

**In the Appellate Tribunal for Electricity,  
New Delhi  
(Appellate Jurisdiction)**

**Appeal No. 209 of 2016**

**Dated: 18<sup>th</sup> May, 2018**

**Present: Hon'ble Mr. I.J. Kapoor, Technical Member  
Hon'ble Mr. N K Patil, Judicial Member**

**In the matter of :-**

**Himachal Pradesh State  
Electricity Board Ltd. (HPSEBL)  
Vidyut Bhawan,  
Shimla-171 004**

**... Appellant**

**Versus**

**1. Himachal Pradesh Electricity  
Regulatory Commission  
Keonthal Commercial Complex,  
Khalini  
Shimla-171 002**

**...Respondent No.1**

**2. M/s Patikari Power Pvt. Ltd. (PPPL)  
1<sup>st</sup> House, Bhumian Estate,  
Nav Bahar, Bhumian Road  
Chhota Shimla-171 002**

**...Respondent No.2**

**Counsel for the Appellant(s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Parichita Chowdhury  
Ms. Neha Garg  
Ms. Rhea Luthra**

**Counsel for the Respondent(s) : Mr. Tarun Johri  
Mr. Ankur Gupta  
Mr. Ankit Saini for R-2**

**JUDGMENT**

**PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER**

1. The present Appeal is being filed by Himachal Pradesh State Electricity Board Ltd.(hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 13.1.2016 (“**Impugned Order**”) passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. 102 of 2015 wherein the State Commission has held that the Respondent No. 2 is liable to pay Liquidated Damages (LD) to the Appellant for a period of 12 days instead of 159 days on account of delay in commissioning of the hydroelectric project by the Respondent No. 2.
2. The Appellant i.e. HPSEBL is a company incorporated under the provisions of the Act. It is the generation and distribution utility in the State of Himachal Pradesh (HP).
3. The Respondent No. 1 i.e. HPERC is the Electricity Regulatory Commission in the State of HP discharging functions under the provisions of the Act.
4. The Respondent No. 2 i.e. PPPL is a company incorporated under the provisions of the Companies Act, 1956 and is a generating company in terms of Section 2 (28) of the Act.

5. **Facts of the present Appeal:**

- a) In response to global invitation for investment, dated 19.4.1999, issued by Govt. of Himachal Pradesh (GoHP), a Memorandum of Understanding (MoU) dated 21.6.2000 was executed between GoHP and East Indian Petroleum Ltd. (EIPL) (the predecessor of Respondent No. 2) for implementation of the 16 MW Patikari Hydro Electric Project (“**Project**”) in the State of HP.
  
- b) After grant of Techno Economic Clearance, an Implementation Agreement (IA) dated 9.11.2001 was signed between GoHP and EIPL. On the same date tripartite agreement was signed between GoHP, EIPL and the Respondent No. 2, which was Special Purpose Vehicle (SPV) to implement and execute the Project. In terms of the IA the Scheduled Commercial Operation Date (SCOD) of the Project was 48 months from the date of Financial Closure (FC) of the Project and FC was to be obtained by the Respondent No. 2 within 24 months from the signing of the IA.
  
- c) The Appellant and the Respondent No. 2 entered into a Power Purchase Agreement (PPA) dated 14.1.2003 (“**earlier PPA**”) for sale and purchase of the electricity from the Project. The State Commission vide order dated 5.9.2003 in a suo-motu petition held that the earlier PPA as unsustainable, non-est and void ab-initio as the Appellant has signed many PPAs including the earlier PPA without the knowledge of the State Commission. Thereafter, in terms of the orders of the State Commission, the Appellant and the Respondent No. 2 filed a joint petition before the State Commission for approval of the new PPA on the terms and

conditions approved by the State Commission. The State Commission vide order dated 19.4.2004 approved the new PPA. Accordingly, the Appellant and the Respondent No. 2 entered into new PPA on 5.7.2004.

- d) The Respondent No. 2 achieved FC of the Project in March, 2006.
- e) On 12.1.2008, the Respondent No. 2 submitted Bank Guarantee (BG) for an amount of Rs. 56 lakh to the Appellant in terms of the PPA. The Project was commissioned on 6.2.2008. On request of the Respondent No. 2 and considering no delay in commissioning of the Project, the BG was released by the Appellant on 9.9.2008.
- f) In terms of the new PPA, the SCOD of the Project was 31.8.2007. The actual Commercial Operation date (COD) of the Project was 6.2.2008 and accordingly as per the Appellant there was a delay of 159 days in achieving COD. After a period of about 5 years after exchange of communications between the parties, the Appellant recovered the LD amount of Rs. 25,44,000 from the energy bill dated 5.10.2013 issued by the Respondent No. 2.
- g) The Respondent No. 2 protested the recovery of LD by the Appellant and filed Petition No. 102 of 2015 before the State Commission seeking refund of LD from the Appellant with interest.
- h) The State Commission vide Impugned Order dated 13.1.2016 has held that LD is applicable only for a period of 12 days and not on 159 days computed by the Appellant and directed the Appellant to refund the balance amount to the Respondent No. 2.

- i) Aggrieved by the Impugned Order, the Appellant has preferred the present Appeal before this Tribunal.

**6. Questions of Law:**

The Appellant has raised the following questions of law in the present Appeal:

- a) Whether the pendency of the PPA for approval before the State Commission is a force majeure (FM) under Article 12 of the PPA?
- b) Whether the State Commission, having come to the conclusion that the reasons being cited by the Respondent No. 2 for delay in obtaining FC are not correct can still give the benefit of the period for which the PPA was pending for approval before it to the Respondent No. 2 for no payment of LD?
- c) Whether the State Commission can interpret the IA and PPA based on the pleading of the parties in the Joint Petition to the effect that the Project was to be commissioned on 1.11.2007 and basing its decision on the same?
- d) Whether the State Commission, in a proceeding under Section 86 (1) (f) of the Act for interpretation of the clauses of the PPA and IA can introduce the concept of 'dies non' in the teeth of specific clause dealing with Force Majeure (FM) in the PPA?

e) Whether the State Commission has understood the concept of LD in the regulatory set up as laid down by this Tribunal in Lanco Kondapalli Power Ltd. v. APERC & Ors. (Judgement dated 12.1.2015 in Appeal No. 154 of 2013) and PTC India Ltd. v. GERC & Anr. (Judgement dated 30.6.2014 in Appeal Nos. 62 & 47 of 2013) and the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd. (2011) 1 SCC394 and Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705?

7. The learned counsel appearing for the Appellant Shri Anand K. Ganesan submitted the following submissions for our consideration on the issues raised in the instant Appeal as follows:-

a) The State Commission has erred in holding that the delay for the purpose of LD to be computed from 1.11.2007 the date agreed by the Appellant and the Respondent No. 2 in the joint petition filed on 15.1.2004 before the State Commission instead of 31.8.2007. Accordingly, period of delay was calculated from 1.11.2007. The State Commission also erred in holding that the LD is payable only until Synchronization Date. The State Commission has artificially reduced the period of delay of 159 days to 107 days.

b) The State Commission failed to appreciate that the PPA and IA are to be interpreted as per the provisions contained therein and not as per the pleadings of the parties. No benefit can be passed on to

the Respondent No. 2 until the case falls within the Article 12 of the PPA which deals with the Force Majeure.

- c) The State Commission on one hand has rejected some aspects of FM, like period between 6.9.2003 to 5.7.2004 (date on which earlier PPA was declared void ab-initio), period between 19.4.2004 to 5.7.2004 (date of approval of new PPA and its execution) and period between August 2007 to October 2007 (alleged FM events) as claimed by the Respondent No. 2 and on other hand has given benefit of 95 days (15.1.2004 to 19.4.2004 period of filing of joint petition and approval of new PPA) on account of 'dies non'.
- d) Adjudication of disputes between parties under Section 86 (1) (f) of the Act has to be carried out based on rights and obligations of the parties under the IA and new PPA and not on artificial concept like 'dies non'. The State Commission has failed to appreciate that PPA approval has nothing to do with the FC or obligation on the Respondent No. 2 to begin construction of the Project within 24 months from the date of signing of the IA.
- e) The State Commission also ignored the letter dated 17.11.2007 of the Respondent No. 2 wherein it had admitted non-completion of important works and has stated synchronization of first unit to be done by 25.12.2007. The Project was synchronized only on 6.2.2008. The delay in commissioning of the Project is wholly attributable to the Respondent No. 2 and is liable to pay LD in terms of Article 16.2 of the new PPA. Delay in commissioning of the Project has adversely affected the Appellant and the

consumers at large in the State on account of timely availability of the electricity.

- f) The Appellant has denied the contention of the Respondent No. 2 that IA is not relevant to the instant Appeal as the IA is the part of the new PPA as per Article 2.2.42 of the new PPA which defines the IA. Bare perusal of the provisions of the IA and the new PPA reveals that the Respondent No. 2 has delayed the Project by 159 days and as such is liable to pay LD for that period.
- g) The State Commission has erred in giving the benefit of delay to the Respondent No. 2 on account of pendency of approval of new PPA without appreciating that the approval of the PPA has no bearing in either achieving FC or to begin the construction of the Project within 24 months from the effective date i.e. signing of the IA.
- h) On the issue of time bar of the claim raised by the Respondent No. 2, the Appellant has submitted that its claim is not time barred and has emphasised that the life of IA and PPA is 40 years and they are still subsisting and operating between the Appellant and the Respondent No. 2.
- i) The State Commission also failed to appreciate that in the regulated contracts, the concept of LD is absolute and does not depend on showing of any actual loss. On this issue the Appellant has relied on the judgement of this Tribunal in Lanco Kondapalli Power Ltd. v. APERC &Ors. (Judgement dated 12.1.2015 in Appeal No. 154 of 2013) and PTC India Ltd. v. GERC & Anr.



(Judgement dated 30.6.2014 in Appeal Nos. 62 & 47 of 2013) and the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd. (2011) 1 SCC 394 and Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705.

8. The submissions made by the learned counsel Shri Tarun Johri appearing for the Respondent No. 2 for our consideration on the issues raised in the instant Appeal are given below:

a) The Article 6.20 (LD for delay in COD) of the IA is not relevant to the instant Appeal as the Appellant and the Respondent No. 2 are contractually and legally governed by the provisions of the PPA.

b) There is no delay in commissioning of the Project by the Respondent No. 2. The Project was commissioned on 6.2.2008 i.e. within the period of 48 months from the date of achievement of FC in terms of the new PPA. The FC for the Project was achieved in March, 2006. The actual time taken in commissioning of the Project from FC was 22 months. The Appellant while considering release the Bank Guarantee (BG) on 1.9.2008 has come to the specific conclusion that there is no delay in commissioning of the Project in view of earlier PPA being declared void ab-initio and signing of the new PPA dated 5.7.2004.

c) The State Commission has rightly come to the conclusion that the delay in commissioning of the Project was due to reasons beyond the control of the Respondent No. 2 as there was no valid PPA between the parties during the period from 15.1.2004 to 19.4.2004 when joint petition for the approval of the new PPA was under

consideration before the State Commission. Considering the commissioning date of 1.11.2007 in the joint petition & after release of the BGon 1.9.2008 while considering no delay in commissioning of the Project, the Appellant is not allowed to contend that there was a delay of 159 days. There is no legal bar on the State Commission to not to rely on the pleadings jointly filed by the Appellant and the Respondent No. 2 before it during the approval process of the new PPA.

- d) The demand for LD dated 21.9.2013 was completely illegal and unlawful and was barred by law of limitation and was hit by delays and laches. Unilateral deduction of LD amount from the bills raised by the Respondent No. 2 is violation of the provisions of the PPA.
- e) The declaration of earlier PPA as void ab-initio by the State Commission was beyond the reasonable control of the Appellant and the Respondent No. 2. This has resulted in preventing and unavoidably delayed the performance of the obligations by both the parties under the earlier PPA. This fact was acknowledged by the Appellant and was reiterated in the joint petition. It was also mentioned in the joint petition that the absence of valid PPA is resulting in non-release of funds from the lenders. It is a well settled principle that existence of valid PPA is required for FC and release of funds by the lenders.
- f) The State Commission has rightly considered the period between 15.1.2004 to 19.4.2004 as FM event and excluded the same in calculating the delay in Scheduled Synchronisation Date of the Project under the PPA. The Appellant wilfully failed to comply with

the interim order dated 17.9.2015 of the State Commission and illegally continued to withhold the payment due to the Respondent No. 2. This attracts penal interest @ 1.5% per month as per provisions of the new PPA. Whereas, the State Commission in the Impugned Order has awarded the interest @ 8% per annum on the outstanding amount due and payable by the Appellant.

9. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and we have gone through the written submissions of the Appellant and the Respondents on various issues raised in the instant Appeal and after thorough evaluation of the entire relevant material available on records the following issues that arises for our consideration are as follows:-

a) In the present Appeal the Appellant is mainly aggrieved by the reduction of number of days from 159 days to 12 days for levy of LD on the Respondent No. 2 due to delay in commissioning of the Project vide the Impugned Order of the State Commission.

b) On Question No. 6. a) i.e. Whether the pendency of the PPA for approval of the State Commission is a Force Majeure under Article 12 of the PPA?, on Question No. 6. b) i.e. Whether the State Commission, having come to the conclusion that the reasons being cited by the Respondent No. 2 for delay in obtaining Financial Closure (FC) are not correct can still give the benefit of the period for which the PPA was pending for approval before it to the Respondent No. 2 for no payment of LD? and on Question No. 6. d) i.e. Whether the State Commission, in a proceeding under

Section 86 (1) (f) of the Act for interpretation of the clauses of the PPA and IA can introduce the concept of ‘dies non’ in the teeth of specific clause dealing with FM in the PPA?, we observe as below:

- i. Let us consider the provisions of FM and the Article 12 of the new PPA. Same provisions related to FM exist in the IA. The relevant extract of the same from new PPA is reproduced below:

*“2.2.33 “Force Majeure” bears the meaning set out in Article 12.*

.....

**ARTICLE 12**

**FORCE MAJEURE**

12.1 In the event a Party is rendered unable to perform any obligations required to be performed by it under the Agreement by Force Majeure, the particular obligation shall, upon notification to the other Party, be suspended for the period of Force Majeure.

12.2 Subject to Section 12.6, Force Majeure shall mean any event or circumstances or combination of events or circumstances that wholly or partly prevents or unavoidably delays any Party in the performance of its obligations under the Agreement, but only if to the extent that such events and circumstances are not within the reasonable control, directly or indirectly, of the affected Party and could not have been avoided even if the affected Party had taken reasonable care. Such events may include acts of the Government/GOI

in its sovereign capacity, war, civil war, quarantine restrictions, freight embargos, radioactivity and earthquakes to the extent they, or their consequences, satisfy the above requirements.

12.3 Upon the occurrence of an event of Force Majeure, the Party claiming that it has been rendered unable to perform any of its material obligations under the Agreement, shall notify the other Party in writing within five (5) days of the commencement thereof giving the particulars and satisfactory evidence in support of its claim. Upon termination of such event of Force Majeure, the affected Party shall, within twenty four (24) hours of its termination, intimate the other Party of such termination.

12.4 Time for performance of the relative obligations suspended by Force Majeure shall then stand extended by the period of delay, which is directly attributable to Force Majeure. The Party giving such notice shall be excused from timely performance of its obligations under the Agreement, for so long as the relevant event of Force Majeure continues and to the extent that such Party's performance is prevented, hindered or delayed, provided the Party or Parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its performance of the obligations under the Agreement.

.....

*12.6 Force Majeure shall expressly not include the following, except to the extent resulting from the Force Majeure:*

.....  
.....

From the above it can be seen that as per the provisions of the new PPA and IA, the obligations of the affected party are suspended for the period of FM on notification by the affected party. FM means events which are not within the reasonable control of the affected party which prevents or delays the obligations of the affected party. The list of FM events is indicative stating that FM may include events that are stated in Article 12.2 above.

- ii. Now let us consider the findings of the State Commission in the Impugned Order. The relevant extracts from the same are reproduced below:

*“14. After having computed the delay in synchronization of the Project, the Commission now proceeds further to analyse the effect of Force Majeure situations stated to have been experienced by the petitioner, as per his claim.*

*15. Here it would be appropriate to refer to Clauses 12.3 and 12.4 of the PPA, which are reproduction of Clauses 7.3 and 7.4 of the IA and read as under:-*

.....

.....

16. The Petitioner has claimed that the period from 06.09.2003 (i.e. the date on which the Power Purchase Agreement dated 14.01.2003 was declared as null and void) to 05.07.2004 (i.e. date of the execution of PPA) should be considered towards the Force Majeure period. The Commission observes that the parties themselves in the Joint Petition dated 15.01.2004 had stated that the Project was required to be commissioned by 01.11.2007. The Commission, therefore, feels that the effects of adverse situation, if any experienced by the Petitioner prior to the 15.01.2004, are deemed to have been duly accounted for while computing the targeted commissioning date as 01.11.2007. In relation to the period from 19.04.2004 to 05.07.2004, the Commission finds that the PPA was approved on 19.04.2004 and the same was actually executed on 05.07.2004. The Petitioner has not placed any evidence to show that the delay on this account was not at all attributable to him, wholly are partly. As such the Commission declines to treat these periods towards the Force Majeure period. The Commission however finds that after declaration of the PPA as null and void on 06.09.2003, the parties filed Joint Petition before the Commission on 15.01.2004 which, after following the due process of inviting comments from Public/Stakeholders, was approved on 19.04.2004. The matter thus remained under process and consideration before the Commission for a period

of 95 days (i.e. the period from 15.01.2004 to 19.04.2004). Keeping in view the facts and circumstances and the specific situation in this case, the Commission feels it appropriate to treat the said period of 95 days as dies non thereby meaning that both the parties shall bear with the situation for this period and shall not raise any claim(s) whatsoever for the delay caused due to the dies non period of 95 days.”

The State Commission has considered the period of 95 days from 15.1.2004 i.e. date of filing of the joint petition until 19.4.2004 i.e. date of approval of the new PPA as ‘dies non’ and directed the parties not to raise any claims for the delay caused due to ‘dies non’ period of 95 days. The State Commission has also held that this situation has arisen due to declaration of the earlier PPA as null and void.

- iii. We observe that the declaration of the earlier PPA as void ab-initio has resulted in a situation in which both the Appellant and the Respondent No. 2 were not in a position to go ahead to fulfil their rights and obligations arising out of the earlier PPA. The parties have also not placed the copy of the earlier PPA on record before this Tribunal. If it is assumed that the IA was also a part of the earlier PPA as in case of the new PPA than even the provisions of the IA could not have been enforced. This situation to our mind was similar to FM situation as defined in the new PPA and here both the parties were affected. Since the earlier PPA was not



enforceable, either of the party was not in a position to raise the notice of the FM. To claim the benefits of FM there was requirement of issuing a notice to the other party to that effect. But this was not possible as there was no valid PPA existing for the period from declaration of the earlier PPA as void ab-initio till approval/signing of the new PPA.

- iv. The State Commission has not considered the period from the date of declaration of the earlier PPA as void ab-initio till the date of filing of the joint petition and from the date of approval of the new PPA till the date of signing of the new PPA for the reasons mentioned in the Impugned Order and as reproduced above. We are in agreement to the said observations of the State Commission. Accordingly, keeping in view the facts and circumstances of the case the State Commission while referring to the FM clauses in the new PPA has come to a conclusion that the said period of 95 days was to be treated as 'dies non' where the parties would not make any claim for the said period of 95 days.

We are also of the opinion that in view of the facts of the case similar conclusion could be drawn even in absence of any valid PPA. In the present case, referring to the Articles of new PPA would not have much relevance as the PPA was signed at a later date on 5.7.2004 and was effective from that date only. Accordingly, it was not possible to apply the provisions of FM but the condition was similar to FM. Hence using of the term 'dies non' for the said period by the State Commission is relevant.

- v. After perusal of the Impugned Order we observe that the other issues raised by the Appellant regarding delay in achieving the FC of the Project by the Respondent No. 2 were rejected by the State Commission after dealing them on merits as the Respondent No. 2 failed to provide any concrete reasoning and documents in support of the same.
  - vi. In view of the discussion as above, we are of the considered opinion that there is no legal infirmity in the decision of the State Commission.
  - vii. Hence the issues raised by the Appellant are decided against it.
- c) On Question No. 6 c) i.e. Whether the State Commission can interpret the IA and PPA based on the pleading of the parties in the Joint Petition to the effect that the Project was to be commissioned on 1.11.2007 and basing its decision on the same?, we observe as below:
- i. This issue requires analysis of the provisions of the IA, new PPA and submissions made by the parties before the State Commission in the joint petition related to the commissioning of the Project.
  - ii. Let us first consider the provisions of the IA. The relevant extract from IA is reproduced below:

“1.2.17 “Construction Schedule” means the scheduled of construction to be mutually agreed between the Company and the Government prior to Financial Closure of the Project which shall then form part of this Agreement and shall be attached as Appendix-I.

1.2.26 “Effective Date” shall mean the date of signing of the Agreement.

1.2.29 “Financial Closure” means the first business day on which substantial funds are made available to the Company under the terms of Financing Agreement.

1.2.54 “Scheduled Commercial Operation Date” shall mean the date by which the Company shall have achieved the Commercial Operation of the Project and shall be forty eight (48) months from the Financial Closure, or such date as may be mutually extended.

6.8.8 Commencement of construction

i) The Company shall start the construction of the Project after obtaining the Statutory Clearances within twenty four (24) months from the effective date.

ii) The Company shall obtain statutory clearances within a period of twelve (12) months from Effective Date.

iii) The Company shall achieve Financial Closure within a period of twenty four (24) months from Effective Date.

From the above, it can be seen that the FC and start of construction of the Project were to be achieved within 24 months from the Effective Date and SCOD of the Project was to be achieved within 48 months from the FC.

- iii. The Effective Date of IA was 9.11.2001. Accordingly, the FC and start of construction were to be achieved by the Respondent No. 2 by 9.11.2003 and accordingly the SCOD of the Project works out to 9.11.2007.
  
- iv. Now let us consider the provisions of the new PPA related to the commissioning of the Project. The relevant extracts are reproduced below:

“2.2.42 “Implementation Agreement” means the agreement dated 9.11.2001 and Tripartite Agreement dated 9.11.2001 entered into between the .....

2.2.63 “Scheduled Commercial Operation Date of the Project/ Scheduled COD of the Project” means the date by which the Company shall achieve Commercial Operation of the Project in accordance of Article- 4 and commence power supply from all the Unit(s) on regular basis. The same shall be the date falling fifteen days

after the Scheduled Synchronisation Date of the last unit.

2.2.65 “Scheduled Synchronisation Date/ Scheduled Date of Synchronisation” means the date by which the Company schedules to synchronise the Unit(s) as per the provisions of the Implementation Agreement.

3.2 For the purpose of this Article the construction period means a **maximum** period of 48 months from the date of financial closure. The construction schedule to this effect is as per Schedule-I of this agreement.....

From the above it can be seen that the construction of the Project was to be achieved in a maximum period of 48 months from the FC date. There is no specific time period mentioned in the definition of SCOD in the new PPA. The IA was part and parcel of the new PPA. However, as per Schedule-I (Construction Schedule) of the new PPA the SCOD date works out as 31.8.2007.

- v. As per the new PPA the Project was to be constructed maximum by March, 2010 as the FC date of the Project was March, 2006. Further, the definition of the SCOD in the new PPA is at variance from that in the IA and does not mention any specific time frame as done in the IA. Further, the Scheduled Synchronisation Date as defined in the new PPA finds mention that it is to be as per the provisions of the IA

and we find that there is no such definition of Scheduled Synchronisation Date in the IA. If the time period of 15 days as mentioned in the new PPA is considered between synchronisation and COD then the conjoint reading of the IA and new PPA the Scheduled Date of Synchronisation works out as 25.10.2007 in terms of the IA.

- vi. A careful perusal of the Schedule-I of the new PPA reveals that both the Appellant and the Respondent No. 2 have agreed for Construction Schedule of the Project and according to which the SCOD works out to be 31.8.2007, which is well within March, 2010. Further, in the Impugned Order it has been stated that the Respondent No. 2 has submitted the commissioning date of the Project as 5.7.2008 i.e. 48 months from the date of signing of the new PPA (5.7.2004) even though the actual FC of the Project was in March 2006.
- vii. We notice that the 'Construction Schedule' and the 'SCOD' have different meanings as defined in IA/new PPA and have different purpose. The 'Construction Schedule' is the schedule agreed between the parties for construction of the Project which also mentions the end date of the Project after testing and commissioning. The construction period as agreed between the parties may be stricter but it cannot undermine the importance of definition of 'SCOD' as defined in IA, which is 48 months from the date of FC of the Project. As per the definition of SCOD in the IA, the SCOD can be mutually extended by the parties and there is no provision for

early SCOD in the IA. However, actual COD could be earlier or later to SCOD depending upon the actual progress of the Project. Accordingly, the provisions related to LD can kick in only with reference to SCOD as defined in the IA.

- viii. Further, there is no definition of FC in the PPA whereas the term “Financial Arrangement” is defined both in IA and PPA similarly and is linked to FC which is defined in the IA. The definition of Financial Agreement as defined in PPA is reproduced below:

*“2.2.31 “Financial Agreement” means the loan agreements, notes, indentures, security agreements, letters of credit and other documents relating to the construction and financing (including refinancing) and over run finance, if any, for the capital cost, or any part thereof, of the Project as the same may be executed, amended, supplemented, or modified from time to time.”*

- ix. As per IA, FC was to be achieved by 9.11.2003. The State Commission vide order dated 5.9.2003 held the earlier PPA as void ab-initio. It is an established practice that FC of a project could not be achieved without a valid PPA. Thus, the FC of the Project was in any case not possible before 19.4.2004 when the new PPA was approved by the State Commission or 5.7.2004 when the new PPA was actually signed.

- x. Now let us consider the impugned findings of the State Commission in considering 1.11.2007 as the commissioning date of the Project. The relevant extract from the Impugned Order is reproduced below:

*“Commission’s view*

*10. The parties to this Lis have worked out the Scheduled CoD of the Project differently. The targeted date for the commissioning of the Project, based on outer time lines given in IA, is 9th November, 2007 and as per the Construction Schedule, which is the part of the PPA, is 31st August, 2007, and as per the statement of the petitioner the same is the 5th July, 2008. The petitioner in his support states that the Financial Closure of the Project can be achieved only after signing of the PPA and the PPA was signed on 05.07.2004, as such, the Financial Closure of the Project is to be considered after 05.07.2004. Even though the Financial Closure of the Project was achieved by the petitioner in the month of March, 2006, he considers the Scheduled Date of Commercial Operation as 05.07.2008. The Commission finds merit in the argument that the execution of the valid PPA is a prerequisite for achieving the Financial Closure.*

.....

*12. In the Joint Petition submitted by the parties on 15.01.2004 for approval of the PPA, it was clearly mentioned that the Project is required to be completed by 01-11-2007. The targeted date was well within the*



outer time limits based on the provisions of the IA. As such the petitioner is entitled to consider the 1-11-2007 as the target date, instead of 31st August 2007, which envisaged construction of certain works even before Financial Closure and perhaps it did not fully take into account the situation emerging out of the PPA dated 14.01.2003, being declared null and void ab-initio and non-est and consequences thereof. After carefully considering the averments made by both the parties, the Commission feels that on the face of various targeted dates for commissioning of the Project, as worked out and set out in para 10 of this Order, the date for the commissioning of the Project was considered by the parties in the Joint Petition i.e. 01-11-2007 is the most appropriate date and should be considered as the targeted date for commissioning of the Project for the purpose of calculating the delay in achieving commissioning of the Project and for working out the amount of the liquidated damages.”

From the above it can be seen that the State Commission in view of various dates of commissioning emerging out of the IA, new PPA and submissions made by the parties, deemed fit to consider 1.11.2007 (filed in joint petition by the parties) as the date of commissioning of the Project and working out of LD with reference to 1.11.2007.

- xi. It is observed that there is no sync between the IA, new PPA, joint petition and submissions of the parties regarding the

commissioning date of the Project and reference date for levy of LD. There is a scope for interpreting the same differently by the parties. As per the IA the commissioning date was 9.11.2007, as per Schedule-I of the new PPA which was signed on 5.7.2004 the commissioning date was worked out as 31.8.2007 and the agreed date of commissioning in the joint petition was 1.11.2007. The State Commission was not aware of the commissioning date of 31.8.2007 while approving the PPA as it has directed the parties to make Construction Schedule (Appendix-I) to the IA as a part of the new PPA which was subsequently signed on 5.7.2004. It was for the first time during impugned proceedings the State Commission came across the date of commissioning in the new PPA. The State Commission in the Impugned Order after considering relevant aspects of the case has considered the commissioning date as 1.11.2007 which is close and stricter to the date of commissioning/SCOD in the IA. We do not see any legal infirmity in the decision of the State Commission in choosing a stricter date closer to 9.11.2017 which is as per the IA for the purpose of scheduled commissioning date of the Project.

- xii. It is also observed that as per Article 16.2 of the new PPA, the LD @ Rs. 1000 per day per MW is applicable only when the unit(s) of the Project is/are not synchronised on or before the Scheduled Synchronisation Date. As discussed above levy of LD can only be linked to the definition of SCOD in IA and not with reference to the Construction Schedule by the parties agreed in new PPA. In our opinion, the liability of LD

arises only from the Scheduled Synchronisation Date as stated in the definition of SCOD in the IA. Accordingly, the State Commission has rightly restricted number of days for which LD is applicable by considering Scheduled Synchronisation date as 17.10.2007 i.e. 15 days before the agreed commissioning date of 1.11.2007.

- xiii. In view of discussions as above and after considering the facts and circumstances of the case and the fact that lesser time was available to the Respondent No. 2 for commissioning of the Project after approval of the PPA/ achievement of FC vis-à-vis time allowed in the IA, we are of the considered opinion that the State Commission was judicious in considering the date of commissioning of the Project as 1.11.2007 and thereby using it for applicability of LD on the Respondent No. 2.
- xiv. Accordingly, this issue is answered against the Appellant.
- d) On Question No. 6. e) i.e. Whether the State Commission has understood the concept of LD in the regulatory set up as laid down by this Tribunal in Lanco Kondapalli Power Ltd. v. APERC &Ors. (Judgement dated 12.1.2015 in Appeal No. 154 of 2013) and PTC India Ltd. v. GERC &Anr. (Judgement dated 30.6.2014 in Appeal Nos. 62 & 47 of 2013) and the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. v. Reliance Communication Ltd. (2011) 1 SCC 394 and Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 ?, we observe as below:

- i. The Appellant has placed reliance on various judgements of this Tribunal and Hon'ble Supreme Court questioning the understanding the State Commission on the concept of LD in regulatory set up. The Appellant has not emphasised/relied on any particular portion of the said judgements. On perusal of these judgements we find that these judgements are related to the applicability/non-applicability of the LD arising out of the contract between the parties which has been discussed in detail in the said judgements.
- ii. We have discussed and upheld the impugned findings of the State Commission at paras 10. b) to 10. c) above. We find that the State Commission has dealt the issue of LD in a prudent manner and has determined the number of days on which LD is recoverable by the Appellant from the Respondent No. 2 due to delay in commissioning of the Project. The delay period for the purpose of LD has been reduced by the State Commission based on the provisions of the Article 16.2 of the new PPA and considering 95 days as 'dies non' based on account of peculiar circumstances of the case and inconsistencies in the dates of commissioning in the IA, joint petition and the new PPA. These situations are not comparable to the cases whose judgements have been relied by the Appellant.
- iii. We are of the considered opinion that the Appellant has failed to make out any case. Therefore, we hold that instant issue is also decided against the Appellant.

After careful evaluation of the oral, documentary and other relevant materials available on the file we do not find any error or legal infirmity in the Impugned Order. The State Commission has rightly justified the findings in answering the issues against the Appellant. Therefore, interference of this Tribunal does not call for.

**ORDER**

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the instant Appeal being Appeal No. 209 of 2016 have no merit.

Hence, the Appeal is hereby dismissed devoid of merits.

The Impugned Order dated 13.1.2016 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **18<sup>th</sup> day of May, 2018.**

**(Justice N. K. Patil)**  
**Judicial Member**

✓

**REPORTABLE/NON-REPORTABLE**

mk

**(I.J. Kapoor)**  
**Technical Member**