

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

I.A. No. 226 of 2013 in Appeal No. 56 of 2013
I.A. No. 227 of 2013 in Appeal No. 68 of 2013
&
I.A. no. 130 of 2013 in Appeal No. 84 of 2013

Dated: 21st August, 2013

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

I.A. No. 226 of 2013 in Appeal No. 56 of 2013
&
I.A. no. 130 of 2013 in Appeal No. 84 of 2013

In the matter of:

**Talwandi Sabo Power Limited,
Site cum Regd. Office,
Village Banwala, Mansa-Talwandi Sabo Road,
Distt. -Mansa,
Punjab-151302**

....Applicant/Appellant

Vs.

**1. Punjab State Power Corporation Ltd.,
Through its Engineer-in-Chief,
Thermal Designs,
PSPCL, Shed No. T-2,
Thermal Design Complex,
Patiala-147001**

**2. Punjab State Electricity Regulatory Commission,
Through the Secretary,
SCO No. 220-221, Sector 34-A,
Chandigarh-160 022.**

.... Respondents

Counsel for the Appellant (s): Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Sitesh Mukherjee
Mr. Aniket Prasoon
Ms. Kanika Chugh

Counsel for the Respondent(s): Mr. M.G. Ramachandran
Mr. Anand K. Ganesan for R.1
Ms. Shikha Ohri for R.2

I.A. No. 227 of 2013 in Appeal No. 68 of 2013

In the matter of:

- 1. Nabha Power Limited,
SCO-32, Sector-26D, Madhya Marg,
Chandigarh-160 019**
- 2. L&T Power Development Ltd.,
Powai Campus, Gate No. 1,
C Building, 1st Floor,
Saki Vihar Road,
Mumbai-400 072**

....Applicants/Appellants

Vs.

- 1. Pubjab State Power Corporation Ltd.,
Through its Engineer-in-Chief,
Thermal Designs,
PSPCL, Shed No. T-2,
Thermal Design Complex,
Patiala-147001**
- 2. Punjab State Electricity Regulatory Commission,
Through the Secretary,
SCO No. 220-221, Sector 34-A,
Chandigarh-160 022.**

.... Respondents

Counsel for the Appellant (s): Mr. Parag Tripathy, Sr. Adv.
Mr. Sitesh Mukherjee
Mr. Aniket Prasoon
Ms. Kanika Chugh

Counsel for the Respondent(s): **Mr. M.G. Ramachandran**
Mr. Anand K. Ganesan,
Ms. Swapna Seshadri,
Ms. Swagatika Sahoo for R.1
Ms. Shikha Ohri,
Mr. Sunil Sharma for R.2

ORDER

Rakesh Nath, Technical Member

Pending above Appeals, against the impugned orders dated 24.12.2012, 31.12.2012 and 27.9.2012 the above IAs have been filed seeking interim orders by Nabha Power Limited and Talwandi Sabo Power Ltd., the generating companies, which are in the process of setting up thermal power projects for supply of power to Punjab State Power Corporation Limited through the tariff based competitive bidding process under Section 63 of the Electricity Act, 2003.

2. The prayer of M/s. Nabha Power Ltd., Applicants/Appellants in IA no. 227 of 2013 in Appeal no. 68 of 2013, is to allow them to continue the tender

process undertaken by the Applicants to import coal by conducting competitive bidding for procurement of imported coal to the tune of 1.3 Million tonnes from international market to meet the shortfall in supply of coal for the project without prejudice to their rights and contentions in the Appeal and to allow pass through of cost of imported coal discovered pursuant to conclusion of the tender process.

3. The prayer of M/s. Talwandi Sabo in the I.A. no. 226 of 2013 in Appeal no. 56 of 2013 is similar with the difference that they seek permission to initiate the tendering process for procurement of coal as they intend to meet the shortfall from imported coal as well from alternate sources of domestic coal.

4. Shri Parag Tripathy, learned Sr. Counsel for the Applicant/Appellant in I.A. no. 227 of 2013 in Appeal

no. 68 of 2013 pressed for interim directions of the Tribunal in view of following:

- (a) The Cabinet Committee on Economic Affairs (CCEA) taking into account the overall domestic availability and actual requirements of coal has decided on 21.6.2013 that Fuel Supply Agreements (“FSA”) have to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the Remaining four years of the 12th Five Year Plan and to meet the balance FSA obligations, Coal India Limited (‘CIL’) may import coal and supply the same to the willing thermal power project on cost plus basis. The Thermal Power Projects may also import coal themselves. The Cabinet Committee also decided that higher cost of

imported coal is to be considered for pass through as per modalities suggested by the Central Commission.

- (b) Punjab State Corporation, the Respondent no. 1 in reply to the IA has reiterated that it is not responsible for arranging coal to meet the requirement of the project. Therefore, the Appellant has taken upon itself to make arrangements by direct import of coal to meet the expected shortfall in supply of coal from the linked sources.
- (c) The Appellant has signed FSA for Unit no. 1 of the Project on 11.5.2013 and also sought supply of imported coal from CIL. However, M/s. SECL, the coal company and subsidiary of CIL, in its letter dated 19.6.2013 has

highlighted that the Appellant will be eligible to receive imported coal from CIL/SECL only after completion of “build up period” of 12 months. For Appellant’s Project, the build up period for imported coal is November-December 2014. Thus, for one year period the CIL/SECL’s commitment is neither enforceable nor redressable by the Appellant in terms of seeking damages, in case of short supply of coal.

- (d) It takes about 7-8 months to receive first shipment of coal from the date of publication of NIT.
- (e) The first unit of the Project is likely to be commissioned in January 2014 and the second unit in May 2014. Hence, there is

urgency to complete the bidding process and place order for import of coal.

5. Shri C.S. Vaidyanadhan, Learned Senior counsel for the Appellant/Applicant in I.A. no. 226 of 2013 and I.A. no. 130 of 2013 in Appeal no. 56 and 84 of 2013 respectively has also made similar submissions except that they want also to explore alternative sources of domestic coal supply besides imported coal.

6. Shri M.G. Ramachandran, learned counsel for Respondent no. 1, admitted that the imported coal may have to be used at the Appellants' power plants to meet the shortfall in domestic coal supply. However, for approval to import coal directly by the Appellants, they should approach the State Commission by filing a separate petition.

7. We find that in the impugned order dated 31.12.2012, the following observations have been made by the State Commission:

“The Commission notes that at this point of time, SECL is assuring to supply 80% of the ACQ of coal. The petitioners’ apprehensions regarding not being able to operate the plant beyond a certain PLF are not entirely unfounded. A significant investment having been made by the developer in the Project, the respondent and the State Government have to, besides the developer, take up the matter with the quarters concerned for allocation and supply of adequate quantity/quality/grade of coal for the generating station to run successfully as per PPA.”

Thus, the State Commission has recognized the problem of shortfall in supply of coal from the linked source.

8. The State Commission in the impugned order dated 31.12.2012 has given directions to the Appellant to take appropriate decisions and actions relating to usage of imported coal offered by Coal India Ltd.(CIL) and South Eastern Coal Fields Ltd. (SECL). However, on use of imported coal from other international markets as well as domestic e-auction of coal for running the project as per PPA, it has decided that the relevant decisions and actions are required to be taken by the Appellant and they could approach the State Commission for approval as per terms of the PPA at the appropriate time.

9. We agree with the Learned Sr. counsel for the Appellants that advance action is required to be taken to meet the expected shortfall in availability of coal from the linked domestic sources during the pendency

of these Appeals as tendering process for import of coal takes time. We, therefore, directed both the parties to suggest the safeguards to be followed by the Appellants in procurement process and supply of imported coal. Accordingly, both the parties filed their affidavits giving their suggestions. We have heard their submissions also.

10. On going through those suggestions and having considered the submissions, we find that the balance of convenience lies in favour of the Applicants/Appellants to take advance action for procurement of coal from alternative sources to meet the anticipated shortfall from the linked sources of coal in order to operate the power plant as per the PPA.

11. Learned counsel for the Appellants assured that no 'take or pay' liability on account of their contracts

with suppliers of alternative sources of coal would be passed on to PSPCL. Further, the Appellants also undertake to receive the entire quantity of coal offered for supply by CIL/subsidiaries of CIL, including imported coal and not to put any restrictions on supply from the linked sources.

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

(A) The Appellants may undertake a transparent competitive bidding process for procurement of imported coal or coal from alternative domestic sources for their projects to meet the expected shortfall in supply from linked sources in order to operate the power plant as per the terms and conditions of the PPA

for a period of 12 months from the expected commencement of operation of the first unit of the project on coal subject to the following conditions:

- (i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL (R-1).
- (ii) The Appellants will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.
- (iii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the Appellants for procurement of coal from

alternative sources will be passed on to PSPCL.

- (iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.
- (v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then

decide the matter and pass the order accordingly as per law as expeditiously as possible but not later than 60 days from the date of the filing of the application.

- (B) We want to make it clear that the above interim order is to enable the Appellants to take advance action for procurement of coal from alternative sources and this will not give any right to the Appellants to raise any charges over and above that admissible to them as per the terms and conditions of the PPA. The actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.

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

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

14. Post the main Appeals for final hearing on **26th Sept., 2013.** In the meantime, pleadings be completed.

15. Pronounced in the open court on this **21st day of August, 2013.**

(Justice Surendra Kumar) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

vs