

**CENTRAL ELECTRICITY REGULATORY
COMMISSION NEW DELHI**

Petition No.275/MP/2018

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 15 of the Power Purchase Agreement dated 13.12.2011 executed between Tata Power Trading Company Limited and SKS Power Generation (Chhattisgarh) Limited.

Date of Hearing : **2.12.2021**

Coram : Shri P.K.Pujari, Chairperson
Shri I.S.Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Petitioner : Tata Power Trading Company Limited

Respondent : SKS Power Generation (Chhattisgarh) Limited

Parties Present : Shri Amit Kapur, Advocate, TPTCL
Shri Vishrov Mukerjee, Advocate, TPTCL
Ms. Aparajita Upadhyay, Advocate, TPTCL
Shri Sajan Poovayya, Senior Advocate, SPGCL
Shri Hemant Singh, Advocate, SPGCL
Shri Lakshyajit Singh Bagdwal, Advocate, SPGCL

Record of Proceedings

Case was called out for virtual hearing.

2. During the hearing, the learned counsel for the Petitioner circulated note of arguments and mainly submitted the following:

(a) The reliefs sought by the Petitioner in present petition is for (i) setting aside the PPA termination notice dated 24.8.2017 issued by the Respondent, (ii) granting specific performance of the PPA dated 13.12.2011 and (iii) awarding damages against the Respondent for loss of trading margin and other associated losses suffered by the Petitioner on account of illegal termination of the PPA comprising of (a) Rs 68.10 crore as loss of trading margin, (b) Rs 4.89 crore for non-supply of power by the Respondent, (c) Rs 1.03 crore towards consultancy fees withheld and (d) interest at the rate of 15% on the above amounts.

(b) The PPA was executed between the Petitioner and the Respondent with an arrangement that the Respondent would commission its project, as per the timelines specified in the PPA and the Petitioner was required to tie up power supply arrangements, in terms of the Replacement PPA Marketing strategy read with Schedule E and Article 4.1.2(i) of the PPA. The project of the Respondent was to be commissioned by 27.3.2015. Due to the failure of the Respondent to achieve COD of the project on time, the Petitioner has suffered loss in revenue



of Rs 68.10 crore as it was prevented from selling power on power exchange.

(c) As the Respondent failed to achieve commercial operation of its project, the Petitioner had, at the request of the Respondent, procured power from alternate sources, to meet its contractual obligations with UPPCL, BEST and MSEDCL respectively.

(d) The Respondent has illegally terminated the PPA vide notice dated 24.8.2017 in order to avoid its liabilities. The Petitioner vide letter dated 13.10.2017 denied the contents and sought withdrawal of the said termination notice, which was not responded. However, the Petitioner issued buyers preliminary default notice under Article 13.3.1, claiming amounts from the Respondent, which was denied vide their letter dated 23.5.2018.

(e) The Respondent had not followed the procedure set out as prescribed under the PPA and, therefore, the termination notice is contrary to the terms of the PPA and cannot be given effect to. In terms of Section 50 of the Indian Contract Act, 1872, if the contract provides for something to be done in a particular manner, then the same can be done only in that manner and in no other manner. Also, it is settled law that the procedure prescribed under the contract ought to be followed by parties [*judgment of APTEL dated 3.6.2016 in Appeal No. 97 of 2016 (Talwandi Sabo Power Limited v. PSPCL & ors)*, the judgment dated 28.10.2021 of the Hon'ble Delhi High Court in *CG Toll way Limited and ors vs National Highway Authority of India & ors (2021 SCC Online Del 4838)* and the Commission's order dated 10.1.2020 in *Petition No.236/MP/2017 (DVC vs MPPMCL)* were referred to];

(f) The Petitioner has fulfilled its obligations under the PPA. In the absence of any available capacity from the project, the Petitioner cannot be expected to specify the modalities of scheduling or enter into long term contracts. In terms of Sections 52, 53 and 54 of the Indian Contract Act, 1872, the Respondent has failed to perform the reciprocal promise i.e. supply of power within the prescribed time frame and is, therefore, bound to compensate the Petitioner for the loss sustained on account of such non-performance [*judgment of the Hon'ble Supreme Court in Surinder Kaur v. Bahadur Singh, (2019) 8 SCC 575 and National Insurance Co. Ltd. v. Seema Malhotra, (2001) 3 SCC 151* were relied upon];

(g) The Respondent had not commissioned even one unit of its 1200 MW project, as on the date of termination of the PPA i.e. 24.8.2017. Therefore, the Respondent cannot escape its obligations under the PPA and take advantage of its own wrong by terminating the PPA [*judgment of the Hon'ble Supreme Court in Nirmala Anand v. Advent Corporation (P) Ltd, (2002) 5 SCC 481 and Eureka Forbes v. Allahabad Bank, (2010) 6 SCC 193* was relied upon];

(h) In terms of Section 10 of the Specific Relief Act, 1963 (as amended in 2018), it is mandatory for courts to direct specific performance of a contract. Also, it is a settled position of law that for a contract to become determinable, the contract should have a provision for 'termination at will'. However, as the PPA signed between the parties do not contain any such provision for termination, the Respondent is bound to perform its obligations under the PPA [*judgment of the Hon'ble Supreme Court in T.O. Abraham v. Jose Thomas (2018) 1 KLJ 128,*



Hon'ble Bombay High Court judgment in Narendra Hirawat & Co. v. Sholay Media Entertainment Pvt Ltd. & anr (2020 SCC Online Bom 391) and judgment of the Hon'ble Madras High Court in Jumbo World Holdings Ltd. & Ors. v. Embassy Property Developments Private Ltd. & ors (2020 SCC Online Mad 61 were referred to];

(i) The Respondent has filed Appeal No.8 of 2020 before the Appellate Tribunal for Electricity challenging the Commission's interim order dated 26.11.2019 in Petition No.275/MP/2018, upholding its jurisdiction to adjudicate the present matter. The said appeal is pending for adjudication and since no stay has been granted, the order dated 26.11.2019 is binding on the parties.

3. The learned Senior counsel for the Respondent SPGCL mainly submitted the following:

(a) The claims of the Petitioner on account of loss of trading margin and consultancy fees are frivolous and based on presumptions. Even assuming, without admitting, that the claim of the Petitioner for Rs.4.89 crore for non-supply of power by the Respondent is acceptable, the said claim cannot be allowed, as the Petitioner has not demonstrated the actual loss or damage caused due to such non-supply by Respondent, in terms of Section 74 of the Indian Contract Act, 1872;

(b) There is no provision for payment of consultancy fees in the Trading Margin Regulations notified by this Commission, which deals with the concept of trading margin to be paid to the trader (Petitioner). Hence, the claim of the Petitioner is contrary to the said regulations and is, therefore, not maintainable;

(c) The Petitioner has not entered into a Replacement PPA, which was a pre-requisite under Article 4.1.2 and Article 4.4.2 of the PPA dated 13.12.2011. Further, in order to claim the trading margin, the Petitioner has to enter into a Power Sale Agreement (PSA) with third parties. In the absence of a Replacement PPA, no power could have been scheduled by the Petitioner;

(d) The Petitioner was under an obligation to enter into a long-term agreement for the supply of 70% of 550 MW power to a third party. Further, for the remaining 30% of 550 MW, the Petitioner has to enter into a medium term agreement and short term agreement of 18% and 12% respectively. However, the Petitioner has not entered into any long term, medium term or short-term power supply arrangements, in terms of the Replacement PPA marketing strategy read with Schedule E of the PPA;

(e) The Petitioner has entered into three short term agreements for supply of power to BEST for a period of 3 months, to UPPCL for 2 months and to MSEDCL for 10 days. Though Letter of Intents (LOI) were issued in respect of the aforesaid arrangements, none of the LOIs culminated into PPA;

(f) The Petitioner had the right to abandon the contract for supply of 250 MW power to UPPCL, if there was failure by UPPCL to sign PPA within 15 days of e-reverse auction. The LOI was signed between the Petitioner and UPPCL beyond the time frame of 15 days. These material facts were suppressed by the Petitioner and it did not disclose that UPPCL failed to honour the terms of tender



documents. Thus, in terms of Article 2.2 of the PPA, the Respondent has a right to terminate the PPA, on account of the breach of obligations contained in Article 13.1(iv) by the Petitioner;

(g) The question of granting specific performance of the contract does not arise in terms of amended section 14(d) of the Specific Relief Act, 1963 [judgment of the Hon'ble Supreme Court judgment in *IOCL vs Amritsar Gas Service & ors* (1991 SCC (1) 533), judgment of the Hon'ble High of Delhi in *Rajasthan Breweries Ltd. vs The Stroh Brewery Company* (AIR 2000 Delhi 450) and judgment dated 12.10.2021 of the Hon'ble High of Delhi in *O.M.P.(I) (Comm.) 292/2021 in ABP Network Private Limited vs Malika Malhotra* were referred to];

4. The learned Senior counsel for the Respondent, however, prayed that the Respondent may be granted time to place on record its submissions along with copies of the judgments relied upon by it in the matter.

5. In response, the learned counsel for the Petitioner objected to the above submissions and clarified that there has been no material suppression of facts, as alleged by the Respondent, as the tender documents relating to UPPCL were made available to the Respondent on 19.6.2017. The learned counsel for the Petitioner further submitted that the judgment of the Hon'ble Delhi High Court in *O.M.P.(I) (Comm.) 292/2021* relates to employment contracts and, therefore, cannot be made applicable to the facts and circumstances in the present case. The learned counsel for the Petitioner, however, prayed that the Petitioner may also be granted time to file its response, after receipt of the submissions of the Respondent.

6. The Commission after hearing the parties, directed the Respondent to file its submissions along with copies of the judgments relied upon by it, on or before 23.12.2021 after serving copy to the Petitioner, who shall file its response, if any, by 3.1.2022. Submissions as above shall be filed by the parties within the due dates mentioned and no extension of time shall be granted.

7. Subject to the above, order in the petition was reserved.

By order of the Commission

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

