

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.262/MP/2020

Subject : Petition under Section 79(1)(f) read with Section 79(1)(a) and (b) and other applicable provisions of the Electricity Act, 2003 for adjudication of disputes under the Power Purchase Agreement dated 11/12/2010 read with the Memorandum of Understanding dated 07/10/2010 between the Petitioner–Punjab State Power Corporation Limited and the Respondent– NTPC Limited.

Date of Hearing : **14.7.2023**

Coram : Shri Jishnu Barua, Chairperson
Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Petitioner : PSPCL

Respondents : NTPC Ltd. and anr.

Parties Present : Shri Anand K. Ganesan, Advocate, PSPCL
Shri. Amal Nair, Advocate, PSPCL
Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Nihal Bhardwaj, Advocate, NTPC
Shri Kartikay Trivedi, Advocate, NTPC
Shri. Parimal Piyush, NTPC

Record of Proceedings

During the hearing, the learned counsel for the Petitioner, PSPCL, made detailed oral submissions, mainly as under:

- (a) The Petitioner had entered into a Memorandum of Understanding (MOU) dated 7.10.2010 with the Respondent NTPC for developing the Gidderbaha Thermal Power Project. Pursuant to the MOU, both parties executed a detailed Power Purchase Agreement (PPA) on 11.12.2010, providing for the development of the Power Project, including the terms and conditions for the sale and purchase of power from the said project.
- (b) In terms of the PPA, the Respondent was required to reimburse the amount spent by the Petitioner, based on the audited statement of accounts for the said expenditure. The obligation to reimburse was neither subject to nor upon the completion and commissioning of the project.



- (c) In terms of the various meetings (dated 9.12.2010, 12.1.2011 and 14.1.2011) held, the Petitioner had raised the demand on the Respondent for reimbursement of the expenditure incurred by the Petitioner for the project with a copy of the auditor certificate;
- (d) The parties were in continuous negotiations for reimbursement of the amount by the Respondent in terms of Article 2.5.4 of the PPA dated 11.12.2010. However, the Respondent vide letter dated 12.10.2012 had taken the stand that no decision on payment of dues could be taken till the coal linkage and the final award of the State Government for land acquisition, were issued;
- (e) Petition No. 46/2015 filed by the Petitioner before the Punjab State Electricity Regulatory Commission under section 86(1)(f) of the Electricity Act, 2003, seeking reimbursement of the said cost by the Respondent, was dismissed by the State Commission on the ground that it has no jurisdiction to adjudicate the issue.
- (f) Article 2.5.4 of the PPA obligates the Respondent to reimburse the Petitioner, all amounts funded by the Petitioner. The said article is not dependent upon the acquisition of land, the issuance of coal linkage, or the establishment of the power project; The only requirement under this article, is for the Petitioner to submit a certificate of audited expenditure incurred by it.
- (g) The development of the project, including obtaining approvals, getting coal linkage, etc., was the responsibility of the Respondent, and if the same have not been obtained, the Petitioner cannot be denied the amounts validly incurred by it.

2. In response, the learned counsel for the Respondent, NTPC made oral submissions, mainly as under:

(a) The obligations under the PPA are reciprocal and cannot exist independently. While the Petitioner refers to Article 2.5.4 of the PPA, with regard to the fulfilment of the obligations by the Respondent, it has, on the other hand, ignored the fulfilment of its obligations to provide the techno-economic feasibility/ coal linkage and various clearances, specially allotment of land; (*Section 53 and 54 of the Indian Contract Act, 1872 was referred to*);

(b) The claims of the Petitioner are without any basis, as the PPA itself stands frustrated due to the non-performance of the obligations by the Petitioner (*Section 56 of the Contract Act was referred to*);

(c) Under Section 16(c) of the Specific Relief Act 1963, the specific performance of a contract cannot be enforced in favour of a person, who fails to prove that he has performed or has been willing to perform the terms of the contract, which are to be performed by him, other than the terms, the performance of which has been prevented or waived by the defendant. The Petitioner has prayed for specific performance of Article 2.5.4 of the PPA, thereby demanding the Respondent to



reimburse the amount incurred by the Petitioner for the project. In terms of Clauses 2(f) and (3) of the MOU, the Petitioner was duty bound to provide the techno-economic feasibility of the project. In the absence of this, the Petitioner cannot force the Respondent, to perform its obligations, when the Petitioner has not performed its obligations. (*the judgment of the Hon'ble Supreme Court in Jagjit Singh v Amarjit Singh (2018) 9 SCC 805 was referred to*).

3. The learned counsel for the Petitioner clarified as under:
 - (a) The reimbursement of expenditure incurred by the Petitioner by the Respondent, was not contingent upon the continued performance of the PPA.
 - (b) The Petitioner is not seeking specific performance of the PPA to the extent of establishment of the project or for supply of power or claiming damages thereof, but is only seeking reimbursement of the expenditure in terms of Article 2.5.4 of the PPA.
 - (c) The question of reciprocal promises being a condition for the reimbursement of the expenses by the Respondent is misconceived. There has also not been any allegation of breach of the terms of the PPA by the Petitioner.
 - (d) The reliance on Section 16 of the Specific Relief Act and the authorities on the said issue is misconceived, as the question in the present case is not for the specific performance of the PPA for generation and supply of power.
 - (e) The reliance placed on Section 56 of the Contract Act to claim frustration of the contract is also not acceptable, as the obligation to pay the expenditure incurred by the Petitioner, has not become impossible in any manner, and the same was also not contingent upon any further action to be undertaken by the Petitioner in terms of the PPA.
4. At the request of the learned counsels, the Commission permitted both parties to file their written submissions (*not exceeding 3 pages*) on or before **21.8.2023**.
5. Subject to the above, order in the petition was reserved.

By order of the Commission

Sd/-
(B Sreekumar)
Joint Chief (Law)

