

# Judgment in Appeal N. 88 of 2014

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In the Appellate Tribunal for Electricity at New Delhi  
(Appellate Jurisdiction)

Appeal No. 88 of 2014

Dated: 1<sup>st</sup> October, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

M/s Uttam Sugar Mills Ltd.,  
Unit :Barkatpur,  
Sabalpur Bitra,  
Tehsil Najibabad,  
District Bijnor (U.P.)

.....Appellant/Petitioner

Versus

1. Uttar Pradesh Power Corporation Limited (UPPCL),  
(Through its Chairman-cum-Managing Director),  
7<sup>th</sup> Floor, Shakti Bhawan,  
14, Ashok Marg, Lucknow (UP).

2. Uttar Pradesh Electricity Regulatory Commission,  
II Floor, Kisan Mandi Bhawan,  
Gomti Nagar, Vibhuti Khand,  
Lucknow, Uttar Pradesh. .... Respondents

Counsel for the Appellant(s) : Mr. S. Vallinayagam

Counsel for the Respondent (s) : Mr. Rajiv Srivastava for  
respondent no.1

# Judgment in Appeal N. 88 of 2014

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## JUDGMENT

### PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present appeal has been preferred by the appellant/petitioner M/s. Uttam Sugar Mills Ltd. against the order dated 31.01.2014, passed by the Uttar Pradesh Electricity Regulatory Commission (in short, 'State Commission') in Petition No. 810 of 2012, captioned as M/s. Uttam Sugar Mills Ltd. Vs. U.P. Power Corporation Ltd., whereby the petition, filed by the appellant/petitioner seeking modification in the Power Purchase Agreement (PPA) dated 22.08.2007 so as to make it consistent with Uttar Pradesh Electricity Regulatory Commission (Captive and Non-Conventional Energy Generating Plants) Regulations, 2009 (hereinafter referred to as the 'State Regulations, 2009') and for declaration that the tariff as revised by the State Commission vide State Regulations, 2009 for existing plants on 01.04.2009, shall apply to the units of the appellant/petitioner and also for declaration that new tariff fixed by the State Commission vide State Regulations, 2009 for the plants/units commissioned after 01.04.2012, shall apply to the third unit, commissioned on 15.04.2012 of the appellant, has been dismissed.

2. The relevant facts giving rise to the instant appeal are as under:-

2.1. that the appellant has a 10 MW bagasse based renewable, non-conventional generating plant at its Barkatpur Sugar Factory in District Bijnor (U.P.), commissioned on 06.03.2006. Considering the quantity of bagasse, the appellant in the year 2007 decided to set up two additional units of 15 MW each at the said factory to generate additional power. The said two units are also bagasse based renewable, non-conventional generating plants, contemplated to be commissioned in the year 2008.

2.2. that the appellant on 22.08.2007 entered into a Power Purchase Agreement (PPA) with the respondent no.1/Uttar Pradesh Power Corporation Limited (in short,

## Judgment in Appeal N. 88 of 2014

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'UPPCL') - distribution licensee for supply/sale of surplus power of 26 MW out of the total 40 MW installed capacity of the plant. The PPA was executed as per the provisions of the UPERC (Captive and Non-Conventional Energy Generating Plants) Regulations, 2005 (hereinafter referred to as the 'State Regulations, 2005).

2.3. that the appellant/petitioner filed the instant petition being Petition No. 810 of 2012 before the State Commission for approval of modification in the PPA and prayed for approval of tariff for Unit-1 (10 MW, Commercial Operation Date (CoD) 6.3.2006), Unit -2 (15 MW, CoD 26.04.2008) and Unit-3 (15 MW, CoD 15.04.2012) as per the State Regulations, 2009. The appellant/petitioner has submitted that the third unit could not be commissioned as per the schedule due to delay in construction of evacuation system.

2.4. that the reasons of delay were not attributable to the appellant as the respondent no.1/ UPPTCL delayed the construction of sub-station which could only be commissioned in March, 2012. It has also been stated in the petition that since the units have been commissioned in different years, the tariff may be based on weighted average of the contracted capacities of the units commissioned in different years as provided in Regulation 30(1) of the UPERC (Terms and Conditions for Supply of Power and Fixation of Tariff for Sale of Power from Captive Generating Plants, Co-generation, Renewable Sources of Energy and Other Non-Conventional Sources of Energy based Plants to a Distribution Licensee) Regulations, 2005 (hereinafter referred to as the State Regulations, 2005). It has also been stated in the petition that although the units were agreed to be commissioned in November, 2008 as per the PPA, but due to delay on the part of respondent no.1, Unit-3 could not be commissioned within the stipulated time frame because originally the evacuation system was to be connected to the Nazibabad 132 KV sub-station which is about 26 km from the plant but later on, it was changed to nearby newly constructed Chandak 132 KV sub-station which is at only 0.3 km from the plant. Thus, keeping in view the

## Judgment in Appeal N. 88 of 2014

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length of the transmission line, the appellant/petitioner approached the UPPCL/distribution licensee with a proposal to provide 7 acres of land free of cost for the setting up of nearby Chandak 132 KV sub-station. The proposal was approved by the respondent no.1 vide letter dated 26.07.2008 and accordingly a supplementary PPA (SPPA) was executed on 13.12.2011.

2.5. that the instant petition being Petition No. 810 of 2012 was filed under Section 62(4) and 86(1) (f) read with section 86(1) (b) of the Electricity Act, 2003 read with Regulation 156 of the UPERC (Conduct of Business) Regulations, 2004. Feeling aggrieved by the inaction of the Station Commission of not modifying the **Power Purchase Agreement dated 22.08.2007**, entered into between the appellant/petitioner and the UPPCL/respondent no.1 to make it consistent with the State Regulations, 2009 in terms of the proviso to the Regulation 27(2) of the State Regulations, 2009 because due to the said inaction of not modifying the PPA, the tariff of the appellant's generating plant is not being modified as per Schedule -II of the State Regulations, 2009 by which the State Commission has revised the tariff for generating plants existing prior to 2009 and fixed new tariffs for new plants commissioned after 01.04.2009, which inaction has resulted in a situation where the appellant despite supplying 10-11 MW electricity to the respondent from 01.04.2012 has not been able to raise bills on the UPPCL, as the rates agreed in the PPA are less than the tariff fixed by the State Commission.

2.6. that the State Commission had fixed a generic tariff for all the non-conventional energy generating plants in the State of Uttar Pradesh as per the technology employed according to State Regulations, 2005. The PPA was executed as per State Regulations, 2005. The tariff for the sale of power from the said non-conventional energy generating plants based on bagasse was fixed as per Schedule-II of the State Regulations, 2005. However, in the State Regulations, 2005 it was stipulated that in the event of generating plant having more than one unit

## Judgment in Appeal N. 88 of 2014

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commissioned in different years, the tariff shall be based on weighted average of the capacities of the units commissioned in different years. In view of the above stipulation, the tariff was calculated in the PPA by taking a weighted average of 10 MW and 30 MW and the basis of calculation was that 30 MW capacity to the generating plant will be added during the financial year 2008-09. The second unit of 15 MW was commissioned on 26.04.2008 i.e. in the FY 2008-09. However, the appellant/petitioner could not get its third unit commissioned due to reasons not attributable to the appellant but clearly attributable to the UPPCL within the time specified in the PPA. The third unit (viz second unit of 15 MW) could be commissioned by the appellant only on 15.04.2012.

2.7. that Clause 16 of the PPA provides as follows:-

*“The Generating Plant shall commission the generation facility and synchronize it with STU system grid by Nov. 08. In case the plant is commissioned beyond the said dates of commissioning, whereas the tariff applicable for sale of electricity from the plant to DISCOM shall be the rate corresponding to the year in which the Commissioning of the plant was agreed to as above, irrespective of delay occurred, if any, due to reason attributable to any party hereof, the UPPCL shall also reserve the right for not purchasing the energy without any consequential liability.”*

2.8. that clause 16 of the aforesaid PPA, according to the appellant, is diverse from the model PPA annexed to the State Regulations, 2005. This clause gives an unfair and unreasonable advantage to the respondent no.1/UPPCL as the respondent no.1 has been insulated even from its own and the appellant/petitioner has been completely exposed to suffer all the loss which is clearly an abuse of the dominant position of the UPPCL to incorporate such a clause 16 in the PPA because by inserting this clause 16 in the PPA, the appellant/petitioner has been placed in a precarious position that it cannot even claim a revision in tariff due to delay in commissioning the generating plant for the reasons attributable to UPPCL and in any case not attributable to appellant/petitioner and the same is void in law and cannot be legally enforced.

## Judgment in Appeal N. 88 of 2014

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2.9. that in the meantime, the State Commission in the year 2009 framed State Regulations, 2009 and fixed the new tariffs for energy generated from non-conventional sources for existing as well as new generating plants and the State Regulations, 2005 were repealed by the new State Regulations, 2009.

2.10. that as per Regulation 35 of the State Regulations, 2005, Generating Plant shall supply power to the distribution licensee of its area through a 33 KV or higher voltage line terminating at the nearest 132 KV sub-station.

2.11. that clause 8 of the aforesaid PPA provides that the power from the generating plant shall be transmitted at 132 KV through a 132 KV line from the generating plant located at Barkatpur and shall be interfaced with respondent's 132 KV grid sub-station located at Nazibabad. The connectivity at the sub-station Nazibabad required the generating plant to lay a 26 km dedicated transmission line. At the relevant time, the sub-station at Nazibabad was over loaded and was resulting in power outages in the area. There was a strong demand from the consumers, especially farmers, in the area to establish a sub-station at Chandak for improving the power supply in the area.

2.12. That since the UPPCL was not able to find a suitable land for setting up a sub-station at Chandak, the appellant/petitioner vide its letter dated 26.07.2008, proposed to provide seven acres of land free of cost at the Chandak for setting up of the proposed 132 KV sub-station so that the power supply in the area would be improved and co-generation plant of the appellant would be connected to the said sub-station at Chandak. The land proposed to be given by the appellant free of cost was about 300 meters away from its generating plant. The said proposal was accepted by the UPPCL and the appellant executed a lease deed in favour of the Uttar Pradesh Power Transmission Corporation Ltd. (UPPTCL) for construction of 132 KV sub-station at Chandak. The appellant, vide letter dated 11.10.2011, again

## Judgment in Appeal N. 88 of 2014

---

requested UPPTCL to change the existing power evacuation system and proposed that the contracted power of 26 MW may be evacuated through 132 KV transmission line at the under construction 132 KV Chandak sub-station. The aforesaid proposals and requests were made by the appellant/petitioner through its letter dated 26.07.2008 and 11.10.2011 in accordance with Regulation 35 of State Regulations, 2005 and also Regulation 35 of State Regulations, 2009 as both the said Regulations provide that the generating plant will be connected to the nearest sub-station. The request of the appellant was allowed by the UPPCL/ distribution licensee and the technical feasibility in that respect was confirmed by the Superintendent Engineer, Electricity Transmission Circle, Moradabad vide his letter dated 20.10.2011.

2.13. that in view of the above change in the power evacuation system, a Supplementary Power Purchase Agreement (SPPA) was executed between the appellant/petitioner and the respondent no.1 on 13.12.2011. The Regulations/clauses 3 & 4 of the said SPPA are reproduced as under:-

*"3. The tariff applicable after commissioning of the plant will be corresponding to the scheduled commissioning date (Nov 08) and no increase in tariff would be admissible due to delayed commissioning.*

*4. The applicable tariff against scheduled commissioning year F.Y. (08-09) onwards would now be subject to revision by UPERC on account of reduced Transmission System cost due to change in the location of Grid Substation from Nazibabad to Chandak.*

*All other terms and conditions as mentioned in PPA dated 22.08.07 read with CNCE Regulation-2009 amended from time to time shall apply."*

2.14. that in view of the stipulation contained in Clause 4 of the SPPA, the respondent no.1/UPPCL filed a petition being Petition No. 785 of 2012 before the State Commission on 02.01.2012 for reduction of tariff due to the reduction

## Judgment in Appeal N. 88 of 2014

---

in the cost of laying down dedicated transmission lines which petition was opposed by the appellant and the State Commission vide its order dated 7.5.2012 dismissed that petition on the ground that the basis of the said petition for reduction of the tariff is the SPPA dated 13.12.2011 which was never got approved by the State Commission observing that in any case the said SPPA was in contravention to the State Regulations, 2009 and was not enforceable.

2.15. that the State Commission in its Regulations, 2005 and 2009 has provided a 16% return on equity (RoE) to the generating plant. If the tariff of the generating plant for the third unit of appellant/petitioner which got commissioned after 01.04.2009 is not taken as per the State Regulations, 2009 and the tariff for the said two units existing on 01.04.2009 is not revised as per the revision done by the State Commission for the existing plants/units, the appellant will not be able to get 16% RoE as guaranteed under the said Regulations. The Constitutional Bench of the Hon'ble Supreme Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603 held that the Regulations framed by the Commission override the existing contractual relationship between the regulated entities because a Regulation is in the nature of a subordinate legislation and such subordinate legislation can even override the existing contracts including Power Purchase Agreement which have got to be aligned with the Regulations.

3. We have heard Mr. S. Vallinayagam, learned counsel for the appellant and Mr. Rajiv Srivastava, learned counsel appearing for the respondent no.1. We have also gone through the material on record as well as the respective written submissions filed by the rival parties.

4. The following issues arise for our consideration:-

## Judgment in Appeal N. 88 of 2014

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- (i) Whether the State Commission is justified in holding that the conditions prescribed in the PPA entered into between the parties in the year 2007 would prevail over the State Regulations, 2009?
- (ii) Whether the State Commission is justified in refusing the tariff prescribed under the State Regulations, 2009 to the appellant's co-generation plant consisting of three units?
- (iii) Whether the delay in building of sub-station resulted in loss of generation and export of electricity to the appellant?
- (iv) Whether the State Commission is wrong in interpreting clause 16 of the PPA by holding that the November, 2008 is the date of commissioning of the generating plant of the appellant?.

### OUR CONSIDERATION ON ALL THESE ISSUES

5. Since all these issues are inter-connected involving interpretation of the relevant clauses of the PPA and also interpretation of State Regulations, 2005 & 2009, we are considering and deciding all these issues simultaneously.

6. The following submissions have been raised on behalf of the appellant on these issues:-

6.1. that the impugned order is contrary to law and unsustainable because the State Commission has wrongly held that the tariff prescribed under the State Regulations, 2009 is not applicable to the appellant's co-generation plant. The State Regulations, 2005 and 2009 specify the control period and the tariff applicable to the relevant control period. The tariff under the relevant control period cannot be denied to the appellant.

6.2. that the conditions of the PPA entered into between the parties should be in line with the Regulations as mandated by the Electricity Act, 2003. The

## Judgment in Appeal N. 88 of 2014

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State Commission cannot hold that the conditions prescribed in the PPA dated 22.08.2007 would prevail over the State Regulations, 2009.

6.3. that the State Commission has further failed to advert to the specific ground taken by the appellant by citing the law laid down by the Hon'ble Supreme Court in PTC India Ltd. v. CERC (2010) 4 SCC 603, which holds that Regulations override contractual relationship under the PPA between regulated entities.

6.4. that the State Commission has failed to appreciate that the distribution licensee/respondent no.1 committed a wrong in not assessing the availability of capacity at its Nazibabad sub station for use by the appellant. It is the duty of the distribution licensee to identify and provide connectivity at the nearest 132 KV sub-station for evacuation of power generated by the co-generation plant of the appellant. Identifying connectivity involves study of available capacity at the sub-station.

6.5. that the PPA was entered into on 22.08.2007 with proposed date of commissioning in November, 2008. The internal communication of the respondent no.1 dated 26.07.2008 specifically establishes the overloaded condition of the Nazibabad sub-station and the inability of the sub-station to take additional load. It is in the above circumstances, the new sub-station was proposed at Chandak.

6.6. that the distribution licensee is mandated under the Regulations to provide connectivity at a sub station which could take the proposed generation of the appellant. The distribution licensee cannot absolve itself from its duty under the Regulation 35 of the State Regulations, 2005 and 2009 by merely mentioning the name of sub station without assessing its capacity to take the proposed generation of the appellant.

## Judgment in Appeal N. 88 of 2014

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6.7. that if the appellant had laid the 27 km evacuation line upto the Nazibabad sub station as per the agreement, the appellant would have been unable to evacuate its generation. Then, the loss of the appellant would have been two-fold, it could not inject its generation because the identified sub-station was overloaded and the investment made in laying down the evacuation line redundant.

6.8. that the State Commission has failed to appreciate the earnest efforts of the appellant who ventured and invested its capital and agreed to supply electricity at the tariff determined by the State Commission to the distribution licensee with an intention to promote co-generation from non-conventional sources. The distribution licensee should be pro-active in providing timely and adequate connectivity to the co-generation plant of the appellant.

6.9. that the State Commission has also failed to appreciate that the respondent no.1/distribution licensee proposed the sub station at Chandak in 2008 but the distribution licensee could establish it only in 2012. The delay in the commissioning of the new sub station further delayed the laying of evacuation line up to the new sub station and commissioning of second 15 MW unit by the appellant. The appellant incurred loss in generation due to the non-availability of sub station, which was the responsibility of the distribution licensee. The appellant had bagasse based two units to generate electricity but with zero evacuation due to non-availability of sub station. The State Commission has also failed to take note of the loss incurred by the appellant.

6.10. that this Appellate Tribunal in Tarini Infrastructure Limited Vs. Gujarat Urja Vikas Nigam Limited (2012) Indlaw APTEL 158) clearly held that under the Electricity Act, 2003, the jurisdiction vests with the Commission for determination of tariff. A contract entered into between the parties is

definitely binding on the parties but only in so far as the conditions contained in a contract are not repugnant and do correspond to the provisions of law. If the contract is the outcome of duress or coercion or where the contract does not conform to the law, the law will prevail over the contract. The Commission has a duty to ensure the promotion of generation of electricity through renewable sources of energy as provided under Sections 61 & 86(1) (e) of the Electricity Act, 2003. While determining the tariff, at the same time, the Commission is bound to ensure that the interest of the ultimate end users is not sacrificed. A power purchase agreement is always subordinate to the provisions of the Act which empowers the State Commission to determine tariff, to promote generation from renewable sources of energy, to promote competition, efficiency and economy and to ensure transparency while exercising its functions under various sections of the Electricity Act, 2003. In the reported case this Appellate Tribunal held that Commission was not justified in holding that since the PPA is a concluded agreement between the parties, re-determination of the tariff sought by the petitioner is not permissible.

6.11. that this Appellate Tribunal in *Uttar Haryana Bijili Vitran Nigam Ltd. vs. Haryana Electricity Regulatory Commission & Ors.* [2012] ELR (APTEL) 1085], held that when the PPA did not provide for a specific clause for revision of the project cost, the State Commission under the Regulations was empowered to re-determine the tariff fixed by it under section 62 of the Electricity Act, 2003.

6.12. that this Appellate Tribunal in *Konark Power Projects Limited, Karnataka vs. Bangalore Electric Supply Company Limited, Bangalore & Anr.* (2012) ELR (APTEL) 429 further held that the State Commission has the power to modify the tariff for concluded PPA in larger public interest but the Commission has

to maintain a balance in view of the guidelines laid down in Section 61 of the Electricity Act, 2003 so that the Generators also may not suffer unnecessarily and in the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of just tariff.

6.13. that the Full Bench of this Appellate Tribunal in Junagadh Power Projects Private Limited vs. GUVNL & Ors. in judgment dated 2.12.2013 in Appeal Nos. 132 & 133 of 2012 held that:-

*"29. In view of provisions of the Electricity Act, 2003, National Electricity Plan, Tariff Policy and the citations given above, we have come to the conclusion that the State Commission has powers to revise the tariff in a concluded PPA keeping in view the change in the circumstances of the case which are uncontrollable and revision in tariff is required to meet the objective of the Electricity Act. The State Commission has the duty to incentivise the generation of electricity from renewable sources of energy and if the renewable energy projects are facing closure of the plants on account of abnormal rise in price of the biomass fuel than what was envisaged by the State Commission while passing the generic tariff order applicable for a long period then the State Commission could revisit the fuel price to avert closure of such plants. However, in such an intervention, the State Commission has to balance the interest of the consumers as well as the generating company. In fact the State Commission has itself in the case of Abellon Clean Energy by order dated 7.2.2011 modified the tariff determined earlier in the generic tariff order dated 17.5.2010. In the order dated 17.5.2010, there was no separate tariff for biomass projects with air cooled condensers and a common tariff was decided irrespective of the type of cooling used. However, the State Commission re-determined the tariff decided in order dated 17.5.2010 and allowed increase in tariff for biomass plants with air cooled condenser." .....*

*"31. Considering all the above factors, we feel that this is an appropriate case where the State Commission should examine and consider to re-determine the biomass fuel price. It should not be considered as a review of its earlier order dated 17.5.2010. In fact this should be considered as re-determination of tariff invoking the powers of the State Commission under*

## Judgment in Appeal N. 88 of 2014

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*the Electricity Act, 2003 to review the tariff in the circumstances of the case to avert closure of the biomass fuel based projects in the State.”*

6.14. that Section 10 of the Electricity Act, 2003 provides for evacuation line by the generator, the appellant never disputed its liability to lay the line and it was due to the overloading of the Naziababad sub-station, the appellant provided land for establishing the Chandak sub-station.

6.15. that Section 42 of the Electricity Act, 2003 provides that it shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in its area of supply and to supply electricity in accordance with the provisions contained in the Electricity Act, 2003. The documents on record, namely, internal communications of the distribution licensee, prove that the Nazibabad sub-station was overloaded which fact is not denied by the distribution licensee.

6.16. that the appellant is entitled to tariff as per the provisions of Regulation 30 of the State Regulations, 2005 revised as in accordance with Regulation 30 of State Regulations, 2009.

7. **Per contra**, the following submissions have been made on behalf of the respondent no.1/UPPCL.

7.1. that the contention of the appellant, to the effect that the delay in commissioning the third unit of the generating plant is clearly attributable to the distribution licensee and the appellant cannot be made to suffer for wrong of the respondent no.1, is wrong and it not substantiated.

7.2. that according to the PPA dated 22.08.2007, entered into between the appellant and the respondent no.1/UPPCL since the generating company owns

and operates a co-generation plant of 10 MW installed capacity commissioned during December, 2005 and generate electricity for its own consumption and thereafter the generating company had undertaken to implement the power project by installing plant and equipment having installed capacity of 30 MW situated at Barkatpur District, Bijnor, its production facility and complete erection, installation and commissioning of the said capacity and make it operational was by November, 2008 and thus the energy produced from the existing as well as the proposed plants would be evacuated in common bus bar.

7.3. that the parties to the PPA further agreed for prior consultation with the State Transmission Utility (STU) for the purpose of implementation of the said PPA and seek its approval for permitting, inter alia, inter connection to the generating plant with the Nazibabad grid sub station owned by STU. It was further provided in Article 16 of the PPA that generating plant shall commission the generating facilities and synchronize it with STU system grid by November, 2008, in case the plant is commissioned beyond the said date of commissioning, whereas the tariff applicable for the sale of electricity from the plant to Discom shall be the rate corresponding to the year in which the commissioning of the plant was agreed to as above irrespective of the delay occurred, if any, due reasons attributable to any party thereof, the UPPCL shall also reserve the right for not purchasing the energy without any consequential liability.

7.4. that the PPA dated 22.08.2007, approved by the State Commission was legally a binding document with respect to the rights and duties of the parties thereto. The entire case of the appellant before the State Commission as well as this Appellate Tribunal is to somehow wriggle out of the legally binding nature of the PPA. The claim of the appellant for determination of tariff on the basis of weighted average is based on the proviso to Regulation 27(2)

without showing at all any inconsistency between the PPA and the State Regulations, 2009.

7.5. that in view of Regulation 28(5) of State Regulations, 2009, the generating plant shall ensure that the distribution licensee has submitted PPA to the State Commission as mentioned in Regulation 27(2) of the State Regulations for approval. The distribution licensee, UPPCL was well within its right not to enter into a fresh PPA with the appellant in terms of Article 16 of the PPA dated 22.08.2007 by which the date of commissioning with respect to fixation of tariff was frozen in November, 2008. Beyond November, 2008 delay in commissioning any plant attributable to any party to the PPA would not entitle the appellant to insist on the date beyond November, 2008 to be factored in fixation of tariff.

7.6. that for PPA dated 22.08.2007, the controlling relevant Regulations were State Regulations, 2005 and no violation of the same has been pointed out by the appellant. Had the appellant been on a firm ground with respect to tariff being fixed in terms of State Regulations, 2009, the UPPCL would not have been sought to be blamed for commissioning the second 15 MW unit of the generating plant for delay by about 3 ½ years as against both the two units of 15 MW each having been required to be commissioned by November, 2008.

7.7. that on the issue of responsibility attributable to the distribution licensee/respondent no.1 for inordinate delay of 3 ½ years of second 15 MW unit, no challenge has been made in the present appeal to the findings in the impugned order. The State Commission's positive finding in the impugned order is that the appellant/petitioner has not submitted supervision charges and other costs so far although about 8 months have passed since execution of PPA. Thus, the delay has occurred due to unresponsiveness of the appellant

and so the statement that the remaining time is not sufficient for construction of 25-30 kms Nazibabad line, does not stand persuasive.

7.8. that it is amply evident from the record that the delay in construction of transmission line to the 132 kv Nazibabad sub-station was deliberate lapse on the part of the appellant which was against the agreed terms of the PPA and the provisions of the State Regulations. The appellant also tried twice to get the permission from the State Commission to use existing line as an alternate arrangement which further establishes the intention of the appellant. Finally, in the absence of any alternate resort, appellant offered land for the establishment of Chandak sub station which was agreed by the distribution licensee subject to the condition that the conditions of the PPA shall remain unaltered except the cost of transmission line which was reduced due to reduction in the length of line.

7.9. that much emphasis has been laid on the presumed overloading of Nazibabad sub station by the appellant on the basis of letter, no. 1304 dated 26.07.2008, written by the Administrative Engineer to Chief Engineer, Meerut. The appellant was never confronted with the so called overloading of Nazibabad sub station till 26.07.2008 as no communication with regard to the said sub station having been overloaded was made to the appellant from the UPPCL. The recorded fact is that till August, 2008 the appellant had not paid supervision charges and other costs for construction of dedicated transmission line and in any case, no blame for the completion of second 15 MW unit could be laid at the door of UPPCL in terms of the law settled by this Appellate Tribunal in its judgment dated 20.10.2011 in Appeal No. 19 of 2010 M/s. Dwarikesh Sugar Industries Ltd. Vs. M/s. Madhyanchal Vidyut Vitran Nigam Ltd. & Ors. in which second respondent signed the PPA on behalf of the first respondent and assumed all the obligations of the first respondent, the second

## Judgment in Appeal N. 88 of 2014

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respondent Corporation was not held responsible for construction of line because the first respondent, namely, distribution licensee was held responsible to develop and maintain distribution system in its area of supply and establishment of transmission lines was not held to be the function of a distribution licensee considering the provisions of Section 42 of the Electricity Act, 2003.

7.10. that the State Commission in its order dated 12.11.2009, in Petition No. 615 of 2009 observed that the onus of construction of evacuation system shall lie with the generator. Since the petitioner was not pursuing the construction of transmission line to Nazibabad sub-station from very beginning, although the survey of line was completed in December, 2007 but the petitioner did not deposit the requisite supervision and other charges to State Transmission Utility, namely, UPPTCL. Since no progress in the construction of transmission line was achieved till March-April, 2008, the appellant/petitioner approached the State Commission seeking permission for temporary tapping with existing Nehtor-Laksar 132 KV inter-state line which was rejected by the State Commission vide order dated 19.5.2008 considering the facts that the said line is a double circuit inter-state line catering to States of UP and Uttrakhand and also because the concerned Executive Engineer of UPPTCL has also objected to proposal of tapping of the inter-state line. In the month of August, 2008 again a petition of the petitioner was dismissed by the State Commission with the observation that " neither the supervision charges and other costs for construction on dedicated transmission line had yet been deposited nor construction of transmission line resumed. This delay clearly establishes deliberate lapse on the part of the petitioner/itself."

8. We have given our serious consideration to the rival submissions raised before us on behalf of the parties. Now, we deem it necessary to first

## Judgment in Appeal N. 88 of 2014

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reproduce the relevant portion of the impugned order and then to test or examine the validity or legality of the impugned order. We reproduce the relevant part of the impugned order dated 31.01.2014:-

"4.....  
.....  
.....  
.....

From above, it is amply evident that the delay in construction of transmission line to the 132 kv Nazibabad substation was deliberate lapse on the part of Petitioner which was against the agreed terms of PPA and the provisions of Regulations. The petitioner also tried twice to get the permission from the Commission to use existing line as an alternate arrangement which further establishes the intension. Finally, in absence of any alternate resort, the Petitioner offered land for the establishment of nearby Chandak substation which was agreed by the Respondent on the condition that the conditions of PPA shall remain unaltered except the cost of transmission line which has reduced due to reduction in the length of line. A supplementary PPA was also entered with this effect on 13.12.2011. The issue of reduction in tariff on this account was brought to the Commission in petition no. 785 of 2011 which was rejected by the Commission with the observation that:

*the UPPCL's petition is based on a condition of supplementary PPA entered between the parties on 13.12.2011. They have requested for reduction in tariff due to reduction in the cost of transmission line as per the agreed terms in the same supplementary PPA. As in this case the said agreed supplementary PPA has never been submitted for the approval of the Commission, any issue breeding out of it does not sustain for the consideration of the Commission. Hence, the petition, ab-initio , is not maintainable.*

The approval of supplementary PPA is still pending.

5. Hence, in light of the above facts, it is sufficiently established that the delay in completion of transmission line was premeditated by the Petitioner and hence, any change in the conditions of PPA is not permitted. It is also relevant due to the fact that the delay in the commissioning of plant does not cast any liability on the Respondent.

As far as the issue of weighted average tariff is concerned, it is allowed in the case when contracted capacities are commissioned in different years whereas in this case total 26 MW was to be commissioned in November, 2008 as

agreed by the parties and same has been approved by the Commission, therefore no change is permissible. Here, it also seems necessary to direct the UPPCL for filing of supplementary PPA for the approval of the Commission within one month of the order alongwith the details of reduced length of transmission line and the land provided by the Petitioner. The saving in the cost of transmission line and the cost of land provided for the substation shall be considered by the Commission in the matter of approval of SPPA. The Commission considers putting impetus on the point that any change in approved PPA should be filed by UPPCL for the approval of the Commission as soon as possible so that the disputes, if any, may be resolved at the earliest and only after the approval of the Commission, the amendment should be implemented in the PPA. The dispute arisen in the terms of supplementary PPA after signing by both the parties has no meaning as it is understood that both parties have agreed only after careful thought and therefore any disagreement after signing the agreement has no validity. However, the disputes arise during the operation of those agreed terms may require intervention by the Commission.

Before parting with the case, we would, however, like to observe that any unnecessary delay in filing the SPPA would be considered as negligence on the part of both the parties. It would be the responsibility of the generator to pursue UPPCL for filing the petition for the approval of the Commission. UPPCL is also to be more vigilant in such matters.

6. The petition is dismissed.”

9. After the careful scrutiny of the rival submissions of the parties and the material on record including the impugned order, the following facts emerge established.

9.1. The appellant M/s. Uttam Sugar Mills Ltd., in the beginning had a 10 MW bagasse based renewable non-conventional generating plant at its Baraktpur Sugar Factor in District Bijnor U.P. commissioned on 06.03.2006 and used the generation for its own use. The appellant in the year 2007, decided to set up two bagasse based renewable non-conventional additional generating units of 15 MW each at its said sugar factory to generate additional power, contemplated to be commissioned in the year 2008.

## Judgment in Appeal N. 88 of 2014

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9.2. The appellant entered into a Power Purchase Agreement with respondent no.1/distribution licensee (UPPCL) for sale of surplus power of 26 MW out of the total 40 MW installed capacity of the plant, on 22.08.2007. The PPA dated 22.08.2007, was executed as per the provisions of the State Regulations, 2005.

9.3. The appellant/petitioner filed the instant petition being Petition No. 810 of 2012 before the State Commission for approval of modification in the said PPA and prayed for approval of tariff for Unit-I (10 MW, COD 6.3.2006), Unit -2 (15 MW COD 26.04.2008) and Unit-3 (15 MW COD 15.04.2012) as per the State Regulations, 2009 stating that the third unit could not be commissioned as per the schedule, due to delay of 3 ½ years in the construction of the evacuation system by the respondent no.1, the reasons of delay not attributable to the appellant as the construction of evacuation system was got delayed due to construction of Chandak sub station in lieu of originally settled Nazibabad sub station as the Nazibabad sub station was overloaded and was unable to bear the additional load of the generation of the appellant's project.

9.4. The units were agreed to be commissioned by November, 2008 as per the PPA but Unit No. -3 could be commissioned only in April, 2012 as evacuation facility could be made available to the appellant only in March, 2014. The Unit No.3 (of 15 MW) of the appellant could not be commissioned within the stipulated time frame, namely, November, 2008 because originally the evacuation system was to be connected at Nazibabad sub station which was about 26 km from the appellant's generation plant, but later on, it had to be changed to nearby newly constructed Chandak sub station which was at only 0.3 km from the appellant's plant.

9.5. Keeping in view the length of the transmission line, the appellant approached the distribution licensee with a proposal to provide 7 acres of land free of cost for setting up nearby Chandak sub station which proposal was approved by the respondent no.1 vide letter dated 26.07.08 and accordingly a supplementary PPA

## Judgment in Appeal N. 88 of 2014

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(SPPA) was executed on 13.12.2011 between the appellant and UPPCL/respondent no.1.

9.6. The State Commission had fixed a generic tariff for all Non-Conventional Energy Generation Plant in the State of UP according to State Regulations, 2005 and the aforesaid PPA was executed as per State Regulations, 2005.

9.7. More emphasis has been laid by the appellant on the point that as per State Regulations, 2005, in the event of generating plant, having more than one unit, commissioned in different years, the tariff shall be based on weighted average of the capacities of the units commissioned in different years and in that view the tariff was accordingly calculated in the said PPA during FY 2008-09. One more contention of the appellant is that the Clause 16 of the PPA giving unilateral right to the UPPCL to reserve the right of not purchasing the energy without any consequential liability in the event of any delay in the commissioning of the generating plant and synchronizing it to the transmission system by November, 2008, irrespective of the delay occurred due to reasons attributable to any party is void in law and legally not enforceable as the UPPCL has abused its dominant position by incorporating the said clause 16 in the PPA.

10. The material on record further establishes that in view of the change of place from Nazibabad sub station to Chandak sub station, nearby the appellant's generation plant, whereby the length of the transmission line got reduced from 26 kms to 0.3 km, a Supplementary Power Purchase Agreement dated 13.12.2011 was executed between the parties with clauses 3 and 4 of the said SPPA clearly stipulating that tariff applicable after commissioning of the plant will be corresponding to the scheduled commissioning date (November, 2008) and no increase in tariff would be admissible due to delayed commissioning and also the applicable tariff against scheduled commissioning year (FY 2008-09) onwards would be subject to revision by the State Commission on account of reduced transmission system cost due to change in the location of grid sub station from Nazibabad to

## Judgment in Appeal N. 88 of 2014

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Chandak and further stipulating that all other terms and conditions prescribed in PPA dated 22.08.2007 read with State Regulations, 2009 amended from time to time shall apply.

It is, thus, evident that after construction of Chandak sub station, the third unit of the appellant's co-generation plant was commissioned in April, 2012 and due to change in the place of power evacuation system from Nazibabad to Chandak sub station, a Supplementary Power Purchase Agreement with afore-stated clauses 3 & 4 was executed between the parties. The SPPA clearly provides that the tariff applicable after commissioning of the plant will be corresponding to the scheduled commissioning date, namely, November, 2008 and no increase in tariff would be admissible due to delayed commissioning. Applicable tariff against scheduled commissioning of the units of the appellant's plant would be subject to revision by State Commission on account of reduced length of transmission system.

11. The respondent no. 1 UPPCL filed petition being Petition No. 785 of 2012 in view of the stipulation contained in clause 4 of the SPPA for reduction of tariff due to reduction in cost of laying down dedicated transmission line had already been dismissed by the State Commission vide order dated 07.05.2012 on the ground that the supplementary PPA dated 13.12.2011 was never got approved by the State Commission and hence the said SPPA, being in contravention to State Regulations, 2009 was not enforceable.

12. The main grievance of the appellant/petitioner in the instant appeal is that the State Commission in its Regulations, 2005 and 2009 has provided a 16% return on equity (ROE) to the generating plant. If the tariff for the third unit of the generating plant of the appellant, which was commissioned after 01.04.2009, is not determined as per the State Regulations, 2009 and the tariff for the said two units existing on 01.04.2009 is not revised as per the revision done by the State Commission for the existing plants, the appellant will not get 16% ROE. To further clarify, the appellant wants the tariff for its two units which were existing on 01.04.09 as per the revision

## Judgment in Appeal N. 88 of 2014

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done according to State Regulations, 2009. Thus, the appellant wants the revision of tariff for its two units existing on 01.04.09 as the revision was done by the State Commission as per the State Regulations, 2009. The appellant further wants tariff for its third unit commissioned in April, 2012 to be determined treating it as a new unit according to State Regulations, 2009. The appellant has pleaded that the third unit of the appellant should be treated as the new unit for the purpose of tariff fixation as per State Regulations, 2009. The appellant in a strange way wants revised tariff for its two already existing units treating them to be existing on 01.04.2009 for the purpose of tariff fixation. This contention of the appellant is against the PPA and the SPPA which cannot be allowed to the appellant since due to change in the place of evacuation system, the supplementary PPA has never been got approved by the State Commission. If the SPPA has been executed and signed by the parties then the same is not approved by the State Commission. In the facts and circumstances of this matter, the appellant cannot plead that Article/Clause 16 of the PPA is void and cannot be legally enforced. The Petition filed by the respondent no.1 seeking reduction of tariff due to the reduction in the cost of laying down dedicated transmission line has already been dismissed on 07.05.2012 by the State Commission on the ground of non-approval of the SPPA by the State Commission. Thus, if supplementary PPA dated 13.12.2011 executed between the parties, due to change in the power evacuation system has no legal value and in that event the commissioning of the third Unit of the appellant and synchronizing it to the Chandak sub station for evacuation of power cannot be said to be valid. That being so, the impugned order passed by the State Commission appears to be legal and sound one, requiring no interference by us in the instant appeal.

13. The appellant's claim for determination of tariff on the basis of the weighted average is based on the proviso to Regulation 27(2) without showing inconsistency between the PPA and the State Regulations, 2009 and due to this reason, the claim of the appellant for determination of tariff on the basis of weighted average cannot be accepted and is not legally sustainable. For PPA dated 22.08.2007, the controlling

## Judgment in Appeal N. 88 of 2014

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Regulations are State Regulations, 2005 and no violation of the same has been pointed out during arguments by the appellant. The appellant is blaming the UPPCL for commissioning of third unit (15 MW) of the generating plant for delay of about 3 ½ years as both the units of 15 MW each were required to be commissioned by November, 2008. The State Commission in the impugned order has recorded a finding that since the appellant did not deposit supervision charges and other costs for several months even after execution of the PPA and the said delay has occurred due to the unresponsiveness of the appellant. The appellant in the past also tried twice to get the permission from the State Commission to use the existing line as an alternate arrangement showing blame-worthy intention of the appellant and finally in the absence of alternate resort, the appellant offered land for establishment of Chandak sub station which was agreed by the distribution licensee subject to the condition that the terms and conditions of the PPA shall remain unaltered because of the cost of transmission line which was reduced in the length of the line. If there was overloading of Nazibabad sub station, the appellant was never confronted with the said overloading till 26.07.2008 as no communication was made by the UPPCL to the appellant. Till August, 2008, the appellant had not paid supervision charges and other cost for construction of dedicated transmission line. Not only this, the appellant by filing Petition No. 615 of 2009 approached the State Commission when the State Commission in its order dated 12.11.2009 observed that the onus of construction of evacuation system shall lie with the generator and since the petitioner was not pursuing the construction of transmission line to sub station Nazibabad, but from the very beginning, although the survey of line was completed in December, 2007 but the petitioner did not deposit the requisite supervision and other charges to the State Transmission Utility, namely, UPPTCL and no progress in the construction of transmission line was achieved till March-April, 2008. Thereafter, the appellant approached the State Commission seeking permission for temporary tapping with existing Nehtor- Laksar 132 KV inter-state line which was rejected by the State Commission vide order dated 19.05.2008 due to the reason that the said line

## Judgment in Appeal N. 88 of 2014

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was a double circuit inter State line catering to the States of UP and Uttrakhand and was also objected to by the Transmission Utility.

15. In the light of the above points, we have collated and deeply analyzed the impugned order and we do not find any infirmity or illegality in the findings recorded by the State Commission in the impugned order. After going through the material on record, we observe that the tariff, as was permissible to the appellant for its three units, has been correctly and legally determined and we do not find any sufficient or cogent reason to interfere therewith because nobody can be allowed to approbate and reprobate as has been held in the case of State of Punjab Vs. Dhanjit Singh Sandhu reported in 2014 AIR SCW - 4485. It is trite law that in case of statutory contracts, the terms of statute prevail over the terms of the contract as held by the Hon'ble Supreme Court in M/s. Soma Isolux NH One Tollway Private Ltd. Vs. Harish Kumar Puri & others reported in 2014 AIR SCW 3421.

16. In the appeal in hand, there is no inconsistency or infirmity between the PPA and the State Regulations or the provisions of the Electricity Act, 2003. There occurred a delay on the part of the appellant/petitioner itself in the commissioning of the third unit of its generation plant due to various reasons and ultimately the third unit was commissioned by the appellant in April, 2012 with a delay of more than 3 ½ years beyond the time frame as provided in the PPA.

17. In view of the above discussion, all the issues are decided against the appellant and the instant appeal has no merits.

### 18. SUMMARY OF FINDINGS

18.1. The State Commission is legally justified in dismissing the petition being Petition No. 810 of 2012 filed by the appellant/petitioner seeking modification in the power purchase agreement dated 22.08.2007 to make it consistent with the State Regulations, 2009 and for declaration that the tariff as revised by the State Commission vide State Regulations, 2009 for existing plants on 01.04.2009 should

## Judgment in Appeal N. 88 of 2014

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apply to the two units of the appellant and the new tariff fixed by the State Commission vide State Regulations, 2009 for unit commissioned after 01.04.2009, should apply to its third unit commissioned on 15.04.2012. The tariff is to be fixed as per the relevant tariff regulations for that control period and no one is entitled to the revised tariff just on the ground that a particular unit has been commissioned with a delay of more than 3 ½ years for some reasons. In the instant case, the appellant is itself responsible for the delay occurred in commissioning of the third unit as the appellant filed petitions several times before the State Commission with one prayer or the other giving different proposals culminating in the delay in commissioning of the third unit, which was to be commissioned by November, 2008 but actually commissioned and synchronized to transmission grid in April, 2012. The State Commission has rightly determined the tariff for the three units of the appellant as per the prevalent State Regulations taking consideration of the provisions of the PPA.

18.2. In the instant case, due to change in the place of the evacuation system from Nazibabad sub station to Chandak sub station, a supplementary PPA was executed on 13.11.2012 between the parties with clauses 3 & 4 but the supplementary PPA has never been got approved by the State Commission and the State Commission, vide its earlier order dated 07.05.2012 in the Petition No. 785 of 2012 filed by the appellant/petitioner, rightly observed that the said SPPA was in contravention of the State Regulations, 2009 and was not enforceable. The State Commission, in the impugned order, has never observed that the conditions prescribed in the PPA would prevail over the State Regulations, 2009. The State Commission is justified in refusing the tariff prescribed under State Regulations, 2009 to the appellant's co-generation plant consisting of three units, considering the terms and conditions of the PPA and supplementary PPA. Consequently, the delay, if any, caused in building sub-station at Chandak in lieu of Nazibabad sub station has not resulted in loss of generation and export of electricity to the appellant as the appellant has not filed any supporting evidence in this regard. The State Commission has further correctly and rightly

## Judgment in Appeal N. 88 of 2014

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interpreted the different clauses of the PPA including clause 16 and only thereafter has dismissed the appellant's petition by the impugned order.

18.03. Consequently, the instant Appeal No. 88 of 2014 is dismissed as it has no merits and the impugned order dated 31.01.2014 passed by the State Commission in Petition No. 810 of 2012 is hereby affirmed. No order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 1<sup>ST</sup> DAY OF OCTOBER, 2014**

(JUSTICE SURENDRA KUMAR)  
JUDICIAL MEMBER

(RAKESH NATH)  
TECHNICAL MEMBER

REPORTABLE/NON-REPORTABLE