IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

APPEAL NO 283 OF 2015

Dated: 17th May, 2018

Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF:

Nabha Power Limited
SCO-32, Sector -26D, Madhya Marg
Chandigarh – 160019 … **Appellant**

VERSUS

(1) Punjab State Power Corporation Ltd.
(A successor entity of Punjab State Electricity Board)
Through its Engineer-in- Chief, Thermal Designs
PSPCL, Shed No. T -2, Thermal Design Complex
Patiala – 147001

(2) Punjab State Electricity Regulatory Commission
Through the Secretary
SCO No. 220-221, Sector 34-A
Chandigarh … **Respondents**

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Sanjay Sen, Sr. Adv.
Mr. Aniket Prasoon
Mr. Abhishek Kumar
Ms. Himangini Mehta

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg
Ms. Rhea Luthra
Ms. Parichita Chowdhury for R-1

Mr. Sakesh Kumar
Ms. Charu Singhal for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by Nabha Power Limited (**"NPL")** under Section 111 of the Electricity Act, 2003 against the Impugned Order passed by the Punjab State Electricity Regulatory Commission ("**Respondent No. 2/State Commission**") dated 07.10.2015 whereby the Respondent No. 2, Commission has disposed off Petition No. 27 of 2015. The Appellant has filed the aforesaid Petition in relation to dispute arising in context of the Power Purchase Agreement dated 18.01.2010 (**PPA**) between Nabha Power Limited (**Appellant/NPL**) and Punjab State Power Corporation Limited (**Respondent No. 1/PSPCL**).

2. The dispute has primarily arisen on account of failure of providing adequate demand of power from the 2 x 700 MW Rajpura Thermal Power Project (**Project/Plant**) which is necessary to ensure operation of the Project in a manner that meets the stipulations made at the stage of bidding under Bidding Documents, the PPA and the also, the submissions made by PSPCL before the Respondent No. 2 State Commission while seeking approval for procurement of power from the Project in terms of the mandatory requirement specified in the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005 issued by the Ministry of Power, Government of India (**Competitive Bidding Guidelines**) under section 63 of the Electricity Act, 2003.

   Aggrieved by the Order dated 07.10.2015, the Appellant has filed the present appeal before this Appellate Tribunal.

3. FACTS OF THE CASE

3.1 The Appellant, Nabha Power Ltd. (**NPL**), is a company incorporated under the Companies Act, 1956 having its registered office at PO Box no. 28, Near Village Nalash, Rajpura – 140401, Punjab. NPL is a special purpose vehicle that had been set up by the Punjab State Electricity Board (**PSEB**), the predecessor of Respondent No.1 herein, for developing the 2x700 MW Rajpura Thermal Power Project (**Project/Plant**). The entire shareholding of NPL was subsequently transferred to M/s L&T Power Development Limited, after it was selected as the successful bidder under the tariff-based competitive bidding process held by PSEB in accordance with the Case 2 model of the "*Guidelines for the Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005*" issued by the Ministry of Power, Government of India on 19.01.2005.

3.2 L&T Power Development Ltd. (**L&TPDL**), a company incorporated under the Companies Act, 1956 having its registered office at L&T House, N. M. Marg, Ballard Estate, Mumbai – 400001, participated in the competitive bidding under Case 2 conducted by the PSEB for development of the said Project. Pursuant to being selected as the successful bidder, L&TPDL acquired the SPV (i.e., NPL) in order to execute the Project. Prior to its acquisition by the L&TPDL, NPL was primarily involved in carrying out pre-bid obligations on behalf of PSEB (now Respondent No. 1).

3.3 The Respondent No. 1 i.e., Punjab State Power Corporation Ltd. (**PSPCL**), is the successor entity of erstwhile PSEB. Upon the unbundling of PSEB vide Notification No. 1/9/08-EB (PR) 196 dated 16.04.2010, and in accordance with the Punjab Power Sector Reforms Transfer Scheme, 2010 framed there under, the

Respondent No. 1/PSPCL has been constituted as a separate corporate entity succeeding to the generation and distribution businesses of the erstwhile PSEB. Any reference to the Respondent No. 1 in the present appeal includes reference to PSEB, the predecessor of the Respondent No. 1 and vice versa.

3.4 The Respondent No. 2 i.e., Punjab State Electricity Regulatory Commission was constituted by the Government of Punjab under Section 17 of the Electricity Regulatory Commissions Act, 1998 vide its notification dated 31.03.1999 and continues to exercise jurisdiction as the State Commission under Section 82 of the Electricity Act, 2003.

3.5 The present case pertains to development of a generation project which was conceived by the Respondent No. 1 to be developed under the Scenario 4 of Case 2 model (i.e., where coal linkage is provided by the procurer for the purpose of fuel supply to the power project) in terms of the Competitive Bidding Guidelines. Under this route, the Respondent No. 1 on the basis of power demand requirement sought the approval of the Respondent No. 2 Commission to conceive this Project and consequently issued the Request for Qualification (**RFQ**) and the Request for Proposal (**RFP**) for the Project on 10.06.2009. L&TPDL, the parent company of the Appellant participated in the bidding process based on the representations and stipulations of the Respondent No. 1 made before the Respondent No. 2 Commission while seeking its approval for the Project and the stipulations held out by it at the stage of bidding to the bidders in the RFQ, RFP and the draft PPA (i.e., Bid Documents) which were issued to the bidders. The bidders were required to quote the Net Quoted Heat Rate (**NQHR**)/ Net Station Heat Rate (**NSHR**) and the capacity charges as the

bidding Parameters. It is significant to note that cost of fuel (i.e., energy charges) in the context of the present Project is a complete pass through under the PPA and was therefore, not specified as the bidding Parameter.

3.6 Pursuant to the above described competitive bidding process, the L&TPDL was declared as the successful bidder and accordingly on 19.11.2009, the Respondent No. 1 issued a Letter of Intent in favour of L&TPDL calling it upon to acquire 100% shareholding of NPL. Subsequently, a Share Purchase Agreement to the same effect was executed on 18.01.2010 between the Appellant, L&TPDL and Respondent No. 1 (then PSEB). Thereafter, the PPA setting out the terms and conditions for the construction, operation and maintenance of the Project, sale of contracted capacity and supply of electricity by the NPL/Seller to the PSEB/Procurer was signed between the Appellant and the Respondent No. 1 on 18.01.2010.

3.7 As per the Competitive Bidding Guidelines, approval of the appropriate commission is required prior to initiating the bidding process specifically with respect to the quantum of energy to be procured by a distribution company like the Respondent No. 1 in the instant case. Further, it is also significant to note that under Case 2 route, a power project can be set up to meet power requirements of different distribution companies in different states or to meet exclusively the power demand of a distribution company in a particular state. In this case, the present Project was conceived by the Respondent No. 1 and was accordingly approved by the Respondent No. 2 Commission in terms of the Competitive Bidding Guidelines to be set up in the State of Punjab to exclusively meet the power requirement of the Respondent No.1.

3.8 The instant Project was conceived by the Respondent No. 1 during the period 2006– 2007 to meet the power requirement of the State of Punjab which was facing acute shortage of power at that stage and was projected to face such shortage in the forthcoming years (i.e. till 2016 -17 - end of 12th five year plan) considering the steep increase in demand of power in Punjab. This becomes clear from the Orders dated 11.06.2007 passed by the Respondent No. 2 Commission allowing the Respondent No. 1 to conceive *inter alia* the instant Project.

3.9 After getting the approval from the Respondent No. 2 Commission, the Respondent as part of the RFQ dated 10.06.2009 issued to the bidders provided the 'Business Forecast' in relation to its power requirement. The said 'Business Forecast' clearly established that despite procurement of the entire power from this Project, the Respondent No. 1 will continue to face a very significant deficit as the required quantum of power by the Respondent No. 1 will be significantly higher than the available quantum of power.

3.10 In view of the stipulations in the RFQ, the bidders were informed by the Respondent No. 1 that considering the power deficit scenario that the Respondent No. 1 is facing and is going to face in the coming years, the entire capacity of the Project will be procured to bridge the power deficit scenario to the maximum extent. Further, despite procurement of the entire power from the Project, as per the 'Business Forecast' provided by the Respondent No. 1, its power deficit could not be met in any case.

3.11 L&TPDL as a bidder, while participating in the bid, was given to assume that the plant will operate on full load at Normative Availability level of 85% (i.e., 85% of time when plant is available, it will operate at full load) and it structured its bid accordingly.

Considering that the Normative Availability as per the PPA is 85%, L&TPDL considered that for 15% of the time, the Project may not be available/ready for generation on account of outages, shutdown etc. Therefore, in view of all the above stated factors including Respondent No. 1's specific representations, it was considered that the Plant will be operating at full load for 85% of the time to meet the acute power shortfall being suffered by Respondent No. 1.

3.12 As per the requirement of the Respondent No. 1 specified in the RFP and the PPA for the Project, the present Project was envisaged to be developed on the 'Supercritical Technology'.

3.13 In view of the above background with clear specifications and representations, the Respondent No. 1 invited the bidders to quote the capacity charges (escalable and non-escalable) (i.e., fixed cost component of the plant) and the **NQHR**/Net Station Heat Rate (**NSHR/SHR**) (i.e., efficiency of the Project) as part of competitive bidding mechanism.

3.14 L&TPDL while quoting the NQHR/NSHR for the Project acted on the basis of Respondent No. 1's aforesaid representations which essentially meant that the Project will be allowed to operate at optimum/maximum level and in any case not below the normative level of 85% with full load so as to ensure that the Project operates as a base load plant within Supercritical Technology Parameters.

3.15 However, pursuant to the commercial operation of Unit 1 and Unit 2 of the Project on 01.02.2014 and 10.07.2014, the Project has been scheduled by the Respondent No. 1 to be operated at low loads during most of the time in the last year and that too with frequent load variations. Only for few months on account of paddy season, the Respondent No. 1 scheduled operation of the Plant at

PLF higher than 85%. Due to low load operation and variation in the daily dispatch instructions by the Respondent No. 1, Appellant has been suffering on account of efficiency loss due to adverse implications on the NQHR/SHR. Since the month of April 2014, on an average, the Project has been scheduled to operate at a PLF of around 50% - 60% with minimum PLF as low as 43.41%.The SHR of the Project increases to more than 2500Kcal/Kwh when the Project operates at a PLF of around 50%. This makes it apparent that the SHR of the Project significantly increases if it is made to operate at lower PLF with frequent load variations. As the Appellant's claim is based on the adverse implication on SHR due to operation of the Plant at part load with frequent load variations, the Appellant has set out above the relevant details on the basis of the operation in the months when the Project was made to operate on part load with frequent load variations.

3.16 As the Appellant continued to suffer losses on account of operation of the Plant consistently at lower PLF with frequent load variations due to lower dispatch of power from the Respondent No. 1, it raised the issue of adverse impact on heat rate due to such operation of the Project at low loads to the Respondent No. 1 vide its letter dated 23.01.2015. Since, the cost of the additional coal required to generate same quantum of power due to increase in SHR was not being reimbursed under the energy charges formula as per the PPA, the Appellant mentioned that due to adverse impact on heat rate, it is suffering on account of energy loss which is currently non-recoverable. In view of the above, the Appellant requested the Respondent No. 1 to intervene either to avoid low load operation and variation in dispatch schedule in order to effectuate economical and efficient operation of the Plant or

consider different heat rates at part load/low load dispatch. However, the Appellant did not receive any reply from the Respondent No. 1 on this issue.

3.17 Pursuant to this, the Appellant vide its letter dated 09.04.2015 again raised this issue and stated in its letter that in absence of Respondent No. 1's response to its aforesaid letter dated 23.01.2015 and continued operation of the Project at low loads due to lower dispatch schedule provided by the Respondent No. 1, it is constrained to approach the Respondent No. 2 Commission for resolution of dispute and for remedial action.

3.18 Since the Respondent No. 1 continued to schedule and dispatch power from the Project at lower load/PLF leading to recurring financial losses to the Project due to adverse implications on the SHR, the Appellant was constrained to approach the Respondent No. 2 Commission for resolution of dispute by way of filing a petition. Accordingly, the Appellant filed a petition No. 27 of 2015 on 17.04.2015 before the Respondent No. 2 Commission. The Appellant in the said petition emphasized that it cannot be made to bear the adverse financial consequences associated with operation of plant at higher SHR due to Respondent No. 1 allowing operation of the plant at part load with varying load factor despite making specific representations at the time of bidding by stipulating base load power requirement and supercritical Parameters.

3.19 The Appellant accordingly, prayed before the State Commission that the Respondent No. 1 should be directed to make good the losses already suffered by the Appellant due to adverse impact on the SHR of the Plant; and in future either continue to schedule and dispatch power at such level which can ensure operation of the

Plant as a base load plant within supercritical Parameters; or in alternative, be directed to compensate the Appellant for further losses due to operation of plant on part load with frequent load variations on the basis of principle to restitution.

3.20 The Respondent No. 2 Commission vide the Impugned Order dated 07.10.2015 rejected the Appellant's petition and the prayers made therein.

4. **Questions of Law**

The present appeal raises the following questions of law for adjudication by this Hon'ble Tribunal:

(i) Whether it is the obligation of the procurer/Respondent No. 1 under the DPR, RFQ, RFP, PPA and the Competitive Bidding Guidelines read together to ensure that the off-take of power from the Plant is carried out in the manner such that the Plant can operate as a base load Plant within the Parameters associated with the Supercritical Technology?

(ii) Keeping in view the representations and stipulations made by the Respondent in the DPR, RFQ, RFP, PPA of the Project read with its submissions before the Respondent No.2 Commission in petitions seeking approval to conceive this Project, whether the Respondent is liable to provide adequate demand ensuring operation of the Plant at PLF equivalent to or higher than normative level of 85% or in alternative, to compensate the Appellant for further losses due to operation at low PLF?

(iii) Whether the Appellant is entitled to be compensated for the losses suffered by it on account of operation of the Plant at low PLF of around 50 to 60%?

(iv) Whether in terms of the objectives of the Electricity Act, 2003, National Electricity Policy and the Tariff Policy, a regulatory commission is barred from exercising its regulatory power in case of generation project which has been awarded through competitive bidding?

(v) Whether existence of a particular provision in the PPA pertaining to revision of SHR is precursor to the exercise of regulatory power?

(vi) Whether payment of capacity charges by the Respondent No. 1 for the power not scheduled and dispatched by it can be treated as compensation for non-recovery of actual energy charges incurred by the Appellant on account of increased SHR due to operation of the Plant at low PLF/load of around 50 to 60%?

(vii) Whether the Appellant's right to sell a part of available capacity which has not been dispatched by the Respondent No. 1 to a third party under the PPA can be construed as a long term solution to off-set the adverse implication on SHR due to lower off-take of power by the Respondent No. 1?

(viii) Considering the present Project has been set up under Case2 Scenario 4 of the Competitive Bidding Guidelines wherein the cost of coal is a complete pass through, whether the Respondent No. 1 is justified in refusing to reimburse the cost on account of higher utilization of coal due to increased SHR because of lower off take of power by the Respondent No.1?

5. **Relief Sought**

In view of the facts and circumstances mentioned above, the Appellant has prayed that this Hon'ble Tribunal may be pleased to:

(a) Set aside the Impugned Order passed by the Respondent No. 2 Commission dated 07.10.2015;

(b) Direct Respondent No. 1 to make good the monetary losses already suffered by the Appellant on account of the adverse implications on SHR due to operation of the Project at lower PLF of around 50% to 60% since commercial operation of Unit 1 of the Project on 01.02.2014;

(c) Direct Respondent No. 1 to prospectively continue to schedule and dispatch power from the Project at PLF equivalent to or higher than normative level of 85% in order to ensure operation of Project within supercritical Parameters as specified in the RFP and the PPA;

(d) In alternative to prayer (c), direct Respondent No. 1 to compensate the Appellant for further losses due to operation of plant on part load with frequent load variations on the basis of principle to restitution; and

(e) award cost in favour of the Appellant; and

(f) grant such order, further relief/s in the facts and circumstances of the case as this Hon'ble Tribunal may deem just and equitable in favour of the Appellant.

6. **The learned senior counsel, Mr. Sanjay Sen submitted the following written submissions:**

6.1 The present case has been filed to seek recourse against the significant monetary losses being faced by the Appellant on account of the Net Quoted Heat Rate (**NQHR**)/ Station Heat Rate (**SHR**) for the 2 x 700 MW Rajpura Thermal Power Project (**Project/Plant**) being adversely affected due to the consistent part load off take by PSPCL (i.e., operation of the Plant at a lower and varying load factor).

6.2 SHR is the measure of the efficiency of a power project and it denotes the amount of heat (Kcal) required by a power project to produce 1 unit/Kwh of electricity. The lesser heat required to generate 1 unit of electricity, the more efficient a power project is. Effectively, an efficient power project with a lesser SHR will require less amount of coal for generation of 1 unit of electricity.

6.3 The SHR of a power plant is inversely proportional to the load at which such a plant is made to operate. This means that if a plant is made to operate at a lower load and/or at varying load, the SHR will be adversely impacted i.e., the SHR will increase meaning thereby, the Project will require more heat and thus, consume more coal to generate same amount of power. In other words, the Project uses higher quantum of coal to generate the same amount

of energy which it could have generated with the lesser quantum of coal with lower SHR.

6.4 The grievance emanates from the fact that the Appellant is paid the energy charges under the PPA in terms of Article 1.2.3 of the Schedule 7, based on the fixed SHR i.e. 2268 Kcal/Kwh, however, in reality, the SHR increases due to operation of the Project at a lower load/Plant Load Factor (**PLF**) and/or varying load. As a result, additional coal is consumed to operate the Project, in order to generate the same amount of energy. However, the Appellant is not getting paid for such additional quantum of coal. Thus, there is an under recovery of the fuel/coal costs on account of the lower load/PLF. ***The adverse impact on the SHR on account of operation of the Project at a lower PLF/load due to part off-take of power by Respondent No. 1 entails adverse implications on the energy charges component of the Tariff.*** Therefore, the Appellant is seeking requisite compensation for the losses suffered by it.

6.5 The fact that the SHR increases when a plant is made to operate at a lower load becomes clear from the review of the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2010 dated 29.04.2016 (**4th GridAmendment Regulations**) wherein CERC has, by way of the said regulations (**which are applicable to competitively bid projects as well**) provided the extent of the increase in the SHR in terms of the percentage at different levels of low loads.

6.6 The entire philosophy of a project like the instant Project which is developed under Scenario 4 of the Case 2 Model (where a linkage is provided by the procurer for the purpose of fuel supply to the power project) is that the bidder/developer is not responsible vis-à-

vis the price of fuel/coal as it is a complete pass through. However, in the present case, the Appellant is not getting paid the actual cost of the coal that it incurs to generate power on account of the increase in SHR due to the operation of the Project at a lower load/PLF.

6.7 The dispute has primarily arisen on account of the failure and/or refusal of the Respondent No. 1 to fulfil its obligation of providing necessary operational conditions to the Project which are required to ensure operation of the Project in a manner that meets the representations and stipulations made by the Respondent No. 1 in the following documents and/or instances:

(i) at the stage of bidding under the Bidding Documents i.e., Request for Qualification dated 10.06.2009 (**RFQ**) and Request for Proposal dated 10.06.2009(**RFP**);

(ii) the PPA dated 18.01.2010; and

(iii) also the submissions made by it before the Commission while seeking approval for procurement of power from the Project in terms of the mandatory requirement specified in the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005 issued by the Ministry of Power, Government of India (**Competitive Bidding Guidelines**) under section 63 of the Electricity Act, 2003 (**Act**).

6.8 The Respondent made very clear stipulations in its 'Business Forecast' as a part of the RFQ to the bidders that it would continue to face a very significant deficit of power as the required quantum of power will be significantly higher than the available quantum of power (i.e., generation capacity needed is 14000 MW and the additional capacity required is 8000 MW).

6.9 The Respondent in its RFQ and RFP had clearly stated that the objective of the bid was to procure a minimum contracted capacity of 1080 MW and a maximum of 1320 MW of power.

6.10 The Respondent clearly specified in the RFP and PPA that the present Project is to be developed on the 'Supercritical Technology' Parameters. The specifications in form of the required temperature and pressure for setting up the 'Supercritical Technology' based plant, were clearly specified by the Respondent No. 1 in the RFP and PPA. Moreover, the PPA required the developer/Appellant to demonstrate 'Supercritical Technology' attributes during the performance test of the Project.

6.11 The developer of the Project has a right under the PPA to recover the complete capital cost if its plant is in a state of readiness to operate at Normative Availability of 85% as specified in the PPA.

6.12 On the basis of the abovementioned specific and unambiguous representations, it was not only logical but also completely legal for the Appellant's parent company i.e., L&T Power Development Limited (**L&TPDL**), to have assumed that the Project will operate as a base load plant to meet the unvarying load or fixed load to be provided by the Respondent which would occur throughout the day (i.e., consistent demand) and that the quantum of fixed load will be such that the Appellant's Plant/Project will operate at maximum continuous rating to generate maximum continuous output at its terminals in order to provide steady flow of power to meet Respondent No. 1's consistent demand.

6.13 The Appellant proceeded to participate in the bidding process being mindful of certain assumptions which were made solely on the basis of the representations given by the Respondent No.1. The conduct of the Appellant was based on these

representations/promises made by the Respondent No.1, and these promises/representations are thus enforceable in light of the legal principle of 'promissory estoppel'.

6.14 The basic underlying principle of the PPA read with the DPR, RFQ and RFP is that PSPCL must ensure that such operating conditions are made available to the Appellant which can ensure operation of the Project as a 'Base Load Plant' within the Supercritical Parameters. In this regard, it is relevant to set out the meaning of a Base Load Plant.

6.15 A base load is construed as the unvarying load or fixed load which occurs throughout the day (i.e., consistent demand). In contrast peak load is the load/demand which occurs during certain time frames in a day and is over and above the base load. Accordingly, two types of plants are classified on the basis of load/demand i.e., (i) base load power plant; and (ii) peak load power plant. In addition, procurement of power is made for seasonal power requirement. Thus, ***the Competitive Bidding Guidelines in Para 2.2*** provided an option to the Respondent No.1 being the procurer to select the kind of power plant based on its procurement requirement i.e*.,* ***base-load, peak-load and seasonal power requirements***. The Respondent No. 1 selected "base load plant" considering the acute shortage of power forecasted in Punjab and the long-term power requirement.

6.16 The Central Electricity Authority (**CEA**) in the Executive Summary of the '*Report of the Expert Committee on Fuels for Power Generation*' dated February 2004 (**CEA Report**) in Para 7 clearly provided as follows:

> *"**Cost of Generation by Various Fuels at 30 % PLF***
> ***7.0** Comparison of cost of generation of peaking plants (30%PLF) by types of fuels is given below. **As coal and***

lignite based plants are base load stations and cannot operate at low PLF as peaking plants, cost of generation of these types of plants is not considered in the analysis.…"

The abovementioned CEA Report of 2004 (much before the bidding of the present Project) clearly set out the distinction between the peak load plants and base load plants and specifically provided that coal and lignite based plants, being base load plants, cannot operate at a low PLF.

6.17 It is further significant to highlight that in terms of the CEA (Technical Standards for Construction of Electrical plants and Electrical lines) Regulations, 2010 (CEA Regulations), '*Base* Load Operation' means operation at maximum continuous rating (MCR) or its high fraction; and the MCR in relation to the coal or lignite based thermal generating units, means maximum continuous output at the generator terminals (net of any external excitation power) as guaranteed by the manufacturer at the rated Parameters. The aforesaid definitions read together clearly establish that a plant meant for 'base load operation' is required to operate continuously at the maximum continuous output. In view of the above, it is also clear that the quantum of fixed load or unvarying load to be provided by the Respondent No.1 should be such that the Appellant's Plant/Project could operate at maximum continuous rating to generate maximum continuous output at its terminals in order to provide steady flow of power to meet Respondent No. 1's consistent demand.

6.18 The aforesaid CEA Regulations were issued on 10.08.2010 much prior to the commissioning of the present Project, Unit 1 of which achieved commercial operation on 10.02.2014.These regulations are binding on all thermal power projects being set up in the

country and therefore, have been relied upon by the Appellant. The fact that these regulations were issued after the date of bidding of the Project does not change in any manner the definition and the concept of a 'base load plant' which as mentioned above has been understood by the CEA as being different from a peak load plant. In any event, it is to be noted that the concept of a base load plant has been widely understood in the power sector industry since various decades.

6.19 In addition to specifying the operation philosophy of the Plant as 'a base load plant', the Respondent No. 1 also clearly specified in the RFP and the PPA that the present Project is to be developed on the 'Supercritical Technology'. The specifications in form of the required temperature and pressure for setting up 'Supercritical Technology' based plant, were clearly specified by the Respondent No. 1 in the RFP and PPA. Further, the PPA required the developer/Appellant to demonstrate the 'Supercritical Technology' attributes during the performance test of the Project.

6.20 Primarily, a Supercritical plant is able to generate very high pressure and temperature which results into higher efficiency of such plants. As mentioned in the RFP and PPA, specific pressure and temperatures were specified which are the main attributes of a Supercritical plant. The plants which operate below Supercritical Parameters function as Sub-critical plants which are known to be lesser efficient in comparison to Supercritical plants. It is submitted that Supercritical Parameters in terms of temperature and pressure as specified in the RFP and PPA can only be achieved when a plant is operated continuously at higher PLF. Thus, continuous operation at higher PLF is must for ensuring operation of a Supercritical plant within Supercritical Parameters. In case a plant

is operated at a lower PLF with a varying load factor, the high pressure and temperature required for Supercritical technology based performance cannot be maintained and plant operates at sub-critical Parameters.

6.21 Since the Appellant acted upon the representations made by the Respondent No.1 qua the plant having to be developed as a 'Base Load Plant' which would be operated on 'Supercritical Parameters', the obligation to provide operating conditions to ensure operation of the Project as a supercritical plant is an implied term of the PPA and is in effect the obligation of the Respondent No. 1. Therefore, in case of breach of such obligation by the Respondent No. 1, it is responsible to make good the losses suffered by the Appellant.

6.22 Once it is clear that the Appellant is suffering losses on account of reasons which are not attributable to it but are solely on account of the Respondent No. 1 failing to meet its unequivocal representations made at the stage of bidding, a remedy can be fashioned by a sector regulator like Respondent No. 2. However, in the event of failure of the Respondent No. 2 to fashion such remedy to take care of the losses of the Appellant (as has been done in the present case), this Hon'ble Tribunal can direct the same to be done.

6.23 The Appellant, at the outset during the course of hearing, clarified that admittedly, there is no specific provision in the PPA which stipulates that non-provision of the appropriate operating conditions by the Respondent No. 1 to the Appellant to ensure the operation of the Plant as a base load plant within supercritical Parameters, is Respondent No. 1's default and that it would be liable to pay compensation for losses caused to the Appellant.

6.24 It has been held by the Courts in various judicial precedents that a term can be implied if it is necessary in the business sense to give efficacy to the term of the contract, however, a term can be implied in a contract when it is clear beyond doubt that both parties intended a given term to operate, although they did not include it in so many words. In this regard, reliance is placed on the judgment of the **Hon'ble Supreme Court in the matter of Khardah Company Ltd. Vs. Raymon & Co. (India) Private Ltd. AIR 1962 SC 1810,** wherein it was *inter alia* held as under:-

> *"But it is argued for the Respondents that unless there is in the contract itself a specific clause prohibiting transfer, the plea that it is not transferable is not open to the Appellants and that evidence aliunde is not admissible to establish it and the decision in Seetharamaswami v. Bhagwathi Oil Company; Hanumanthiah vs. Thimanthiah and Hussain Kasam Dada vs. Vijayanagaram Comm. Asson. are relied on in support of this position.* ***We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances****.…."*
>
> The aforementioned judgment thus makes it abundantly clear that reading of a contract cannot only be limited to the terms expressly mentioned therein, and that the

circumstances surrounding/on the basis of which a contract has been signed can be taken into account while construing a contract, on the basis of which an implied term may be read into such contract. In the context of the present case, based on the review of the specific unequivocal representations and assurances made by the Respondent No. 1 during the pre-bid stage as well as in the PPA, it is clear beyond any doubt that the parties intended that the Respondent No. 1 must ensure such operating conditions to the Project which can ensure its operation as a base load plant within supercritical Parameters and thus, the said obligation is an implied term of the contract.

(Reliance on the judgment of **Messrs Deviprasad Khandelwal vs. Union of India- 1967 SCC On Line Bom 94** and also the judgment of **Koduri Krishnarao vs. State of Andhra- 1961 SCC On Line AP 6)**.

6.25 It is also relevant for the Appellant to submit that the relevant penta test as set out in Para 49 of the Judgment dated 05.10.2017 pronounced by the Hon'ble Supreme Court in the case of **Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr.** (C.A. No. 179 of 2017) are satisfied in the present case. The relevant excerpt of the Judgment is set out below:

> " 49. …*requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying, i.e., The Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract.*"

The provision that, the Respondent No. 1 must provide such operating conditions to the Project which can ensure its operation as a base load plant within supercritical Parameters, can be read as an 'implied term' in the PPA as the said term:

a) is reasonable and equitable term keeping in view the representations made by the Respondent No.1 at the stage of bidding and the approval sought by it from the Respondent No. 2 to get the Project set up to meet acute power shortage of Punjab over a long-term period;

b) meets the test of business efficacy and the test of 'it goes without saying' (i.e., as in both the parties intended to have this term)as discussed;

c) is capable of clear expression; and

d) does not contradict any express term of the PPA as the Appellant is seeking compensation for the losses on the principles of restitution and the concept of adverse impact on SHR due to low load operation, envisaged under the CERC's 4th Grid Amendment Regulations. This in no way, contradicts the explicit term of the PPA as no party (i.e., the Respondent No. 1) cannot be allowed to take benefit of its own wrong.

6.26 The doctrine of promissory estoppel essentially provides that if a party changes its position substantially, either by acting or forbearing from acting in a certain way, after relying upon a promise made by another party, then the first party can enforce the said promise, even in the absence of a formal contract to that effect. Over a period of time, the law with respect to 'promissory estoppel' has developed in a way where the requirement of changing the position based on a representation to one's detriment is also not necessary and the mere action on the basis of a representation/promise is sufficient to plead the doctrine of 'promissory estoppel' against such person who made the representation/promise.

6.27 These principles are very well settled and have been expounded upon by various Courts/judicial forums in a catena of judgments from time to time. In this regard, it is relevant to set out the views of the Hon'ble Supreme Court in its judgment dated 12.12.1978 in

the matter of **Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Ors.**, (1979) 2 SCC 409.

6.28 Further, the views of the Hon'ble Supreme Court with regard to the doctrine of promissory estoppel in the judgment dated 05.08.2004 in the matter of **State of Punjab Vs. Nestle India Ltd. And Anr.**, *(2004) 6 SCC 465*, are set out below:-

> *"29. As for its strengths it was said:* ***that the doctrine was not limited only to cases where there was some contractual relationship*** *or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affect a legal relationship which would arise in future.* ***The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made, contractual, administrative or statutory****.*

The aforesaid views were laid down by the Hon'ble Supreme Court in the Nestle case while explaining the views as observed in the case of Motilal Padampat.

[Also reliance on the judgment of **Manuelsons Hotels Private Limited v. State of Kerala &Ors. – (2016) 6SCC 766** and also the judgment of **Union of India v. Godfrey Philips India Ltd.- (1985) 4 SCC 369.**

6.29 It is further relevant to highlight that the Respondent No.1 has relied upon the judgment of the Hon'ble Supreme Court in the matter of **Transmission Corporation of Andhra Pradesh Limited and Anr. Vs. Sai Renewable Power Private Limited and Ors.**, *(2011) 11 SCC 34,* in order to state that *contractual obligations cannot be frustrated by the aid of promissory estoppel.* PSPCL further argued that the principle of 'promissory estoppel' does not apply in case of contracts/contractual relationship and that it only applies in case of administrative sphere. The Hon'ble Supreme Court in Nestle's Case while explaining 'the contours of

the doctrine of promissory estoppel' as explained in Motilal Padampat case clearly states that "***The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made, contractual, administrative or statutory***" and rather clarified that this doctrine is not limited to cases involving contractual relationship. Thus, PSPCL's contention that the doctrine of promissory estoppel has limited operation only in area of administrative law is completely wrong and untenable.

6.30 It is evident from a bare perusal of the above excerpt from the judgment in the matter of **Transmission Corporation of Andhra Pradesh Limited and Anr. vs. Sai Renewable Power Private Limited and Ors.** that the authorities in the said case had not made any definite or clear promise, so as to enable the respondents/developers therein to invoke the doctrine of promissory estoppel. However, as has been articulated in Paras above, Respondent No.1, in the present case, had made clear and unambiguous promises to the Appellant, subsequent to which and contingent upon which the Appellant herein submitted its bid to develop the Project. In view thereof, PSPCL is bound to adhere to the promises/representations made by it, as a result of which the Appellant has materially altered its position and invested in the Project.

6.31 The PSPCL cannot be allowed to renege on its promises, as the same is causing severe monetary losses to the Appellant.That if it is assumed, only for the sake of arguments, that the provision to grant relief in the present case to NPL cannot be implied in the PPA and or/promissory estoppel cannot be invoked against PSPCL, even then, the Respondent No. 2 while exercising

regulatory jurisdiction has plenary powers to regulate the tariff of the Project, which fall under its jurisdiction and such powers extend beyond the adoption of tariff. Further, it is a trite law that the Respondent No. 2, while exercising its power to 'regulate' is required to take all appropriate steps to ensure that the various objectives as envisaged in the Act, Tariff Policy 2006 and the Competitive Bidding Guidelines are fulfilled.

6.32 Irrespective of whether the PPA envisages a provision dealing with revision of the SHR or not, the Respondent No. 2, in exercise of its regulatory power under the Act, can definitely provide a recourse to the Appellant as the SHR of the Project is getting adversely impacted on account of the Respondent No.1's failure to ensure that the Project operates as a Base Load Plant and within Supercritical technology Parameters.

6.33 In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in the matter of **Energy Watchdog Vs. Central Electricity Regulatory Commission and Ors. Etc.**(2017) 14 SCC 80 (**Energy Watchdog Matter**). The relevant excerpt from the aforesaid judgment is reproduced herein below for ease of reference:-

> *"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines.* ***For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory***

> ***provisions.*** ***The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized.*** *Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under* ***Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act,*** *(after laying down the terms and conditions for determination of tariff mentioned in Section 61)* ***or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding****.* ***In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power*** *to determine or* ***adopt tariff****. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff.* ***It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used****."*

6.34 The Competitive Bidding Guidelines do not envisage any provision which deals with situation involving adverse impact on SHR due to operation of plant at a lower load and/or varying load due to procurer not providing requisite operational conditions. Therefore, the aforesaid carve out as stipulated in the Energy Watchdog Judgment (i.e., where the Guidelines are silent) will be squarely

applicable and the Commission's general regulatory power under Section 86 of the Electricity Act (Section setting out SERC's power – corresponding to Section 79 with respect to CERC) read with relevant provisions of the Act, can be exercised to provide appropriate recourse in form compensation to the Appellant for losses suffered by it due to Respondent No. 1's default.

6.35 As a counter to NPL's submission, PSPCL has averred that Article 4.12 of the Competitive Bidding Guidelines expressly states that no adjustment shall be provided for the heat rate degradation of the generating stations, in light of which it cannot be said that the guidelines are silent on the aspect of adverse impact on SHR due to low PLF. According to PSPCL, as a result of the same, the Energy Watchdog Judgment would not be applicable to the present case. This contention of PSPCL is completely misconceived and needs to be rejected out rightly.

6.36 It is also relevant to mention that the CEA in the 'Recommendations on Operation Norms for Thermal Power Stations Tariff Period 2014 – 2019' dated January 2014 (**CEA Recommendations Report**) has clearly dealt with the provisions in Case – II Standard Bidding Documents (**SBD**) and separately dealt with 'Heat Rate Degradation' factor and 'Compensation for part loading/low dispatch'.

The aforesaid distinction clearly shows that the concept of degradation of SHR over the life time of a power project as set out in Para 4.12 of the Competitive Bidding Guidelines is completely different from the aspect of payment of Compensation for part/low dispatch. It is reiterated that the Appellant in the present case is seeking compensation for the adverse impact on the SHR due to

part loading/low dispatch and is not making any claim towards the degradation of the SHR.

6.37 The Ministry of Power have also in fact taken cognizance of the aforesaid premise (i.e., SHR of coal based plant increases due to its operation at lower PLF) which has been recognized and accepted by IEA. Pursuant to this, the Ministry of Power in the new Standard Bidding Documents (SBD) for case-2/UMPP projects has specified increase in SHR for dispatch below normative loading factor of 85%. The provisions dealing with Heat Rate due to operation on lower PLF (Net Heat Rate which takes into account the impact of PLF on Gross Heat Rate as well as on Auxiliary Power consumption) in the Standard Bidding Documents. The Appellant deems it necessary to clarify that the reference to the new SBD document issued by the Ministry of Power is only meant to support and establish the premise that at lower level of dispatch of power (i.e., lower PLF), the SHR of a plant increases.

6.38 It is further reiterated that the Appellant has borne the risks associated with SHR only to the extent that it cannot claim adverse implications on SHR on the basis of normal wear and tear of the plant and machinery during the term of the PPA. NPL is responsible to bear the risk associated with the efficiency of the boiler, turbine and generators so far as the Project is allowed to operate at optimum/maximum capacity as a base load plant so that it still performs within the Supercritical Parameters. However, in any event, the Appellant cannot be made to bear the risks associated with the adverse implications on SHR on account of the Respondent No. 1 constantly making the Project operate at part load with varying load factor i.e., sub-critical levels thereby

changing the basic nature of the Project which is based on the Supercritical technology.

6.39 Further, PSPCL has averred that a similar provision as set out in Para 4.12 of the Competitive Bidding Guidelines, is also set out in Clause 2.7.1.4(1) of the RFP which provides that 'No adjustment shall be provided for heat rate degradation'. It is significant to state herein that the heat rate degradation envisaged here is on account of causes such as wear and tear of equipment, performance efficiency of the equipment etc. The Appellant being a developer can only be held responsible for heat rate degradation on account of the equipment performance. In other words, the Appellant as the developer of the Project, is responsible to maintain the constant/quoted SHR with respect to quality of the Plant (i.e., boiler, turbine, generator) over the term of the Project and that no degradation of SHR on account of wear and tear owing to usage over the term of PPA could be allowed to the developer. However, the losses associated with the adverse implications on SHR on account of operation of the Plant on part load at varying loading conditions cannot be borne by the developer and the aforesaid provision is not meant to cover such situations.

6.40 PSPCL has also vaguely submitted that the regulatory powers of the Respondent No. 2 in terms of the Hon'ble Supreme Court's judgment in the Energy Watchdog Judgment is exercisable in case of a competitive bidding power project only up to the extent of competitive bidding and not beyond that. This submission of PSPCL is devoid of any merit. The review of Para 20 of the Energy Watchdog Judgment, clearly provides that Section 86(1)(b) of the Electricity Act (corresponding provision to Section 79(1)(b) in context of CERC) is the source of the power to regulate which

includes the power to adopt tariff under Section 63 of the Electricity Act. The Hon'ble Supreme Court has not laid down any limitation on the exercise of such regulatory powers and in no event, can it be contended that no regulatory powers can be exercised beyond the date when the competitive bidding process is concluded and the contract is awarded.

6.41 The claim of the Appellant is not with respect to the payment towards idle capacity but is on the issue of under recovery of fuel costs on account of lower load/PLF which is related to energy charges. That the Respondent No. 1 is making payment towards capacity charges based on the plant availability is anyway its obligation under the PPA, however, the same is neither intended nor can it cover the losses suffered by the Appellant on account of adverse impact on the SHR due to the operation at a lower load/PLF.

6.42 The sanctity of competitive bidding cannot be seen in isolation i.e., only to the extent of bid Parameters not being allowed to change. The SHR was quoted by NPL on the basis of specific representations made by PSPCL, therefore, the said rule of no change in terms of the bid after the bid has been submitted, equally applies to the representations made by PSPCL. The moment these representations are not fulfilled by PSPCL, NPL's claim to compensation arises due to increase of HR caused by PSPCL not scheduling the plant as per the design and bid Parameters laid down by PSPCL. The sanctity of competitive bidding applies to the representations made by the counter party also as bids are not submitted out of context and in isolation.

6.43 NPL is seeking compensation for the losses suffered by it on account of default of PSPCL in not providing the required

operational conditions for the Project. NPL is not at all asking for changing any bid Parameter i.e. the quoted SHR. The fact that the CERC has come up with the 4th Grid Amendment Regulations allowing compensation to even competitive bid out projects, on account of the adverse impact on the SHR due to the operation part load/low PLF, shows that such compensation can be paid without changing the quoted bid Parameter i.e., quoted SHR. The Appellant is seeking similar relief and is not in any manner trying to change the bid Parameters.

6.44 PSPCL has also averred that the CEA Regulations that have been relied upon by the Appellant, under Clause 7(2) state that while the unit shall be capable of base load operation, it shall also be capable of regular load cycling and two shift operations. Relying on the said clause, PSPCL has contended that the Plant was never meant to continuously operate as a Base Load Plant. In this regard, it is submitted that the said Parameters have been laid out in order to ensure that the Plant is equipped to deal with a situation wherein there is a sudden fluctuation in load demand. That said, this clause in no circumstances can be taken to mean that the Plant is meant to oscillate between being operated as a base load plant, and a peak load plant. It is thus respectfully stated that ***a condition of exigency cannot be the norm for operation of the Project, especially since the DPR clearly stipulates that the operation norm of the Project is that of a Base Load Plant.***

6.45 PSPCL has time and again contended that Article 18.4 of the PPA provides that the PPA is the final document and it supersedes all the previous documents & communications, and therefore, one cannot see the surrounding circumstances or previous documentations. Such an assertion is completely flawed and is to

be rejected out rightly. The Hon'ble Supreme Court in its judgment dated 05.10.2017 in the matter of *NPL v. PSPCL*, C.A. No. 179 of 2017, while adjudicating the disputes between NPL and PSPCL in relation to the same PPA which is being referred to in the present case, has clearly relied upon the pre-bid clarifications, provisions of the RFQ and RFP to interpret the terms of the PPA and therefore, NPL is completely right in relying upon the representations made in the DPR, RFQ, RFP and the PPA to make relevant claims. In no event, the aforesaid provision can be pressed to restrict NPL's claims as it is trite law that the bid clarifications and stipulations in the bidding documents are required to be analyzed tools to interpret the final concession agreement i.e., PPA in the instant case.

6.46 PSPCL has claimed on the basis of Article 18.17 of the PPA that its liability is limited to what has been explicitly provided in the PPA and that no claims based on non-explicit terms can be made by NPL. As mentioned above, it is reiterated that NPL's claim is not contrary to any explicit terms of the PPA and is rather based on the unequivocal and specific representations made by PSPCL in the said PPA read with the other key documents. Moreover, as far as the issue of 'implied term' is concerned, it is NPL's case it has fulfilled the penta test and thus, the obligation to compensate for NPL's losses can be implied in the PPA. In any event, there is no provision in the PPA which states that no implied terms can be read into it.

6.47 PSPCL during the course of hearing has mentioned different figures of peak demand in various years (i.e. FY 2014-15 - 11500 MW; FY 2015 -16 – 10852 MW and FY 2017-18 – 11705 MW) to state that its forecast as set out in the RFQ is correct. What

PSPCL has completely ignored is that the instant Project was and is meant to meet the base load requirement in context of which the forecast in the RFQ referred to a significant mismatch in the required power and capacity that would be available. The peak demand requirement could not be used to justify a base load plant. The conduct of PSPCL by way of relying on the peak power demand in Punjab to justify its forecast and requirement of a base load plant clearly demonstrates its lack of understanding of the concept and objectives of a base load plant. In any event, it is to be noted that the Respondent No. 2 in its order dated 02.01.2008 in Petition No. 58 of 2007 approved the procurement of power from the present Project keeping in view the power requirement of Punjab as 15385 MW in the year 2015-16 in contrast to the availability of 13847 MW in the said year.

6.48 The Respondent No. 2 has wrongly held that having been successful in competitive bidding, the Appellant could not claim compensation on account of the adverse impact on SHR specifically when there is no such provision in the PPA. The Respondent No. 2 Commission has completely failed to appreciate the fact that even in the case of competitively bid out projects, the basic principle of Electricity Act, 2003 read with the Tariff Policy and the National Electricity Policy etc. i.e., tariff should be reflective of the real cost generation has to be adhered to and cannot be done away with. Therefore, just because a project has been awarded through competitive bidding, it cannot be said that the power should be sold at the rate which is lower than the actual cost of generation specifically (i) when for no default of the Appellant and for reasons absolutely beyond its control; (ii)

primarily on account of default of PSPCL, the Plant is being continuously operated at low load/PLF.

7. **The learned counsel, Mr. Anand K. Ganesan, appearing for the Respondent No. 1, (Punjab State Power Corporation Ltd.) submitted following submissions:**

7.1 NPL has established the generating station and entered into the PPA pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003 as approved by the State Commission. The bidding process being under Case - 2 as per the Government of India Guidelines, the bidders had to quote the capacity charges and the Station Heat Rate.

7.2 L&T Power Development Limited had participated in the bidding process. The bidders were to quote the capacity charges and the Net Station Heat Rate. L&T Power Development Limited had quoted Net Station Heat Rate of 2268 Kcal/Kwh. The terms and conditions of the PPA were part of the bidding documents and made known to all the bidders.

7.3 It was for the bidders to quote the tariff after taking into account their commercial consideration. The tariff was not based on actual costs and expenses, but a quoted bid tariff. The quoted tariff which includes the quoted Heat Rate is sacrosanct and is not subject to adjustment based on actual. There is no avenue for any amendment in the tariff de-hors the provisions of the PPA. The participation of L&T in the bidding process was on this basis and after fully accepting the terms and conditions of the bidding documents including the PPA.

7.4 The quoted Station Heat Rate was one of the primary considerations for bid evaluation with the entity quoting the lowest Station Heat Rate, together with other criteria for bid evaluation

being considered for selection of the lowest bidder. The quoted Station Heat Rate is sacrosanct and it is not open to either NPL or the PSPCL to seek any variation in the quoted Heat Rate.

7.5 Upon the quoted tariff including the Quoted Heat Rate being the most competitive and being selected as the successful bidder, L&T Power Development Limited took over the ownership and control of NPL. The PPA was executed between NPL being wholly owned by L&T Power Development Limited and the PSPCL as the procuring entity.

7.6 The PPA was entered into between the parties which governs the rights and obligations of the parties. The PPA is on the same terms as was made available as a part of the bidding documents. Any claim made by NPL has to necessarily be in terms of the PPA and it is not open to NPL to make any general claim which is not provided for in the PPA.

7.7 From the above, the following are evident:

The Energy Charges in the tariff is to be arrived at based on the Quoted Heat Rate. There is no other consideration apart from the quoted heat rate, which was a bid Parameter. The terms of the PPA are the final and exclusive expression of the agreement between the parties and the rights and obligations of the parties are to be as expressly provided for in the PPA. No indirect or consequential losses or any claims not expressly provided for in the PPA can be allowed.

7.8 The PPA does not mandate that the PSPCL will necessarily have to off take the entire electricity made available by NPL. It is open to PSPCL to schedule and off take electricity to the extent of its requirement, the only consequence being that NPL is entitled to

the capacity charges for the electricity declared available in terms of the PPA. The PPA provides for the capacity charges to be paid by PSPCL provided the availability is declared by NPL up to 85% on an annual basis. For any availability declared above, NPL is entitled to an incentive. There is no dispute between the parties in the present case as to the applicability of the incentive or disincentive based on the availability declared by NPL or the payment of capacity charges.

7.9 Further, with regard to energy charges, the PPA specifically provides that the Quoted Net Station Heat Rate shall be used for computation. PSPCL has acted strictly in terms of the PPA without any deviation. All the bills raised by NPL were cleared by the PSPCL in terms of the PPA. However, NPL sought relaxation and increase in the quoted Heat Rate on the ground that the PSPCL was not scheduling electricity to the full extent and consequently the generating station was operating at a lower level than 85%.

7.10 The tariff payable to NPL is two part tariff, fixed charges payable based on the availability of the generating station irrespective of actual generation and the variable cost for fuel on actual generation of electricity. In terms of the PPA once the generating station is available, the PSPCL is liable to pay the full fixed charges to the extent of such availability irrespective of whether the PSPCL schedules the electricity for generation or not. In other words, even if no schedule is given by the PSPCL and no electricity is generated and supplied, the PSPCL is liable to pay the fixed charges based on the availability declared.

7.11 NPL claimed that since upon commissioning of the generating station and during the year 2014 – 15, the plant operated at a lower level than 85% on account of non-scheduling of electricity,

NPL was liable to be compensated by way of increase in Station Heat Rate and consequent increase in tariff. This was sought for over and above the fixed charges that were paid by the PSPCL to NPL for the availability declared but not scheduled.

7.12 The case being set up by NPL is wholly contrary to the terms of the PPA. In a two-part tariff, the only obligation on the procurer for not procuring electricity made available is to pay the fixed charges. The same has also been provided in the PPA entered into the parties which has been fully implemented. Over and above the payment of the fixed charges, NPL is seeking variation in the Station Heat Rate, which is used as an input for the calculation of the variable cost.

7.13 The claim made by NPL is not under the PPA entered into between the parties, but by virtue of the purported regulatory jurisdiction of the State Commission to override the terms of the PPA and provide relief to NPL. There is not a single provision in the PPA which has been pointed out by NPL either before the State Commission or before this Hon'ble Tribunal which enables NPL to claim this relief against PSPCL. On the contrary, there is an admission by NPL that there is no such provision in the PPA but an implied term must be read into the PPA or in the exercise of regulatory powers, the State Commission ought to fashion an additional relief for NPL.

7.14 In the petition filed by NPL as well as in the appeal, there was not a single provision of the PPA identified which would permit NPL to claim the relief of getting energy charges on actual SHR. NPL merely sought to invoke the regulatory powers of the State Commission to give it a relief beyond the terms of the bidding documents and the PPA entered into. Though NPL sought to

contend default on the part of PSPCL, there is not a single event of default that has been pointed out. Events of Default are provided for in the PPA and there is no provision of the PPA pointed out by NPL. Much emphasis has been laid by NPL on the fact that it was to set up a base load generating station. The concept of base load generating station is being confused by NPL. The base load generating station is a well-accepted principle, namely that of a generating station which is capable of being operated at capacity at any point of time or on a sustained basis without being dependent upon the vagaries of water availability, solar radiation, wind availability etc.

7.15 Base load generating stations are in contradistinction to peak load stations or seasonal generating stations or must run generating stations who can generate electricity only during particular peak hours, particular seasons or generating stations such as solar, wind, small hydro which run based on the availability of fuel from time to time as it is not possible to store the fuel for generation as and when required. It is, however, wrong that a base load generating station has to necessarily operate at full capacity at all points of time, which in fact is contrary to the very concept and principle of a base load generating station. NPL has relied on the definition of Base Load Operations in the CEA (Technical Standards for construction of Electrical plants and Electrical Lines) Regulations dated 20/08/2010. Firstly, this is a subsequent document and cannot in any manner decide how the PPA between the parties needs to be interpreted. The parties in the bidding process obviously did not intend to define any terms in terms of Regulations which came into force subsequently.

7.16 Further, NPL has only relied on the definition of Base Load Operations. Definition is not law, but its purpose is only to give a meaning to the expression found in the particular document and not gives a meaning to the expression for all purposes, all enactments, all documents etc. In this regard, in the case of Pappathi Ammal alias Nallammalv. Nallu Pillai., **(1963) 2 Mad LJ 594 FULL BENCH,** it has been held as under**:**

> *"The purpose of a definition clause in a statute is two-fold: (i) to provide a key to the proper interpretation of the enactment; (ii) to shorten the language of the enacting part of the statute to avoid repetition of the same words contained in the definition every time the legislation wants to refer to the thing contained in the definition. The definition clause therefore speaks no more than this: that when you find the word defined in the statute it shall be understood in the sense defined unless there is something repugnant in the context. In other words, the existence of a definition normally facilitates the ascertainment of the scope and operation of the Act; at the same time it is not the rule that the word defined should have a hidebound meaning as it were wherever it occurs in the Act. In Arunachala Chetttar vs. Annamalai Chettiar, a question arose in a somewhat inverse form, viz., whether the apparently wide terms of the word 'agriculturist" in the Madras Indebted Agriculturists (Temporary Relief) Act, 1954, would be capable of enlarging the benefit conferred by the Act, so as to profit persons not in the contemplation of the Legislature. It was observed—*
>
> > *"It may be accepted as a general rule that the words occurring in an Act should be interpreted in terms of the definition contained therein. At the same time if the scope of the enactment itself is limited the terms of the definition cannot enlarge it."*
>
> *In the present case, the scope of the enactment is undoubtedly limited, the definition of the term "debt "is consistent with it. What the respondent seeks to do before us is to enlarge the scope of the Act by discarding the definition*

and adopting the wider dictionary meaning of the word "debt." That can hardly be permitted, particularly so in an expropriatory legislation of the kind before us, when any extension of the meaning would be to confer benefits on persons not intended to be benefited by the Legislature and at the expense of the creditors."

7.17 NPL has very conveniently omitted to mention Regulation 7 which clarified what is a base load operation is for under the Regulations. Regulation 7 reads as under –

Regulation 7 –Operation Capabilities of a Unit in the Station

……

(2) The unit shall be capable of base load operation. However, the unit shall also be capable of regular load cycling and two-shift operation. The steam turbine shall be designed for a minimum of 4000 hot starts, 1000 warm starts and 150 cold starts during its life.

(5) The unit shall be capable of automatically coming down to house load and operation at this load in the event of sudden extreme load throw off.

7.18 The CEA Regulations merely state how a unit is to be designed for the purpose of construction. A base load operation is merely a manner of operation and any unit capable of base load operation should also be capable of regular load cycling and two shift operation. Further, such a unit should also be capable of operation at extremely low house load and during extreme load throw off.

7.19 The only other contention on the merits is that PSPCL had given a business forecast of peak demand of 11000 MW and this has gone wrong. Firstly, it is only a forecast and not a term of the bid on which the bids were to be submitted. Further, what was forecasted was peak demand not base demand. The peak demand was in

fact in the range as indicated and above 11000 MW even in the year 2014-15. There is no material placed on record by NPL on how the forecast was wrong (even assuming that such forecast was relevant).

7.20 Article 18.4 and Article 18.17 of the PPA are also clear provisions agreed to in the PPA between the parties and NPL having signed the PPA, the same cannot be unilaterally varied or wriggled out by NPL. It is stated that actual costs and expenses have no relevance in a competitive bidding tariff discovered. The issues of commercial viability, regulatory powers etc. are being raised only to try and wriggle out of the binding PPA entered into between the parties which is impermissible.

7.21 NPL has also relied on the subsequent amendment to the competitive bidding guidelines for future projects. This amendment can obviously not be applied to the Appellant. The amendment is only applicable for future bidding processes to be undertaken and does not in any way amend the terms of the PPA already entered into between the parties. The contention of NPL is contrary to the very sanctity of the competitive bidding process and introducing new terms to the benefit of the generator and at the cost of the consumers at large, which is impermissible. NPL cannot cherry pick any one aspect in the subsequent competitive bidding guidelines without adverting to all the other changes which has been made in the Guidelines.

7.22 The sanctity of the bidding process is to be maintained and cannot be allowed to be vitiated. This is one of the fundamental principles of law developed over the years and there cannot be any direction sought which goes contrary to the bidding terms and conditions. It is submitted that a contract is by consensus ad idem and parties

more particularly when the contract is entered into pursuant to a bidding process. In the present case, NPL is seeking to change the term of quoted heat rate to actual heat rate. The heat rate was one of the bidding Parameters and the basis on which the bids were invited and bids were evaluated.

7.23 After having quoted the heat rate based on the bidding documents including the terms of the PPA, NPL cannot be allowed to now claim that the quoted heat rate should be ignored or varied. This strikes squarely on the sanctity of the bidding process.

7.24 The basis of the sanctity of the bidding process is that if the bidders were told prior to the bids that the heat rate could be varied, other bidders may have quoted lower. Further, there could be persons who did not other participate but who would have participated with different terms and conditions. Having participated in the bidding process, quoted a lowest tariff and becoming successful after edging out others, it is not open to NPL to now claim that the bidder terms should be varied.

7.25 There are numerous decisions on the sanctity of the bidding process to be maintained. PSPCL relies on the following decisions in this regard:

(a) **Har Shankar *vs.* Excise & Taxation Commr., (1975) 1 SCC 737 (Constitutional Bench)**

(b) **State of Haryana vs. Jage Ram (1980) 3 SCC 599**

(c) **Excise Commr. *vs.* Issac Peter, (1994) 4 SCC 104**

(d) **Puravankara Projects Ltd. *vs.* Hotel Venus International, (2007) 10 SCC 33**

(e) **Yazdani International (P) Ltd. *vs.* Auroglobal Comtrade (P) Ltd., (2014) 2 SCC 657**

(f) **Sasan Power Limited vs CERC & Ors** (Judgment dated 23/03/2015 in Appeal No. 90 of 2014)

(g) **M/s JSW Energy Ltd vs. Maharashtra State Electricity Distribution Co. Ltd &Anr** 2013 ELR (APTEL) 343

(h) **Punjab State Power Corpn Ltd.** vs. **Nabha Power Ltd & Others**, Appeals No. 75, 76 and 164 of 2014 dated 10.04.2015, considering the present PPA between the parties, the Hon'ble Tribunal has held the same to be statutory and binding:

> *"**Issue No. 2: Whether the State Commission has erred in allowing various charges such as energy charges, demand charges, power factor surcharge incentive, voltage surcharge etc., as provided in Schedule of Tariff for Large Industrial Consumers for Start-Up Power supplied to TSPL by PSPCL?***
> *As per Article 11.9 of the PPA, the Seller shall be liable to pay for the power and energy consumed for start up power of the project at the then prevalent rates payable by such industrial consumers.* ***The PPA is a statutory agreement between the parties and the same is a binding contract and the fact that the Appellant Talwandi Sabo Power Ltd has not disputed any of the terms of the PPA hence the Appellant is liable to pay various charges specified in the Tariff Schedule of large industrial consumers approved by the Commission.***

7.26 NPL has relied on several judgments on its propositions. On the proposition that an implied term may be read in the PPA, NPL has relied on the following judgments –

(i) **Khardah Company Ltd vs Raymon& Co (India) Pvt Ld** (1963) 3 SCR 183

(ii) **Nabha Power Limited vs PSPCL &Anr** – Judgment dated 05/10/2017 in Civil Appeal No. 179 of 2017

7.27 The above judgments have no application in the present case. In fact, the Hon'ble Supreme Court in the case of Nabha Power Limited Civil Appeal No. 179 of 2017 has in Para 49 laid down the strict test for implying terms in a contract and kept the threshold very high. One of the conditions is that the term sought to be read should (a) not contradict any express term of the contract; (b) is capable of clear expression; and (c) goes without saying. The Hon'ble Supreme Court has also in Para 72 cautioned against implied reading of terms in the contract and held that the contract should be read on its terms.

7.28 On the aspect of promissory estoppel, NPL has relied on the following judgments –

(i) **Union of India vs Godfrey Philips India Ltd** (1985) 4 SCC 369

(ii) **State of Punjab vs Nestle India Ltd** (2004) 6 SCC 465

(iii) **Manuelsons Hotels Pvt Ltd** v **State of Kerala &Ors**(2016) 6 SCC 766

7.29 The doctrine of promissory estoppel is a principle of administrative law and in each of the Judgments cited by NPL, the matter pertains to administrative law. This principle has no application to contract. In **A.P. TRANSCO *vs.* Sai Renewable Power (P) Ltd., (2011) 11 SCC 34**, the Hon'ble Supreme Court has held as under -

> ***83.*** *It is a settled canon of law that doctrine of promissory estoppel is not really based on principle of estoppel but is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can also be the basis of a cause of action. Even if we assume that there was a kind of unequivocal promise or representation to the respondents, the reviews have taken place only after the period specified under the guidelines and/or in the PPAs was over.* ***This is a matter which, primarily, falls in the realm of contract and***

the parties would be governed by the agreements that they have signed. Once these agreements are signed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel."

7.30 When parties have crystallized their inter-se rights and obligations by entering into a contract, it is not understood as to how the doctrine of promissory estoppels can be invoked. This Hon'ble Tribunal has in its recent decision dated 12/04/2018 in Appeal No. 95 of 2017 & batch – **Green Energy Association** v **Central Electricity Regulatory Commission** has also rejected a similar plea taken by NPL in the present matter.

7.31 On the aspect of exercise of regulatory powers by the State Commission, NPL has relied on the following judgments –

(i) **Energy Watchdog vs Central Electricity Regulatory Commission & Ors** (2017) 14 SCC 80

(ii) **Gujarat Urja Vikas Nigam Limited vs Tarini Infrastructure Ltd & Ors**(2016) 8 SCC 743

(iii) **Cellular Operators Association of India & Ors v Union of India & Ors**(2003) 3 SCC 186

(iv) **Central Power Distribution Company &Ors** v **Central Electricity Regulatory Commission & Anr** (2007) 8 SCC 197

7.32 None of the above decisions state what is being contended by the Appellant and further they have no application to the present case.

7.33 In the case of ***Energy Watchdog***, the Hon'ble Supreme Court held that while adopting tariff under Section 63, the powers under Section 79(1)(b) are also available if there are no guidelines or if the guidelines do not deal with the particular situation. The Hon'ble Supreme Court has certainly not held that regulatory powers can be used to change the terms of the contract after the bid is over,

nor can such a view be taken considering the host of authorities including the constitutional bench decisions cited above.

7.34 On the other decisions particularly of ***Tarini*** case and reopening of contracts, the contentions are misconceived. Tarini was a case under Section 62 of the Electricity Act and the tariff determined itself was subject to periodic review. In the peculiar circumstances, the Hon'ble Supreme Court decided the matter. There is no application to competitive bids as noted in Para 12 of the judgment itself.

7.35 The decision in the case of Tarini Power has been distinguished by the Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited &Ors. (2017) SCC Online SC 1248,** wherein the Hon'ble Supreme Court held that the PPAs are binding and cannot be varied by the Regulatory Commission.

7.36 In terms of the above, the law as now settled by the Hon'ble Supreme Court is that even in cases of Section 62, the State Commissions cannot vary the terms of the PPA. In the facts and circumstances mentioned above, there is no merit in the contentions of the Appellant and the present appeal is liable to be dismissed with costs.

8. **We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent at considerable length of time and we have also gone through carefully the written submissions filed by the learned counsel appearing for both the parties and also perused the relevant material on records, the issues that arise for consideration are as follows:**

(A) Whether in a PPA entered into by way of competitive bidding under Section 63 of the Electricity Act, 2003, a claim can be made contrary to the express terms of the Standard Bidding Guidelines, bidding documents and the PPA?

(B) Whether the State Commission by the exercise of its 'regulatory powers' can fashion a relief for a generator which is not stipulated in the concluded PPA between the parties?

(C) Whether the doctrine of promissory estoppel can be invoked by NPL against PSPCL?

9. **Our Findings and Analysis on the above issues**

Issue No. A

9.1 The Appellant has submitted that the energy charges being paid under the PPA in terms of Article 1.2.3 of the Schedule 7, based on the fixed SHR i.e. 2268 Kcal/Kwh. However, in reality, the SHR is more on account of operation of the project at a low/varying load. The Appellant has further contended that the SHR increases when a plant is made to operate at a lower load. It is clear from the review of the CERC in the Fourth Grid Code Amendment Regulations, 2010 dated 29.04.2016 by way of which, the Central Commission has provided the extent of the increase in the SHR in terms of the percentage at different load levels. The Appellant has also brought out that the basic underline principal of the PPA read with the DPR, RFQ and RFP is that PSPCL must ensure that such operating conditions are made available to the Appellant which can ensure operation of the Project as a Base Load Plant within the 'Supercritical Parameters'. To support its contention, the Appellant has quoted the definitions of Base Load Plant from the Reports/Regulations of CEA.

9.2 The Appellant during the course of hearing admitted that there is no specific provision in the PPA which stipulates that non-provision of the appropriate operating conditions by PSPCL to ensure the operation of the plant as a Base Load Plant within 'Supercritical Parameters', shall be treated as default on the part of the procurer and it would be liable to pay compensation for losses caused to

the Appellant. The Appellant has stated that in various judicial precedents, it has been held by the courts that a term can be implied if it is necessary in the business sense to give efficacy to the term of the contract, although, the parties did not include it in many words. The Appellant has placed reliance, in this regard on the Judgment of the **Hon'ble Supreme Court in the matter of *Khardah Company Ltd. vs. Raymon & Co. (India) Private Ltd. AIR 1962 SC 1810.*** In addition, reliance has also been placed by the Appellant on the Judgment ***Messrs Deviprasad Khandelwal vs. Union of India- 1967 SCC on Line Bom 94*** and also the judgment of ***Koduri Krishnarao vs. State of Andhra- 1961 SCC On Line AP 6)***.

9.3 It is further reiterated by the Appellant that it has borne the risks associated with SHR only to the extent that it cannot claim adverse implications on SHR on the basis of normal wear and tear of the plant and machinery during the term of the PPA. The Appellant claims to be responsible only to bear the risks associated with the efficiency of the equipments of the plant so far as the Project is allowed to operate at optimum/maximum capacity as a base load plant so that it performs within the Supercritical Parameters. However, the Appellant cannot be forced to bear the resultant risks associated with the adverse implications on SHR due to fault of the Respondent No. 1 by not making available the requisite load of the plant and resulting into sub-critical operation of the plant. The Appellant has clarified that its claim is not with respect to the payment towards idle capacity but is on the issue of under recovery of fuel charges on account of lower PLF of the plant. Accordingly, the Appellant is seeking compensation for the losses suffered by it on account of default of PSPCL in not providing the

required operating conditions for the project. The Appellant has emphasized that its claim is not contrary to any explicit terms of the PPA and is rather based on the unequivocal and specific representations made by PSPCL in the said PPA read with the other bid documents. In this regard, the Appellant has also quoted the issue of 'implied term' as contained in the **Judgment of Hon'ble Supreme Court in the case of Nabha Power Limited vs. PSPCL and Anr. (CA No. 179 of 2017)** and claimed that it fulfills the prescribed panta test elucidated in the judgment. Thus, the obligation to compensate for its losses can be implied in the PPA.

9.4 ***Per Contra,*** the learned counsel for the Respondent No. 1, PSPCL submitted that the quoted Station Heat Rate (SHR) was one of the primary considerations for bid evaluation with the entity quoting the lowest Station Heat Rate, together with other criteria for bid evaluation being considered for selection of the lowest bidder. It is sacrosanct and it is not open to both the parties to seek any variation in the quoted Station Heat Rate. The PPA was entered into between the parties which governs the rights and obligations of the parties. The PPA is on the same terms which was made available as a part of the bidding documents. Therefore, any claim made by NPL has to necessarily be in terms of the PPA and it is not open to NPL otherwise.

9.5 It is further pointed out by the Respondent PSPCL that PPA does not envisage for off taking the entire electricity generated by NPL and it was opened to PSPCL only to schedule and off take power to the extent of its requirement. The PPA provides for the capacity charges to be paid by PSPCL provided the availability is declared by NPL up to 85% on an annual basis. For any availability

declared above, NPL is entitled to an incentive and there is no dispute between the parties in the present case as far as the payment of capacity charges for the incentive or disincentive as the case may be. The PSPCL reiterated that the PPA specifically provides that the quoted Net Station Heat Rate shall be used for computation of energy charges and it has acted strictly in terms of the PPA without any deviation.

9.6 The Respondent has further submitted that there is not a single provision in the PPA which has been pointed out by NPL either before the State Commission or before this Hon'ble Tribunal which entitles NPL to claim this relief arising out of higher SHR. The Respondent has further submitted that Article 18.4 and Article 18.17 of the PPA are clear provisions agreed to between parties and the same cannot be varied or wriggled out for deriving any benefit beyond that stipulated under the PPA. In fact, the actual costs and expenses have no relevance in a competitive bidding tariff. It is further contested by the Respondent that reliance of NPL on the subsequent amendment to the Technical Standard/Grid Code, Competitive Bidding Guidelines, etc. are to be considered for future projects and cannot be applied to those projects where PPA has already been entered into between the parties. In fact, NPL cannot cherry pick any one aspect in the subsequent amendments without adverting to all the other changes which have taken place subsequently.

9.7 PSPCL has highlighted the sanctity of the bidding process and to strengthen its contention, it has cited several judgments of the Hon'ble Supreme Court which, *inter-alia,* hold that sanctity of the bidding process has to be maintained.

Our Findings

9.8 We have considered the submissions of the learned counsel appearing for the Appellant and also the learned counsel appearing for the Respondent on this issue and also perused the decisions of various judgments cited by the parties. It is a fact that the reference power plant was envisaged to be a Base Load Station and to have technical parameters of 'Supercritical Plant'. As per definition contained in the CEA Regulations, 2010 for technical standards for construction of electrical plants and lines, the 'Base Load Operation' means operation at maximum continuous rating (MCR) or its high fraction and the MCR means maximum continuous output at the generator terminals as guaranteed by the manufacturer at the rated parameters. In fact, in an ideal situation, the Base Load Plants having 'Supercritical Parameters' should be facilitated to operate at MCR or its high fraction and at the same time, such plants should be capable of operating at technical minimum limit with specified ramping up or ramping down. Admittedly, the operation of such plants at low load or at varying load would result into higher SHR than the rated one. It is the case of the Appellant for which it is seeking compensation though not specifically stipulated in the PPA agreed to between the Appellant and the Respondent. We note that Appellant is not aggrieved for violation of any provision of the PPA and seeks ways and means to get compensated by the implied terms beyond the ambit of the PPA. It is also relevant to note that the competitive bidding was concluded primarily based on the quoted Station Heat Rate being the sole important element among the other parameters envisaged through the bidding documents. While PPA is a binding document for the parties and cannot be subjected for

re-defining by any of the parties merely on account of subsequent development like in this case with specific reference to increase in SHR due to low load operation of the plant.

9.9 We agree with the submissions of the PSPCL as well as the findings of the State Commission that once competitive bidding is concluded and PPA signed, the rights and obligations of both the parties get crystallized through PPA and it emerges to be a binding instrument for the parties. The operation of supercritical base load station at part load or varying load and resultant increase in SHR has been acknowledged at various Government Forums and accordingly, the earlier technical standards, grid code and Competitive Bidding Guidelines have been amended with a specific consideration of allowing increase in SHR on account of reduction in MCR due to part load operation. While these changes would apply to future projects, the same cannot be applied to old plants decided on earlier parameters of the bid documents. **We, therefore, opine that the claim of NPL arising out of higher SHR is beyond the periphery of concluded PPA and the provisions of PPA are being scrupulously implemented by PSPCL. Hence, we do not find any rationale in re-opening or re-interpreting the provisions enshrined under the PPA.**

Issue No. 2

9.10 The Appellant has contended that it is suffering losses on account of reasons not attributable to it but is solely on account of the Respondent No. 1 failing to meet its unequivocal representations made at the stage of bidding. Thus, a remedy can be fashioned by a Sector Regulator i.e. State Commission which is required to take care of the losses of the Appellant and protect the interests of generator and procurer in a equitable manner. However, the State

Commission has failed on this account without redressal of the Appellant's problem. The Appellant has brought out that the State Commission while exercising regulatory jurisdiction has statutory powers to regulate the tariff of a project and such powers extend beyond the adoption of tariff. The Appellant has further submitted that irrespective of whether exercise of its inherent powers under the Act, can definitely provide recourse to the Appellant as the SHR of the project is getting adversely impacted on account of the Respondent No.1. In this regard, the Appellant has placed reliance on the judgment of the **Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. etc.** (2017) 14 SCC 80 (**Energy Watchdog Matter**)**.**

9.11 The Appellant has further contented that the Competitive Bidding Guidelines do not envisage any provision which deals with the situation as in the present case involving adverse impact on SHR due to operation of plant at low/ varying load. Therefore, as stipulated in the Energy Watchdog Judgment, where the Guidelines are silent, the Regulatory Commission can exercise its powers under the Act to provide appropriate recourse in form of compensation to the Appellant. The Appellant has claimed that just because of a project has been awarded through competitive bidding, it cannot be presumed that the power should be sold at the rate which is lower than the actual cost of generation. It becomes more relevant when reasons contributing to losses are not attributed to the Appellant and are absolutely beyond its control and primarily it is on account of default of PSPCL.

9.12 ***Per Contra,*** The Respondent PSPCL has contended that the PPA is a statutory agreement between the parties and the same is a binding contract as held by the Hon'ble Tribunal in batch of

appeals of 2014 vide its judgments dated 10.04.2015 between **Punjab State Power Corporation Ltd.** vs. **Nabha Power Ltd. & Ors.** The Respondent has stated that the proposition of NPL regarding an implied term may be read in the PPA is not tenable and its reliance on cited judgment is totally misplaced. The judgments relied upon by the Appellant such as **Khardah Company Ltd vs. Raymon & Co (India) Pvt Ltd.** (1963) 3 SCR 183 and **Nabha Power Limited** vs **PSPCL & Anr** – Judgment dated 05/10/2017 in Civil Appeal No. 179 of 2017 have no application in the present case. The Hon'ble Supreme Court in its above judgment has laid down strict tests and very high threshold and also cautioned against implied reading of terms in the contract and held that the contract should be read on its terms.

9.13 Further, the decision in the case of *Tarini* Power has been distinguished by the Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited &Ors. (2017) SCC Online SC 1248,** wherein the Hon'ble Supreme Court held that the PPAs are binding and cannot be varied by the Regulatory Commission.

Our Findings

9.14 While taking note of the arguments and submissions of the Appellant and the Respondent and also, findings of various judgments of the Apex Court and this Tribunal, we find that the PPA entered into by the parties is a statutory and binding instrument which crystallises the rights and obligations of the involved parties. Accordingly, the same would need to be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term". The Hon'ble Supreme Court in GUVNL case (2017) has also held that PPAs are binding and

cannot be varied by the Regulatory Commission. **Thus, it is clear that the State Commission by the exercise of its regulatory powers cannot fashion a relief for the Appellant (NPL) which is not stipulated in the concluded PPA between the parties.**

Issue No. 3

9.15 The Appellant has claimed that the Respondent No. 1 made representation on the plant having to be developed as a Base Load Plant which would be operated on Supercritical Parameters. As such, it amounts to an obligation on the part of the PSPCL to provide operating conditions to ensure operation of the plant according to the desired technical parameters. Therefore, it amounts to breach of an obligation by the Respondent No. 1 and it is responsible to compensate the losses being incurred by the Appellant.

9.16 The Appellant has further emphasized that the doctrine of promissory estoppel essentially provides that if a party changes its position substantially, either by acting or forbearing from acting in a certain way, after relying upon a promise made by another party, then the first party can enforce the said promise, even in the absence of a formal contract to that effect. Over a period of time, the law with respect to 'promissory estoppel' has developed in a way where the requirement of changing the position based on a representation to one's detriment is also not necessary and the mere action on the basis of a representation/promise is sufficient to plead the doctrine of 'promissory estoppel' against such person who made the representation/promise.

9.17 These principles are very well settled and have been expounded upon by various Courts/judicial forums in a catena of judgments from time to time. In this regard, it is relevant to set out the views

of the Hon'ble Supreme Court in its judgment dated 12.12.1978 in the matter of **Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors.**, (1979) 2 SCC 409.

9.18 ***Per Contra,*** The Respondent PSPCL has submitted that the doctrine of promissory estoppel is a principle of administrative law and in each of the Judgments cited by NPL, the matter pertains to administrative law. This principle has no application to a contract as held in case of **A.P. TRANSCO vs. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34.**

9.19 Further the Respondent PSPCL has repeatedly argued that when parties have crystallized their inter-se rights and obligations by entering into a contract, it is not understood as to how the doctrine of promissory estoppels can be invoked. This Hon'ble Tribunal has in its recent decision dated 12/04/2018 in Appeal No. 95 of 2017 & batch – **Green Energy Association vs Central Electricity Regulatory Commission** has also rejected a similar plea as taken by NPL in the present matter. The Respondent has pointed that as per the decisions of the Hon'ble Supreme Court as well this Tribunal, the matters which primarily fall in the realm of a contract, the parties would be governed by the agreements that they have signed. Once these agreements are signed and are enforceable in law then the contractual obligations cannot be frustrated by the aid of promissory estoppel.

Our Findings:

9.20 We have carefully evaluated the rival contentions of both the parties and note that there is no breach of obligations by any of the parties as far as the provisions made out in the concluded PPA are concerned. The Appellant has not indicated anyone provision

under the PPA which is being violated by the Respondent. The findings and decisions contained in various judgments cited by the parties clearly hold that the PPA being the binding and statutory instrument, both the parties have to honour the same in true spirit and should not search a way to wriggle out any of the agreed provisions under the PPA for taking benefit beyond the ambit of the PPA. **In fact, the provisions contained in the agreed PPA, would need to be interpreted in its real terms and not in any implied form as being claimed by the Appellant. It is, thus, amply clear that there does not appear a case for invoking doctrine of promissory estoppels by the Appellant.**

10. **Summary of Our Findings & Analysis:**

10.1 After due deliberations in the matter and considering the submissions filed by the learned counsel appearing for both the parties, we also examined the applicability of various judgments of the Apex Court as well as this Tribunal as relied upon by the Appellant as well as the Respondent. What is admittedly clear that the Appellant is facing losses due to higher SHR arising out of operation of its plant at low load/varying load and intends to avail recourse under implied application of the PPA. While going through the findings of the State Commission and various provisions under the latest revised Technical Standards, Grid Code, Competitive Bidding Guidelines, we note that the provisions in revised SBD/PPA, contain divergent & major differences in the tariff design out of which some may suit to the Appellant while other may not. As such, cherry picking of some favourable elements only in the latest bidding documents cannot be permissible under the law.

10.2 We, therefore, conclude that the PPA being binding and statutory in nature cannot be re-opened or re-interpreted merely for the consequential circumstances as in the present case. Hence, the Appeal being devoid of merit is liable to be dismissed. The State Commission has passed the Impugned Order after evaluation of the documentary evidence available on the file and has assigned valid and cogent reasons. We do not find any legal infirmity in the Impugned Order. Therefore, we are of the considered view that the Impugned Order passed by the State Commission deserves to be upheld.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that issues raised in the present Appeal are devoid of merit. Hence, the Appeal No. 283 of 2015 is dismissed and the Impugned Order passed by the Punjab State Electricity Regulatory Commission dated 07.10.2015, is hereby upheld.

No order as to costs.

Pronounced in the open Court on this **17th day of May, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~