of India (Investment Advisers) (Amendment) Regulations, 2021

The Securities Exchange Board of India (**"SEBI"**) in exercise of powers conferred under sub-section (1) of Section 30 read with clause (b) of sub-section (2) of section 11 of the SEBI Act, 1992 (15 of 1992) has amended the SEBI (Investment Advisers) Regulations, 2013 ("**IA Regulations, 2013**") vide *Notification dated January 11, 2021*, which shall come into force on April 1, 2021.

These regulations shall be called the Securities and Exchange Board of India (Investment Advisers) (Amendment) Regulations, 2021.

The amendments made to the IA Regulations, 2013 are as under:

1. after Clause (m) of Regulation 6, the following clause shall be inserted, namely, -
"(n) Whether the applicant is a member of a recognized body or body corporate as specified under Regulation 14:
Provided that the existing investment advisers shall comply with the requirement under this clause in such manner as may be specified by the Board."

2. in the Second Schedule -
   2.1 In Clause 1,
      a. sub-clause (a) shall be substituted with the following, namely, -
      "***For individuals and firms: Rs. 2,000"***
      b. sub-clause (b) shall be substituted with the following, namely, -
      "***For body Corporate including Limited Liability Partnerships: Rs. 10,000***"

   2.2 Clause 2 shall be substituted with the following, namely -
   "***2. Every applicant shall pay registration fee at the time of grant of certificate by the Board as under:***
      a. ***For individuals and firms: Rs. 3,000***
      b. ***For body Corporate including Limited Liability Partnerships: Rs. 15,000***"

   2.3 In Clause 3,
      a. the words "**prescribed at paragraph 2 above**" shall be substituted with the words and symbol "**specified below**,"
      b. after the words "**has been paid**", the symbol "**.**" shall be substituted with the symbol ":"

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Securities Exchange Board of India - Relaxation from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

The Securities Exchange Board of India ("**SEBI**") in exercise of the powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 read with Regulation 101 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR, 2015**") issued a *Circular dated January 15, 2021* ("**Circular**") to extend relaxations provided to listed entities until December 31, 2021 due to the COVID-19 pandemic.

Among other things, SEBI vide its Circular dated May 12, 2020 had relaxed certain provisions of the LODR, 2015 relating to general meetings, pursuant to the Ministry of Corporate Affairs ("**MCA**") relaxation.

The MCA vide its circulars dated December 31, 2020 and January 13, 2021 extended relaxation for companies to conduct their extraordinary general meetings by June 30, 2021 and annual general meetings by December 31, 2021 via video conferencing or other audio-visual means.

In view of the same, vide this Circular, the SEBI has extended the relaxations granted to the listed entities in the Circular dated May 12, 2020 with regards to sending physical copies of annual reports to shareholders and the requirement of proxy for general meetings conducted by electronic means until December 31, 2021. The provisions of this Circular shall come to force with immediate effect.

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Ministry of Corporate Affairs

Amendment in Companies (Corporate Social Responsibility Policy) Rules, 2014

Central Government in exercise of powers conferred under section 135 and sub-sections (1) and (2) of section 469 of the Companies Act, 2013 ("**CA Act, 2013**") amended the Companies (Corporate Social Responsibility Policy) Rules, 2014 ("**CSRP Rules, 2014**")vide *Notification dated January 22, 2021*.

This amended rules shall be called as Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 ("**CSRP Rules, 2021**").

Table of Amendments:

Corporate Social Responsibility ("**CSR**")

Sr. No.	Old Rule No.	Old Rule	Effect	Amended Rule No.	Amended Rule
1.	Rule 4	CSR Activities	Entirely substituted	Rule 4	CSR Implementation
2.	Rule 5 (2)	CSR Committees	Sub-rule 2 substituted	Rule 5(2)	CSR Committees
3.	Rule 6	CSR Policy	Removed	----	----
4.	Rule 7	CSR Expenditure	Entirely substituted	Rule 7	CSR Expenditure
5.	Rule 8	CSR Reporting	Entirely substituted	Rule 8	CSR Reporting
6.	Rule 9	Display of CSR Activities on website	Entirely substituted	Rule 9	Display of CSR Activities on website
7.	Rule 10	----	New rule inserted	Rule 10	Transfer of unspent CSR amount

A. Introduction of CSR concept & list of activities that are not included in CSR: The inclusive definition of CSR was previously given in the CA Act, 2013. Now that the inclusive definition has been revised as an exclusive definition and the exclusive definition specifically defines activities that are not considered to be CSR. CSR means the activity undertaken by the company u/s 135, read in compliance with these CSRP Rules, 2021, but does not include the following:

Sr. No.	Activity Name	Explanation
1.	Normal Course of Business	Activities conducted in pursuit of the company's usual course of operation. However, in this regard, the Ministry of Corporate Affairs exempted under some conditions the companies engaged in research and development activities from the latest COVID 19-related vaccines, drugs and medical devices for financial year ("**FY**") 2020-21, 202-22, 2022-23.

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Sr. No.	Activity Name	Explanation
2.	Outside India Activity	Any activity that the company undertakes outside India (except for the training of the Indian sports personnel representing any State or Union territory at the national level or India at International level).
3.	Political Contribution	Contribution to any political party under section 182 of the CA Act, 2013 of any amount directly or indirectly.
4.	Benefit of Employee	Activities that benefit the company's employees significantly, as specified in clause (k) of section 2 of the Wages Code, 2019 (29 of 2019).
5.	Benefit to its product	Activities aided by companies to derive marketing advantages for their products or services on a sponsorship basis.
6.	Other obligation in Law	Activities carried out under any law in effect in India for the fulfillment of any other statutory obligations.

B. **Unique CSR Registration Number:** Any entity covered by these rules which intends to undertake any CSR activity shall register with the Corporate Governance by filing the e-form CSR-1 with the Registrars of Companies ("**ROC**") on w.e.f. April 1, 2021. When CSR -1 is submitted, a 'Unique CSR Registration Number' is generated automatically by the system. It is mandatory for any implementing agency to register itself with the ROC by filing the e-form CSR-1 as from April 1, 2021. If CSR-1 is not filed by any implementing agency, they will not be eligible to continue as the implementing agency.

C. **Rules on CSR Expenditure (Rules 7):** As a company to which the provisions of Section 135 apply, 2% of the average net profit of the previous three FYs must be spent on CSR activities.

- Excess amount spent by a company in any FY:
  In compliance with the CSRP Rules, 2021, Rule 7 sub-rule 3 specifies that if a company has spent on CSR in excess of the requirement (i.e., 2%), the excess amount can be set-off against the requirement of the CSR Spending u/s 135 (5) up to the immediate successor of the third FY, subject to the conditions that:
  1) The excess amount available for set-off shall not include, where applicable, the surplus resulting from CSR activities in compliance with sub-rule 2 of these rules.
  2) A resolution to that effect will be passed by the Board of Directors.

- Administration Over Head ("**AOH**"):
  AOH means the expenditures incurred by the Company for the general management and administration of the Company's CSR functions. It does not include Expenses incurred directly for the designing, execution, monitoring, ad assessment of a specific CSR project or program. The definition of the same has been added in Rule 2(b). AOH shall not exceed 5% of the Company's total CSR expenditure for the FY.

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- Treatment of the surplus arising from the amount of CSR (Rule7(2)):
  Any surplus resulting from the activity of CSR shall not be part of the profit of the business. This surplus shall be used for the following purposes within a span of six (6) months of the expiry of the FY:
  1) Ploughed back to the same project;
  2) Transferred to the account of the unspent CSR; and
  3) Spent according to the policy of CSR and the annual policy action plan.

- Spending on Capital Assets:
  The CSR amount may be spent on the development or acquisition of a capital asset by a company, which shall be held by:
  1) The CSR Assets to be held by a Section 8 Company, or a Registered Public Trust, or registered society with the charitable objects, having CSR registration number or
  2) Beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities or
  3) A public

  Any CSR asset developed prior to these CSRP Rules, 2014 shall be subject to enforcement within a period of one hundred and eight (180) days [Board may extend by ninety (90) days].

D. Treatment of Unspent Amount: If the Company fails to spend 2% of the Average Net Profit, the treatment of the amount not spent would be as follows.

Sr. No.	Condition	Explanation	Impact
1.	If the unspent amount does not concern an ongoing project	The Board shall state the reasons for not spending the amount in its report and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), the unspent amount shall be transferred to the Fund referred to in Schedule VII within six (6) months of the expiry of the FY.	The amount remaining unspent for FY 2020-21 shall be transferred to the Fund under Schedule VII by September 30, 2021 at the latest.
2.	If the unspent amount concerns an ongoing project	The balance shall be transferred to a special account within a period of thirty days from the end of the FY to be opened by the company in that name in any scheduled bank for that FY to be called the Unspent Corporate Social Responsibility Account ("**UCSRA**").	The remaining unspent sum (on an ongoing project) for FY 2020-21 will be transferred to UCSRA by April 30, 2021 at the latest. The remaining unspent amount transferred to UCSRA for FY 2020-21 must be used for the project up to FY 2023-24.
3.	If the unspent amount is failed to spend on the ongoing project	If the Company fails to spend for a period of three years, the Company shall move the same amount to the Fund stated in Schedule VII within thirty (30) days of the end of the third FY.	The sum not spent shall be allocated to a fund referred to in Schedule VII.

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E. Reporting of CSR Disclosure (Rule 8):

- Directors Report:
  The Company shall attach an Annual Report on CSR in Annex-I format (for the FY 2020-21) or in Annex II (w.e.f. FY 2021-22) to its Board Report.

- In case of a Foreign Company:
  The balance sheet filed u/s 381 shall include an annual CSR report in the format of Annex I (for the FY 2020-21) or Annex II (w.e.f. FY 2021-22).

- Impact Assessment ("**IA**"):
  This is a modern idea that has been introduced by these rules. An IA shall be carried out by a company which has an obligation to spend an average CSR sum of Rs. 10,00,00,000/- (Rupees Ten Crores Only) or more over the three immediately preceding FYs in compliance with Section 135(5) of the CA Act, 2013. IA to be performed by an independent agency. IA to be conducted for CSR projects having outlays of Rupees One Crore or more and completed not less than one (1) year prior to the implementation of the impact study. The reports on the IA shall be submitted to the Board and shall be annexed to the annual report on CSR. IA expenditure for a FY shall not exceed five per cent (5%) of total CSR expenditure in respect of that FY or Rs. 50,00,000 (Rupees Fifty Lakhs), whichever is less.

- Disclosure of the Website (Rule 9):
  The Board of Directors of the Company shall make the following mandatory disclosures on its website (if any):
  1) Composition of the Committee for CSR
  2) Policy for CSR
  3) Board approved Projects

F. Reporting of CSR Disclosure (Rule 8):

- CSR Policy:
  CSR Policy to cover:
  1) Approach and direction provided by the Company's Board, having regard to the recommendations of its CSR Committee;
  2) Guiding principles for the selection, execution and monitoring of activities and the formulation of the annual plan of action.

- Ongoing Project:
  "Ongoing Project" means a multi-year project with a time span of not more than three (3) years, except the FY in which it was:
  1) Project that was not previously approved as a multi-year project can be made ongoing by extending the term by the Board beyond one (1) year on the basis of reasonability;
  2) It appears that the period of the CSR Project cannot be more than three (3).

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- Net Profit:
  Net profit with the relevant provisions of the CA Act, 2013 as per its financial statement, but does not include:
  1) Any profit resulting from any international branch or branches of the Company, whether or not it is run as a separate company; and
  2) Any dividend earned from other companies in India which is covered by the provisions of Section 135 of the CA Act, 2013 and which complies with them.

- Net Profit for Foreign Company:
  Net profit means the company's net profit as prepared in terms of clause (a) of sub-section (1) of section 381, read with section 198 of the CA Act, 2013, as per profit and loss account.

G. Implementation of CSR Spending: The activities of CSR may be carried out by the company itself or by the following implementing agencies: -

1) A company established under Section 8 of the CA Act, 2013; or
2) A Registered Public Trust; or (amended as only registered public trust)
3) A Registered Society
4) Either individually or along with the other company; or
5) The entity formed above by the Central Government or the State Government; or
6) Any entity referred to above with a track record of at least three years in similar activities; or
7) Any entity set up pursuant to an Act of Parliament or a State Legislature.

- Collaboration:
  Subject to the conditions, a company can also collaborate with other companies to conduct projects or programs or CSR activities.

- International Organization Engagement:
  A company can engage international organizations to plan, track and evaluate CSR projects or programs in compliance with its CSR policy, as well as to develop capacity for its own CSR personnel. Only notified organizations of the Central Government shall be eligible as an International Organization.

H. CSR Committee (Rule 5(2)): The Committee shall prepare and recommend to the Board, in compliance with its CSR policy, an annual action plan, including the following: -

1) A list of approved CSR projects or programmes to be undertaken in the zone of Schedule VII;
2) The way of carrying out such projects;
3) Modalities for using the funds and executing the timetable for the projects;
4) Project or program monitoring and reporting mechanism; and
5) For the project undertaken by the Company, specifics of the need and IA, if any.

I. Board's Responsibilities (Rule 4(5-6)):

1) The Board shall itself be satisfied that the funds thereby disbursed were used for the purpose and in the manner authorized by it.

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2) The Chief Financial Officer or the individual in charge of the financial management shall attest to that effect.

In the case of an ongoing project, the Board shall track the execution of the project in accordance with the agreed timelines and the year-by-year allocation, and shall, if necessary, be competent to make amendments.

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Case Summary

Case Name : ***Maharashtra State Electricity Distribution Co. Ltd. Vs. Maharashtra Energy Development Agency & Ors.- Case No. 21 of 2020***

Court Name : Maharashtra Electricity Regulatory Commission ("**MERC**" **/** "**Commission**")

Order Date : January 1, 2021

Facts of the case:

1. The Maharashtra State Electricity Distribution Company Limited ("**MSEDCL"/ "Petitioner"**) has filed the present Petition under Regulation 19 of the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligations, its Compliance for removal of difficulty and Implementation of REC Framework) Regulations, 2019 ("**RPO-REC Regulations 2019**") seeking relaxation of penalty Clauses under the Regulation to the extent of non- fulfilment of Renewable Purchase Obligation ("**RPO**") targets by FY 2022-23. Further, MSEDCL has sought fixing of tariff for procurement of power from Renewable Energy ("**RE**") sources post expiry of Energy Purchase Agreements ("**EPAs**") and seeking increase in ceiling tariff for procurement of solar and wind power through competitive bidding process.

2. With respect to EPAs, MSEDCL stated that out of 7654MW of total commissioned RE projects, EPAs of 1765.77MW will be expiring during years from FY 2019-20 to FY 2023-24.

3. The Petitioner has only been able to achieve the Solar RPO target up to FY 2015-16 and Non-Solar target up to FY 2017-18. With a view to meet the RPO targets set out by the Hon'ble Commission, they are required to procure around 8000MW additional solar and 2000MW additional non-solar power. Hence, the MSEDCL has been aggressively calling for tenders through transparent competitive bidding from December 2017 onwards, under Solar and Non-Solar category, all which received poor responses, compelling MSEDCL to cancel many.

4. MSEDCL contended that most tenders for 'post expiry of EPA' have received very low response due to low commercial attractiveness of the ceiling tariffs set and the generators with such projects are selling in Open Access markets for better prices.

5. The wind energy producers who formed a significant part of the Applicants in the Petition herein have asked the Hon'ble Commission to direct MSEDCL to procure Wind Energy at Rs. 4/- per unit flat rate or Rs. 3.50 per unit with 5% year on year escalation.

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Commission's Analysis and Rulings:

The Hon'ble Commission has given a partial ruling in the above-mentioned matter and has held as follows:

Issues related to EPAs:

1. On the issue of increased ceiling rate, the Hon'ble Commission notes that one of the deciding factors for bidders to participate in the bidding process is the financial soundness of the buyer/Distribution Licensee and its track record of promptly paying generator's bills. Hence the Hon'ble Commission has asked the MSEDCL to improve their payment system to generators to attract more bidders.

2. Further the Hon'ble Commission also held that they would not fix any ceiling rate for bidding process and MSEDCL based on its due diligence has to fix such ceiling rate, which would then be scrutinised by Hon'ble Commission.

3. Indian Wind Power Association ("**IWPA**") has pointed out various clauses in bid documents which are restricting participation of Wind Generators in the competitive bidding. MSEDCL should try to address these issues so as to increase participation of Wind generators with expired EPA in bidding process.

4. In view of the above and as contended by IWPA, the Hon'ble Commission is of the opinion that MSEDCL should conduct separate competitive bidding process for the wind projects with expired EPAs and for new projects.

Relaxation in RPO penalty till FY 2022-23:

5. With respect to the request made by MSEDCL not to levy the penalty for being unable to meet its RPO targets, the Hon'ble Commission has stated that such submissions are premature in nature and shall be dealt with at the appropriate time. In the meanwhile, MSEDCL must take all efforts towards fulfilling its RPOs including procurement of the RECs at regular intervals.

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Case Summary

Case Name	***: Ireo Grace Real Tech Pvt. Ltd. Vs. Abhishek Khanna & Ors.- Civil Appeal No. 5785 of 2020***
Court Name	: The Supreme Court of India
Order Date	: January 11, 2021
Sections cited	: Section 23 of Consumer Protection Act, 1986 ("**CPA, 1986**"), Section 2(1)(c) of CPA, 1986, Section 2(1)(g) of CPA, 1986, Section 2(1)(o) of CPA, 1986; Section 2(1)(r) of CPA, 1986; Section 14 of CPA, 1986; Consumer Protection Act, 2019 ("**CPA, 2019**"); Section 11(4)(a) of Real Estate (Regulation and Development) Act, 2016 ("**RERA, 2016**"), Section 18 of RERA, 2016; Section 31 of RERA, 2016; Section 71 of RERA, 2016; Section 79 of RERA, 2016, Section 88 of RERA, 2016.

Facts of the case:

The Appeal has been filed by the Appellant- Developer ("**Developer**") challenging the judgment passed by the National Consumer Disputes Redressal Commission ("**National Commission**") directing refund of the amounts deposited by the Apartment Buyers in the project. The Apartment Buyers received a copy of Apartment Buyer's Agreement ("**Apartment Buyer's Agreement**") vide letter dated March 25, 2014.

There was an inordinate delay in completing the data since the Developer had failed to obtain timely approvals as regards the project. The project was revised in 2017.

Since there was a delay in completing the project and Developer having failed to handover possession, few Apartment Buyers had approached the National Commission seeking refund of deposits under Apartment Buyer's Agreement. An Apartment Buyer had also approached the Haryana Real Estate Regulatory Authority, Gurugram.

Issues before the Court:

The Hon'ble Supreme Court had framed four (4) issues for its determination; however, the following issues assume the utmost importance in terms of analyzing the established law:

1. Whether the terms of the Apartment Buyer's Agreement were one-sided, and the Apartment Buyers would not be bound by the same; and
2. Whether the provisions of the RERA, 2016 must be given primacy over the CPA, 1986; and

Out of the four (4) issues raised, the above two are of utmost importance.

Court's Analysis:

Terms of the Apartment Buyer's Agreement were one-sided:

1. The Hon'ble Supreme Court initially analyzed the various clauses of the Apartment Buyer's Agreement and was of the view that the clauses reflected wholly

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one-sided terms of the Apartment Buyer's Agreement, which are entirely loaded in the favour of the Developer and against the allottee at every step.

2. The terms of the Apartment Buyer's Agreement are oppressive and wholly one-sided and would constitute an unfair trade practice under the CPA, 1986.

3. It proceeded to refer to Section 2(1)(c) of CPA, 1986, Section 2(1)(g) of CPA, 1986, Section 2(1)(o) of CPA, 1986 and Section 2(1)(r) of CPA, 1986 and its judgment in ***Lucknow Development Authority v. M.K. Gupta (1994) 1 SCC 243***; ***Pioneer Urban Land & Infrastructure Limited v. Govindan Raghavan (2019) 5 SCC 725*** and ***Wg. Cdr. Arifur Rahman Khan & Ors. v. DLF Southern Homes Pvt. Ltd. 2020 SCC OnLine SC 667***.

4. The failure of the Developer to comply with the contractual obligation to provide flat within the contractually stipulated period, would amount to deficiency of service. Given the one-sided nature of the Apartment Buyer's Agreement, the consumer fora had the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

5. Section 14 of CPA, 1986 empowers the Consumer fora to address the deficiency of service by issuing directions to the Builder, and compensate the consumer for the loss or injury cause by the opposite party, or discontinue the unfair or restrictive trade practices.

6. Under CPA, 1986 powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of power to discontinue unfair or restrictive trade practices.

7. Hence, the term 'unfair contract' has been defined under CPA, 2019 and powers have been conferred on the State Consumer Fora and National Commission to declare contractual terms which are unfair as null and void. This statutory power was implicit under CPA, 1986 also.

<u>Primacy to be given to RERA, 2016 over the CPA, 1986</u>:

8. While dealing with this issue, the Hon'ble Supreme Court analyzed the Statement of Objects and Reasons for enacting the CPA, 1986, Section 3 of CPA, 1986 and its judgment in ***Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha (dead) through LRs and Ors. (2004) 1 SCC 305; Virendra Jain v. Alaknanda Cooperative Group Housing Society Limited & Ors. (2013) 9 SCC 383 and Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751.***

9. Also, the Statement of Objects and Reasons of RERA, 2016, Section 18 of RERA, 2016, Section 71 of RERA, 2016, Section 79 of RERA, 2016, Section 88 of RERA, 2016 were discussed by the Hon'ble Supreme Court.

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10. The Hon'ble Supreme Court also elaborated on the doctrine of election under which an allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two (2) concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action. The doctrine of election is based on the rule of estoppel.

11. It referred to its judgments in ***A.P. State Financial Corporation v. M/s. GAR Re-rolling Corporation (1994) 2 SCC 647; P.R. Deshpande v. Maruti Balaram Haibatti (1998) 6 SCC 507; National Insurance Co. Ltd. v. Mastan & Ors.; Transcore v. Union of India (2008) 1 SCC 125 and Mathew Varghese v. M. Amritha Kumar (2014) 5 SCC 610*** whereby it was held that doctrine of election clearly suggests that when two (2) remedies are available for the same relief, the party to whom said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two (2) remedies is essentially different.

12. Reliance was placed on recent judgment of the Hon'ble Supreme Court in ***M/s. Imperia Structures Ltd. v. Anil Patni & Anr. (2020) 10 SCC 783*** it was held that remedies under CPA, 1986 were in addition to the remedies available under special statutes.

13. Therefore, the absence of bar under Section 79 of RERA, 2016 to initiate the proceedings before a fora which is not a civil court, read with Section 88 of RERA, 2016 makes the position clear.

Held by the Hon'ble Supreme Court:

1. The Developer cannot compel the apartment buyers to be bound by one-sided contractual terms contained in the Apartment Buyer's Agreement.

2. The Developer was directed to deposit the amounts paid by the Apartment Buyers along with interest.

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Case Summary

Case Name : ***Tamil Nadu Spinning Mills Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors.- Appeal No. 191 of 2018 along with Appeal No. 195 of 2018, Appeal No. 265 of 2018 and Appeal No. 406 of 2019***

Court Name : Appellate Tribunal for Electricity ("**APTEL**")

Order Date : January 28, 2021

Sections cited : Section 49 and 86(1)(e) of the Electricity Act, 2003 (**"EA Act, 2003**").

Facts of the case:

1. The present appeals are filed against the Wind Tariff Order No. 6/2018 dated April 13, 2018 (**"Impugned Order"**) passed by Tamil Nadu Electricity Regulatory Commission (**"State Commission"**) determining the tariff components and all other allied issues related to Wind Energy Generators (**"WEGs"**) installed in the State of Tamil Nadu for the control period of two (2) years with effect from April 01, 2018 to the extent thereby it made certain modifications in the dispensation on the subject of "power banking" declining to withdraw the facility altogether.

2. In the Impugned Order, the State Commission has, inter alia, increased the banking charges from 12% to 14% apart from holding that any WEG installed or commissioned after March 31, 2018 is not eligible for banking facility; withdrawn the banking facility to the existing WEGs including those which are selling power generated from such WEGs under the third party sale scheme; directed that open access charges, hitherto collected at 40% of the charges applicable for thermal power plants, would be hereafter collected at 50% (transmission and wheeling charges); increased the scheduling and system operation charges from 40% to 50%; also increased the cross subsidy surcharge to 60% from existing 50%; determined the "Feed in Tariff" for sale of power to the utility at Rs. 2.86/- without accelerated depreciation and Rs.2.80/- with accelerated depreciation; retaining the payment period at sixty (60) days but reducing delayed payment levy to 1% interest from 1.5%.

3. In one of the appeals (Appeal No. 406 of 2018), the distribution licensee i.e., Tamil Nadu Generation and Distribution Corporation Limited ("**TANGEDCO**") has challenged the Impugned Order as the banking facility is proving financially detrimental to its interest and is pressing for withdrawal of banking facility and for increase in cross subsidy surcharge from 50% to 100% instead of 60% granted by the State Commission in the Impugned Order.

4. While the other three (3) appeals are by entities which are pressing on continuance of the facility of power banking, particularly for WEGs, contesting that there is no cause for the reliefs afforded to this sector to be taken away since the grounds on which such promotional measures were adopted continue to exist till date.

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Court's Findings and Decisions:

In the herein mentioned appeals, the Hon'ble APTEL has observed as follows: -

Withdrawal of banking facilities

1. The claim of TANGEDCO for permanent discontinuance of the banking facilities to be radically extreme and patently contrary to the contemporary letter and spirit of the prevalent law particularly concerning wind energy resources. There can be no doubt as to the fact that mandate of Section 86 (1) (e) of the EA Act, 2003 is that renewable sources of energy are to be promoted and that for such promotion, suitable measures for connectivity with the grid and sale of electricity to any person are to be adopted, this besides such measures wherein mandatory quantum purchase of electricity from renewable sources of energy can be enforced. These aspects are wide enough to include providing connectivity to the grid, open access and evacuation facilities.

2. The private generators in this field get attracted to contribute to the cause by setting up projects based on the terms and conditions that are prevalent at the time of investment, these including tariff terms and conditions and other facilities such as banking, connectivity, open access, concessional transmission charges, zero or concessional rate of cross subsidy surcharge etc. The private investors in the wind power projects cannot hope to get the desired returns on short-term operations. In this view of the matter, it is necessary to maintain continuity of policy and certainty for the investor and that it would possibly be unfair and unjust to modify the terms adverse to its interest during the life of the project.

3. The State Commission has chosen to maintain the banking facility for the existing WEGs for twelve (12) months but has made a modification in the case of new WEGs by reducing and restricting the banking facility to one (1) month and in the case of all existing and new WEGs disallowed banking when the generated electricity is sold to third parties. The Hon'ble Tribunal do not find any reasons, much less sufficient, set out in the Impugned Order for such stipulation. Therefore, this makes the Impugned Order injudicious and consequently unsustainable.

4. It is also observed that wind (as also solar) power is intermittent generation source and by its very nature, not available for continuous availability and end-use/ consumption. The quantum of wind velocity obtainable, which determines the quantum of possible generation, varies seasonally during periods known as high wind season, low wind season and sub-marginal wind season. This phenomenon makes it imperative that banking facility be provided to wind power projects for the entire year. It is doubtful that a wind power project, including a new project, can operate effectively with the banking facility being allowed for one month only. The generation during high wind season cannot be consumed completely in the same month of generation thus, it is necessarily required to be banked and consumed in later seasons. This inherent nature of use of wind generated power has been glossed over by the State Commission. The condition of one (1) month period of banking affects the fundamentals of functioning of wind power projects providing a consistent quantum for consumption.

Restricting banking for sale of energy to third parties

5. In terms of Section 49 of the EA Act, 2003, the freedom has been given to a generating company to sell electricity to end-users without the tariff being regulated by the Regulatory Commission. The Act also provides for non-discriminatory open

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access for wheeling or transmission of power from the place of generation to the place of end use. The Section 86 (1) (e) of the EA Act, 2003 provides for promotion of renewables by adopting suitable measures for connectivity with the grid and sale of electricity to any person. The end user procuring electricity from sources other than the distribution licensee of the area is also an obligated entity for fulfilment of Renewable Purchase Obligation under the regulations notified by the State Commissions in terms of section 86 (1)(e) of the EA Act, 2003. Therefore, the denial of banking facility to third party sale is contrary to the said provisions and to the scheme and objective of the EA Act, 2003.

6. It is relevant to highlight that there is no foundation laid to support the view that wind power projects have become so economical as to establish that continued support by such promotional measures as in question is no longer required. Similarly, there is no scrutiny undertaken by the State Commission to infer that banking facility is proving to be too onerous for the distribution licensee making it financially unviable for it to operate or sustain.

7. It is also observed that the State Commission has taken a view on various aspects without ascertaining the factual position.

8. In the matter of ***Fortune Five Hydel Ltd. Vs. Karnataka Electricity Regulatory Commission & Ors. (Appeal No. 42 of 2018 & batch)***, the Hon'ble Tribunal in its judgment dated March 29, 2019 had rejected the finding of the Karnataka Electricity Regulatory Commission that "the continuance of the promotional tariffs and other concessions, which are finally passed on to the consumers, is no longer justified" and further held that banking is not a sole commercial transaction but is a physical support to RE generation on account of generation being infirm and periodical in nature. The relevant excerpt of the said judgment is set forth below: -

> *"14.16 Having regard to the submission made by the learned counsel for the Appellants as well as learned counsel for the Respondents and various judgements of the Hon'ble Supreme Court and this Tribunal, we opine that the finding of the State Commission that promotional measures for enhancing RE generation is no longer required, based on the present day landed cost of RE generation and technological development, is not supported by the adequate analysis and also not justified in the eyes of law. Besides, amendment in the terms and conditions of the executed WBAs during the currency of its validity is considered beyond the regulatory ambit of the State Commission. Once the RE generators have come forward to invest in the sector and given certain representations such as flexibility in banking and consumption pattern, the same cannot be taken away by simply passing an order which is not permissible under the settled principles of law. It is not in dispute that over the period, there has been increase in RE generation in Karnataka but the banking of energy account for only a small percentage of total power purchase / supply of the State from all sources. The State Commission, being the sector regulator in the State*

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has a mandate to strike judicious balance among all the stakeholders as required under various provisions of the Act. The small RE plants cannot be compared with major/ mega RE plants which are generally supplying power to inter-state and are taken care of, for their balancing on the regional / all India basis. The banking is not a sole commercial transaction but is a physical support to RE generation on account of their generation being infirm and periodical in nature. Moreover, any amendment has to take place for future projects and not for the already commissioned projects for which wheeling and banking agreements have been executed and valid for a period of 10 years from the date of execution.

14.17 In view of the aforesaid facts and circumstances, we are of the considered view that the impugned order passed by the State Commission reducing the banking period and imposing other restrictions during currency of validity period of WBAs cannot be sustainable in law.

…

16.8 In view of the forgoing reasons, we are of the considered view that for taking such a decision of modifying the Wheeling and banking arrangement, sufficient data, analysis and evaluation have to be considered which in the instant case is virtually lacking. As the similar request of ESCOMs for reduction in banking period of RE generators was rejected by the State Commission in 2013-14 and since then no additional data or analysis or ground has been generated by the ESCOMs, the findings of the State Commission in the impugned order without judicious analysis and evaluation do not appear justified."

9. Further, there is possibility that the banking facility is resulting in difficulties for the distribution licensee on account of "must run" nature of wind power, it consequently causing some instability of grid and compelling the licensee to ask its other sources (thermal) to back down, and in the bargain constrained to compensate the latter. The Hon'ble Tribunal highlighted that the State Electricity Regulatory Commissions are under a statutory mandate to adopt such measures wherein balance is struck and the legislative objective of encouraging environmentally benign sources is pursued even while larger consumer interest of availability of quality economical electricity is protected.

10. In light of the above, the Hon'ble Tribunal requested the Central Government to call upon the Central Electricity Authority to undertake the necessary study and recommend fair and equitable solutions balancing the competing interests bearing in mind the legislative scheme and public policy of the State such that all State Electricity Regulatory Commissions are properly guided.

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For the foregoing reasons, the Hon'ble APTEL has found the Impugned Order, to the extent challenged, to be suffering from various issues due to reasons of it being arbitrary, capricious, unjust and inequitable. Therefore, the Impugned Order is set aside to the extent it is challenged in the present Appeals.

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Warm Regards,

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