In the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO. 97 OF 2016
&
IA Nos. 241 of 2016, 242 of 2016 & 270 of 2016

Dated: 03rd June, 2016

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :

Talwandi Sabo Power Limited (TSPL)
Village Banwala,
Mansa-Talwandi Sabo Road,
Dist|. Mansa,
Punjab-151302.

...Appellant(s)

Versus

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

2. **Punjab State Load Despatch Centre,**
   Through its Chief Engineer
   SLDC Building near 220 KV grid station,
   PSTCL, Ablowal, Patiala-147001, Punjab

3. **Punjab State Electricity Regulatory Commission**
   SCO 220-221
   Sector 34A,
   Chandigarh-160022

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Nimesh Kr. Jha
Mr. Ruth Elwin
Mr. Piyush Singh

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Mr. Ranjitha Ramachandran
Mr. Anushree Bardhan
Ms. Poorva Saigal
Mr. Shubham Arya for **R.1**

Mr.Anand K. Ganesan
Ms. Neha Garg
Mr. Akshay Garg(Rep.)
for **R.2**

Mr. Sakesh Kumar for **R.3**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. The Appellant Talwandi Sabo Power Limited (**"**Appellant **TSPL or TSPL"**) is developing a thermal power plant with an installed capacity of 1980 MW(3X660 MW) at district Mansa in Punjab for supplying the entire power generated by the said project to Respondent No.1 Punjab State Power Corporation Limited (PSPCL) on long term basis, pursuant to the Power Purchase Agreement("PPA") dated 01/9/2008 executed between

the Appellant TSPL and Respondent No.1. Respondent No.1 PSPCL is the distribution licensee in the State of Punjab. Respondent No.2 Punjab State Load Despatch Centre (SLDC) is the State Load Dispatch Centre in the State of Punjab. Respondent No.3 is Punjab State Electricity Regulatory Commission (**"the State Commission"**).

2. Aggrieved by the order dated 25/4/2016 passed by the State Commission the Appellant TSPL has filed this appeal under Section 111 of the Electricity Act, 2003 (**"the said Act"**). It is necessary to give gist of the facts leading to this appeal.

3. Appellant TSPL filed petition under Section 86(1)(f) of the said Act read with Article 6.2 of the PPA dated 1/9/2008 seeking directions to PSPCL to witness the commissioning tests of Third Unit (Unit No.1) of Appellant TSPL's Power Plant (3X600 MW) at Village Banawala, District Mansa. It is Appellant TSPL's case that in terms of Article 6.1 of the PPA it was required to serve 60 days advance preliminary written notice and at least 30 days advance final written notice to the Procurer of the date on which it intended to synchronize a Unit to the Grid System. According

to Appellant TSPL it clearly exchanged desired communications with the Respondents and kept them posted from time to time regarding the progress of Third Unit (Unit No.1) indicating the synchronization of the Unit to the Grid. It is Appellant TSPL's case that correspondence exchanged between the parties makes it amply clear that SLDC took cognizance of the synchronization request only when Appellant TSPL had met all other legal requirements for synchronization to the Grid System and accordingly SLDC allowed the synchronization of the Third Unit(Unit No.1) with the Grid on 28/3/2016. According to Appellant TSPL, the synchronization was achieved on 29/3/2016 on approval as per the terms of the PPA. It is further the case of Appellant TSPL that on 29/3/2016 at 0024 hrs the Central Electricity Authority (**" CEA"**) also recognised the synchronization of the Third Unit (Unit No.1) and to that effect a certificate was issued by CEA which is conclusive evidence that synchronization has been achieved. However, on 30/3/2016 Appellant TSPL received a letter from PSPCL that it has not accorded any approval for synchronization. Appellant TSPL's case is that as per Article 6.2 of the PPA, it has duly served the notice of commissioning test of Third Unit (Unit No.1) to PSPCL and

Independent Engineer on 15/3/2016 and though SLDC has provided the approval for synchronization, PSPCL is now arbitrarily demanding notice for synchronization in accordance with Article 6.1.1 of the PPA. PSPCL vide letters dated 29/3/2016, 30/3/2016 and 1/4/2016 has refused to come to witness the commissioning tests of the Third Unit (Unit No.1) even though TSPL has issued to PSPCL, 10 days prior notice as envisaged in the PPA. According to Appellate TSPL, PSPCL by this conduct is illegally denying witnessing the commissioning test of Third Unit (Unit No.1) so as to avoid payment of capacity charges in terms of the PPA. It is avoiding obligation under the PPA, thereby causing irreparable loss to Appellant TSPL. This leads to generation loss which is also a national loss. Appellant TSPL made following prayers to the State Commission **:**

> ***"a) Direct Respondent No.1 to witness/monitor the commissioning tests of Unit No.1 (3rd Unit) of the Petitioner's power plant in compliance of the provisions of Clause 6.2 of the PPA dated 01/9/2008 and the Petitioner's letter dated 15/3/2016 at the earliest, without any further delay;***
>
> ***b) Quash the Respondent's letter No.1143/DPT-63 Vol-9 dated 29/3/2016 and 1176/DPT-63 Vol-9 dated 30/3/2016 being illegal and bad in law;***

c) Direct Respondent No.1 to pay capacity charges calculated on normative availability of contracted capacity of the Third Unit (Unit 1) for the period the Unit is available for conducting Commissioning Tests, as confirmed by the Petitioner, but prevented on account of the default of Respondent No.1;

d) Pass any such order and/or direction as this Hon'ble Commission may deem just and proper in the facts and circumstances of the present petition."

4. PSPCL, on the other hand, submitted that Appellant TSPL has not come to the State Commission with clean hands. It has not complied with mandatory provision of written notice contemplated under the PPA. It has purported to synchronise the Third Unit (Unit No.1) on 29/3/2016 without mandatory notice. According to PSPCL the communication and minutes of meeting related to the period before 29/6/2015 and provided only the tentative date when Third Unit (Unit No.1) was expected to be commissioned and not notices in terms of Article 6.1.1 and 6.2.2 of the PPA. There was no notice after 29/6/2015 till 15/3/2016. It is contended by PSPCL that a letter dated 15/1/2016 is purported to have been written to SLDC. It was however given to SLDC on 21/3/2016. The said letter has not been given to PSPCL till date. It is the case of PSPCL, that

without placing the relevant correspondence on record Appellant TSPL is making unwarranted allegations against PSPCL. According to PSPCL, there is no merit in the case of Appellant TSPL that the communication dated 29/3/2016 of PSPCL is illegal or bad in law and the PSPCL is required to pay capacity charges.

5. It appears from the impugned order that Appellant TSPL filed additional submissions. In response to PSPCL's contention that 60/30 days notices are meant to enable PSPCL to make advance arrangements for purchase of power and it has commercial implications it was stated that on account of demand and supply position in the period from April to July, 2016, it shall be commercially beneficial for PSPCL to purchase maximum power from TSPL Plant. It was pointed out that PSPCL did not insist for the said notices for synchronization for Unit No.3 or Unit No.2.

6. PSPCL also filed its additional submissions. It placed on record minutes of visit to the site on 10/2/2016 by the officers of Thermal Design Organisation of PSPCL, which is the concerned

authority in the matters before declaration of COD, as per PPA dated 1/9/2008. PSPCL pointed out that Appellant TSPL's conveying to these officers that synchronisation of Third Unit (Unit No.1) would be around 20/4/2016 was only an indication and not a notice as required in terms of Article 6.1.1 of the PPA. PSPCL contended that PP&R Division is concerned only with the post COD activities and vide letter dated 29/3/2016 it only clarified the matters relating to billing arrangements. By the said letter there was no waiver of 60 days notice. PSPCL further contended that there was no consent of Thermal Design Organisation of PSPCL which is the concerned department.

7. By the impugned order the State Commission held that notices fulfilling the requirements in terms of Article 6.1.1 and 6.2.2 of the PPA are mandatory and were required to be issued by Appellant TSPL. The State Commission rejected the prayers made by Appellant TSPL and disposed of the petition. The said order is challenged in this appeal.

8. We have heard Mr. Sanjay Sen, learned senior counsel appearing for Appellant TSPL. We have perused the written

submissions filed by him. Gist of the written submission is as under:

i) The PPA dated 01/9/2008 has to be read as a whole. An intermediate term providing for notice for synchronisation, which term has not been strictly followed in the past, cannot defeat the core purpose and object of the PPA. The core purpose and object of the PPA is to commission and commercially operate the power station on the scheduled date of commercial operation. Delay in commercial operations, unless visited by Procurer's default or force majeure event, has severe commercial consequences on the seller.

ii) In any event, the provisions of Article 6.1.1, which Article only requires notification of "intention" to synchronise, is only a directory requirement and not a mandatory requirement. This conclusion is derived from the fact that such period of notice was not earlier insisted upon. Also from the fact that under Article 6.2.2 of the PPA, for the purposes of commissioning of a unit the physical presence of the Procurer and the independent engineer is required,

which is not the case under Article 6.1.1. The fact that the SLDC (Respondent No.2) has till date not insisted on the notice in terms of Article 6.1.1 goes to show that the provision is not at all mandatory.

iii) Article 6.1.1 of the PPA does not envisage that notice has to be given for synchronisation of each unit separately. The minimum notice period requirement in terms of the said article is only for the first unit so as to enable completion of the Procurer's obligation of setting up the Interconnection and Transmission Facilities for evacuation of power under Article 4.2 of the PPA.

iv) Various clauses of the PPA demonstrate that commissioning of the plant and commercial operation thereof had to occur within timelines agreed in the PPA. Article 3.1.2, 3.5.1, 4.4.1(b), 4.2, 4.2(a), 4.5, 4.5.1, 4.6, 5.1, 5.7.1 are designed to ensure that the timelines provided for supply of power for a period of 25 years are strictly complied with. Therefore synchronisation and commissioning of the third unit cannot be withheld for want of notice for a clear period of 60 days or 30 days.

v) The word "a unit" has to be read along with the entire Article 6.1.1 which provides that no unit shall be synchronised prior to 36 months from the notice to proceed. Obviously, the first unit could have been synchronised 36 months prior to notice to proceed. There is therefore no need for separate notices of 60 days and 30 days for each unit.

vi) The purpose of the notice has to be seen. A combined reading of the clauses of the PPA establishes that the whole purpose of the notice is to ensure that the synchronisation/commissioning of the first unit takes place on time. After commissioning of the first unit, the relevance of 60/30 days notice becomes irrelevant.

vii) The contract has to be read as a whole. In this connection reliance is placed on the following judgements:

a) DLF Universal Ltd. v. Director Town and Country Planning Department, Haryana [1].

[1] **(2010) 14 SCC 1**

b) Citibank N.A v. TLC Marketing PLC & Another [2].

c) Gomathinayagam Pillai & Others v. Palaniswami Nadar [3].

d) Answar Hasan Khan v. Mohd Shafi & Others [4].

viii) The principles laid down by the Supreme Court are applicable to the present case. The timeline provided in Article 6.1.1 has lost relevance today, when the third unit is being commissioned after significant delay. The intermediate timelines in Article 6.1.6 are provided for early commissioning of the plant and cannot be used to delay the COD beyond the scheduled commercial operation date.

ix) Synchronisation of the third unit (Unit No.1) has indeed taken place on 29/3/2016. It was permitted by the SLDC after a decision taken in a meeting held at PSPCL office on 18/3/2016. A communication to that effect was issued by PSPCL on 29/3/2016. Parties have acted upon such communication which has not been withdrawn till date. Site visit of the Procurer dated 10/2/2016, minutes of the meeting dated 14/3/2016, Appellant's letter dated

[2] **(2008) 1 SCC 481**
[3] **(1967) 1 SCR 227**
[4] **(2001) 8 SCC 540**

15/3/2016, notice of synchronisation issued to SLDC on 19/3/2016, PCPCL's letter dated 21/3/2016 indicating that it would take further action in the matter, Appellant's letter dated 23/3/2016 confirming the expected date of synchronisation as 24/3/2016, PCPCL's letter to the Appellant dated 24/3/2016 regarding the status of likely COD confirms this fact. The Procurer had substantial notice.

x) Between 26/3/2016 and 29/3/2016 several e-mails were exchanged between the Appellant and Respondents No.1 and 2 which make it clear that SLDC has never demanded any notice of 60/30 days.

xi) In the meeting convened in the office of the Chief Engineer/PP&R, PSPCL on 28/3/2016 which was not attended by officers of the Thermal Department of PSPCL decision was taken to allow synchronisation of the third unit. Certificate of CEA dated 29/3/2016 acknowledges this fact. There is no explanation why officers of Thermal Department did not attend this meeting.

xii) PSPCL has waived its right to receive notice of 60/30 days under Article 6.1.1 of the PPA.

xiii) It is clear that PSPCL did not object to synchronisation. There appears to be a disagreement between the officers of PP & R and Thermal Design, after synchronisation. The consequence of such disagreement cannot invalidate the event of synchronisation which has taken place with the express knowledge and consent of PSPCL. Reliance is placed on the following decisions.

a) ***Ogilvy & Others v. Hope Davis***[5].

b) ***Commissioner of Customs, Mumbai v. Virgo Steels Bombay & Another*** [6].

c) ***Glencore Grain Ltd. v. Flacker Shipping Ltd.***[7].

xiv) The Appellant is entitled to relief under the equitable principle of estoppel by convention. The Procurer has admitted in its reply that it did not strictly follow Article 6.1.1 for synchronisation of the earlier two units. It cannot

[5] **(1976) ALL ER 683**
[6] **2002 (4) SCC 316**
[7] **(2002) Vol.2 Lloyds Law Reports 487**

take a contrary stand now. Reliance is placed on the following judgements.

a) ***Glencore Grain Ltd. v. Flacker Shipping Ltd***

b) ***Panchand Freres S.A v. Etablissements General Grain Company*** [8]

xv) Article 18 of the PPA is only in relation to giving and receiving of notices. It does not concern itself with the issue as to which officer of PSPCL will bind PSPCL as an organisation by its conduct or otherwise.

xvi) Letter dated 29/3/2016 issued by PSPCL under the pen of Deputy Chief Engineer (PP&R) which letter has been acted upon by the parties will bind PSPCL. In this context reliance is placed on the following judgments.

a) ***Century Spinning and Manufacturing Company Ltd and Another v. Ulhasnagar Municipal Council and Another*** [9].

b) ***Sunil Pannalal Banthia and Others v. City and Industrial Development Corporation of Maharashtra Ltd. & Another*** [10].

[8] **1970 Vol.1 Lloyd's Law Reports 53**
[9] **(1970) 1 SCC 582**
[10] **(2007) 10 SCC 674**

xvii) PSPCL & SLDC have made false statements on oath/affidavits with intent to derive illegal benefit.

xviii) The State Commission has failed to exercise its regulatory jurisdiction and permitted PSPCL to avoid cheaper power available from the Appellant in favour of the more expensive power of the State Gencos.

xix) The State Commission has failed to exercise its regulatory jurisdiction as a sector regulator.

a) **Cellular Operators Assn. of India v. Union of India [11].**

9. We have heard Mr. M.G. Ramachandran, learned counsel appearing of PSPCL. We have perused the written submissions filed by him. Gist of his submissions is as under:

a) No notice of synchronisation as required under Article 6.1.1 was given by Appellant TSPL to PSPCL Thermal Design, the authorised representative of PSPCL.

b) Notices required to be given under Article 6.1.1 need to be specific. No such notice was given. Communication indicating likelihood of synchronisation is not a notice

[11] **2003 (3) SCC 186**

required under Article 6.1.1. Notice of commissioning is no notice of synchronisation.

c) Notice under Article 6.2.2 can be given only after the completion of the steps provided in Article 6.1.1 and upon the successful synchronisation, subsequent to the process provided under Article 6.1.1 being duly undertaken and completed, namely giving an advance preliminary written notice of synchronisation of 60 days and advance final written notice of 60 days.

d) By letter dated 15/3/2016 Appellant TSPL informed the Chief Engineer, Thermal Design about the commissioning test to be undertaken by Appellant TSPL on 26/3/2016. PSPCL by its letter dated 21/3/2016 inquired with TSPL about the steps taken by it relating to synchronisation, more particularly about the notices required to be given as per Article 6.1.1 of the PPA. Appellant TSPL then planted a backdated letter dated 15/1/2016 as notice of synchronisation and delivered it to the office of the SLDC. This letter was not served on PSPCL Thermal Design, RLDC or SLDC prior to 21/3/2016. On the basis of this letter it was alleged that notice of synchronisation was given.

e) When PSPCL by its letter dated 21/3/2016 had inquired with Appellant TSPL whether Article 6.1.1 of the PPA was complied with by it, Appellant TSPL should not have

proceeded to take steps for synchronisation of the third unit. Pertinently Appellant TSPL did not place reliance on letter dated 15/1/2016 before the State Commission or in this Tribunal.

f) Appellant TSPL proceeded to deal with PSPCL's PRR Division and SLDC, held a meeting on 28/3/2016 and undertook synchronisation on 29/3/2016 which is not valid synchronisation as notices prescribed under Articles 6.1.1 and 6.1.2 were not given.

g) Notices provided under Article 6.1.1 and 6.1.2 are mandatory.

h) The development of the project is subject to the timelines prescribed under the various provisions of the PPA including Article 6.1.1 and 6.1.2.

i) Article 6.1.1 requires notice of synchronisation to be given for each unit i.e. in respect of each of the three units and not in respect of only the first generating unit.

j) It is well settled that if any agreement states that a particular act relating to the furtherance of the contract has to be done in a particular manner then it has to be done in that manner and in no other manner. (Ref. Section 50 of the Indian Contract Act 1872, Chitty on Contract Vol.I General Principles 31st Edition

Paragraph 21.004 at page 1552, ***Bishambar Nath Agarwal v. Kishan Chand and Ors***[12]***, Mrs. Niloufer Siddiqui v. Indian Oil Corporation Ltd.*** [13] ***, Food Corporation of India v. Chandu Construction*** [14] ***, Rajasthan State Industrial Development and Investment Corp. v. Diamond and Gem Development Corp. Ltd.*** [15]***, State of Punjab v. Devans Modern Breweries Ltd.***[16]***, Arcos Limited v. E.A. Ronaasen & Sons***[17]***.***

k) It is not correct to say that the purpose of giving notice of synchronisation is only to enable PSPCL to arrange for the Interconnection and Transmission Facilities for evacuation of power. It is also necessary for PSPCL to arrange its affairs to receive the contracted capacity under the PPA.

l) The judgments cited by TSPL are not applicable to this case. The principles of purposive or objective construction or implied terms etc will arise only if the express terms are vague or there is absence of express terms. Such is not the case here.

m) In order to constitute waiver there has to be clear knowledge on the part of the party of its rights. Waiver

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[12] **AIR 1990 ALL 65**
[13] **AIR 2008 Patna 5**
[14] **(2007) 4 SCC 697**
[15] **(2013) 5 SCC 470**
[16] **(2004) 11 SCC 26**
[17] **(1933) ALL ER 646**

must be intentional. Reliance is placed on the following judgments.

i) Motilal Padampat Sugar Mills Co. Ltd v. State of Uttar Pradesh and others [18].

ii) P. Dasa Muni Reddy v. P. Appa Rao [19].

iii) Associated Hotels of India Ltd v. S.P. Sardar Ranjit Singh [20].

iv) Municipal Corpn. Of Greater Bombay v. Hakimwadi Tenants' Assn., [21].

n) Waiver has to be in terms of Article 18.3 of the PPA. There is no waiver in terms of Article 18.3 of the PPA.

o) That PSPCL did not insist on 60 days notice on the previous two occasions is no ground for not giving notice as required by Article 6.1.1 and 6.1.2. Non insistence in the past cannot constitute a waiver for the future transaction (See: ***Sikkim Subba Associates v. State of Sikkim*** [22].

[18] **AIR 1979 SC 621**
[19] **AIR 1974 SC 2089**
[20] **AIR 1968 SC 933**
[21] **1988 Supp SCC 55**
[22] **(2001) 5 SCC 629**

p) Conduct of Appellant TSPL disentitles it from claiming any equitable consideration Appellant TSPL has not acted in a bona fide manner. It has conducted itself in a fraudulent manner. Fraud vitiates every solemn act (See: ***Ram Chandra Singh v. Savitri Devi***[23]).

10. We have heard Mr. Anand K Ganesan, learned counsel appearing for Respondent No.2. We have perused the written submissions filed by him. The gist of his submissions is as under:

a) Article 6.1.1 of the PPA does not require notice to be issued to Respondent No.2. Notice is required to be served only to the Procurer and RLDC.

b) Respondent No.2 is concerned only with the technical aspects of synchronisation and operation of the State Grid and not with the compliance of the contractual terms by the parties. Appellant TSPL has to ensure compliance of the PPA. Appellant TSPL cannot rely on the actions of Respondent No.2 to claim fulfilment of its contractual obligations.

c) By communication dated 21/3/2016 Respondent No.1 sought the details of the notices given by Appellant TSPL

[23] **(2003) 8 SCC 319**

under Article 6.1.1 of the PPA. The said communication was not to the knowledge of Respondent No.2 in the meeting held on 28/3/2016. It is only after the meeting was held on 28/3/2016 that Respondent No.2 came to know about the communication dated 21/3/2016 and disputes between the parties under the PPA.

d) The PPA or the communications exchanged by Appellant TSPL with PSPCL were not placed by Appellant TSPL in the meeting held on 28/3/2016. The synchronisation of the Unit No.3 with the grid on 29/3/2016 was undertaken without any reference to the contractual obligations of the parties.

e) The allegation made by Appellant TSPL that Respondent No.2 is illegally supporting the actions of PSPCL is misconceived.

11. The core issue in this case is whether notice of 60/30 days which the Seller is required to give to the Procurer & RLDC of the date on which the Seller intends to synchronise a Unit to the Grid System, contemplated in Article 6.1.1 of the PPA dated 01/9/2008 is mandatory. The gravamen of the argument of the counsel for the Appellant is that PPA dated 01/9/2008 has to be read as a whole. The object of the PPA is to commission and

commercially operate the power station on the scheduled date of commercial operation. It is contended that Article 6.1.1 of the PPA does not envisage that notice has to be given for synchronisation of each unit separately. The minimum notice period requirement in terms of Article 6.1.1 is only for the first Unit so as to enable completion of the Procurer's obligation of setting up the Interconnection and Transmission facilities for evacuation of power. There is no need for separate notices of 60 days and 30 days for each unit. Various clauses of the PPA demonstrate that the commission of the plant and commercial operation of the plant has to occur within timelines agreed in the PPA. Separate notice of 60 days or 30 days will delay commissioning of the plant and will frustrate the object of the PPA. It is vehemently contended that an intermediate term like Article 6.1.1 providing for notice for synchronisation is therefore not mandatory. This is more so because this requirement of notice has not been strictly followed in the past. It is submitted that if such a view is taken the Appellant's project would be stranded and that will be a national loss. Without prejudice to the above, it is submitted that the Procurer has waived the requirement of notice.

12. On the other hand, it is submitted on behalf of PSPCL that the requirement of notice is mandatory. Relying on Section 50 of the Indian Contract Act 1872, it is contended that if any agreement states that a particular act relating to furtherance of contract has to be done in a particular manner it has to be done in that manner and no equity can be claimed by Appellant TSPL it having not followed the terms of the PPA. Admittedly notice prescribed under Article 6.1.1 was not given. Under the PPA Chief Engineer, Thermal Design of PSPCL is the authorised representative of PSPCL for the purpose of receiving notices under the terms of the PPA. The Appellant TSPL, knowing this, proceeded to deal with office of the SLDC and another Division of PSPCL though it had received communication dated 21/3/2016 from the office of the Chief Engineer, Thermal Design on 21/3/2006 itself. Appellant TSPL did not disclose this letter in the meeting of 28/3/2016 but attempted to deliver a letter purported to be dated 15/01/2016 on 21/3/2016 to the office of SLDC, purporting to give notice of commissioning. It is further submitted that without prejudice to the above there is no waiver in this case as required under Article 8.3 of the PPA.

13. While canvassing their case apart from legal submissions the counsel made some submissions based on facts. It was urged with some vehemence by the counsel for the Appellant TSPL that PSPCL and SLDC are guilty of misleading this Tribunal by making incorrect/false statements on oath with the intent to derive an illegal/wrongful advantage/benefit. PSPCL has levelled a serious attack on Appellant TSPL that it is guilty of fraud. It has tried to create evidence to show that it had served notice dated 15/1/2016 on 21/3/2016 on the office of SLDC as per Article 6.1.1 of the PPA. However, subsequently it gave up this case and did not rely upon the said letter knowing that this surreptitious conduct will go against it. It is contended that Appellant TSPL purposely interacted with another division of PSPCL, bypassing the Chief Engineer, Thermal Design, who is the authorised representative under the PPA and get the synchronisation done on 29/3/2016 fraudulently. This conduct disentitles Appellant TSPL from getting any relief from this Tribunal. During the course of hearing our attention is drawn to several letters and e-mails by the parties to substantiate their case and negate the case of the other side.

14. Having gone through the correspondence to which our attention is drawn and having examined it against the backdrop of relevant dates and events, we do feel that Appellant TSPL has not proceeded to undertake the exercise of synchronisation as it should have. Allegations and counter allegations leave an unsavoury taste in the mouth. We propose to first go to the legal submissions and refer to facts wherever necessary. If this case can be decided on legal submissions, it will not be necessary for us to go the allegations of fraud and alleged attempt to misguide this Tribunal.

15. We must first reproduce Section 50 of the Indian Contract Act, 1872.

> ***"50. Performance in manner or at time prescribed or sanctioned by promise. – The performance of any promise may be made in any manner, or at any time which the promise prescribes or sanctions."***

16. We shall now reproduce articles of the PPA dated 01/9/2008, which are relevant for the purpose of deciding the much debated issue of notice.

> ***"6. ARTICLE 6: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION***

6.1 Synchronization

6.1.1 The Seller shall give the Procurer and RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to synchronise a Unit to the Grid System. Provided that no Unit shall be synchronized prior to 36 months from NTP. Provided however, that in the event the Seller Commissions a Unit prior to the Scheduled COD, as specified in clause 3.1.2(viii)(a), the Seller shall be entitled to the Early Commissioning Incentive as defined in and in accordance with the orders dated April 17,2008 and April 23, 2008, passed by the Hon'ble Punjab Electricity Regulatory Commission in Petition No.7 of 2008, as per Schedule-7 Clause 1.2.10 of this Agreement;

6.1.2 Subject to Article 6.1.1, a Unit may be synchronised by the Seller to the Grid System when it meets all connection conditions prescribed in any Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronisation to the Grid System.

6.2 Commissioning

6.2.2 The Seller shall give the Procurer and the Independent Engineer not less than ten (10) days prior written notice of Commissioning Test of each Unit.

6.2.3 .....

18.1 Amendment

This Agreement may only be amended or supplemented by a written agreement between the parties and after duly obtaining the approval of the Appropriate Commission, where necessary.

18.11 Notices

All notices to be given under this Agreement shall be in writing and in the English Language.

All notices must be delivered personally, by registered post or any method duly acknowledged or facsimile to the addresses below:

Seller:

TALWANDI SABO POWER LIMITED
C/o STERLITE ENERGY LIMITEDS
VEDANTA, 75, NEHRU ROAD
VILE PARLE(EAST), MUMBAI-400099
FAX: +91 22 66461350
TEL:+91 22 66461000

Procurer:

CHIEF ENGINEER(THERMAL DESIGN)
PUNJAB STATE ELECTRICITY BOARD,
THE MALL, PATIALA, PUNJAB,
INDIA
FAX: 01752-2303924
TEL: 01752-2213038"

17. It is not disputed that in Article 6.1.1 of the PPA there is express provision of notice. It is not disputed that Article 18.11 states that all notices addressed to the Procurer must be delivered to the Chief Engineer (Thermal Design) at Punjab State Electricity Board, The Mall, Patiala, Punjab. It is also not disputed by Appellant TSPL that notice contemplated under Article 6.1.1 was not given. We will examine what is the effect of this.

18. PPA dated 9/1/2008 is the controlling document. It is a binding contract. Section 50 of the Indian Contract Act which we have reproduced hereinabove clearly states that the performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. Section 50 therefore embodies the oft quoted legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in a particular manner then it has to be done in that manner and in no other manner. Thus if Article 6.1.1 of the PPA prescribes notices to be given in a particular manner notices have to be given in that manner and no other manner. If Article 18.11 prescribes that notice to be served on the Procurer has to be served on its authorised representative it has to be served on him and on no other person. There is no scope to urge that conduct of parties shows that there was substantial notice. When the contract contains express and unambiguous terms there can be no question of there being any implied term or reading the contract as a whole. Search for implied term on the specious ground that it is equitable is not permissible. In this context following extracts

from Chitty on Contracts (Thirty First Edition Volume I) are material.

> ***"Where term not implied : A term ought not to be implied unless it is in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out convenient: the touchstone is always necessity and not merely reasonableness.....***
>
> ***.....A term will not be implied if it would be inconsistent with the express wording of the contract....."***

19. In this context, we must also refer to the judgment of the Supreme Court in ***Food Corporation of India***. In that case learned Single Judge of the Bombay High Court had affirmed the view taken by the arbitrator that the rate quoted by the claimant did not include the cost of the material. The Appellant's appeal was dismissed by the Division Bench. The said judgment was carried in appeal to the Supreme Court. It was submitted before the Supreme Court that the claim for supply of sand against claim 9 was patently opposed to the terms of the contract between the parties. It was urged that the relevant clause of the

contract is clear, unambiguous and admits of no such interpretation as has been given by the arbitrator that the rate quoted by the claimant did not include the cost of the material. It was urged that the arbitrator misconducted himself in awarding additional amount in favour of the claimant. On the other hand it was urged by the claimant that it was within the domain of the arbitrator to construe the terms of the contract. After referring to its judgments in ***Alopi Prasad & Sons Ltd. v. Union of India***[24] and ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath*** [25] the Supreme Court allowed the appeal. The Supreme Court quoted its observations in ***Naihati Jute Mills*** that where there is an express term, the Court cannot find, on construction of the contract, an implied term inconsistent with such express term. The Supreme Court observed that the arbitrator was not justified in ignoring the express terms of the contract. It was further observed that it was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimant was low and another contractor had been separately paid for the material. It

[24] **AIR 1960 SC 588**
[25] **AIR 1968 SC 522**

was held that the claimant's claim had to be adjudicated by the specific terms of their agreement with the Appellant and no other.

20. We may also refer to the Supreme Court's judgement in ***Rajasthan State Industrial Development & Investment Corpn.*** In that case the High Court had quashed the order of cancellation of allotment of land and had issued a direction for restoration of possession and for provision of access road. Pertinently after referring to its observations in ***DLF Universal Limited*** on which reliance is placed by Appellant TSPL the Supreme Court allowed the appeal, *inter alia*, on the ground that the cancellation was in terms of the lease agreement. Relevant observations of the Supreme Court are as under:

> ***"IV. Interpretation of the terms of contract :***
>
> ***23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not***

made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely."

21. Judgment of the Allahabad High Court in ***Bishambar Nath Agarwal v. Kishan Chand & Ors.*** also needs to be referred to. In that case the Plaintiff's suit for specific performance based on a compromise entered into between the parties was decreed by the trial court. The Defendant appealed to the High Court. Before the High Court one of the points urged was that the Plaintiff had no sufficient funds on the date of execution of the agreement. The Plaintiff on the other hand relied upon his conduct which according to him established that the Plaintiff was ready and willing to get the sale deed executed. The Allahabad High Court observed that clause 3(B) of the compromise between the parties prescribed certain mode of payment. The Plaintiff had not followed the said term of the compromise. The Allahabad High Court further observed that if any agreement states that a particular act relating to the furtherance of the contract has to be done in a particular manner, then it should be done in that manner and it is not open to the concerned party to chalk out his

own manner of performing his part of the contract. The Allahabad High Court held that Plaintiff had failed to perform its part of the agreement. In the circumstances the appeal was allowed. Similar view has been taken by the Patna High Court in ***Mrs. Niloufer Siddiqui & Anr. v. Indian Oil Corporation Ltd. & Ors.***

22. It was submitted that since the officers of PP&R department had notice of synchronisation that is substantial compliance with the requirement of notice. Even if no notice was served on the office of Thermal Design requirement of notice can be still said to have been complied with. We are not inclined to accept this submission. When under clause 18.11, notice is required to be served on the Chief Engineer, Thermal Design, the said requirement is not fulfilled by serving notice on some other department. The whole purpose of clause 18.11 is negated by this approach.

23. In ***Union Bank of India v. Smt. Kanan Bala Devi & Others*** [26], the Supreme Court was considering the question whether all branches of a bank should be imputed with

[26] **(1987) 2 SCC 583**

constructive knowledge of the death of a customer because one of the branches of the bank had been informed about the death. The Supreme Court held that notice to one branch of a bank is no notice to the other branches. Drawing parallel from this we hold that assuming PP&R Department were given a notice by Appellant TSPL that is no notice to the Chief Engineer Thermal Department contemplated under Article 18.11 of the PPA.

24. Moreover, when there are specific express terms providing for notice and the person on whom it is to be served is specifically mentioned, the concept of substantial compliance of the contract by some mode other than that specified in the contract cannot be introduced. In this connection we may profitably refer to the observations of Lord Atkin in ***Arcos Ltd. v. E.A. Ronaasen & Sons.***

> ***"In dealing with commercial contracts the question is not in all cases whether there has been a substantial compliance with the contract. If the written contract specifies conditions of weight, measurement, and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less, when you descend to minute measurements does half an inch mean about half an inch. If the seller wants a margin he must stipulate for it. By***

recognised trade usage particular figures may be given a different meaning, as in, a baker's dozen, and there may be microscopic deviations which business men, and, therefore, lawyers, will ignore."

25. In view of the above legal position, in our opinion, the fact that Appellant TSPL did not give notice in terms of Article 6.1.1 and 8.11 is fatal to its case.

26. It is now necessary to go to the chain of events, to see whether as contended by Appellant TSPL from the conduct of the parties PSPCL could be said to have notice of synchronisation assuming such notice is valid.

27. It appears that on 10/2/2016 site visit was undertaken by the team of PSPCL officials, when TSPL had indicated that synchronisation was likely to be done by 20/4/2016 and the tentative date of commissioning is 30/4/2016. There was no clear notice as contemplated under Article 6.1.1. By letter dated 15/3/2016 TSPL issued notice to the Chief Engineer, Thermal Design about the commissioning test to be undertaken by TSPL on 26/3/2016. There was however no reference to synchronisation. As rightly pointed out by counsel for PSPCL

notice under Article 6.2.2 can be given only after the completion of the steps provided in Article 6.1.1 and upon successful synchronisation, subsequent to the process provided under Article 6.1.1 being fully undertaken and completed, namely giving an advance preliminary written notice of synchronisation of 60 days and advance final written notice of 30 days. In response to the letter dated 15/3/2016 PSPCL, Thermal Design by letter dated 21/3/2016 inquired about the fulfilment of steps relating to the synchronisation by TSPL. In that letter there was specific reference to the advance preliminary notice and advance final written notice required under Article 6.1.1 of the PPA. Thus PSPCL, Thermal Design expressed its reservations. It did not treat that letter as notice and called for details of compliance of Article 6.1.1.

28. At this stage we must refer to letter dated 15/1/2016 which TSPL is said to have delivered to the office of SLDC on 21/3/2016, that is the date on which PSPCL Thermal Design inquired with TSPL about the fulfilment of steps relating to synchronisation. This letter was not served on the Chief Engineer, Thermal Design. Curiously counsel for TSPL has stated that TSPL is not relying on this letter. No reliance was

placed on it before the State Commission. It is vehemently contended by counsel for PSPCL that this is a backdated document created by TSPL to show that Article 6.1.1 was complied with, but TSPL tried to distance itself from the said letter knowing that it would be exposed. We do not want to opine on the conduct of the parties because this appeal can be decided purely on law. But it is not understood why TSPL has not relied upon this letter. It is rather surprising that it was served on SLDC on 21/3/2016 which is the date on which PSPCL Thermal Design addressed a letter to TSPL inquiring about notice under Article 6.1.1. After receiving letter dated 21/3/2016 from PSPCL, Thermal Design TSPL proceeded to deal with SLDC and another division of PSPCL and had a meeting on 28/3/2016 to get the synchronisation done on 29/3/2016. It is important to note that officers of the Thermal Design department of PSPCL were not present. In that meeting communication dated 21/3/2016 was not disclosed. After this meeting a letter dated 29/3/2016 was sent by the office of Chief Engineer, PPR Division of PSPCL to TSPL regarding energy accounting for the billing purposes. TSPL cannot draw any mileage from this letter. It appears from the correspondence to which our attention is drawn by both sides

that TSPL has instead of dealing with Thermal Design Division of PSPCL, which is the designated agency of PSPCL and instead of giving clear notice of synchronisation as per Article 6.1.1 to the designated authority has dealt with different officers of PSPCL and contended that there is substantial notice to PSPCL. Synchronisation based on some communication from PSPCL's PPR Division or SLDC cannot be considered to be a valid or legal synchronisation. We are not inclined to hold that from the above correspondence and other e-mails on which TSPL has placed reliance to which specific reference is not necessary we can infer that PSPCL had notice of synchronisation as required by Article 6.1.1. Such a view apart from being illegal will set a bad precedent.

29. It is submitted that clauses of the PPA such as Article 4 which relate to the development of project are designed to ensure that the COD agreed under the PPA is adhered to and since the project has to be executed in a timely manner the intermediate notice period/timeline cannot be used for the purpose of delaying scheduled commercial operation date. It is contended that timelines provided in Article 6.1.1 are directory in nature. It is

not possible for us to accept this submission. It is true that projects have to be executed in a timely manner. But that cannot be done by bypassing mandatory provision of notice which has a purpose and which is not an empty formality. Article 4 relates to development of the project. Article 4.1 relates to the seller's obligation to build, own and operate the project. Article 4.1.1 uses the words "subject to the terms and conditions of this agreement". Therefore development of the project is also subject to the timelines prescribed under various provisions of the PPA which include Article 6.1.1 & 6.2.2. Pertinently Article 6.1.1 uses the expression 'shall'. In our opinion therefore provision of notice contained in Article 6.1.1 is mandatory in nature.

30. It is not possible to accept the submission that there is no need for separate notices of 60 days and 30 days for each unit because notice is required to be given in respect of only the first unit. If notice contemplated under Article 6.1.1 was to be given only in respect of the first generating unit, Article 6.1.1 would have contained the words 'first unit' instead of 'a unit'. In this connection it is necessary to note that the term 'Scheduled Connection Date' has been defined as under:

"Scheduled Connection Date"	**shall mean the date falling 210 days before the scheduled COD of the first unit.**

Scheduled Synchronisation Date has been defined as under:

"Scheduled Synchronisation Date"	**means in relation to a Unit, the date which shall be of one hundred and eighty (180) days prior to the Scheduled COD of the respective Unit.**

We appreciate the submission that the definition of the term "Scheduled Synchronisation Date" read with Article 6.1.1 dealing with synchronisation makes it abundantly clear that synchronisation is with respect to each of the units.

31. It is also important to note that stipulation contained in Article 6.1.1 cannot be said to have been changed by the parties without the approval of the Appropriate Commission, as the amendment to Article 6.1.1 will have financial implication. Purpose of giving notice of synchronisation is not only to enable PSPCL to arrange for the Interconnection and Transmission Facilities for evacuating power. The notice of synchronisation is also necessary for PSPCL to arrange its affairs to receive the contracted capacity under the PPA. It is required to make

arrangements for procurement of power from various sources in advance. In the circumstances we are of the opinion that TSPL has not complied with Article 6.1.1 which is mandatory in nature. This view taken by the State Commission is perfectly legal.

32. Now we will go to the question of waiver. We have to find out whether PSPCL can be said to have waived its right of notice under Article 6.1.1. In this context Article 18.3 of PPA is material. It reads as under:

> ***"18.3. No Waiver***
>
> ***A valid waiver by a Party shall be in writing and executed by an authorized representative of that Party. Neither the failure by any Party to insist on the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by any Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect."***

33. It is clear from the above article that valid waiver by a party has to be in writing. It must be executed by an authorized

representative of that party. Neither the failure by any party to insist on the performance of the terms, conditions and provisions of the PPA nor time or any other indulgence granted by any party to the other parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under PPA, which shall remain in force and effect.

34. Facts of the present case need to be examined in light of this article. In the present case admittedly there is no waiver in writing executed by any authorised representative of the Procurer. Thus case of waiver must fall on this ground alone. The concept of waiver has been discussed by the Supreme Court in several judgments. Our attention is drawn to some of them. It is not necessary to quote all the judgments. Suffice it to quote the following two judgments.

> ***" i) <u>Motilal Padampat Sugar Mills Co. Ltd v. State of Uttar Pradesh and others.</u>***
>
> ***6.... Waiver means abandonment of a right and it may be either express or implied from conduct but its basic requirement is that it must be 'an intentional act with knowledge' per Lord Chelmsford, L.C. in Earl of Darnley v. London, Chatham and Dover Rly.***

Co.,(1867) 2 HC 43 at p. 57. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out that in Halsbury's Laws of England(4th Ed) Vol. 16 in para 1472 at p.994 that for a 'waiver to be effectual it is essential that the person granting it should be fully informed as to his rights and Isaacs, J. delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd(1920) 28 CLR 305 has also emphasized that waiver 'must be with knowledge, an essential supported by many authorities.

ii) <u>P. Dasa Muni Reddy v. P. Appa Rao.</u>

13……Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right….. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts

which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

35. Thus waiver is an intentional act with knowledge. It is intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver is an informed, voluntary and intentional decision. There is no such evidence in this case to establish that PSPCL has taken a voluntary and intentional decision to waive the notice. The conduct of some officers of PSPCL has been relied upon to contend that it establishes waiver. However these officers are not from the department of Thermal Design. The PPA is signed by some officer on behalf of the Chief Engineer, Thermal Design. Under Article 18.11 notices are required to be delivered to the Chief Engineer, Thermal Division. We are informed that the Chief Engineer, Thermal Division is the authorised representative of PSPCL.

36. Admittedly there is no written waiver executed by the authorised representative of PSPCL. Since the officers who are said to have interacted with Appellant TSPL had no authority to

waive notice there is no question of their having intentionally abandoned the requirement of notice. It may be that PSPCL did not insist on 60 days notice on the previous two occasions. We have quoted Article 18.3 which relates to waiver. It has been expressly stated in the said provision that non-insistence on the performance of the terms of contract by any party cannot constitute a waiver. Therefore, the fact that PSPCL in the past did not insist on 60 days notice is of no assistance to Appellant TSPL. It cannot be said therefore that here there is waiver by convention. Judgments relied on this point therefore need not be referred to.

37. We find no substance in the contention that Respondent No.2 is illegally supporting the actions of PSPCL. Appellant TSPL is required to give a contractual notice prior to synchronisation to Respondent No.1. It is for Appellant TSPL to ensure its compliance. It cannot rely on the actions of Respondent No.2 to claim fulfilment of its contractual obligations.

38. In the circumstances we find no merit in the appeal. The appeal is dismissed. However, all concerned parties shall take immediate requisite steps in terms of the PPA to facilitate synchronisation of the unit in question without any further delay.

39. Pronounced in the Open Court on this **03rd day of June, 2016**.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**