

COURT-II

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 68 of 2013 & IA Nos. 423 of 2014 and 60 of 2015

Dated: 16th March, 2016

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

In the matter of:-

Nabha Power Ltd. & Anr. ... Appellant(s)
Versus
Punjab State Power Corporation Ltd. & Anr. ... Respondent(s)

Counsel for the Appellant(s) : Mr. Parag Tripathi, Sr. Adv. Along with
Mr. Aniket Prasoon

Counsel for the Respondent(s) : Mr. Anand K. Ganesan for R.1
Mr. Matrugupta Mishra and Mr. Tabrez
Malawant for R.2

J U D G M E N T

The instant appeal, being Appeal No.68 of 2013, under Section 111 of the Electricity Act, 2003 has been filed by the appellant namely, Nabha Power Ltd. & Anr. (in short '**NPL**') and L&T Power Development Ltd., against the Impugned Order dated 31.12.2012 in Petition No.56 of 2012, passed by the learned Punjab State Electricity Regulatory Commission (hereinafter referred to as the '**State Commission**'). The only issue involved in this appeal is that the appellant is a Special Purpose Vehicle and bidding under section 63 of the Electricity Act, 2003 was conducted. The controversy is about the coal arrangement as to who should arrange the coal and how fuel supply agreement is to be signed. The present tariff order is based on competitive bidding.

2) We have heard Mr. Parag Tripathi, learned Senior Advocate, assisted by Mr. Aniket Prasoon, for the appellant. We have also heard Mr. M. G. Ramachandran, assisted by Mr. Anand K. Ganesan and have gone through the material on record, including the Interim Order dated 21.08.2013 on IA No.226 of 2013 in Appeal No.56 of 2013 and IA No.227 of 2013 in Appeal No.68 of 2013 and IA No. 130 of 2013 in Appeal No.84 of 2013, passed by a full Bench of this Appellate Tribunal.

3) The full Bench of this Appellate Tribunal vide Interim Order dated 21.08.2013 had ordered as under:

“12. After considering the submissions of both the parties, we feel that suitable interim directions may be issued pending disposal of the above Appeals. Those are following:

(A) The Appellants may undertake a transparent competitive bidding process for procurement of imported coal or coal from alternative domestic sources for their projects to meet the expected shortfall in supply from linked sources in order to operate the power plant as per the terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of the first unit of the project on coal subject to the following conditions:

(i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL (R-1).

(ii) The Appellants will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.

(iii) No ‘take or pay liability’ or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.

(iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.

(v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law as expeditiously as possible but not later than 60 days from the date of the filing of the application.

(B) We want to make it clear that the above interim order is to enable the Appellants to take advance action for procurement of coal from alternative sources and this will not give any right to the Appellants to raise any charges over and above that admissible to them as per the terms and

conditions of the PPA. The actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.

(C) The above interim order is without prejudice to the inter-se claims of the parties in these Appeals.

13. Thus, the IA nos. 226 of 2013 in Appeal no. 56 of 2013, 130 of 2013 in Appeal no. 84 of 2013 and 227 of 2013 in Appeal no. 68 of 2013 are disposed of with the above directions.”

4) After the passing of the aforesaid Interim Order by this Appellate Tribunal the learned State Commission, vide order dated 19.02.2014 in Petition No.57 of 2013 has observed as under:

“35. Although under the Act, the Commission is not mandated to approve procurement of material yet taking a holistic view and considering that the competitive bidding process has been overseen by PSPCL and its representatives signed the technical and price bids opened on 27.09.2013 & 08.10.2013 for supply of imported coal and 18.12.2013 & 26.12.2013 for domestic coal during bid opening, the Commission approves the competitive bidding process undertaken by NPL for procurement of coal from alternative sources to operate the power plant as per terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of Unit-1of the Project on coal subject to the following terms & conditions and modalities for passing through cost of this coal:

(i) NPL shall requisition the coal regularly from SECL as per clause 4.5 ‘Scheduled Quantity’ of the FSA.

(ii) NPL will give preference to the coal supplied by SECL over coal to be directly arranged by it from alternative sources and will not put any restrictions on supply of coal from SECL and accept the entire quantity of coal offered for supply from SECL.

(iii) NPL will not use the coal supply from the alternative sources unless warranted by the exigencies of short supply of coal by SECL in terms of the FSA, that too on ‘Minimal Usage’ basis.

(iv) NPL will daily upload on its website, the inventory of coal received from SECL as well as alternative sources. The same shall, source-wise, include quantity requisitioned, quantity received, quantity used, balance quantity and quantity of coal from alternative sources used as a percentage of coal from SECL, on daily basis.

- (v) The coal consumption/stock position will be monitored fortnightly by Chief Engineer/Fuel, PSPCL Patiala from the information available on NPL website for review by PSPCL management. For the purpose, the officer so appointed may also visit the power plant, at least once a month and NPL shall provide access to the coal stockyard and relevant record to him.
- (vi) Joint sampling and testing of coal 'as received' and 'as fired' shall be conducted and certified by NPL and PSPCL. For this purpose, a PSPCL team shall be permanently posted at NPL premises.
- (vii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of NPL's obligations to suppliers under the contracts entered into by it for procurement of coal from alternative sources will be passed on to PSPCL.
- (viii) Coal from alternative sources/imported coal shall be procured by NPL at lowest prices arrived at through its tender overseen and signed by PSPCL on 27.09.2013 & 08.10.2013 for imported coal and 18.12.2013 & 26.12.2013 for domestic coal. Taxes and duties shall be payable/pass through as applicable.
- (ix) As decided by Hon'ble APTEL in Para 12(B) of its Order dated 21.08.2013 this procurement of coal from alternative sources, as an advance action, will not give any right to NPL to raise any charges over and above those admissible to it as per the terms and conditions of the PPA. The Commission has held in its Order dated 31.12.2012 in Petition No.56 of 2012 that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. Now FSA has followed the LoA and both FSA as well as LoA provide a window for supply of imported coal.

Thus the cost of imported coal/coal procured from alternative sources would be a pass through in terms of LoA/PPA.

- (x) As a measure for smooth operation of the plant and to avoid unnecessary litigation, the Commission appoints a Committee comprising of Secretary, Power/Govt. of Punjab, CMD/PSPCL and Chief Executive/NPL as 'Standing Committee on NPL Project' to resolve day to day issues. The said Standing Committee shall also be the final authority to determine the additional cost of coal from alternative sources / imported coal procured by NPL to meet the shortages in coal supplied by CIL or its subsidiaries.

The petition is disposed of as above.”

- 5) The learned counsel for the contesting parties have agreed to the situation that the Interim Order dated 21.08.2013, passed by this Appellate Tribunal in the instant appeal be hereby made absolute and be given effect to finally along with the relevant part quoted above of the order dated 19.02.2014 of the State Commission in Petition No.57 of 2013.
- 6) Hence, with the consent and agreement of learned counsel for the parties, we hereby dispose of this appeal with the aforesaid directions given in our Interim Order dated 21.08.2013 and State Commission's order dated 19.02.2014 with one clarification, though, the State Commission is of the view that there is no shortage of coal at present, if there is any shortage of coal in future, at any point of time, for the reasons like shortage of any kind of coal namely, domestic coal or shortage of railway rakes or shortage of any other kind of transport not attributable to the appellant(s) then the State Commission is directed to consider the reasons and pass appropriate order at appropriate stage without any procrastination or undue delay. With these terms, ***the instant appeal is hereby disposed of.***
- 7) No order as to costs.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

sh/kt