

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 30th June, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 116 of 2012

M/s. Nabha Power Limited
SCO 32, Sector 26 D,
Madhya Marg,
Chandigarh-160 019

L&T Power Development Ltd
Power Campus, Gate No.1
C Building, 1st Floor,
Saki Vihar Road,
Mumbai-400 072

... Appellant(s)

Versus

- 1. Punjab State Power Corporation Limited,**
PSPCL, Shed No.T-2, Thermal Design Complex,
Patiala-147 001
- 2. Punjab State Electricity Regulatory Commission,**
SCO No.220-221, Sector-34-A,
Chandigarh

Respondent(s)

Counsel for the Appellant Mr. Sitesh Mukherjee
Mr. Sakya Singha Chaudhuri
Ms. Mandakini Ghosh
Ms. Anusha Nagarajan
Mr. Anand Shrivastava
Mr. Aniket Prasoon
Mrs. Kanika Chugh
Ms. Shagun Jain

Counsel for the Respondent (s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Swagatika Sahoo
Ms. Swapna Seshadri for R-1
Mr. Sakesh Kumar for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Nabha Power Limited and L&T Power Development Limited are the Appellants herein.
2. They have filed this Appeal as against the Impugned Order passed by the Punjab State Commission rejecting the prayer of the Appellants to extend the scheduled Commercial Operation Date of the project being developed by the Appellants by a period of 8 months and 12 days.
3. The relevant facts are as follows:
 - (a) The Appellant No.1, Nabha Power Limited is a Special Purpose Vehicle that had been set-up initially

by the Punjab State Electricity Board for developing the project. The entire share holding of Nabha Power Limited was subsequently transferred to the Second Appellant i.e. M/s. L&T Power Development Limited after having been selected as a successful bidder of the development of the project under a competitive bidding process.

(b) The Punjab State Power Corporation Limited, the 1st Respondent, is the successor entity of the erstwhile Punjab State Electricity Board.

(c) Upon unbundling of the State Electricity Board, the First Respondent has been constituted as a separate entity succeeding to the generation and distribution business of the erstwhile Punjab State Electricity Board.

(d) The erstwhile State Electricity Board intending to procure power through competitive bidding u/s 63 of the Electricity Act, 2003 decided to invite the bids from the power developers to set-up the project.

(e) Nabha Power Limited the first Appellant, has been made a authorised representative for carrying out pre bid obligation on behalf of Electricity Board in relation to the project.

(f) Accordingly, on 10.6.2009, the Request for Qualification and Request for Proposal for selection of developer through tariff based competitive bidding process for procurement of power on long term basis were issued.

(g) Pursuant to the bidding process, the second Appellant was selected as a successful bidder.

(h) The letter of Intent was issued to the second Appellant on 19.11.2009. The Second Appellant wrote a letter on 14.12.2009 to Nabha Power Limited, the representative of the State Electricity Board informing that it had started working on the layout of the project and requested for removal of the HT Line which was necessary for carrying out works at the project sites without any hindrance.

(i) Thereupon through the letter dated 12.1.2010, the State Electricity Board asked the Appellant to deposit the processing fee of Rs.50,000/- in regard to shifting of the line.

(j) On 13.1.2010, the Appellant again wrote a letter to Nabha Power Limited for removal of 220 KV line. In their letter, the Second Appellant asked the Electricity Board that the HT line needed to be removed by

31.5.2010 to ensure that the project development being carried out by the Appellant is not affected.

(k) Thereupon on 18.1.2010, the PPA was entered into between both the parties despite the existence of the encumbrance in the form of 220 KV line.

(l) Even after executing the PPA, the exchange of correspondence continued between the Second Appellant and the State Electricity Board in relation to the removal of the 220 KV line.

(m) On 28.1.2010, the Appellant sent a letter to the State Electricity Board indicating that an amount of Rs.50,000/- as demanded by the State Electricity Board was deposited and sought for shifting of the 220 KV line within a month to enable the Appellant to complete the project as scheduled.

(n) On depositing the processing fee, the State Electricity Board conducted surveys etc for location of 220 KV line adjacent to the project site on eastern side and intimated the same to the second Appellant.

(o) Then the Appellant on 13.2.2010 again wrote a letter to the State Electricity Board reiterating the necessity for removal of 220 KV HT line. In this letter, the Appellant sought for shifting of 220 KV transmission line further east from the place where the

survey had been carried out. The route was identified because the Appellant relocated the switchyard to the eastern side of the project.

(p) Pursuant to the process of identifying a new route for shifting of transmission line, the revised route alignment was drawn up subject to the approval of the State Electricity Board. The State Electricity Board by the letter dated 1.4.2010 informed the Appellant that the cost estimate for the new location was approximately Rs.3.20 Crores and asked the Appellant to deposit the amount stating that unless the amount is deposited, the work could not be taken in hand.

(q) In response to the said letter, the Appellant replied by the letter dated 3.4.2010 that they were not required to pay for the shifting.

(r) Again the Appellant-1 sent further letter that it was the responsibility of the State Electricity Board to ensure that the land for the project was handed over free of encumbrance and requested the State Electricity Board to commence the work of re-locating the 220 KV HT line at the earliest.

(s) Again, the Electricity Board sent a letter on 7.4.2010 to the Appellant demanding the payment of

the cost of shifting. Ultimately, after almost 04 months after the date of execution of the PPA, the Electricity Board agreed to bear the cost after discussion with the Appellant.

(t) The State Electricity Board on 6.5.2010 wrote a letter informing the Appellants that the delay in relocating was caused on account of the Appellant's request that the entire process had to be restarted. Ultimately, the removal of 220 KV HT line activities got finally completed on 30.9.2010 and the same was informed by the State Electricity Board to the Appellant on 6.10.2010 which was acknowledged by the Appellant.

(u) At this stage by the letter dated 17.2.2011, the Appellant requested the first Respondent to grant extension of time due to the delay in shifting the 220 KV HT line.

(v) In reply to the said letter, the first Respondent, the State electricity Board sent a letter on 30.3.2011 contending that the Appellant cannot now claim for extension of time since it was the liability of the Appellant to verify the suitability of the project site prior to the submission of the bid as per the provisions in RFQ, RFP and PPA. Thereafter, the

correspondence continued between the parties but the first Respondent refused to extend the scheduled Commercial Operation Date of the project.

(w) Hence, the Appellant approached the State Commission and filed a Petition on 27.5.2011 referring the dispute in question and praying for extension of time and consequential relief.

(x) The State Commission after hearing both the parties passed the Impugned Order on 23.4.2012 rejecting the prayer of the Appellant and dismissing the Petition filed by them.

(y) Aggrieved by this order, the Appellants have filed this Appeal.

4. The learned Counsel for the Appellants has raised the following grounds as against the validity of the Impugned Order. They are as follows:

(a) The Respondent was under binding obligation to provide the land for the 2 x 700 MW Thermal Power Project free of encumbrances.

(b) The bidding for the project has been done in the terms of the competitive bidding guidelines issued u/s 63 of the Act, 2003. One of the main objectives behind the competitive bidding guidelines is to ensure

that the procurer completes the preparatory activities in order to convince the bidders about its irrevocable intention. Thus, the obligation of the procurer to make available the land free of encumbrances is part of such preparatory activities. The State Commission however, failed to appreciate that the First Respondent defaulted in complying with the said prior obligation and thereby erred in not extending the scheduled Commercial Operation Date of the project by such a period for which encumbrance was not removed from the project site.

(c) The existence of the transmission line over the project land would amount to encumbrance as it involves right of way over such transmission line. It is settled law that the right of way of a person over other's land amounts to an easementary right over such property and an easementary right amounts to encumbrance over the property to which it is attached. The State Commission failed to appreciate that the existence of the transmission line over the project land would amount to encumbrance. Thus, the obligation of the Respondent to hand over the land for the project site free of encumbrance has not been discharged by the Respondent.

(d) The State Commission failed to appreciate that the delay in relocating the 220 KV HT line was mainly caused on account of the indecision on the part of the Respondent especially when the Appellant intimated to the Respondent Electricity Board that the 220 KV line was to be shifted and relocated. The Respondent having agreed to bear the cost of relocating the 220 KV HT line in view of its obligation to transfer the land for the project site free of encumbrance, there is no justification for the Respondent to hold the work from 14.12.2009 to 8.4.2010 when the Respondent finally agreed to bear the cost of the relocation of the transmission line.

(e) The State Commission has committed an error in construing the letter dated 13.1.2010 sent by the Appellant amounted to acquiescence to the position that the Respondent was entitled to complete shifting of the 220 KV HT line by 31.5.2010. In fact, in the said letter it was mentioned that the Government of Punjab had assured that it would facilitate Electricity Board to relocate the 220 KV HT line by 31.5.2010. This letter was sent by the Appellant in good faith with the belief that the transmission line would be removed latest by 31.5.2010. The State Commission came to the conclusion on the basis of this letter without

considering the subsequent letters written by the Appellants whereby the Appellants indicated that the line to be shifted within a period of one month and the project schedule was required to be adjusted on account of the delay in removal of 220 KV HT transmission line. However, as the Respondent failed to remove the line, at least by 31.5.2010 and actually removed it on 30.9.2010, it is not open for the Respondent to rely on the letter dated 13.1.2010.

(f) The map produced by the Respondent purportedly depicting that the position of the 220 KV HT line was at least 120 meters away from the boiler area of the Unit-I which forms part of the power block is not a map that can be relied upon as legally admissible evidence. The onus of proving that such a map is accurate lies on the party who produced it. There is no presumption of accuracy in respect of the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in the absence of proof of its accuracy.

5. On these grounds, the learned Counsel for the Appellants has prayed for setting aside the Impugned Order and consequently for granting extension of time sought for.

6. In reply to the above submissions, the learned Counsel for the Respondents, the Power Corporation and the State Commission, in justification of the Impugned Order has made the following submissions:

(a) The Appellant was fully aware of the existence of the 220 KV HT line over the land designated for the power project at the time when the Appellant submitted the bid and therefore the Appellant accepted that the said line would have to be shifted subsequent to the selection and execution of the agreement with selected bidder and the selected bidder taking control of the project company. Such existence of the line was not an encumbrance on the land as it did not in any manner affect the title of the land.

(b) As per the bid documents, the installation of the switch yard for evacuation facilities of the project was envisaged at a place which would not have in any manner affected the shifting of the 220 KV line adjacent to the boundary of the project on the east side. The Appellant for its own convenience desired to locate the evacuation facilities of the project near the above boundary in the East side instead of the place envisaged in the bidding documents for such evacuation facilities and without notice to the

Respondent. The Respondent not being made aware of such a change in location by the Appellant, the Appellant cannot now claim any prejudice on account of the time taken in shifting.

(c) There was no delay on the part of the Respondent under the PPA in regard to the shifting of 220 KV HT line. The delay if any in shifting of the line was on account of the specific request of the Appellant to locate the line at a distance from the project to accommodate the location of the Appellant's switchyard. In fact, the Appellant had relocated the evacuation facilities from the original place indicated in the bidding documents. As such, there was no impediment to the Appellant in the construction of the project because of the time taken for shifting. At any rate, such impediment pointed out by the Appellant being not attributable to the Respondent cannot be the reason for the extension of time for the project schedule.

(d) In fact, the Appellant had acknowledged and accepted in its letter dated 13.1.2010 that the initial shifting of the transmission line without considering the specific request of the Appellant to locate it at a distance from the project would itself have taken time till 31.5.2010. By reason of the request of the

Appellant to shift the line at a distance from the project, the time taken was till 30.9.2010 i.e. by another four months. The above cannot be held to be unreasonable or in violation of the terms of the PPA or otherwise attributable to the Respondent.

(e) The stipulation in the RFQ which stated that the land will be made available to the successful bidder or the developer free of encumbrance does not mean that the 220 KV line was to be shifted before signing of the PPA. The context in which the above provision occurs in the RFQ is that the land shall be acquired and transferred to the Company under the land acquisition process without any issue over the title of the land. There is no specific reference to the removal of the 220 KV line in any of the bid documents including the RFQ.

(f) In the letter dated 13.1.2010, the Appellant had acknowledged that that land would be required to be shifted by 31.5.2010. The above communication was sent even before the execution of the PPA. Thus, the Appellant, on the above date, did not raise any issue on the place to which the 220 KV line need to be shifted. Similarly, the Appellant did not also raise the aspect of relocation of the evacuation facilities of the project from the place where it was envisaged in the

bidding documents. In the same way, the Appellant at the time of execution of the PPA, did not indicate that the evacuation facilities were planned to be shifted from what was provided for in the bidding documents. The bidding documents clearly envisaged the switchyard for evacuation facilities of the project in the site map. The Appellants had changed the location of the switchyard for evacuation facilities at a particular place on the north side as provided in the bid documents to the eastern side and did not inform the Respondent about this. Thus, the time taken for relocation of the 220 KV line beyond 31.5.2010 till 30.9.2010 was on account of the Appellant's request for change of location and therefore attributable to the Appellant and not to the Respondent.

7. On the basis of this reply, the learned Counsel for the Respondents submitted that the Impugned Order which is a well reasoned order does not call for any interference.
8. In the light of the above rival contentions, the main questions which may arise for consideration are as follows:
 - (a) Whether the 220 KV line constitute an encumbrance on the project site and was required to be removed by the Respondent on or before the execution of the PPA?

(b) Whether the delay in removing the 220 KV line was on account of any contributory delay by the Appellant or acquiescence by the Appellant and if so to what extent?

(c) Whether the fact that the 220 KV line passing over the project site delayed the progress of the project execution work by the Appellant?

9. On these questions, elaborate arguments have been advanced by both the parties as referred to above.
10. Since all the three questions are interconnected, let us discuss all these issues together.
11. Before dealing with these issues, it would be worthwhile to refer to the findings of the State Commission giving the reasons for rejecting the claim for extension of time made by the Appellant. They are as follows:

“16. The findings of the Commission on these issues are summed up as under:-

(i) On the issue that the petitioners were contractually entitled to get the Project land delivered free of all encumbrances on the day of signing of PPA, the Commission holds that this view of the petitioners militates their own satisfaction conveyed through the letter dated 13.1.2010 addressed to Director (Project) Nabha Power Limited wherein it is mentioned without demur that “The Government of Punjab shall facilitate with PSEB to remove the 220 KV HT line passing through the land acquired for the project latest by 31st

May 2010 so as to enable NPL to maintain the project schedule. Our request for removal of the line has already been submitted vide our letter No.RKS/PSEB/0116-09.

The above is for your necessary action and record. We also request that a letter of support by the Government of Punjab for the above may also be given to us”.

Thus after giving full acquiescence for removal of 220 KV HT line by 31.5.2010, now to revert to insist that line should have been shifted before 18.1.2010, is wrong on the part of the petitioners. Further the Commission can not ignore the request made by the petitioners vide letter No.RKS/PSEB/0164-10 dated 13.2.2010 just at the time the PSPCL had finalized the first route plan for shifting the line. Another 40 days, fully explained by the respondents on the directions of the Commission, had to be spent for re-routing the line further East. There was substantial increase in quantum of work and cost for the respondents. Naturally the original date of 31.5.2010 could not have been adhered to under these circumstances. That pushed the execution of work from dry season of March-May to rainy /monsoon season of July-September taking more time for shifting the line. The Commission holds that the petitioners can not escape their responsibilities for delay in shifting the line beyond agreed date of 31.5.2010.

(ii) The Commission’s findings on second and more substantial issue of whether the existence of 220 KV HT line actually caused hindrance or not in smooth and planned execution of activities of grading, leveling, soil testing, Test piling and Job piling planned during this period i.e. (March to September 2010) for critical path activity in Boiler Area for Unit I of the project are as below:-

From the progress reports that came on record for the months of March to June 2010, the Commission notes that soil testing was completed during these months without representation of any kind by the petitioners that 220 KV HT line was causing any hindrance. The drawing for Test pile was approved on 15.5.2010. The Commission notes that no hindrance due to 220 KV HT line had been indicated by the petitioners. Hence it can be presumed that upto 15.5.2010 the work was going on as per planning and convenience of the petitioners. Work of Test piles was taken in hand on 16.6.2010, a month after the approval of drawings. Work of Test piles has to take its own time in normal course of things and completion of Test piles on 20/23.8.2010 appears to be normal and natural. Regarding Job piles, the drawing for same is stated to have been approved on 25.6.2010. The work of Job piles could not have been taken in hand before approval of Job pile drawing i.e. 25.6.2010 and in no manner the petitioners have been able to prove and establish that existence of 220 KV HT line was any way responsible for delay for causing any hindrance in project work. This fact is further proved from the sketch submitted by the respondents showing that 220 KV HT line was a minimum 120 metres away from the Boiler Area of Unit I. This sketch has gone uncontested by the petitioners. The Commission is unable to agree with the argument of petitioners that they are not in position to mark the location of 220 KV HT line on the layout plan of the project. As the Boiler area which has been stressed by the petitioners so strongly in their earlier pleadings being always on critical path in any project construction lies 120 metres away from the 220 KV HT line, the Commission is of the considered view that no hindrance or impediment could be caused to the free movement of construction rigs working in that area. So plea of the petitioners fails on this account also. That work had been slow in

the months of July, August and September, as has been tried to be conveyed by the petitioners, could be due to the heavy and unprecedented rains and flooding of site during these rainy months. This fact has been intimated by the petitioners to the respondents in their two letters dated 13th July 2010 and 2nd August 2010.

In view of the discussion in the preceding paras, the petition fails.

The petition is accordingly dismissed. Parties to bear their respective cost”

12. In the light of the above findings, let us now discuss the issues.

13. While making analysis of these issues, it would be appropriate to recall some relevant events which led the Appellants to approach the State Commission for seeking for relief for extension of time.

(a) Nabha Power Limited is a Company set up initially by Punjab Electricity Board as a Special Purpose Vehicle for developing 2x660 MW Thermal Power Project in district Patiala, Punjab. The entire equity share holding of NPL was subsequently transferred to L&T Power Development Limited, the successful bidder for development of the project through NPL under competitive bidding process.

(b) The second Appellant i.e. L&T Power Developer on receipt of the letter of Intent informed the NPL, the authorised representative of the State Electricity Board that a 220 KV line which was passing through the project site had to be removed from the project site.

(c) This was conveyed to the Electricity Board and correspondence continued to be exchanged between the parties. Although, it was the sole responsibility of the Electricity Board to shift the 220 KV line and hand over the said land free of encumbrance, the Petitioner as demanded by the State Electricity Board had deposited Rs.50,000 towards the processing fee. The Electricity Board informed the Appellants that the route planned for relocating the line was under preparation and requested the Appellant to deposit the amount of Rs.1 Crore towards the cost of shifting the line initially and balance to be deposited after final estimate was sanctioned. However, the Appellant disputed this claim contending that the cost for relocating not to be borne by the Appellant. However, it was decided ultimately that the cost of relocating the transmission line shall be borne by the Electricity Board.

(d) The Appellant sent a letter to the Respondent that the process of shifting the line was far from satisfactory and that non-shifting would affect adversely the project completion schedule. Thereupon, the shifting was completed finally on 30.9.2010.

(e) At this stage, the Appellant on 17.2.2011 requested the Respondent to grant the extension in time due to delay in shifting the 220 KV HT line and that the period of such delay being 8 months and 12 days the period between signing PPA on 18.1.2010 and the date of shifting the line on 30.9.2010. But this was declined by the Respondent and hence the Appellant filed a Petition praying for the declaration that they are entitled to extension of time for completion of the project under the PPA for a period of 8 months and 12 days toward the time taken by the Electricity Board for removal of the transmission line which was passing through the project site and also for a direction that the PPA stands amended along with all the related consequences. This was stoutly opposed by the Respondent.

(f) Ultimately, the State Commission dismissed the Application filed by the Appellants by rejecting its claim for extension of time. Hence, this Appeal.

14. Bearing these facts in mind, we will now analyse the issues.
15. The subject matter of this Appeal relates to the claim of the Appellant, a Generating Company for extension of time for scheduled Commercial Operation Date by a period of 8 months and 12 days for completion of power project under Article 4.5 of the Power Purchase Agreement.
16. According to the Appellant, there has been an event of default on the part of the Distribution Licensee (R-1) which delayed the construction of the project and thereby, the Appellant was prevented from proceeding to construct for a period of 8 months and 12 days. This event of default on the part of the Distribution Licensee (R-1), as pointed out by the Appellant is that the Distribution Licensee failed to arrange for shifting of 220 KV transmission line passing over the project site thereby defaulted in removing the encumbrance at the site which was violative of the bidding terms consequent to which, the Appellant has suffered a loss.
17. According to the Respondent, there was no delay on the part of the Respondent under the provisions of the PPA in regard to the shifting of 220 KV line. Delay if any, on shifting of the line was on account of the specific request of the Appellant to locate the line at a distance from the project to accommodate the location of the Appellant's Switch Yard for evacuation of the facilities of the Appellant.

18. Thus, the Appellant had re-located the evacuation facilities from the place indicated in the bidding documents and therefore, the delay cannot be attributed to the Respondent and as such, the same cannot be the reason for extension of time for the project schedule.
19. The first and foremost, it shall be considered whether the existence of the 220 KV line was an encumbrance within the meaning of the bidding documents.
20. The only stipulation in the RFQ is that the land will be made available to the successful bidder or the developer free of encumbrance. This stipulation reads as under:

"Tasks Undertaken: The Punjab State Electricity Board (PSEB) has incorporated a company under the name Nabha Power Limited, which would operate as a Special Purpose Vehicle (SPV) and would be domiciled for the Project. The development of the project at village Nalash near Rajpura, District Patiala, Punjab, India has commenced. About 1078 acres of land has been made available. The Bidders can choose any configuration as per land availability. Land will be made available to the Successful Bidder or the developer free of encumbrances. Resettlement & Rehabilitation issues would be the responsibility of PSEB. Nabha Power Limited has completed the following tasks. The cost implications of all the activities required so as to enable the bidders in determination/ calculation of tariff will be informed 30 days before the bid submission date."

21. The sentence that the land will be made available to the successful bidder or the developer free of encumbrance

does not indicate that the 220 KV transmission line was to be shifted to a different location before signing of the PPA. The context in which the above provisions occur in the RFQ is that the land shall be acquired and transferred to the Company under the land acquisition process without any issue over the title of the land.

22. In other words, there is no reference as to the removal of 220 KV line passing over the land on the cost and responsibility of the Respondent in all the bid documents including the RFP as well as the PPA.
23. The existence of the transmission line was a physical condition of the land. The successful bidder was required under the bid documents to satisfy itself about the suitability.
24. Let us now refer to the relevant provisions in the RFQ, RFP and the PPA. They are as under:

“RFQ Item 4:

“While this RfQ has been prepared in good faith, neither the Procurer nor their employees or advisors make any representation, or warranty, express or implied or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RfQ, even if any loss or damage is caused by any act or omission on their part”. (Page 64)

Clause 2.7.2.1 of RFP:

“The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. While submitting the Bid the Bidder shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water), examined the laws and regulations in force in India, the transportation facilities available in India, and grid conditions, the conditions of roads, bridges, ports etc for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RfP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason”. (Page 144)

Article 5.2 of PPA:

“The Seller acknowledges that before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its condition (including but not limited to its geological condition on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agreed that it shall not be relieved from any of its obligations under this

Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.

The State Government authorities would be implementing the resettlement and rehabilitation package ('R&R') in respect of the Site for the Project, for which the costs is to be borne by the Seller. The Procurer shall endeavour to ensure that the State Government implements such R & R ensuring the land for different construction activities becomes available in time so as to ensure that the Power Station and each Unit is commissioned in a timely manner. Assistance of the Seller may be sought, which he will provide on best endeavour basis, in execution of those activities of the R & R package and as per estimated costs, if execution of such activities is in the interest of expeditious implementation of the package and is beneficial to the Project affected persons". (Page 236)

25. The bidding documents referred to above, clearly provides that the representations and warranties cannot be relied upon even if some loss is caused to the bidders. Only after having accepted this terms of the bidding documents and acted as per the provisions thereof, the Appellant has submitted the bids and when that being the case, it would not be open to the Appellant to claim now that the provisions in the RFQ, RFP and other bid documents do not apply and that the Distribution Company is responsible for the time taken for the shifting of the 220 KV line.

26. Similarly, Clause 5.2 of the PPA also provides that the Respondent shall assist in execution of Resettlement and

Rehabilitation package, if the same is in the interest of the expeditious implementation of the package. As such, there is no binding obligation on the part of the Respondent in regard to the same. The Appellant having inquired, analysed and taken a clear decision on the implications of the 220 KV line passing over the project site, cannot now claim that the shifting of 220 KV line from the project site was a pre-condition for the period specified for implementation of the project to commence.

27. Therefore, the existence of the transmission line cannot be considered to be an encumbrance unless it is established that there was unreasonable delay in shifting of the line and it caused delay in execution of the work which resulted in delay in completion of the project.
28. On the other hand, it was open to the Appellants to adopt an appropriate course to have the line removed from the project site like in the case of rehabilitation and resettlement.
29. In other words, irrespective of the question as to whose responsibility was to get the transmission line removed and relocated the said relocation of the line was not a pre-condition to the execution of the PPA.
30. The Second Appellant and the other bidders had proceeded on the basis that some time would be taken for shifting of 220 lines after execution of the PPA. The scheduling for

completion of the project commenced from the signing of the PPA. In the present case, the Appellant has signed the PPA on 18.1.2010 and the 220 KV line was to be shifted within a reasonable time thereafter.

31. It was the Appellant to take steps with the transmission company to remove the line from the project site. But in the present case, the R-1 agreed to remove it from the project site at the cost of the Appellant. In the present case, because of issues raised by the Appellant, the Distribution Company even agreed to bear the cost.
32. Therefore, the contention urged by the Appellant on this issue has no basis.
33. According to the Appellant, the Distribution Company (R-1) did not shift the transmission line either prior to or immediately after execution of the PPA. After signing of the PPA it is true that the R-1 agreed to relocation of the transmission line from the place adjacent to the power project on its own cost. Though the Respondent initially raised the issue of cost of such shifting to be borne by the Appellant, the Respondent agreed to incur the cost in the interest of the project. That gesture of the Respondent cannot be relied by the Appellant to claim that there was an obligation on the part of the Respondent under the PPA in the absence of any provision in the PPA.

34. As a matter of fact, through his letter dated 13.1.2010, the Appellant had acknowledged that the line would be required to be shifted by 31.5.2010. This acknowledgement was even before the execution of the PPA. The letter dated 13.1.2010 sent by the Appellant No.2 has stated as under:

“The Government of Punjab shall facilitate with PSEB to remove the 220 KV HT Power line passing through the land acquired for the Project latest by 31st May 2010, so as to enable NPL to maintain the project schedule. Our request for removal of the line has already been submitted vides our letter no. RKS/PSEB/0116-09.”

35. From this, it is clear that the Appellant as on the above dates, did not raise any issue on the location to which the transmission line need to be shifted.

36. Similarly, the Appellant did not raise the aspect of relocation of the evacuation facilities of the project from the place where it was envisaged in the bidding documents. In addition to that, the Appellant at the time of execution of PPA did not indicate that the evacuation facilities were planned to be shifted from the place as provided for in the bidding documents. The bidding documents clearly envisaged the switchyard of evacuation facilities of the project in the site map. With location of the switchyard for Evacuation Facilities of the project at the above place, the Distribution Company was to plan the route for shifting the 220 KV line.

37. Immediately upon execution of the PPA, the Distribution Company began the process of shifting the line and proceeded to survey and identify the route. Admittedly, the above was completed by 15.2.2010. The route selected by the Respondent for the relocation of the transmission line was on the immediate east of the project site adjoining the project site.
38. By the first week of Feb, 2010, the Distribution Company (Respondent) had completed the process of survey etc. It also identified the proposed re-location of the line, the number of towers to be shifted, the route map etc.
39. In terms of the above, the shifting of the 220 KV line would have been duly completed by or before 31.5.2010 i.e. within the time which the Appellants themselves have stated in the letter dated 13.1.2010 and if so, the clear representation of the Appellant was that the same would not affect the project schedule.
40. Under those circumstances, the time available to the Appellants for completion of construction of power plant was from the date of PPA till 31.5.2010, as per the initial plan of shifting of the transmission line. Therefore, there is no question of transmission line shifting being completed as on the date of the PPA.

41. As indicated above, the Appellant has signed the PPA on 18.1.2010 without raising any issue of transmission line of having not shifted and after writing the letter dated 13.1.2010 specifying 31.5.2010 for completion.
42. When such was the representation made by the Appellant to which the parties acted on said basis, the question of the Appellants now claiming that the line was to be shifted before the execution of the PPA does not arise.
43. Therefore, the contention on this issue raised by the Appellant would not hold good.
44. It is the case of the Appellant that the time taken for shifting of 220 KV line beyond 31.5.2010 till 30.9.2010 was on account of inaction on the part of the Respondent for change of location as such the same is attributable to the Respondent.
45. As mentioned earlier, through the letter dated 13.2.2010, the Appellant requested the Respondents to shift the transmission line further on the eastern side of the proposed relocation route as per the survey done by the Respondent. This was to accommodate the evacuation facilities planned by the Appellants on the east side of the project site. The relevant portion of the letter dated 13.2.2010 is as follows:

“We would like to inform you that as 2 nos 400 KV (D/C) Transmission lines for the power evacuation

from the Project are planned on the east side of the said Project, it would be prudent to shift the existing 220 KV (D/C) Transmission line further east of the existing 66 KV Transmission line (kindly refer enclosed sketch).

Kindly note that the said 220 KV (D/C) line needs to be shifted within a month's time to enable us to limit the delays in the Project Schedule”

46. In view of the above request of the Appellant who had changed the location of the switchyard from the northern side as provided for in the bid documents to the eastern side, the delay was occurred.
47. In fact the Appellant did not inform this to the Respondent at any time prior to 13.2.2010.
48. On account of the above request, the Respondent had to start the entire process afresh of survey, analysing different routes for relocation, analysing the towers to be relocated, drawing and tracing of the proposed routes etc.
49. The shifting of the 220 KV line to further east as per the requests of the Appellant involved the various arrangements such as re-survey and re-assessment of the new transmission corridor, drawing and tracing of the new proposed route, the number of towers which had to be re-located , the length of the line to be re-located , more numbers of land owners to be notified and co-ordinating with the State Load Despatch Centre operations or taking shutdown of the existing 66 KV line and constructing the

towers and taking the line to the east of the existing 66 KV line.

50. Thus, shifting of the 220 KV line to a distance from the Project Site also involved locating the line beyond another existing 66 KV line. This also required taking shut down of 66 KV line. The time taken for completion of the above was, therefore, till 30.9.2010 instead of 31.5.2010.
51. Thus, the time taken for re-location of the line was wholly attributable to the Appellants and not to the Respondent.
52. According to the Respondent it took only reasonable time for shifting the line. Admittedly, the Appellant had not undertaken any material work on the project site till March, 2010. Thus, there was no hindrance caused by the 220 KV transmission line over the project. No monthly progress reports were submitted by the Appellant till the month of March, 2010, though the Appellants were under an obligation to provide the same.
53. As a matter of fact, in the progress report of the month of April, 2010, submitted by the Appellant on 30.4.2010, the Appellant did not refer to any hindrance on account of the 220 KV transmission line over the project site.
54. Immediately, after signing of the PPA dated 18.1.2010, the Respondent began the task of shifting of the transmission

line from the project site by taking upon various actions. Those details of the actions as referred to by the Respondent are as follows:

(a) Senior Executive Engineer, TLSC Division, Patiala made a site inspection on 01.02.2010 for the line to be shifted. The site inspection involved surveying the line to be shifted and identifying different possible routes for shifting.

(b) The concerned officers/officials made site visits on 01.02.2010 and 02.02.2010 for surveying the lines to be shifted. For the 220 kv lines, different routes at site are identified for possible relocations plans and the appropriate route is then selected from among the identified routes. Such route plan based on the site survey was required to be considered and approved by the office of Chief Engineer/Transmission line organization before the same can be taken as final.

(c) Based on the above, the route was finalized by the Additional S.E./TLSC, Patiala on 4.2.2010. The Additional S.E./TLSC, Patiala sent route plan after finalizing it, to Dy. Chief Engineer/TLSC Circle, PATCL vide letter No. 336 dated 04.02.2010. The Dy. Chief Engineer/TLSC Circle, PSTCL thereafter verified the said route plan and after granting his approval

forwarded the same to the office to Transmission Design, Patiala for approval vide letter no. 413 dated 09.02.2010.

(d) The above plan identified was within the knowledge of the Appellant. In the meantime, the Appellant vide their letter no. RKS/PSEB/0164-10 dated 13.02.2010 requested for modification of the route plan selected and for shifting the transmission line to further east of the proposed relocation route as per survey done by the Respondent.

55. While the lay out plan as per the bid documents specified it on the northern side, the Appellant neither at the time of bidding nor thereafter till 13.2.2010 notified the Respondent of any proposal for locating the evacuation facilities on the eastern side.
56. Accordingly, the Respondent had proceeded on the basis of the layout plan circulated along with the bid documents as per which the evacuation facilities were on the north side of the project site.
57. Based on the above, the proposed shifting of the transmission line by the Respondent would not have created any hindrance to the evacuation facilities. However, only on the request of the Appellant for shifting the transmission line for their convenience the Respondent had to re-start the

entire process of survey, identification etc for a much longer route.

58. The Appellant identified the route again and the initial approval was granted by the Dy Chief Engineer to the new route plan on 15.3.2010. Thereafter, the higher Offices approved the new route plan. Then the final approval for the drawing was given on 18.5.2010. Thus, about 40 days were taken only for the preparation of the new route plan. This was on account of the request of the Appellant to accommodate their evacuation facilities on the east side of the project site.
59. The new route plan involved installation of 20 new towers as compared to 13 towers envisaged for the earlier plan. The distance involved for the new line was also substantially higher.
60. On account of the above factors, it was not possible for the shifting of the line to be completed by 31.5.2010 originally envisaged by the parties. Thus, the extension of time which was required for the shifting of the line was only on account of the request of the Appellant for relocation of the transmission line.
61. According to the Respondent, the additional 4 months time taken was reasonably required for such shifting considering additional scope of work, paddy/rainy season.

62. Admittedly, in the meantime, monsoon season had also set in. There were heavy rains which affected the work. The Appellants themselves through their letter dated 13.7.2010 and 2.8.2010 claimed that the project development work was getting affected and delayed on account of heavy rains. The very same reason was also applicable for shifting of 220 KV line by the Respondent.
63. In these circumstances, the claim of the Appellant that the Respondent did not shift the 220 KV line is misconceived.
64. According to the Appellant, it suffered impediment only due to the inaction of the Respondent.
65. The Respondent was undertaking the process of relocating the line to facilitate the setting up of the project. It is an admitted fact that the Respondent informed the Appellant through its letter dated 6.5.2010 about the delay in relocation which was on account of the request of the Appellants for shifting of its line to the far east of the project site for its own convenience. The letter dated 6.5.2010 reads as under:

*"In this context, it is brought out that M/s L&T Power Development Ltd vide their letter No RKS/PSEB/0116-09 dt.14.12.09 requested M/s NPL (then owned by erstwhile PSEB) to relocate existing 220 KV D/C transmission line (which is passing through the project site) **from the present location to outside the project area.** The process was accordingly initiated*

by M/s NPL. (then owned by PSEB)/erstwhile PSEB. After getting the process fee of Rs 50000/- for shifting the line deposited vide your Demand Draft dated 28.01.2010 erstwhile PSEB got carried out the survey for preparation of the route for shifting the said 220 KV line outside the project site as requested. However, vide your letter No RKS/PSEB/0164-10 dt. 13.02.10 and RKS/PSEB/0154-10 dt. 13.02.10, it was requested that the existing 220 KV D/C line be shifted further east of the existing 66KV transmission line instead of the route finalized earlier. Thus whole of the process of the survey, investigation finalization has to be started afresh.

It may be appreciated that shifting of 220 KV D/C transmission line involves survey/route finalization, acquisition of land, procurement of material, erection of new line before de-energizing the existing one & connecting the new line with the existing system after taking requisite shut downs. As such, the whole process requires certain minimum time after the finalization of the route. The process of shifting of line on priority is already in progress.

From the above facts, it is evident that Punjab State Power Corporation Limited has not performed any action which attracts your attention to invoke Clause 12.3(ii)(1)(c) of the PPA."

66. In this letter there was a specific reference about the request of the Appellant for the relocation from the present location to outside the project area.
67. In terms of Clause 5.7.1 of the PPA, the Appellants are required to provide monthly progress reports for the Project development. Admittedly, the Appellants did not take into

account for the first three months after signing the PPA. On account of the above, the Appellant did not provide any monthly report during the months of January to March, 2010. For the month of April, 2010, the Appellant provided the monthly progress report on 30.4.2011. In the said report, the Appellant listed out certain activities to be carried out on the site including Geo tech investigations. There was no reference whatsoever in the said report dated 30.4.2011 for hindrance on account of transmission line over the project.

68. According to the Appellant, before the State Commission they have been raising the issue of the project schedule being affected because of non-shifting of the 220 KV line during the period from January, 2010 to September, 2010. The line was shifted on 30.9.2011. Only, as late as on 17.2.2011 did the Appellants claim extension of the Scheduled Commercial Operation Date for the project.

69. The learned Counsel for the Respondent pointed out that the conduct of the Appellant was mala-fide and blameworthy. According to the Respondent, the following facts would reflect the conduct of the Appellant:

(a) After having duly acknowledged and accepted that if the line is shifted with switchyard being at the place indicated in the Bid Documents; by 31.5.2010 the

project schedule will not be affected, the Appellants are now alleging to the contrary that the Project Schedule was affected since 18.01.2010 i.e. from the date of signing of PPA. This is clearly a plea false to the knowledge of the Appellants and contrary to record.

(b) Having taken advantage of the accommodation for shifting the 220 KV line, the Appellant cannot seek any extension of time for the Project Schedule because of the extra time which is taken for shifting to accommodate the Appellants. The shifting has benefited the Appellant by allowing the Appellant to relocate the Switchyard to the East side of the Project, which was never informed to the Respondent at any time prior to the communication dated 13.02.2010.

(c) The Appellant had acknowledged and accepted that the shifting of the line, if done by 31.5.2010 would not affect the Project Schedule. This was in the context of the shifting of the line adjacent to the East side of the Project. When the Appellant requested the shifting of the line to further East which involved the survey of the land once again, additional towers and other aspects mentioned herein above, the Appellant should have accepted the fact that the additional time would be required. The additional time was, therefore, well within

the contemplation of the Appellant and in any event cannot be attributed to the Respondent.

70. These factual events as referred to above would clearly indicate that the Appellants were not able to demonstrate that only on account of the existence of the 220 KV line, the Appellant could not undertake piling work at the project site.
71. It was also pointed out by the Respondent that the State Commission by the Order dated 22.11.2011 directed the Appellant to disclose the information regarding the time taken for designing of piles, testing and thereafter to start the piling work at the project site.
72. The stand taken by the Appellant before the State Commission was that on account of the existence of the 220 KV line, the Appellant could not undertake the piling work during the period prior to 30.9.2010 though the Appellant was ready to do such piling work is contrary to the Appellant's own reports from the following facts which were pointed out by the Respondent:

(a) The Job Pile Drawing was first released on 25.6.2010. The job pile work started only on 21.8.2010. There is no explanation whatsoever for this delay of about two months between the release of the drawings and the starting of the job pile work. **The same could not have possibly been on account of**

the transmission line, as the work was started before the line was relocated.

(b) In the monthly progress reports for August, 2010 to November, 2010 the Appellants, have stated 427 number of total Job Pile for Boiler area Unit No. 1. The Appellant subsequently increased the number of Job Piles to 542 in the monthly progress reports of December, 2010 to February, 2011. Subsequently it was further increased to 632 Job Piles as disclosed in the progress report of March 2011. **The Appellant has undertaken 427 Job Piles between August, 2010 to November, 2010 when for part of the period (upto September, 2010) the transmission line was still existing. However, the Appellant only undertook an additional about 200 job piles in the next six months.** As against a total of 427 job piles completed by November, 2010 the Appellant had completed a total of 627 job piles by 30.4.2011 and 631 job piles by 31.5.2011. There can be no reasons for such delay in the progress when the progress was much faster when the transmission line was still existing.

73. The above facts would establish that the allegations of the Appellant about the transmission line affecting the job of the piling work and delaying the progress of the plant is not correct and bona fide.

74. In fact, the State Commission has indicated the conduct of the Appellant in the Impugned Order which is reproduced below:

"From the progress reports that came on record for the months of March to June 2010, the Commission notes that soil testing was completed during these months without representation of any kind by the petitioners that 220 KV HT line was causing any hindrance. The drawing for Test pile was approved on 15.5.2010. The Commission notes that no hindrance due to 220 KV HT line had been indicated by the petitioners. Hence it can be presumed that up to 15.5.2010 the work was going on as per planning and convenience of the petitioners. Work of Test piles was taken in hand on 16.6.2010, a month after the approval of drawings. Work of Test piles has to take its own time in normal course of things and completion of Test piles on 20/23.8.2010 appears to be normal and natural. Regarding Job piles, the drawing for same is stated to have been approved on 25.6.2010. The work of Job piles could not have been taken in hand before approval of Job pile drawing i.e. 25.6.2010 and in no manner the petitioners have been able to prove and establish that existence of 220 KV HT line was any way responsible for delay for causing any hindrance in project work.

75. The Appellant submitted the project site and lay out plan map at the time of planning the 400 KV switchyard. The map makes it clear that the distance between the end of the Boiler No.1 and the 220 KV transmission line is not less than 120 meters. The map is on the scale of 1mm = 9.523mtr.

The distance between the right side edge of the boiler and the 220 KV transmission line is about 13 mm which amounts to 123.8 meters. With such distances, there can be no question of any hindrance in piling work for the boiler area of Unit-1 as claimed by the Appellant. As pointed out by the State Commission, the piling rigs could have been easily operated over such areas as was actually operated by the Appellant when the transmission line still existed. The entire basis of the Appellant claiming that the 220 KV line passed over the power block and boiler area and no work could be undertaken cannot be said to be correct statement.

76. Admittedly, the map was filed by the Respondent along with the Affidavit. The State Commission directed the Appellant to file its reply to the Affidavit of the Respondent to review the contents of the Affidavit including the map. However, no reply Affidavit was filed by the Appellant and the map was not contested.
77. In the above circumstances, it is not open to the Appellant to now disown its own map and contend that the same is wrong.
78. In the Impugned Order the State Commission has taken note of the same as under:

".....The work of Job piles could not have been taken in hand before approval of Job pile drawing i.e. 25.6.2010 and in no manner the petitioners have been

*able to prove and establish that existence of 220 KV HT line was any way responsible for delay for causing any hindrance in project work. **This fact is further proved from the sketch submitted by the respondents showing that 220 KV HT line was a minimum 120 metres away from the Boiler Area of Unit I. This sketch has gone uncontested by the petitioners. The Commission is unable to agree with the argument of petitioners that they are not in position to mark the location of 220 KV HT line on layout plant of the project. As the Boiler area which has been stressed by the petitioners so strongly in their earlier pleadings being always on critical path in any project construction lies 120 metres away from the 220 KV HT line, the Commission is of the considered view that no hindrance or impediment could be caused to the free movement of construction rigs working in that area....."***

79. It is pointed out by the Respondent that the Appellant was directed by the State Commission on 31.1.2012 to produce the exact location of the test piles and job piles for the Boiler foundation and the exact location of the existing 220 KV line on the site plan. But the Appellant did not produce the said map showing the exact location of the boiler area and the 220 KV line with the full knowledge that the 220 KV line does not pass over the boiler of Unit-1 in the Power Block.
80. Thus, it is clear that the Appellant was not complying with the directions given by the State Commission in regard to the tracing on the lay out map exact positioning of the transmission line as was in existence at the relevant time. In

such a situation, the Appellants cannot make a plea that the delay was on account of the Respondent's in action.

81. Under those circumstances, it has to be held that the Appellant have not made out any case for interference with the Impugned Order passed by the State Commission as there is no material to show that the Appellant was being affected on completion of its work on account of delay on the part of the Respondent.

82. **Summary of Our Findings**

(i) The shifting of the 220 KV line was delayed by the Respondent on the suggestion of the Appellant only on 13.2.2010 due to relocation of the switchyard with respect to that envisaged in the layout given in the bid documents.

(ii) The Appellant by the letter dated 13.1.2010 had stated that shifting of the transmission line by 31.5.2010 would not affect the Project Work.

(iii) The Appellant has not been able to establish that the transmission line caused any hindrance in execution of the work in the critical boiler turbine area. Thus, no case has been made out for interference with the Impugned Order.

83. In view of our above findings, we find no merit in this Appeal. Accordingly, the Appeal is dismissed. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 30th June, 2014

√REPORTABLE/~~NON-REPORTABLE~~