

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
(Appellate Jurisdiction)

**APPEAL No.120 OF 2022**

Dated: 12.08. 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member

**In the matter of:**

**RKM POWERGEN PRIVATE LIMITED**

*Through its Representative*

Having its Registered Office at:

14, Dr. Giriappa Road, T. Nagar,  
Chennai – 600017

*Email: aravind@rkmpowergen.in*

... Appellant

*Versus*

**1. CHHATTISGARH ELECTRICITY REGULATORY  
COMMISSION**

*Through its secretary,*  
Irrigation Colony, Shanti Nagar,  
Raipur (CG.)- 492001  
*Email: cserc.sec.cg@nic.in*

**2. CHHATTISGARH STATE POWER DISTRIBUTION  
COMPANY LIMITED**

*Through its Office in Charge,*  
Energy Information Technology Centre  
Shed-No.8, Chhattisgarh State Power Company,  
Danganiya, Raipur (Chhattisgarh) Pin-492013  
*Email: psvsanjeev1963@gmail.com*

**3. STATE OF CHHATTISGARH,**  
*Through its Chairman,*

Energy Department, Govt. of Chhattisgarh,  
Mahanadi Bhavan, Mantralaya, Atal Nagar,  
Nava Raipur (C.G.)-492001  
*Email: chairman@cspc.co.in*

- 4. THE CHIEF ELECTRICAL ENGINEER (CEI),**  
*Through its Officer in Charge*  
Block-2, H-I, Indrawati Bhawan, Atal Nagar  
Nava Raipur (C.G.)-492001  
*Email: ceiraipur@gmail.com*

- 5. CHHATTISGARH STATE RETIRED POWER  
ENGINEER-OFFICERS ASSOCIATION**  
*Through Sunil Ganesh Oak*  
Office: 29, Dungajee Colon, G.E. Road,  
Anipam Udyn Ke Pichhe,  
Raipur (C.G.)-492001  
*Email: ce.project@cspc.co.in*

... Respondents

Counsel for the Appellant(s) : Sajan Poovayya, Sr. Adv.  
Hemant Singh  
Mridul Chakravarty  
Biju Mattam  
Lakshyajit Singh Bagdwal  
Harshit Singh  
Lavanya Panwar  
Alchi Thapliyal  
Apurwa Shah  
Chetan Kumar Garg

Counsel for the Respondent(s) : Basava Prabhu Patil, Sr. Adv.  
Abhinav Kardekar for Res.2  
  
Ravin Dubey for Res.5

## **J U D G M E N T**

**PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

- 1.** This appellant, a coal based thermal power plant having capacity of 1440MW (4x360MW) in Chhattisgarh, is aggrieved by the order dated

11.03.2022 passed by the 1<sup>st</sup> respondent Chhattisgarh State Electricity Regulatory Commission (hereinafter refer to as 'the Commission) whereby its petition under Section 86(1)(f) of the Electricity Act, 2003 seeking direction to 2<sup>nd</sup> respondent Chhattisgarh State Power Distribution Company Limited (CSPDCL) (previously known as Chhattisgarh State Power Trading Company Limited – CSPTCL) to comply with the obligations under the PPAs dated 29.09.2006, 04.10.2007 and 26.06.2012 and to procure 30% of the aggregated capacity of the appellants generating unit as well as 5% of the net power generated by the project, has been dismissed.

**2.** A birds eye view of the facts and circumstances of the case leading to filing of this appeal is as below:-

- (i) The appellant and the erstwhile Chhattisgarh State Electricity Board (CSEB) signed a Memorandum of Understanding (MoU) dated 03.04.2006 for establishing 1440 MW (3x360) coal based thermal power plant at Uchpinda Village, Janjgir Champa District, Raigarh, Chhattisgarh. As per Article 10 of the MoU, the appellant is required to supply 5% power of the net energy produced in the power project to the Government of Chhattisgarh or its nominated agency on annual basis at variable energy rate determined by the appropriate Commission.
- (ii) Vide order dated 13.02.2007, the State Government authorized the CSEB as its nominated agency to procure power from the appellant. Accordingly, the appellant entered into a Power

Purchase Agreement (PPA) dated 29.09.2006 with CSEB in accordance with the MoU dated 03.04.2006.

- (iii) A tripartite Implementation Agreement (IA) to be signed between the Government of Chhattisgarh, CSEB and the appellant on 22.05.2007.
- (iv) The PPA dated 29.09.2006 was approved by the Commission on 22.12.2007 in petition No.30/2007. Meanwhile, a Supplementary PPA dated 04.10.2007 had been executed between the appellant and the CSEB. Subsequently, in terms of the order dated 22.12.2007 of the commission in petition No.30/2007, a second Supplementary PPA was executed between the appellant and CSEB on 02.04.2008.
- (v) Another tripartite Implementation Agreement was executed between Government of Chhattisgarh, CSEB and the appellant on 28.07.2008 in supersession of the previous Implementation Agreement dated 22.05.2007.
- (vi) On 19.12.2008, the State Government restructured CSEB by way of a notification and vested the job of bulk purchase of electricity from generating companies with the Chhattisgarh State Power trading Company Limited (CSPTCL). Thus, all the rights and obligations of CSEB under the PPAs executed with the appellant got vested in CSPTCL. The State Government notified “the Chhattisgarh State Electricity Board Transfer Scheme Rules, 2010” on 01.01.2009 thereby allocating the

assets, properties, interests, rights and liabilities etc. of CSEB in CSPTCL.

(vii) Apprehending that the 2<sup>nd</sup> respondent CSPTCL may sign an agreement with the Telangana Government for purchase of 2000MW of power and it was not willing to comply with its obligations under the PPA dated 29.09.2006 as well as Supplementary PPAs to procure 30% of the aggregate capacity of generating units along with 5% of net power generated by the appellant's power project, the appellant approached the Commission by way of petition No.20/2018, which came to be dismissed vide impugned order dated 11.03.2022.

**3.** The petition was contested on behalf of the 2<sup>nd</sup> respondent stating that by way of undertaking dated 11.08.2013 furnished by the appellant coupled with appellant's Board Resolution dated 08.12.2014, it had specifically undertaken not to insist upon performance of CSPTCL's obligations under the PPA to procure 30% of power generated in the appellant's power project and had, thus, waived off its right in this regard. It was further contended that the State of Chhattisgarh had, by way of directions dated 07.10.2011, directed the 2<sup>nd</sup> respondent to purchase 30% of the power only from such plants which have been allotted captive coal block by the State, which was followed by another directive dated 24.08.2014 asking the 2<sup>nd</sup> respondent to let all the power generators know that it is not obligated to purchase 30% power from them, and to obtain undertakings from them in this regard. It was, therefore, stated by the 2<sup>nd</sup> respondent that being a state-owned company, it is bound by policies and directives of the state.

4. On the basis of the contentions of the parties, following three issues were framed by the Commission for its consideration: -

“

- *Whether the petitioner has any right to file this petition on 22.02.2018, when it has already waived-off its rights under board's resolution dated 08.12.2014.*
- *Whether the respondents are obligated to purchase power upto 30% of the contracted capacity from the petitioner's power plant at the tariff decided by the Commission.*
- *Whether the petitioner company is obligated to supply 5% of the net power generated by its power plant at the energy charges determined by the Commission.”*

5. Vide the impugned order, the Commission decided all the three issues against the appellant and concluded as under: -

*“i. As the waiver is an intentional relinquishment of a known right, the petitioner has no right to file this petition.*

*ii. The respondents are not obligated to procure power upto 30% of the aggregate capacity from the petitioner's power plant.*

*iii. The petitioner is under an obligation to supply 5% of net power at energy charge rate to the respondent no 1 from its power plant.*

*The case is disposed off accordingly.”*

**6.** Accordingly, the appellant has now approached this Tribunal by way of the instant appeal impugning the above noted order passed by the Commission.

**7.** It needs to note here that by way of order dated 16.05.2023, an application filed on behalf of the appellant bearing IA No.1944/2022 for amendment of Memo of Parties to the appeal was allowed and Chhattisgarh State Power Distribution Company Limited (CSPDCL) was substituted as 2<sup>nd</sup> respondent in place of CSPTCL.

**8.** We have heard learned senior counsels on behalf of appellant and 2<sup>nd</sup> respondent. We have also heard learned counsel appearing for the 5<sup>th</sup> respondent. There was no appearance on behalf of other respondents. We have also gone through the impugned order as well as the written submissions filed on behalf of appellant and 2<sup>nd</sup> respondent.

**9.** Learned senior counsel appearing for the appellant vehemently argued that the impugned order of the Commission is absolutely erroneous and cannot be sustained in the eyes of law. He submitted that: -

- (i) The contention on behalf of respondents that the appellant has waived off its right qua supply of 30% contracted capacity of power

to 2<sup>nd</sup> respondent by way of undertaking dated 11.08.2013 and Board Resolution dated 08.12.2014 is incorrect and based on naïve premises for the reason that as per clause 8 of second Supplementary PPA dated 29.03.2008 executed between the parties, any change / alteration in the terms of PPA would come into effect only after getting approval of the Commission. Hence, the waiver, if any, contained in the undertaking dated 15.08.2013 of the appellant as well as its Board Resolution dated 08.12.2014 cannot be legally construed as a valid waiver under law.

- (ii) Even a meaningful reading of the Board Resolution dated 08.12.2014 of the appellant does not give an impression that the appellant had waived off any of its rights under the PPA. It is pointed out that the undertaking does not use the word “waiver” at any place and instead the expression “would not insist” is used which cannot be construed as waiver.
- (iii) The Board Resolution in question was also issued by the appellant under compulsion due to continuous coercion, undue influence and arm-twisting exercised by 2<sup>nd</sup> respondent which is reflected from various communications issued by 2<sup>nd</sup> respondent to the appellant.
- (iv) PPA is a sacrosanct document as it is approved by the Commission, the regulatory authority created under the statute and therefore, even a slightest change or modification to it cannot be done without the approval of the Commission. On this aspect, reliance is placed in the judgment of Hon’ble Supreme Court in All



*India Power Engineer Federation v. Sasan Power Limited (2017) 1 SCC 487.*

- (v) The MoU dated 03.04.2006 exhausted and became inoperative upon execution of the PPA dated 29.09.2006 as well as the Supplementary PPAs between the parties. Therefore, the MoU cannot override the terms of PPAs which have been duly approved by the Commission. Same principle equally applies to the Implementation Agreement dated 22.05.2007 and 28.07.2008 which did not have any approval from the Commission at all.

**10.** On behalf of 2<sup>nd</sup> respondent, learned senior counsel argued that the impugned order of the Commission is a well-reasoned order based upon sound legal principles, and therefore, does not call for any interference from this Tribunal. He submitted that: -

- (i) The Implementation Agreement dated 28.07.2008 was executed between the parties after the approval of PPA dated 29.09.2006 by the commission, and even the said Implementation Agreement provides in clause 3.1 (ii) and 3.1(iv) that the appellant is bound to supply 5% power at concessional rate to 2<sup>nd</sup> respondent whereas 2<sup>nd</sup> respondent has the option to purchase additional 30% power, and the same is not mandatory.
- (ii) The intention of the parties becomes clear from the reading of two documents i.e. MoU dated 03.04.2006 signed between the parties prior to the execution of PPA and Implementation Agreement dated 28.07.2008 which was signed after the approval of the PPA

- by the Commission, that the purchase of 30% power by the 2<sup>nd</sup> respondent was optional whereas supply of 5% power by the appellant at concessional rate was mandatory.
- (iii) Clause 16.3 of the approved PPA authorizes the parties to waive any of their rights enshrined in the documents with the only limitation that the waiver should be in writing. The appellant by way of written documents i.e. undertaking dated 11.08.2013 and Board Resolution dated 08.12.2014 has specifically waived its right to supply 30% of power from its power project to the 2<sup>nd</sup> respondent, and therefore, 2<sup>nd</sup> respondent is not bound to purchase the same.
  - (iv) The above noted undertaking and the Board Resolution squarely fall within the purview of Section 63 of the Contract Act and there is no escape for the appellant from the impact of these two documents. Reliance is placed upon judgment of the Hon'ble Supreme Court in Ramdev Food Products P. Ltd. v. Arvindhbai Rambhai Patel & Ors. (2006) 8 SCC 726, wherein the meaning of waiver under Section 63 of the contract Act has been discussed.
  - (v) The appellant has failed to show how and in what manner was it coerced by the 2<sup>nd</sup> respondent to issue these specific waivers. In the absence of any specific material in this regard from the appellant's side, such contentions cannot be believed and have been rightly disregarded by the Commission.
  - (vi) Waiver issued by the appellant under Clause 16.3 of the PPA does not constitute modification of the terms of PPA but is limited

to non-enforcement of one of its provisions only, and therefore, it does not require any approval from the Commission.

- (vii) The 2<sup>nd</sup> respondent is procuring power from different generators at a much cheaper rates than the rate mentioned in the PPA executed with the appellant, and therefore, if it is asked to purchase power from the appellant, it would result in extra financial burden upon the company as it neither requires such power nor has capacity to supply such powers to third parties and the burden has to be shifted to common consumers which would not be in public interest. Therefore, the judgment of Supreme Court in *Sasan Power (supra)* does not advances the cause of the appellant and to the contrary, supports the case of the 2<sup>nd</sup> respondent.

**11.** We have given our thoughtful consideration to the rival submissions made by the learned counsels and have perused the entire record.

**12.** The first document executed between the parties is the MoU dated 03.04.2006 for establishing the 1440MW thermal power project in question. Clauses 10 and 12 of this MoU are relevant and quoted hereinbelow: -

*“Clause 10 – The Company will provide, on an annualized basis, to the Government or its nominated agency, 5 (five) percent of the net power (gross power generated minus the auxiliary consumption) generated by the project at the Energy (variable) charges, as determined by the Appropriate Electricity Regulatory*

*Commission. Provided that if the company is allocated captive coal block also in the State of Chhattisgarh for supply of coal to the project, then the Company will provide, on an annualized based, the Government or its nominated agency, 7.5 (seven point five) percent of the net power (gross power generated minus the auxiliary consumption) generated by the project at the Energy (variable) charges, as determined by the Appropriate Electricity Regulatory Commission.”*

*“Clause 12 – The Government, the Board or their assignees do not guarantee purchase of power from the company. However, the Government or its nominated agency shall have the first right to purchase power up to 30 (thirty) percent of the aggregate capacity of the generating units (S) for a period of 20 (twenty) years, through its nominated agency, at the rate to be approved by the appropriate Electricity Regulatory Commission. The company will make this offer only once and this right shall be exercisable by the Government within 60 days of the offer being made by the Company in this respect. This right is in addition to the percentage of power supplied to the Government or its nominated agency under clause 10. The term of the said Power Purchase Agreement (PPA) on the expiry of 20 (twenty) years can be extended if the Government so desires on the terms and conditions to be mutually agreed by the Parties at*

*that time. The sale of such power will be subject to terms and conditions in the PPA to be agreed mutually between the Company and the purchasing entity.”*

**13.** A bare reading of above noted clause 12 of the MoU would indicate that the government or the 2<sup>nd</sup> respondent do not guarantee to the appellant any purchase of power from the power project. The clause only provides that the government or the 2<sup>nd</sup> respondent shall have first right to purchase power up to 30% of the aggregate capacity of the power project for a period of 20 years, if they so wished.

**14.** Thereafter PPA dated 29.09.2006 was executed between the appellant and the 2<sup>nd</sup> respondent. Following two clauses in the recital of the PPA are material and are reproduced herein: -

*“(C) The Company has requested CSEB to purchase the Contracted Capacity and Power Output from the Project (30% (thirty percent) of the net power) at the Delivery Point for a period of Twenty (20) years from the Commercial Operation Date of the Project and CSEB has agreed to purchase such power at the delivery point, for a period of Twenty (20) years from the Commercial Operation Date of the Project.*

*(D) The Company will provide, on an annualized basis, to C.S.E.B., 5 (five) percent of the net power (gross power generated minus the auxiliary consumption) generated by the Project at the Energy*

*(variable) Charges, as determined by the Appropriate Electricity Regulatory Commission. Provided that if the Company is allocated captive coal block also in the State of Chhattisgarh for supply of coal to the Project, then the Company will provide, on an annualized basis, to C.S.E.B., an additional 2.5 (two point five) percent to the above 5 (five) percent of the net power (gross power generated minus the auxiliary consumption) generated by the Project at the Energy (variable) charges, as determined by the Appropriate Electricity Regulatory Commission. The above power is to be provided at variable cost over and above the contracted capacity and cannot be adjusted against the contracted capacity. The provision of this clause regarding energy at variable cost is subjected to terms and conditions as laid down in the M.O.U. dated 03.04.2006 and implementation agreement to be signed between the company, Govt. of Chhattisgarh and its nominated agency.”*

**15.** Manifestly, these clauses in the PPA make a departure from the terms of the MoU, as noted hereinabove. In the PPA, the parties have agreed that 30% of the net power produced in the power project of the appellant would be purchased by the 2<sup>nd</sup> respondent at the delivery point for a period of 20 years from the Commercial Operation Date of the project. A supplementary PPA was executed between the appellant and the 2<sup>nd</sup> respondent on 04.10.2007 which may not be relevant for the disposal of this appeal. What is important to note here is that the PPA dated 29.09.2006 as well as the Supplementary PPA dated 04.10.2007 got

approval of the Commission on 22.12.2007. However, the approval was subject to various conditions out of which condition Nos.(1) and (8) are material which are produced hereinbelow: -

*“(1) In the petition it is mentioned that this PPA is for purchase of a total of 490 MW from the first and second units of the project. There is no clarity in the petition about the manner in which 490 MW which includes the electricity to be availed by CSEB at energy (variable) charge only will be procured. The PPA needs to clarify the position having regard to the provisions of MOU and Implementation Agreement (IA) of 22.05.2007. The PPA provides that the CSEB will purchase the contracted capacity and the power output from the project i.e 30% of net power at the delivery point for a period of 20 years. It also states that the company will provide on an annualized basis to CSEB 5(five) percent of the net energy (gross energy generated minus the auxiliary consumption) generated by the project to CSEB at the energy (variable) charges only, as determined by the Commission. Since the full quantum of power as per the MOU (i.e. 5% at variable cost and 30% as normal tariff) is to be availed from the first two units only, from unit number one (full capacity) and from number two (remaining power), the PPA must clarify as to the quantum of power to be availed at variable cost from unit no.1 and no.2. Secondly, there is no limitation of time*

*period in the MOU as well as in PPA regarding supply of energy to CSEB at energy (variable) charge only by the company. Therefore, it must be clarified in the PPA that 5% or 7.5% of net energy (as the case may be) at energy (variables) charges only, will be sold by the company to CSEB or its successor entity till any of the unit(s) of the project remains in operation, at the same terms and conditions as mentioned in this PPA.”*

...

*“(8) A clause should be incorporated in the PPA that any amendment(s) required to be made in the PPA after the PPA is duly modified as per this order, these should be made only with the approval of the Commission.”*

**16.** We may note here that before the PPAs got approval from the Commission, a tripartite Implementation Agreement dated 22.05.2007 had been executed between the Government of Chhattisgarh, 2<sup>nd</sup> respondent and the appellant. Noting the variation in the terms of the PPA as well as Implementation Agreement dated 22.05.2007, the Commission vide condition No.(1) hereinabove directed the parties to clarify the position in this regard.

**17.** In compliance with the order dated 22.12.2007 of the Commission, a second Supplementary Agreement was executed between the parties on 02.04.2008 wherein the modalities for purchase of 30% of the power generated in the power project to the tune of 490MW by the 2<sup>nd</sup> respondent were explained as under: -



“2. The modalities of power purchase to the tune of 490MW at generator terminal will be as follows:-

a) Installed Capacity = 1400MW  
30% of Installed Capacity = 420MW  
Say Auxiliary Consumption = 10% of IC.  
Power at bus = 420-42 = 378MW (at 100% PLF)  
At actual PLF power availability at bus will accordingly change proportionately

b) Installed Capacity = 1400MW  
Say Auxiliary Consumption = 10% of IC.  
i.e. Power at bus (Net Capacity) = 1400-140 = 1260MW.  
30% of 1260MW = 378MW  
i.e. method (a) & (b) is same

c) 5% of Net Capacity i.e. 1260MW = 63MW  
Total Power available for purchase at bus by CSEB = 378+63 = 441MW.

This corresponds to 490MW at Generator terminal as given below:-

$$441MW + 10\% \text{ of 'X' } - \text{'X'}$$

Where, 'X' = Contracted at Generator Terminal

$$\text{Therefore, } X = 441/0.9 = 490MW.”$$

**18.** Further, clause 8 was also inserted in the PPAs which provides as under:-

*“8. Any change in PPA including change necessitated by financial institutions will be done after approval from CERC, Raipur.”*

**19.** Perusal of the PPA dated 29.09.2006 along with the two Supplementary PPAs executed between the parties clearly reveal that the 2<sup>nd</sup> respondent had committed to purchase 30% of the power generated in the power project of the appellant i.e. 490MW for a period of 20 years from the Commercial Operation Date of the project. Since, the PPAs have been duly approved by the Commission under its regulatory powers, these become sacrosanct documents and binding upon the parties.

**20.** We now turn to the undertaking dated 11.08.2013 issued by the appellant as well as resolution dated 08.12.2014 passed by its Board of Directors. The undertaking is in the letter signed by appellant to 2<sup>nd</sup> respondent wherein the appellant confirms that the 2<sup>nd</sup> respondent has no obligation to buy 30% of power from its project at a tariff to be approved by the Commission. Paragraph Nos.2 and 3 of the letter / undertaking are material and are quoted hereinbelow: -

*“2. Company also confirms that while CSEB or its assignee (as per art: 16.6.4 of PPA) has the right to buy 30% of the energy from our project at a tariff to be approved by the appropriate regulatory commission, we*

*hereby confirm that CSEB or its assignee has no obligation to buy the same.*

*3. In the event CSEB or its assignee decides not to procure this 30% power, before 90 days of COD of the project, the company, along with a third party shall agree to market/off take said power without any commercial liability to CSEB or its assignee.”*

**21.** In the Board Resolution dated 08.12.2014 adopted by the Board of Directors of the appellant company, it has been resolved that in case 2<sup>nd</sup> respondent is not in a position to sell the contracted capacity as defined in the PPA dated 29.09.2006, the appellant would not insist on the performance of the obligations by the 2<sup>nd</sup> respondent under the PPA. We find it profitable to quote the entire resolution hereunder: -

*“RESOLVED THAT with reference to Power Purchase Agreement executed by the Company on 29.09.2006 (read with supplements dated 04.10.2007 and 02.04.2008) with erstwhile Chattisgarh State Electricity Board (CSEB), the consent of the Board of Directors of the Company be and is hereby accorded that in the event of Chattisgarh State Power Trading Company Limited (erstwhile CSEB), not being in a position to sell the contracted capacity as defined in the PPA dated 29.09.2006 (read with supplements dated 04.10.2007 and 02.04.2008), the Company would not insist on the*

*performance of Chattisgarh State Power Trading Company Limited's obligations under PPA and that there would be no financial liability of contractual obligations on either party under the agreement whatsoever."*

*"RESOLVED FURTHER THAT the Company may further agree to supply power to third party in long term, medium term or short term contracts without any financial liability to Chattisgarh State Power Trading Company Limited."*

**22.** It is argued on behalf of the 2<sup>nd</sup> respondent that by virtue of the above noted undertaking as well as Board Resolution, the appellant has waived its right to sell 30% of the power from its power project to the 2<sup>nd</sup> respondent at the tariff to be decided by the Commission, and therefore, it is precluded from seeking enforcement of the terms in this regard contained in the PPAs. It is also argued that the intention of the parties, which is apparent from the reading of documents executed between the parties i.e. MoU dated 03.04.2006, which was prior to the execution of the PPA, and the Implementation Agreement dated 28.07.2008, which was signed after the approval of the PPA, was that the purchase of 30% power by the 2<sup>nd</sup> respondent was optional whereas supply of 5% power by the appellant at concessional rate was mandatory.

**23.** We are in agreement with the submissions on behalf of the appellant on this aspect that MoU dated 03.04.2006 exhausted and became inoperative upon execution of the PPA dated 29.09.2006 and as well as the Supplementary PPAs between the parties.

**24.** The issue which now arises for our consideration is whether the terms of Implementation Agreements dated 22.05.2007 and 28.07.2008 would override the provisions of the PPAs and whether the appellant, by virtue of undertaking dated 11.08.2013 as well as Board Resolution dated 08.12.2014 can be said to have waived off its rights under the PPA.

**25.** We note that the PPA dated 29.09.2006 and first Supplementary PPA dated 04.10.2007 were duly approved by the Commission vide order dated 22.12.2007 with certain conditions and those conditions were incorporated in the second Supplementary Agreement dated 28.07.2008. One of such conditions incorporated by way of second Supplementary Agreement is that any change in the PPA including change necessitated by financial institutions will be done after the approval of CSERC, Raipur. Therefore, it was not open for the parties to change or vary any term of the PPAs unless approved by the Commission. Even otherwise also, PPA is a sacrosanct document between the parties executing it as it is approved by a regulatory authority created under the statute i.e. the Electricity Act, 2003. Consequently, any change or modification to any of the terms contained in the PPA cannot be carried out without the approval of the Commission. Hence, the terms of the two Implementation Agreements dated 22.05.2007 and 28.07.2008, so far as those are at variance with the terms of the PPAs cannot be looked into for the reason that the Implementation Agreements can not override the duly approved PPAs. The rights and obligations of the parties would continue to be governed by PPAs approved by the Commission and would not get affected by any subsequent document including the Implementation Agreement.

**26.** Now coming to the issue of waiver. Waiver involves voluntary surrender of right. It is an intentional relinquishment of a known right or advantage, abandonment of a claim or a privilege. This Tribunal had the occasion to deal with issue of waiver in Bangalore Electricity Supply Company Ltd. v. Devangere Sugar Company Limited 2010 SCC OnLine APTEL 49, wherein, after analyzing several judgments of the Hon'ble Supreme Court, following principles regarding waiver have been laid down:

*“37. In the above decisions, various principles have been laid down with regard to waiver which are as follows:*

*(1) Waiver is a matter of intention and can be either express or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. In order to hand over a waiver some positive act on the part of the party which is supposed to have waived his right.*

*(2) Waiver is an intentional relinquishment of known right or advantage, abandoning claim or privilege, which except for such waiver, the party would have enjoyed. The waiver is a voluntary surrender of right. It implies the meeting of the minds. It is a matter of mutual intention. The essential element of waiver is that there must be a voluntary and intentional relinquishment of right.*

*(3) Whenever waiver is pleaded, it is for the parties claiming the same to show that an agreement waiving the right in consideration of some compromise came into being.*

*(4) Waiver actually requires two parties; one party waiving and the other party receiving the benefit of waiver. There can be waiver so intended by one party and was sought by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. The waiver is a voluntary, conscious act which must be an affirmative act on its part. A mere omission to assert its right or insist upon its right cannot amount to a waiver or dispensation within the meaning of section 63 of the Indian Contract Act.*

*(5) A person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the court to arrive at a conclusion that he did so with knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right.”*

**27.** We are of the opinion that the concept of waiver as applicable to the general contracts cannot be applied to the PPAs. It is for the reason that any waiver by any of the parties to the PPA of its right under the PPA would affect not only the parties to the PPA but also the consumers at large who

are the end users of the electricity and have to pay the tariff. Any alteration or modification in the terms of a PPA is definitely going to impact the tariff applicable to the concerned power project, and therefore, would impact the consumers of the electricity. It for this reason that the PPAs do not take effect unless approved by the appropriate commission. Therefore, any waiver of the terms of the PPA which would have substantial impact upon the interests of the consumers would definitely need approval of the commission. On this aspect, we find it profitable to refer to the following observations of the Hon'ble Supreme Court in All India Power Engineer Federation v. Sasan Power Limited (2017) 1 SCC 487:-

*“31. All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it*



would impact consumer interest and therefore public interest.

32. But on the facts of these cases, it is argued by learned counsel for Sasan that in point of fact the tariff laid down in Schedule 11 of the PPA has not been sought to be changed. All that has happened is that, as a result of COD being declared on 31.3.2013, the very tariff laid down in Schedule 11 becomes applicable, but for year one being treated as one day and year two commencing from 1.4.2013. Counsel for Sasan may be right in saying this, but the substance of the matter is that a consumer would have to pay substantially more by way of tariff under the PPA if year one is gobbled up in one day, as year two's tariff is one paisa more than year one and year three's tariff is substantially more than year two. In short, instead of getting two years or part thereof exceeding one year at a substantially lower tariff, the consumer now gets only one year and one day at the lower tariff rates. This may also by itself not lead to the parties having to go to the Commission as this is envisaged by the PPA. But it is clear that if a waiver is to be accepted on the facts of this case, it would clearly impact the public interest, in that consumers would have to pay substantially more for electricity consumed by them. This being the case, on facts it may not be

*necessary to go to the Commission as had Sasan in fact met the parameters of Schedule 5 on 30th March, then as per Schedule 11, year one would in fact have been only for one day. However, any waiver of the requirement of Schedule 5 would definitely impact the generation of electricity at the mandated percentage of contracted capacity as also the amounts payable by consumers, and would therefore affect the public interest. This being the case, this is not a case covered by the judgments cited on behalf of Sasan, in particular the judgment of this Court in Commissioner of Customs v. Virgo Steels, in which it has been held that even the mandatory requirement of a statute can be waived by the party concerned, provided it is intended only for his benefit. This case would fall within the parameters of the other judgments referred to above, and would therefore be governed by judgments which state that any waiver of the requirements of Article 6.3 and Schedule 5 would ultimately impact consumer interest and therefore the public interest. Such waiver therefore cannot be allowed to pass muster on the facts of the present case.”*

**28.** Therefore, the abandonment of its right by the appellant to sell 30% of power from the project to the 2<sup>nd</sup> respondent as per the PPA, would be ineffective and cannot be considered for the reason that such alteration to the terms of the PPA, which are very vital and impact the public interest,

have not been approved by the Commission. Such variation in the terms of the PPA, even by way of waiver, also run in the teeth of clause 8 of the second Supplementary PPA which clearly provides that any change in the PPA will be done only after the approval of the Commission.

**29.** So far as the directives dated 07.10.2011 and 24.08.2014 stated to have been issued by the Government of Chhattisgarh directing the 2<sup>nd</sup> respondent to purchase 30% of power only from such plants which have been allotted captive coal block by the State, are concerned, we may note that such directives cannot override the validly subsisting and approved PPAs between the parties. It is a settled principle of law that such administrative actions / directives cannot render the duly approved PPA a nullity. PPA was executed between the parties herein on 29.09.2006 which was followed by two Supplementary PPAs dated 04.10.2007 and 02.04.2008. The directives in question have been issued by the State Government much later i.e. in the year 2011 and 2014. Therefore, these directives cannot, in any way, override the terms of the PPAs which have got approval of the Commission and are sacrosanct between the parties.

**30.** Considering the above discussion, it is evident that the Commission has erred in holding that the 2<sup>nd</sup> respondent was not bound to purchase 30% of power from the appellant's power project. Accordingly, we find the impugned order of the Commission unsustainable in the eyes of law as well as of facts. The same is hereby set aside. The appeal stands allowed.

**31.** We make it clear that the rights and obligations of the parties vis-à-vis sale / purchase of power from the appellant's power project are governed by

the PPAs dated 29.09.2006 coupled with Supplementary PPAs dated 04.10.2007 and 02.04.2008, and direct the 2<sup>nd</sup> respondent to comply with its obligations under these PPAs henceforth and to procure power from the appellant's power project accordingly.

**32.** The appellant shall make available the power, as per the PPA, to be supplied to the 2<sup>nd</sup> respondent within 15 days from the date of pronouncement of this judgment.

Pronounced in the open court on this the 12<sup>th</sup> day of August, 2024.

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

*tp*