

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 262/MP/2020**

**Coram:**

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

**Date of Order: 20<sup>th</sup> January, 2024**

**In the matter of:**

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 7.10.2010 between the Petitioner, Punjab State Power Corporation Limited and the Respondent, NTPC Limited.

**And**

**In the matter of:**

Punjab State Power Corporation Limited,  
The Mall, Patiala,  
Punjab - 147001

**...Petitioner**

**Vs**

1. NTPC Limited,  
NTPC Bhavan, Scope Complex,  
Core-7, Institutional Area, Lodhi Road,  
New Delhi-110003

2. Gidderbaha Power Limited,  
PSEB Building, The Mall,  
Patiala, Punjab - 147001

**...Respondents**

**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



## ORDER

Petition No. 262/MP/2020 has been filed by the Petitioner, Punjab State Power Corporation Limited (hereinafter referred to as "PSPCL") seeking the following relief(s):

- (a) *Direct NTPC to reimburse to the Petitioner the up to date amount incurred by the Petitioner which has been spent by Gidderbaha Power Limited against submission of audited statement (Annexure D, subject to further revisions) of expenditure by Petitioner in terms of Article 2.5.4 of the PPA;*
- (b) *Award interest at the rate of 16% per annum on account of delayed payment of the said amount payable in terms of prayer (a) above from the day when the amounts became due and payable till the date of actual payment by NTPC to the Petitioner;*
- (c) *Award the costs of the present litigation in favour of the Petitioner and against NTPC;*
- (d) *Pass such further order(s) as deemed fit and proper.*

2. The Petitioner, in justification of the above prayers, has submitted the following:

- (a) In the year 2008, the Petitioner proposed to develop a 2640 MW Thermal Generating Station, Gidderbaha Thermal Power Project (in short 'Power Project/Project'). The Power Project was envisaged to be developed by a Special Purpose Vehicle (SPV) in the EPC mode. and for the said purpose, Respondent No. 2, Gidderbaha Power Limited (in short 'GPL'), was incorporated as a wholly-owned subsidiary of the Petitioner.
- (b) The Petitioner, through GPL, had conducted various preliminary activities and incurred expenditure to establish the Power Project, including applying and following up for various clearances and approvals viz. Railway linkages, Irrigation Department approval, Ministry of Civil Aviation approval, etc. and also conducting preliminary studies. In terms of the claim of the Petitioner, the incurred amount spent by the GPL, which has been funded by the Petitioner, is liable to be reimbursed by NTPC to the Petitioner.
- (c) Subsequently, it was decided by the Petitioner and also by the Government of Punjab (GoP) that the Power Project be developed on Build, Own and Operate ('BOO') basis and to involve a third-party agency/generating company. Thereafter, based on the negotiations held, it was decided that the Power Project would be developed by Respondent No. 1, NTPC Limited (in short 'NTPC').
- (d) On 7.10.2010 the Petitioner had entered into a Memorandum of



Understanding (in short 'MoU') with NTPC providing for the broad terms and conditions, subject to which NTPC would develop the Power Project.

- (e) With regard to the various issues and concerns raised by the Petitioner, PSPCL, NTPC by letter dated 27.11.2010 clarified on (i) the Commissioning schedule, (ii) Environment & Other clearances, licenses etc., and (iii) land acquisition. NTPC also requested that the PPA for the Project be concluded by the 30<sup>th</sup> of November, to enable NTPC to immediately start the process of investment approval.
- (f) Pursuant to the MoU and the broad understanding between the parties, the Petitioner and NTPC negotiated, finalised and executed a detailed Power Purchase Agreement (PPA) dated 11.12.2010 providing for the development of the Power Project and the terms and conditions for sale and purchase of power from the Power Project.
- (g) In terms of Article 2.5.4 of the PPA, NTPC was required to reimburse the amount spent by the Petitioner/GPL upon the Petitioner producing the audited statement of account showing such expenditure by the Petitioner. The purpose of the said article was that when NTPC had taken the responsibility of establishment of the Power Project, the preliminary expenses, etc., which were incurred by GPL and funded by the Petitioner were required to be reimbursed by NTPC. The said obligation to reimburse was neither subject to nor upon the completion and commissioning of the Power Project.
- (h) The total expenditure incurred by GPL, which has been funded by the Petitioner, as on 31.3.2014, is Rs. 12,36,56,050/- as audited and marked as Annexure-D. There has been no dispute raised by NTPC on the quantum of the expenditure incurred, which, in any event, is audited and subject to verification. It is relevant to mention that the above amount may further increase and change based on the subsequent events and also due to the inaction on the part of NTPC to perform its obligations under the PPA.
- (i) A meeting was held on 9.12.2010 between the Petitioner, NTPC and the Government of Punjab to discuss the progress of the Power Project. Thereafter, the setting of the Power Project was discussed in various meetings, including the meeting dated 12.1.2011, wherein PSPCL asked NTPC to pay the expenditure incurred by GPL (SPV) as they had taken loan from the Banks for which they had to pay interest. NTPC informed that PSPCL may raise demand by submitting a copy of audited expenditure along with a copy of contracts awarded in this regard to PFC Consulting Limited (PFCCL). Further, in the MOM dated 14.1.2011 (between the Petitioner, NTPC and PFCCL), it was discussed and agreed that the



expenses related to the Power Project by GOP/PSPCL and their agencies /subsidiary, if any, will be reimbursed by NTPC.

- (j) The Petitioner vide letter dated 4.2.2011 raised the demand on NTPC for reimbursement for the expenditure incurred by the Petitioner in GPL along with a copy of the auditor certificate. This issue was also discussed in the meeting between the Petitioner and NTPC on 10.2.2011, wherein it was *inter-alia* clarified to NTPC that a committee headed by CMD, PSPCL will negotiate the scope of work and amount for the Consultancy works for the development of Power Project with PFCCL, and the amount payable/paid to PFCCL shall be accepted and reimbursed by NTPC and NTPC agreed to the same. It was also agreed that due payment shall be released to PFCCL after negotiating by the PSPCL Committee with PFCCL.
- (k) Another meeting was held in the chamber of the Principal Secretary (Power), Government of Punjab, on 13.4.2011, and NTPC mentioned that the interest rate @14% being charged by the Petitioner on the amount of loan to GPL was high. The Petitioner stated that the major component of the cost incurred by the GPL is the cost of the contract placed to PFCCL for carrying out studies under case-2 bidding, and the same interest rate is charged from M/s L&T and M/s Sterlite. The Petitioner further stated in the meeting that it was not possible to change the interest rate and agreed to hand over the relevant papers for reference to NTPC. In this meeting, the Petitioner also stated that it has not charged administrative expenditure from GPL, whilst the same has been charged from M/s L&T and M/s Sterlite. PSPCL informed that NTPC has already agreed to reimburse the cost incurred by GPL, and the issue cannot be re-opened.
- (l) The Petitioner, vide its letter dated 2.6.2011, called upon NTPC to reimburse the amount spent on GPL. Vide letter dated 7.6.2011, the Petitioner also called upon NTPC to attend the meeting under the chairmanship of the Principal Secretary (Power), Government of Punjab on 13.6.2011.
- (m) In the meeting held on 13.6.2011, the progress on the Power Project was discussed, including the land cost, coal allocation, etc. Further, vide letters dated 17.10.2011, 4.1.2012, 22.3.2012, 28.3.2012, 6.6.2012, 27.6.2012, the Petitioner once more called upon NTPC to reimburse the expenditure which had been incurred by the Petitioner up to 31.3.2011 and onwards on the GPL and also enquired about the status of Power Project.
- (n) NTPC vide its letter dated 2.7.2012, for the first time, took the position that any decision on the payment of dues would be taken only after the State Government's issuance of the final letter of award of the land for the



Project. This was a complete shift of stand and not in accordance with the MoU, PPA and the MoM between the parties.

- (o) The parties were in continuous negotiations on the reimbursement of the amounts by NTPC in terms of Article 2.5.4 of the PPA. The Petitioner once again, vide letters dated 16.7.2012 and 7.9.2012, called upon NTPC to make payment of the dues already incurred by the Petitioner. NTPC, vide letter dated 12.10.2012, took the position that no decision on payment of dues can be taken till the coal linkage is issued and issuance of the final award of the State Government for land acquisition. The Petitioner reiterated the claim vide its letter dated 5.9.2013, which was refused by NTPC vide its letter dated 16.9.2013.
- (p) The Petitioner filed Petition No. 46/2015 before the Punjab State Electricity Regulatory Commission (PSERC), claiming reimbursement of the expenses already incurred. Even during the pendency of the Petition, various communications were exchanged between the parties, wherein the Petitioner called upon NTPC for the resolution of disputes and provided the information on the expenditure incurred on the project, as desired.
- (q) The Petitioner, in the right earnest, once again, vide letter dated 4.6.2018 and vide reminders dated 23.7.2018 and 20.8.2019, wrote to NTPC to seek an amicable resolution of the disputes. Later, NTPC, vide email dated 1.2.2019 called for a meeting in Delhi, which was attended by the Petitioner, but could not fructify with regard to pending disputes.
- (r) By order dated 30.9.2019, the State Commission dismissed the Petition no. 46/2015, citing a lack of jurisdiction on its part to adjudicate the issue of whether NTPC is liable to reimburse the costs to the Petitioner. The State Commission did not go into the merits of the same.
- (s) Article 2.5.4 of the PPA is very clear and obligates NTPC to reimburse the amount of expenses incurred by GPL, as funded by the Petitioner. Article 2.5.4 is not dependent upon the acquisition of land, issuance of coal linkage etc. or even the establishment of the Power Project. A plain reading of Article 2.5.4 indicates its scope and application. The only requirement under Article 2.5.4 is for the Petitioner to submit a certificate of audited expenditure incurred by it, and once the auditor certified expenditure is submitted, NTPC is under a legal obligation to reimburse the amount incurred, as reflected in the auditor certificate. There is no further qualification that NTPC is seeking to add.
- (t) In the MOM dated 12.1.2011, as well as in subsequent correspondences, there is clear admission on the part of NTPC that it would pay the amount once the audited accounts are submitted. The amounts have been incurred



by the Petitioner by taking a loan on which interest is also being paid by it. The development of the Power Project, including obtaining approvals, getting coal linkage, etc., was the responsibility of NTPC, and if the same has not been obtained, the Petitioner cannot be denied the amounts validly incurred by it on GPL.

- (u) It is a well settled principle that no person can take advantage of his own wrong. If NTPC has not been able to get the coal linkage or any other clearance, the Petitioner cannot be blamed for the same, and it is entitled to recover the amount in terms of Article 2.5.4 of the PPA. In any event, the reimbursement of expenses incurred by the Petitioner by NTPC is not subject to any coal linkage to be granted or any other contingency. The stand taken by NTPC is not only incorrect but is contrary to the record, the provisions of the MoU and PPA and the admissions made by NTPC. In view of the above and the disputes that have arisen between the parties, the Petitioner has approached this Commission seeking adjudication of disputes in terms of Section 79(1)(f) of the 2003 Act.

Accordingly, the present Petition has been filed by the Petitioner, with the prayers as in para 1 above.

#### **Hearing dated 30.7.2020**

3. The Petition was listed for hearing through video conferencing. However, since none appeared on behalf of the Petitioner, the Commission postponed the hearing of the Petition.

#### **Hearing dated 20.4.2023**

4. During the hearing, the learned counsel for the Petitioner submitted that the matter pertains to reimbursement of the expenses incurred by the Petitioner on GPL relating to the development of the project by the Respondent NTPC for the period prior to its commissioning. However, based on the submissions of the learned counsel for the Respondent NTPC to file reply on the 'admissibility' of the petition, the Commission directed the Respondent to file its reply on 'maintainability' and on 'merits'.



5. In compliance with the above directions, the Respondent NTPC, vide affidavit dated 9.6.2023 has filed its reply, and the Petitioner, vide affidavit dated 11.7.2023, has filed its rejoinder to the said reply.

### **Reply on behalf of the Respondent NTPC**

6. The Respondent NTPC vide reply affidavit has mainly submitted the following:
- (a) The Power Project was envisaged to be developed by the Petitioner itself, which led to the incorporation of GPL on 14.8.2008 as a wholly owned subsidiary of the Petitioner. It was subsequently agreed that the project would be developed by the Respondent after taking over the ownership of the Project from the Petitioner.
  - (b) Thereafter, the Petitioner, the Government of Punjab and the Respondent NTPC entered into an MOU dated 7.10.2010, which records the intention of the parties, that the Power Project shall be developed by NTPC, subject to its techno-economic feasibility, which had to be provided by the Petitioner. Subsequently, the Petitioner and NTPC entered into the PPA.
  - (c) The COD of the project was envisaged in September 2015. However, due to reasons not attributable to NTPC, the Project has not been developed till date, and it is not likely to come up in the near future. As of today, the Board of the Petitioner Company has already approved the winding up of the Respondent GPL. In view of the aforesaid, the PPA executed for the sale of power generated from the Power Project to beneficiaries stands frustrated in terms of Section 56 of the Indian Contract Act, 1986 (in short, 'the Contract Act').
  - (d) The claims made by the Petitioner are frivolous and without any basis as the PPA itself stands frustrated due to the non-performance of the obligations by the Petitioner. Therefore, the claims made by the Petitioner are not maintainable before this Commission.

### ***PPA stands frustrated due to non-performance of the obligations qua the Petitioner.***

- (e) MOU was entered into by the Petitioner, the Respondent NTPC and the Government of Punjab, with an intent to establish the project, subject to establishment of techno-economic feasibility, tie up for fuel, necessary clearances and signing of the PPA. In the present case, the obligation to provide the techno-economic feasibility /coal linkage and other necessary





approvals was on the part of the Petitioner, which was the prerequisite for NTPC to prepare the feasibility report and implementation of the Project.

- (f) In accordance with the terms and objectives of the MOU, the Petitioner and the NTPC entered into PPA, wherein NTPC was required to obtain investment approval from its Board of Directors and begin the process of implementing the Power Project only after the Petitioner fulfilled its obligations viz., (i) Approval of land clearance where the project was supposed to be established, and (ii) Establishment of techno-economic feasibility, without which the initiation of the Project is not possible.
- (i) The Petitioner had to carry out its obligations under the MoU and the PPA for NTPC to perform its obligations for the Project. The obligations, as specified under the MoU and the PPA, are reciprocal obligations and cannot exist independently. In this regard, reference can be drawn to Sections 53 and 54 of the Contract Act, which laid down the law relating to the performance of reciprocal promises under a contract. In the present case, when it comes to the fulfilment of obligations by NTPC, the Petitioner refers to Articles of the PPA, but on the other hand, when it comes to the fulfilment of contractual obligations to provide the techno-economic feasibility /coal linkage and various clearances specifically allotment of land, the Petitioner conveniently ignores its obligations. Reliance is placed on the judgments of the Hon'ble Supreme Court in *M/s Sikkim Subba Associates V. State of Sikkim (2001) 5 SCC 629*, and *National Insurance Co. Ltd. v. Seema Malhotra (2001) 3 SCC 151* to substantiate the law governing performances and reciprocal obligations.
- (g) The Petitioner has been constantly apprised by NTPC that it would not be possible to implement the Power Project without the coal linkage availability and the availability of land. The same has been evidenced in the communications dated 2.7.2012, 12.10.2012 and 16.9.2013. wherein it was conveyed by NTPC that until and unless the coal linkage is available and the final letter for award of land is issued by the Government of Punjab, NTPC will not be in a position to implement the Power Project, and therefore, expenses incurred by the Petitioner cannot be reimbursed.
- (h) The Petitioner did not take any steps despite repeated reminders from NTPC. Therefore, the Petitioner, at this stage, cannot force NTPC to fulfil its obligations when it has not adhered to its duties and liabilities. It is the Petitioner's failure to effectively discharge its obligations that the Power Project failed to take off. This Petition is a bid by the Petitioner to escape the commercial liability for its own failures, which cannot be countenanced.
- (i) The development of the Power Project formed the fundamental basis for the PPA. The performance of the obligations under the PPA, is premised





on the Power Project, being set up, which could not be implemented on account of the failure of the Petitioner to perform its obligations. The fact that the Power Project never came up has frustrated the PPA in terms of Section 56 of the Contract Act. In terms of Article 2.5.3 of the PPA, NTPC had to take over GPL for the development of the project, which could never fructify due to the reasons attributable to the Petitioner, and to date GPL is a wholly owned subsidiary of the Petitioner.

- (j) The PPA exists solely to facilitate the sale of power to the Power Project's intended beneficiaries. Since the Power Project itself has not been established and there is no generation and supply of power, then the whole purpose of the PPA gets defeated. It was the obligation of the Petitioner to ensure that the techno-economic feasibility had been met for the development of the Power Project, and all the reasons were beyond the reasonable control of NTPC.

(i) Section 56 of the Contract Act addresses the performance of contracts and is intended to include situations in which the performance of a contract is excused or dispensed with on the grounds of the contract being void owing to the impossibility of performance. Judgments of the Hon'ble Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr.*, AIR 1954 SC 44; *Mugneeram Bangur & Co. v. Gurbachan Singh*, (1965) 2 SCR 630; *Naihati Jute Mills Versus Khayaliraam Jagannath*: AIR 1965 SC 522; *Energy Watchdog v. Central Electricity Regulatory Commission* (2017) 14 SCC 80; *Managing Director, Army Welfare Housing Organisation v. Sumangal Services (Pvt) Ltd*, (2004) 9 SCC 619; *Smt. Sushila Devi and Anr v. Hari Singh and Ors.*, (1971) 2 SCC 288 relied upon)

- (k) The Commission may appreciate that the underlying fundamental basis of the PPA has been eroded as the Project was never developed, and thus, there was no sale of power. The Hon'ble Supreme Court in *Smt. Sushila Devi & anr v Hari Singh & ors* (1971) 2 SCC 288 has held that when the fundamental basis of a contract is eroded, the same need not be performed. In the light of the above decisions, the PPA between the Petitioner and NTPC stands frustrated and NTPC cannot be compelled to perform its obligations under the PPA when the Petitioner has not fulfilled the reciprocal obligations of the Petitioner under the PPA.

***Specific Performance sought by the Petitioner***

- (l) The Petitioner has prayed for specific performance of Article 2.5.4 of the PPA, thereby demanding NTPC to reimburse the up-to-date amount incurred by GPL in the said Project. As per Clause 2(f) of the MoU, it was mutually agreed between the Petitioner and NTPC that the Petitioner was to obtain various statutory clearances/inputs pertaining to the State Government of Punjab, thereby providing the documents and reports for



the specific studies /investigations including EIA studies conducted at site for preparation of feasibility report. The condition precedent for reimbursement of the cost incurred by the Petitioner was that it should provide techno-economic feasibility, which will be part of the Project cost.

- (m) As per Clause 3 of the MoU, NTPC was to prepare a feasibility report and begin with the implementation of the project only after the establishment of techno-economic feasibility, which was the sole prerogative of the Petitioner. From the above clause of the MoU, it is clear that the Petitioner was duty-bound to provide the techno-economic feasibility of the Project. It is a fact that the said feasibility was never provided, and hence the Petitioner cannot in any manner thrust upon NTPC to perform its obligations when it has not performed its duties and liabilities. Reliance is placed upon Section 16 (c) of the Specific Relief Act, 1963.
- (n) The Hon'ble Supreme Court in the case of *Jagjit Singh v. Amarjit Singh*, (2018) 9 SCC 805 while relying on the settled position of law as established in *Gomathinayagam Pillai v. Palaniswami Nadar*, (1967) 1 SCR 227, *J.P. Builders v. A. Ramadas Rao*, (2011) 1 SCC 429 and *P. Meenakshisundaram v. P. Vijayakumar*, (2018) 15 SCC 80, has held that in a case of specific performance, the plaintiff must prove that he was always ready to perform his part of the contract right from the date of initiation of the contract till the date of filing the suit.

### **Rejoinder of Petitioner to the reply of the Respondent, NTPC**

7. The Petitioner, in its rejoinder dated 11.7.2023, has submitted as under:

#### ***Frustration of the PPA***

- (a) The establishment of the generating station was not a precondition for the reimbursement of the expenditure in terms of Article 2.5.4 of the PPA. The reimbursement of the expenditure incurred by the Petitioner in GPL was not dependent or contingent upon the continued performance of the PPA and establishment of the generating station or supply of power therefrom.
- (b) The claim of the Petitioner does not extend to seeking specific performance of the PPA to the extent of establishment of the generating station or supply of power or claiming damages thereof but is only claiming the reimbursement of expenditure incurred by the Petitioner in GPL, which NTPC is required to reimburse in terms of Article 2.5.4 of the PPA.
- (c) The reliance by NTPC on Sections 53 and 54 of the Contract Act, 1972 is misconceived as the reimbursement of the expenditure in terms of Article 2.5.4 of the PPA was not contingent upon any further action to be taken under the PPA towards the establishment of the generating station or



supply of electricity. NTPC having consciously entered into the PPA, now cannot seek to avoid enforcement of the same.

- (d) Had NTPC paid the cost incurred by the Petitioner at the relevant time upon the execution of the PPA, the question of refund of the said expenditure on the ground that the generating station could not be established would not have arisen. This being the position, NTPC cannot take advantage of its own default in reimbursement of the expenditure to the Petitioner and thereafter claim that the same is not payable as the generating station has not been established
- (e) The reliance on the mutual performance of reciprocal promises being a defence to the present claim of the Petitioner is also misconceived. There has not been any allegation of breach of the terms of the PPA by NTPC on the Petitioner. The question in the present case is on payment of the expenditure incurred by the Petitioner in the GPL, which is payable by NTPC in terms of Article 2.5.4 of the PPA. This is not dependent upon any further action to be undertaken by the parties towards the establishment of the generating station.
- (f) The question of reciprocal promises being a condition for the reimbursement of expenses by NTPC is wholly misconceived. Firstly, there was no such condition in the PPA for the reimbursement only upon the establishment of the generating station or any further steps to be taken by the Petitioner. There was no condition attached to the generating station being established as a pre-condition for the same or any other obligation to be undertaken by the Petitioner as a prior condition for such reimbursement.
- (g) The authorities sought to be relied on by NTPC on the issue of non-performance of reciprocal promises is misconceived and has no application to the present case. The reimbursement of expenditure in terms of article 2.5.4 of the PPA was not contingent upon further action to be taken towards the establishment of the generating station, allocation of coal linkage, procurement of land etc.
- (h) 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 in terms of the PPA. The default in performance of its obligations by NTPC cannot be thereafter sought to be defended on the ground that subsequent action under the PPA could not be performed.



- (i) The contentions ought to be raised on alleged defaults by the Petitioner in the performance of the PPA, which is completely irrelevant to the issue that arises in the present case, namely on the reimbursement of expenditure incurred by the Petitioner in GPL.
- (j) The reliance on the feasibility report not being prepared for the development of the project, etc., is also extraneous to the issue at hand (obligation of NTPC to pay the expenditure incurred by the Petitioner in GPL). This obligation was undertaken by NTPC in terms of Article 2.5.4 of the PPA. The said obligation is not dependent upon any other obligation to be performed by any of the parties. The question in the present case is not the specific performance of the PPA for the generation and supply of electricity. For this reason, the reliance on Section 16 of the Specific Relief Act, 1963 and the authorities on the said issue are wholly misconceived.

### **Hearing dated 14.7.2023**

8. During the hearing on 14.7.2023, the learned counsel for the Petitioner and the Respondent NTPC made detailed oral submissions, mainly on the lines of their submissions in the Petition/Reply and Rejoinder, as noted above. However, the Commission, after permitting both the parties to file their written submissions, reserved its orders on 'maintainability' and on 'merits'. In compliance with the said directions, the Petitioner and the Respondent NTPC have filed their written submissions on 21.8.2023.

### **Written Submissions of the Petitioner and the Respondent, NTPC**

9. The Written submissions filed by the Petitioner and the Respondent NTPC mainly reiterate the submissions made in the Petition/Reply and Rejoinder and the same are not mentioned herein for the sake of brevity.

10. Based on the submissions of the parties and the documents on record, we proceed to first examine the issue of 'maintainability' of the Petition.

### **Analysis and Decision**

11. PSPCL proposed to develop a 2640 MW thermal generating station, namely the



Gidderbaha Thermal Power Project, by an SPV, on EPC mode, and for this purpose, the Respondent No.2 GPL was incorporated as a wholly owned subsidiary of PSPCL. PSPCL, through GPL, had conducted various preliminary activities and incurred expenditures with regard to the establishment of the generating station, including the various clearances and approvals and also conducting preliminary studies. Subsequently, PSPCL and the Government of Punjab decided that the said Power Project be developed on a 'BOO' basis, involving a third-party agency, and based on the negotiations, it was decided that the said Project be developed by NTPC Limited. Accordingly, the Government of Punjab, PSPCL and NTPC entered into an MOU on 7.10.2010, providing for broad terms and conditions, subject to which NTPC would develop the Project. Some of the terms and conditions in the MOU are extracted below:

**WHEREAS:**

*a) NTPC is the premier power generating company in India having expertise and strength in areas such as setting up and operation & maintenance of Power Projects and sale of power. NTPC has developed comprehensive in-house expertise in various facets of power generation from concept to commissioning, efficient operation in accordance with Power Policies of Govt. of India.*

*b) NTPC intends to set up a 2640 MW of Coal Based Thermal Power Project at Gidderbaha in the state of Punjab, subject to establishment of its techno- commercial viability.*

*c) Govt. of Punjab has agreed to facilitate acquisition of land, allocation of water and allocation of coal linkage for the project and has conveyed to NTPC in- principle clearance for about 2316 Acre of land and 125 cusecs of water vide Department of Power, Govt. of Punjab letter No. 5/3/2007-PE6/2812 dated 13<sup>th</sup> September, 2010.*

*d) For the aforesaid purpose the Parties agree to sign these Presents on mutually agreed Terms and Conditions mentioned hereunder.*  
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**2. Broad Agreements**

*a) The proposed Power Project in Gidderbaha, shall be a regional Power Project for benefit of Punjab and other willing States/UTs of the Northern Region. Sharing of power between Punjab and other beneficiaries will be on the lines of regional Power Projects being executed by NTPC and final allocation to be firmed up by Ministry of Power, Gol.*

*b) At least 50% of the power shall be allocated to GoP subject to the approval of Ministry of Power, Gol. NTPC and Govt. of Punjab have already taken up the issue of higher allocation of power with Ministry of Power, Gol.*



*c) Land requirement for the project would comprise of plant area including green belt, plant reservoir, ash disposal area, township and corridors for makeup water, ash slurry pipelines, railway siding, etc. Govt. of Punjab have already issued notification under Section-4 of LA Act for 2316 acres of land for the Project, vide letter No. 5/3/2007-PE6/2812 dt. 13<sup>th</sup> Sept., 2010.*

*d) GoP has already given clearance for 125 cusecs of water for this Project, vide letter No. 5/3/2007-PE6/2812 dt. 13<sup>th</sup> Sept., 2010.*

*e) NTPC has already sought long term coal linkage from Ministry of Coal. GoP shall extend their cooperation in obtaining the coal linkage for the project.*

*f) Erstwhile Punjab State Electricity Board had conducted site specific studies / investigations, including EIA studies at the site. It is mutually agreed that GoP / PSPCL shall extend their cooperation for obtaining various statutory clearances / inputs pertaining to the State Government. PSPCL shall provide to NTPC all the documents /reports for the specific studies/investigations including, EIA studies conducted at site for preparation of Feasibility Report. The cost incurred by GoP/PSPCL towards site studies shall be reimbursed by NTPC, after techno-economic feasibility and shall form part of the Project cost.*

*g) NTPC shall take up balance/various site-specific studies/investigations for the preparation of the FR on fast track.*

*h) Investment approval of the project shall be sought by NTPC from its Board, after the tie up of all inputs, (including land, water & coal), preparation FR, receipt of statutory clearances, signing of PPAs etc., have been completed.*

*i) The power generated from the project shall be allocated from the bus bars of the proposed project to Punjab State and other beneficiaries as per clause 2(a). A separate Agreement shall be entered into by all the beneficiaries with Power Grid Company of India Ltd. (PGCIL) for transmission of power to the respective load centres.*

*j) Land acquisition shall be done under aegis of Govt. of Punjab based on negotiated settlement for cost of land. No further annuity payment shall be made.*

### **3. Project Development:**

*NTPC shall prepare the Feasibility Report for the project and start implementation of the project on priority basis, subject to establishment of techno-economic feasibility other necessary clearances and approvals.*

12. Pursuant thereto, PSPCL and NTPC negotiated and executed a 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 Project. Some of the relevant Articles in the PPA are extracted below:

#### **“2.5 Development of the Project**

*2.5.1 NTPC shall obtain all clearances in shortest possible time and initiate other timely actions as necessary for execution of the project to ensure scheduled COD as per clause 2.3. Further, NTPC shall submit detailed PERT Chart for execution of the project including all activities incidental thereto, in order to achieve commercial operation of the first unit by March 2015 positively.*

*2.5.2 NTPC shall immediately initiate action for obtaining clearances, arranging*





*payments for acquiring of land for which Section-4 has already been issued and placement of order for BTG etc. etc. NTPC with the assistance of PSPCL shall make all efforts and ensure to complete these formalities/actions within next six months but not later than 31.5.2011.*

*2.5.3 NTPC shall take over Gidderbaha Power Limited (GPL), SPV wholly owned by PSPCL to take the benefit of actions/clearances taken in its name for development of the Project. In case the process of taking over of SPV involves delay due to involvement of legal procedures, then NTPC may consider obtaining the clearances directly from the departments utilizing the benefit of actions/clearances already obtained by PSPCL. NTPC shall adopt which-so-ever route is faster.*

13. One of the prayers [(prayer (a))] of the Petitioner, PSPCL in the present case, is for a direction on the Respondent No.1 NTPC to reimburse to the Petitioner the up-to-date amount incurred by the Petitioner, which has been spent by the Respondent No.2 against submission of audited statement of expenditure by the Petitioner in terms of Article 2.5.4 of the PPA. Article 2.5.4 of the PPA provides as under:

*“2.5.4 NTPC shall reimburse to PSPCL up to date amount spent by GPL against submission of audited statement of expenditure by PSPCL.”*

14. It is noticed that PSPCL had filed Petition (Petition No.46/2015) before the State Commission (PSERC) for adjudication of disputes with NTPC under the PPA and MoU with regard to the non-reimbursement of the expenses incurred by PSPCL/GPL, by NTPC, in terms of Article 2.5.4 of the PPA. PSERC, after examining the question of its jurisdiction, held that the Central Commission has the jurisdiction to adjudicate the said dispute between NTPC and PSPCL and accordingly, disposed of the said Petition vide its order dated 30.9.2019. The relevant portion of the order is extracted below:

6. (A) xxx

*Section 79 of the Electricity Act pertains to the functions of the Central Commission. On a perusal of Section 79 (1) of the Act it emerges that functions stipulated in clause (a) to (d) exclusively fall within the jurisdiction of the Central Commission. The functions stipulated under (a) to (d) pertain to Regulation of the tariff of generating companies owned or controlled by the Central Government and to determine tariff for inter-State transmission of electricity. Moreover, the functions vested in the Central Commission are specific in nature applicable on an all India basis and the functions vested in the State Commission are general in nature applicable to a particular State. The specific function will, therefore, have to be*





*given preference to the general functions vested in the State Commission. A specific power, function or jurisdiction vested under a statute will always have supremacy over a general power, function or jurisdiction. In view of the same, the provisions of Section 86 (1) (f) vesting the functions in the State Commission have to be read subject to Section 79 (1) of the Electricity Act, 2003 and accordingly, the dispute arising under the PPA dated 11.12.2010 executed between NTPC and PSPCL falls within the jurisdiction of the Central Commission.*

15. In this background, the present Petition has been filed by PSPCL before this Commission under Section 79(1)(f) read with Section 79(1)(a) and (b) and other applicable provisions of the 2003 Act, for adjudication of the disputes with NTPC, under the PPA dated 11.12.2010 read with the MoU dated 7.10.2010. On the specific query of the Commission, during the hearing on 20.4.2023, as to whether this Commission has the jurisdiction to consider the reliefs prayed by PSPCL (as in para 1 above), the learned counsel for PSPCL clarified that the Petition was 'maintainable', as the Commission, in terms of Section 79(1)(f) of the Electricity Act, 2003, can adjudicate the disputes involving generating companies or transmission licensees relating to issues mentioned in clauses (a) to (d) of Section 79(1) of the 2003 Act. Per contra, NTPC has raised issues on 'maintainability' of the Petition. Accordingly, we proceed to examine whether the Commission has the jurisdiction to adjudicate the dispute raised by PSCPL in the present case, as stated in the subsequent paragraphs.

16. Section 79(1) of the 2003 Act is extracted hereunder reference:

*"79. (1) The Central Commission shall discharge the following functions, namely:*

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*(c) to regulate the inter-State transmission of electricity;*

*(d) to determine tariff for inter-State transmission of electricity;*



*(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

*(g) to levy fees for the purposes of this Act;*

*(h) to specify Grid Code having regard to Grid Standards;*

*(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*

*(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*

*(k) to discharge such other functions as may be assigned under this Act.”*

17. Under clauses (a) to (d) of sub-section 1 of Section 79 of the Act, the Commission is required to regulate the tariff of the generating stations owned or controlled by the Central Government and the tariff of the generating stations which have a composite scheme for generation and sale of electricity in more than one State, to regulate the inter-State transmission of electricity and determine the tariff of inter-State transmission system. Under Section 79(1)(f) of the Act, the Commission has the power to adjudicate the dispute involving the generating company or transmission licensee in respect of the matters connected with Clauses (a) to (d) of sub-Section 1 of Section 79 of the Act. In other words, the jurisdiction of the Commission for adjudication of the dispute gets activated if the dispute involves either a generating company or a transmission licensee and the dispute pertain to the regulation of tariff.

18. As stated, PSPCL had proposed to develop the coal-based Gidderbaha Thermal Power Project, and for this, GPL (as an SPV) was incorporated as a wholly owned subsidiary of PSCPL. Thereafter, it was decided by the Government of Punjab and PSPCL that the said Project would be developed by NTPC after taking over the ownership from PSCPL/GPL, and accordingly, MoU and PPA were executed by the



parties. As per the PPA, the SCOD of the Project was envisaged in September 2015. It is evident from the submissions of the parties in the Petition that due to the non-availability of coal linkage and pending allotment of land, the said Project could not be developed to date and is not likely to come up in the near future. The fact that the Project could not be established by NTPC, also finds mention in the PSERC order dated 30.9.2019. It is also noticed that the Board of PSPCL has already approved the winding up of GPL. In the backdrop of the Project not being established, it cannot be said that NTPC owns and controls the said Power Project. Consequently, in the absence of any generation and supply of power from the Project, the question of determination of tariff by this Commission for the electricity supplied from the Project does not arise.

19. The term 'power to regulate' is very wide and includes any issue incidental or consequential thereto so as to make the 'power to regulate' purposeful and effective. While explaining the scope of the term 'regulate' under Section 79(1)(a) of the 2003 Act, the Appellate Tribunal for Electricity (APTEL), in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v. BRPL & Ors.) has held as under:

*"18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term "regulate" as contained in Section 79(1)(a) is a broader term as compared to the term "determine" as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term "regulation" has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. Vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513."*

20. Further, the scope of Section 79(1)(a) of the 2003 Act, providing for regulating the tariff of a generating company, is wider and not synonymous with the determination or fixing of rates. It would also involve the terms and conditions of



supply as held by the APTEL in its judgment dated 4.9.2012 in Appeal No. 94 & 95 of 2012 (BRPL v DERC & ors) as under:

*“32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff”*

*33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply.*

*34. Section 79(1)(f) of the Electricity Act, 2003 provides for adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79(1)(f) of the Act.”*

21. As per the above judgement, Sections 61 and 79 of the 2003 Act deal with not only tariffs but also the terms and conditions of tariffs, which have an impact on tariff, billing, payment, surcharge, rebate, payment security mechanisms such as a letter of credit and escrow arrangement, termination and suspension of supply etc. As stated, Article 2.5.4 of the PPA obligates NTPC to reimburse PSPCL all amounts incurred on GPL as funded by PSPCL, which *inter alia*, included the payment of fees and taxes, interest on PSPCL loan, salaries and allowances, conducting site studies and contingency expenses, based on the audited expenditure. While NTPC has stated that it was impossible for it to perform the obligations under the PPA, as the Project could not be developed due to non-availability of coal linkage and pending final allotment of land, for reasons attributable to PSPCL, PSPCL has contended that the reimbursement of the said expenses in terms of Article 2.5.4 is not dependent upon the acquisition of land, issuance of coal linkage etc., or even the completion and commissioning the Power Project. In fact, PSCPCCL, in its rejoinder, has submitted



that the claim in the present Petition does not extend to seeking specific performance of the PPA to the extent of establishment of the generating station or supply of power or claiming damages thereof but is only on the reimbursement of the expenditure incurred by PSPCL in GPL which NTPC is required to reimbursement in terms of the said article. Thus, the dispute raised by PSPCL in the present Petition is only with regard to NTPC failing to perform its obligation in terms of Article 2.5.4 of the PPA with regard to the reimbursement of the expenses incurred by PSPCL on GPL and is not related to tariff. Further, there is no clause in the said PPA linking the applicability of Article 2.5.4 to tariff, and the said Article is also not dependent upon the determination of tariff. In our considered view, the dispute involves the adjudication of the claim for reimbursement of dues, and PSPCL has sought the enforcement of the obligations of NTPC arising out of Article 2.5.4 of the PPA without any conditions. It is pertinent to mention that PSPCL, in its preliminary submissions on the issue of jurisdiction of PSERC to adjudicate the dispute in Petition No.46/2015, had argued that the dispute does not involve any tariff or any terms and conditions of the tariff and since the project has not even come up there is no question of tariff. PSPCL had also submitted that the PPA dated 11.12.2010 has not yet been approved by the State Commission. In our considered view, the dispute raised by PSPCL in the present case is purely a contractual dispute, unconnected with the power of regulation of this Commission under Section 79 of the 2003 Act. The language of Section 79(1)(f) of the 2003 Act does not embrace adjudication of contractual disputes, not connected with the regulation of tariffs or the regulation of inter-state transmission of electricity. Also, the dispute does not fall within the scope and ambit of Section 79(1)(b) of the 2003 Act and cannot also be said to involve the regulation of inter-state transmission of electricity so as to fall within the jurisdiction of this



Commission under Section 79 (1)(c) & (d) of the 2003 Act. The submissions of the Respondent PSCPL that this Commission has the jurisdiction to adjudicate the dispute in terms of Section 79(1)(f) of the 2003 Act are therefore rejected.

22. Based on the above discussions and findings, we hold that this Commission does not have the jurisdiction to adjudicate the dispute raised by PSPCL, in the present Petition, under Section 79(1)(f) read with clauses (a) to (d) of Section 79(1) of the 2003 Act. The Petition is, therefore, not maintainable. In the absence of any jurisdiction to adjudicate the dispute, we have not expressed any views on the merit of the issues raised in the Petition.

23. We notice that Article 7.2.1 and 7.2.2 of the PPA dated 11.12.2010, provides as under:

*“Article 7.2.1: In the event that the parties are unable to resolve any dispute, controversy or claim relating to or arising under this Agreement, as stated above, which are falling under the provisions of the Electricity Act, 2003, the same shall be dealt in accordance with the Act’*

*Article 7.2.2: All other disputes which are not covered under the Electricity Act, 2003 shall be referred to arbitration. The appointment of Arbitrators and arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996. The venue of Arbitration shall be New Delhi. The Courts of Delhi shall have exclusive jurisdiction in all matters.”*

24. Accordingly, the Petitioner is at liberty to seek the redressal of its grievance before the appropriate forum, in accordance with law.

25. Petition No.262/MP/2020 is disposed of in terms of the above.

**Sd/-**  
**(Pravas Kumar Singh)**  
**Member**

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I.S. Jha)**  
**Member**

**Sd/-**  
**(Jishnu Barua)**  
**Chairperson**

