

**THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 220 OF 2019 & IA No. 246 OF 2021**  
**&**  
**APPEAL NO. 317 OF 2019 &**  
**IA No. 1675 OF 2019 & IA No. 247 OF 2021**

**Dated: 19<sup>th</sup> July, 2021**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

**In the matter of:-**

**APPEAL NO. 220 OF 2019 & IA No. 246 OF 2021**

**Talwandi Sabo Power Limited,  
Mansa- Talwandi Sabo Road,  
Village Banawala, District Mansa,  
Punjab – 151302. .... Appellant**

**Versus**

**(1) Punjab State Electricity Regulatory Commission  
Through its Secretary  
SCO 220-221, 34A,  
Sector 34A, Sector 34,  
Chandigarh – 160022**

**(2) Punjab State Power Corporation Limited  
Through its Chairman Cum Managing Director (CMD)  
Punjab State Power Corporation Limited,  
The Mall, Patiala – 147001,  
Punjab .... Respondents**

**Counsel on record for the Appellant(s) : Mr. Amit Kapur  
Mr. Akshat Jain  
Mr. Pratyush Singh  
Mr. Raghav Malhotra**

**Mr. Samikrith Rao Puksuri**

Counsel on record for the Respondent(s) :

**Mr. Avinash Menon For Res1**

**Mr. M. G. Ramachandran, Sr. Adv.**

**Mr. Anand K. Ganesan**

**Ms. Swapna Seshadri**

**Mr. Amal Nair for Res-2**

**APPEAL NO. 317 OF 2019 &**  
**IA No. 1675 OF 2019 & IA No. 247 OF 2021**

**Talwandi Sabo Power Limited,**

Mansa- Talwandi Sabo Road,

Village Banawala, District Mansa,

Punjab – 151302.

.... Appellant

Versus

**(1) Punjab State Electricity Regulatory Commission**

Through its Secretary

Site No 3, Sector 18-A,

Madhya Marg,

Chandigarh - 160018

**(2) Punjab State Power Corporation Limited**

Through its Chairman Cum Managing Director (CMD)

Punjab State Power Corporation Limited,

The Mall, Patiala – 147001,

Punjab

.... Respondents

Counsel on record for the Appellant(s) :

**Mr. Amit Kapur**

**Mr. Akshat Jain**

**Mr. Pratyush Singh**

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**Mr. Samikrith Rao Puksuri**

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**Mr. M. G. Ramachandran, Sr. Adv.**

**Mr. Anand K. Ganesan**

**Ms. Swapna Seshadri**

**Mr. Amal Nair**

**Mr. Damodar Solanki**

**Mr. Utkarsh Singh for Res-2**

**JUDGMENT**

**(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

1. In Appeal No.220 of 2019, the Appellant - Talwandi Sabo Power Limited (“**TSPL**”) has challenged the legality, validity and propriety of Order dated 11/04/2019 passed by the Punjab State Electricity Regulatory Commission (“**Respondent No.1/State Commission**”) disallowing the incremental cost incurred by TSPL in procurement of alternate/imported coal on behalf of Punjab State Power Corporation Limited (“**PSPCL**”/“**Respondent No. 2**”) during the month of June 2017 to September 2017 (peak paddy season) for supplying power to PSPCL whereas in Appeal No.317 of 2019, the Appellant has challenged Order dated 30/08/2019 passed by the State Commission disallowing the incremental cost incurred by TSPL in procurement of alternate/imported coal on behalf of PSPCL for the period from September 2016 to May 2017 and October 2017 onwards for supplying power to PSPCL and Deemed Capacity Charges.

2. Since these two appeals can be disposed of by a common judgment, as the issues involved in the appeals and the parties are identical inasmuch as regarding incremental cost incurred by TSPL, as stated above, the common judgment is delivered.

**Gist of case of the Appellant in both the appeals:**

3. The Appellant - TSPL is a company incorporated as a wholly owned company of Punjab State Electricity Board ("**PSEB**" – *Presently Punjab State Power Corporation Limited i.e. PSPCL*) to function as a Special Purpose Vehicle ("**SPV**") for establishment of 1980 MW (3X660MW) Thermal Power Project at Talwandi Sabo (Banwala), District Mansa ("**Project**").

4. The entire shareholding of TSPL was subsequently transferred to M/s Sterlite Energy Ltd (now Vedanta Ltd.), after Sterlite Energy Ltd. was selected as the Successful Bidder under the tariff based competitive bidding process held by PSEB, for the development of the Project.

5. Respondent No.1 is Punjab State Electricity Regulatory Commission ("**PSERC**" / "**Respondent No. 1**"). Respondent No.2 is Punjab State Power Corporation Ltd. ("**PSPCL**" / "**Respondent No. 2**"), which is the successor entity of erstwhile PSEB. TSPL and PSEB (now PSPCL) have executed a Power Purchase Agreement on 01.09.2008 for supply of the entire quantum of power from the Project to PSPCL.

6. On 19.01.2005, Ministry of Power ("**MoP**"), Government of India ("**Gol**"), issued Guidelines for determination of tariff by bidding process for procurement of power by distribution licensees

(“**Competitive Bidding Guidelines**”). The erstwhile PSEB decided to invite bids (under Case-2, Scenario 4) from power developers to set up 1980 MW (3 x 660 MW) Thermal Power Plant at Talwandi Sabo, (“**Project**”).

7. The Competitive Bidding Guidelines refer to two mechanisms for power procurement by distribution companies, i.e. Case 1 and Case 2 bidding. The underlying difference in these two mechanisms is division of risks relating to the development and operation of power project between the bidder/seller and the Procurer. It is now a well settled position that the risk of procurer is higher in Case 2 bidding owing to the enlarged responsibility for providing/arranging land, fuel, and facilitation of initial clearances for the development of the Project. This mechanism envisages a unilateral obligation on the procurer to provide for fuel linkage at a pre-identified site/location to the bidder prior to the publication of the Request for Qualification (“**RFQ**”).

8. Further, the Case 2 procurement route envisages 5 scenarios for bidding. In the present case, the bid was invited by TSPL (the SPV of PSEB) under scenario 4 of Case 2 procurement route, i.e. where fuel linkage is to be provided by the procurer. The basis of bidding under Scenario 4 envisages that parameters like quantity, quality and location of the coal source as well as the supplier of coal are to be made known to the bidders prior to the bidding (as in the present case) so that full

cost implications are known to bidders in advance. In case where arrangement of fuel is the Procurer's obligation, such fuel linkage is to be finalized before publication of RFQ as per clause 3.2(I)(iv) of the Competitive Bidding Guidelines.

9. On 25.09.2007, the TSPL acting as an authorized representative for PSEB issued RFQ for selection of Developer on Build, Own and Operate ("**BOO**") basis through Tariff Based Bidding Process for procurement of power on Long Term basis from the Project in line with Competitive Bidding Guidelines. On 18.01.2008, TSPL issued Request for Proposal ("**RFP**") for procurement of power from the Project. Draft Bidding Documents including the PPA were also issued along with the RFP.

10. On 28.04.2008, Mahanadi Coalfield Limited ("**MCL**") wrote a letter to TSPL (then SPV of PSEB) stating that it was possible for MCL to supply up to 5.00 MT coal ('E' Grade) during 2011-12 and 7.70 MT coal ('E' Grade) from 2012-13 onwards for the Project, as communicated by Ministry of Coal ("**MoC**"). TSPL also specified that the long-term coal linkage had been sought for the Project and that the Ministry of Coal, (GoI) had approved the issuance of Letter of Assurance to meet the fuel requirement of the Project. In this regard, PSEB wrote an email dated 03.05.2008 and referred to MCL letter dated 28.04.2008. However, the email dated 03.05.2008 was

superseded by the bid documents and clarifications including the final communication *vide* email dated 12.06.2008 (prior to bid submission).

11. On 08.05.2008, PSEB acting through TSPL organized a pre-bid conference (RFP Bid Conference) at Chandigarh and informed the bidders that MCL by way of its letter dated 28.04.2008 had agreed to supply “E” grade coal up to 5.00 MT during 2011-12 and 7.70 MT from 2012-13 onwards for the Project. TSPL also provided the specification of Fuel during RFP Bid Conference, which was Grade E, with Gross Calorific Value (“**GCV**”) of 4500-4600 kCal/kg, having an ash content of 33-34% which was further reconfirmed *vide* subsequent communication dated 12.06.2008 (at 05:09 PM i.e. final communication prior to bid submission).

12. On 23.06.2008, based on the specific representations and assurances made by PSEB, Sterlite Energy Ltd. submitted its bid for setting up the Project in order to supply entire power from the Project to Procurer (i.e. PSEB now PSPCL) in terms of the PPA. Pursuant to the competitive bid process, Sterlite Energy Ltd. was selected as the Successful Bidder. On 04.07.2008, PSEB issued Letter of Intent (“**LoI**”) in favour of Sterlite Energy Ltd (now Vedanta Ltd.) calling upon it to acquire 100% shareholding of TSPL. On 14.08.2008, MCL issued a Letter of Assurance (“**LoA**”) to TSPL. It is relevant to note that the LoA was issued after the date when the LoI was issued to Sterlite Energy

Ltd.

**13.** On 01.09.2008, a Share Purchase Agreement (“**SPA**”) was executed between PSEB, TSPL and Sterlite Energy Ltd. transferring 100% shareholding of TSPL in favour of Sterlite Energy Ltd. On 01.09.2008, Power Purchase Agreement (“**PPA**”) was signed between TSPL and PSEB.

**14.** On 02.09.2008, i.e. after execution of the SPA and PPA, PSEB entered into a Memorandum of Understanding (“**MoU**”) with TSPL. In terms of Para 3 of the MoU, PSEB undertook the specific obligation to execute the FSA with the fuel supplier and thereafter assign the same in favour of TSPL. It is pertinent to mention that only after the SPA and PPA were executed and TSPL was acquired by Sterlite Energy Ltd, the MoU was entered with TSPL. Further, the LoA dated 14.08.2008 was issued by MCL in the name of TSPL. PSEB provided LoA to TSPL after the execution of the MoU that too much after the date of LoA issuance.

**15.** Pursuant to the signing of the MoU, TSPL received the LoA dated 14.08.2008 issued by MCL, from PSEB. Upon review of the LoA, TSPL to its surprise, noticed that the LoA arranged by PSEB through MCL for 7.72 MTPA of coal (i.e. Annual Contracted Quantity (“**ACQ**”) as defined therein) was contrary to the specifications of the coal as assured and as communicated by PSEB and as mentioned in the MCL letter dated



28.04.2008 and other bid documents. Among others, the major deviations in terms of coal assurance were that MCL reserved a right to provide Grade E/F coal for the Project under the LoA as against the assured supply of Grade E coal only under the MCL letter dated 28.04.2008. Further as per the LoA, MCL also has a right to provide coal through imported sources also against the assured provision of domestic coal only. It is also pertinent to mention that after the review of the LoA, TSPL for the first time realized that the coal under the LoA is only meant for the Project with 1800 MW capacity and not for the optimum capacity of the Project (i.e. 1980 MW) for which the bid was invited by PSEB.

**16.** On noticing the above said discrepancies in fuel arrangement for the Project, TSPL took up the matter with PSEB and has been continuously corresponding with it in relation to various issues pertaining to the Fuel supply for the Project. Accordingly, TSPL initiated the correspondence on 22.01.2009 by sending a letter to PSEB intimating that the existing coal linkage of 7.72 MT of Grade 'F' coal assured by MCL for 1980 MW Project was insufficient to run the plant at ultimate capacity. TSPL requested PSEB to advise/persuade Ministry of Coal for allotment of coal block on priority to facilitate assured supply of good quality coal to the Project. After TSPL wrote the first letter dated 22.01.2009 regarding the shortfall of coal, PSEB approached Central

Electricity Authority (“**CEA**”) for enhancement of coal linkage to 9.6 MTPA vide its letter dated 26.03.2009 which was a step in the right direction as PSEB understood and reconfirmed its obligation as per the terms of PPA to arrange adequate coal for the Project. Thereafter, PSEB again sent a reminder to CEA vide letter dated 20.10.2009 in line with its obligation of arranging coal for the Project. On 15.02.2011, PSPCL also wrote to TSPL informing that it had requested CEA for enhancement of coal linkage from 7.72 MTPA to 9.6 MTPA vide its letter dated 26.03.2009. Since the issues remained unresolved, in March 2012, PSPCL filed Petition No. 11 of 2012 before PSERC for certain directions.

17. Since the disputes regarding coal supply / availability / sufficiency were not getting resolved, TSPL was constrained to approach PSERC for resolution of the larger dispute of supply of coal for the Project by filing a Petition. On 10.09.2012, TSPL filed Petition No. 46 of 2012 before PSERC and, *inter alia*, prayed for: -

(a) Issuance of directions to PSPCL to arrange (including transportation) adequate quantity of Fuel (domestic coal) of the quality as represented and assured at the time of bidding, up to the Project site, for the life time of the Project i.e. 25 years, so that Project could operate at its ultimate capacity of 1980 MW.

(b) Issuance of directions to PSPCL to allow deemed generation benefits and to pay capacity charges and incentives thereon to TSPL, in case the Project could not operate at its ultimate capacity of 1980 MW due to shortfall in supply of Fuel of the assured quality/ grade/ origin or non-availability of Fuel for the Project.

**18.** On 27.09.2012, PSERC passed the Order in Petition No. 11 of 2012 directing TSPL to sign the FSA with MCL without prejudice to all the rights and contentions of the parties under the Power Purchase Agreement dated 1<sup>st</sup> September, 2008.

**19.** On 24.12.2012, PSERC passed the Order in Petition No. 46 of 2012 holding that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. The Commission directed TSPL to vigorously pursue the matter with all concerned Government authorities e.g. MCL, Coal India Ltd., Ministry of Coal, Ministry of Power and Central Electricity Authority etc. for maintaining the status quo with regard to quantity/quality/grade/origin for the coal committed as per the LoA as also for additional allocation of coal required for running the plant as per PPA. Vide Orders dated 27.09.2012 and 24.12.2012 the Commission held that TSPL is obligated to sign the FSA with the fuel supplier (without prejudice) and arrange fuel for the Project.

**20.** Aggrieved by the Orders dated 27.09.2012 and 24.12.2012 passed by PSERC, TSPL filed Appeal No. 84 of 2013 and Appeal No. 56 of 2013 before this Tribunal. This Tribunal passed two interim orders in Appeal No. 56 & 84 of 2013, *inter-alia*, directing that: -

- (a) By Order dated 18.04.2013, TSPL shall sign the FSA without prejudice to its rights and contentions subject to outcome of Appeal Nos. 56 & 84 of 2013.
- (b) By Order dated 21.08.2013, TSPL was allowed to procure alternate coal to meet the expected shortfall of coal from MCL for a period of 12 months from the expected commencement of operation of the first unit of the Project. The Hon'ble Tribunal further clarified that the interim order is to enable TSPL to take advance action for procurement of coal from alternative sources.

**21.** In terms of the directions issued by this Tribunal vide Order dated 18.04.2013, TSPL on 04.09.2013 entered into Fuel Supply Agreement with MCL for supply of Annual Contracted Quantity of 7.72 MTPA coal. Pursuant to the directions of this Tribunal in its Order dated 21.08.2013, TSPL undertook competitive bidding process for procurement of 4 lakh tonne of Non-coking Steam Coal from alternate sources.

**22.** Thereafter TSPL filed a Petition No. 60 of 2013 before PSERC for approval of procurement of coal from alternate sources through

Competitive Bidding Process and for approval of energy charges as per this Tribunal Order dated 21.08.2013 in I.A No.226 of 2013 in Appeal No.56 of 2013. On 11.02.2014, PSERC by its Order in Petition No. 60 of 2013 approved the procurement process of coal from alternative sources subject to certain terms, conditions and modalities. It also appointed a Committee comprising of Secretary, Power/Govt. of Punjab, CMD/PSPCL and COO/TSPL as 'Standing Committee on TSPL Project' to resolve day to day issues and to determine/approve the additional cost to be incurred by TSPL in procuring coal from alternative sources/imported coal in order to meet the shortfall in supply of linkage coal from MCL/CIL.

**23.** On 23.05.2014, TSPL filed Petition No. 31 of 2014 before PSERC seeking payment of various components of Energy Charges which were wrongfully withheld by PSPCL.

**24.** On 05.07.2014, first Unit (Unit No. 2) of TSPL was declared under commercial operation. Thereafter on 25.11.2015 and 25.08.2016, Unit No. 3 and Unit No. 1 were declared under commercial operation respectively.

**25.** By its Order dated 23.11.2015, PSERC dismissed Petition No. 31 of 2014 and disallowed all the prayers of TSPL.

**26.** On 12.01.2016, TSPL filed Appeal No. 36 of 2016 before this

Tribunal challenging PSERC Order dated 23.11.2015 passed in Petition No. 31 of 2014 relating to the payment of past charges up to March 2016, payable by PSPCL to TSPL as per Clause 1.2.3 of Schedule 7 of the PPA.

**27.** On 07.04.2016, this Tribunal passed the Judgement in Appeal Nos. 56 & 84 of 2013 and, *inter alia*, held that:

- (a) It was PSPCL's obligation to sign the FSA with the fuel supplier and arrange fuel for the contracted capacity of the generating station. *[Para 12.33 of the Judgment]*
- (b) After considering the provisions of the Request for Qualification, Request for Proposal, Memorandum of Understanding and the PPA, this Hon'ble Tribunal, held that PSPCL is under obligation to sign the FSA with the Fuel Supplier, namely MCL and the Procurer cannot be absolved of its obligation to supply fuel to TSPL for its power generating station. *[Para 13 of the Judgment].*

**28.** On 16.04.2016, PSPCL filed Civil Appeal No. 4085-4086 of 2016 before the Hon'ble Supreme Court challenging Judgement dated 07.04.2016 passed by this Tribunal. By its order dated 02.05.2016 the Hon'ble Supreme Court admitted the Appeal. However, it declined to grant stay of the operation of the judgment dated 07.04.2016 and further observed that in context of the issue of short-payment of dues by

PSPCL under the PPA, the counsel for PSPCL has given an undertaking that PSPCL will pay the Energy Charges which would also include fuel charges as per the PPA. On 12.07.2016, Hon'ble Supreme Court vide Order in Civil Appeal No. 4085-86 of 2016 directed that the undertaking in the Order dated 02.05.2016 will continue. The said Civil Appeal is pending adjudication.

**29.** On 06.09.2016, in terms of the directions of this Tribunal in the judgment dated 07.04.2016, PSERC passed the consequential order in Petition Nos. 11 and 46 of 2012 and inter alia directed PSPCL to approach MCL within 7 days of the date of issue of the Order and sign the FSA forthwith with MCL in substitution of the earlier FSA dated 04.09.2013 signed by TSPL. It also directed PSPCL to simultaneously approach the Indian Railways authorities within 7 days of the date of issue of the Order and sign a separate FTA forthwith for transportation of Fuel from the Mine to the Project of TSPL in addition to the FSA signed with MCL.

**30.** On 08.09.2016 PSERC passed Order amending the Order dated 06.09.2016, with the following amendments: -

*“The commission feels that the proposal of PSPCL on the issue of signing a Tripartite Agreement between PSPCL, TSPL and MCL is erroneous. The Hon'ble APTEL has clearly held that “PSPCL/Procurer is under the obligation to sign the Fuel Supply*

*Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited". Considering the same, the Commission directs PSPCL to approach Mahanadi Coalfields Limited (MCL) within 7 days of the date of issue this Order and sign the FSA forthwith with MCL in substitution of the earlier FSA dated 04.09.2013 signed by TSPL."*

**31.** On 21.10.2016, TSPL filed Appeal No. 331 of 2016 before this Tribunal challenging PSERC's consequential Order dated 06.09.2016 (as amended on 08.09.2016) passed in Petition Nos. 11 & 46 of 2012. Appeal No. 331 of 2016 has been admitted by this Tribunal on 18.01.2017 and is pending adjudication.

**32.** On 01.11.2016, TSPL wrote to the Secretary (Power), Government of Punjab and PSPCL, requesting to convene a meeting of the Standing Committee for approval of cost incurred in procurement of alternate coal. On 11.11.2016, TSPL again wrote to Secretary (Power), Govt. of Punjab and PSPCL and, *inter alia*, stated that: -

- (a) By the order dated 11.02.2014 passed in Petition No. 60 of 2013, PSERC had appointed a Standing Committee on TSPL Project to resolve day to day issues.
- (b) To maintain continuous power supplies to the state of Punjab, TSPL had arranged alternate coal at TSPL's Project site to meet shortage from MCL linkage coal in the best interest of the Project.



- (c) TSPL needs approximately 2 Million metric tonne of additional coal at GCV ARB of 5700 kCal/Kg to be procured from alternate sources for the next Calendar year at an estimated PLF of 80%.
- (d) Estimated coal procurement plan shall vary depending upon the PLF for the plant and GCV for the coal received.
- (e) The shortage in coal from MCL is due to Grade slippage in Linkage coal being received at TSPL site, i.e. GCV of coal as received at TSPL site is lower than the e-GCV as billed by MCL.

**33.** TSPL requested the Standing Committee on TSPL Project for the approval of coal cost arranged from alternate sources to meet the shortages in coal supplied by CIL/its subsidiaries starting July 2015 till date.

**34.** On 18.11.2016, PSPCL wrote to TSPL providing the details for payments made by PSPCL for the energy supplied by TSPL in September and October 2016. It is pertinent to mention that PSPCL has allowed imported coal for the Project and made some payments for usage of the same. On 24.11.2016, regarding arrangement of alternate imported coal for the Project, TSPL wrote to PSPCL stating that during the meeting with Secretary (Power) and PSPCL on 17.11.2016, it was discussed that TSPL's requests would be considered by PSPCL. TSPL informed that it had arranged alternate coal at the

Project site to meet shortage from MCL linkage coal. However, PSPCL is yet to pay the cost of alternate coal citing requirement of approval from Standing Committee on TSPL Project for making these payments.

**35.** On 25.11.2016, PSPCL wrote to Under Secretary, Coal India Limited, Govt of India referring to CIL's letters dated 18.10.2016/19.10.2016 to the Under Secretary, Coal India Limited, Govt. of India. PSPCL requesting to take necessary action to expedite its directions/opinion as required by CIL in the matter.

**36.** On 10.12.2016, TSPL wrote to PSPCL informing that TSPL's Project had achieved COD for all three units. The entire contracted capacity of 1841.4 MW has been commissioned by TSPL in line with the PPA. TSPL informed that it was facing continuous issues regarding the quality and quantity of coal which was to be supplied/arranged by PSPCL to TSPL at the Project site. Any adverse consequences arising out of non-compliance by PSPCL of the Tribunal's judgment dated 07.04.2016 shall be to PSPCL's account.

**37.** On 07.02.2017, PSPCL wrote to Under Secretary, Govt. of India referring to CIL's letters dated 18.10.2016/19.10.2016 and requested to take necessary action to expedite its directions/opinion as required by CIL in the matter. On 28.02.2017, PSPCL wrote to TSPL informing that 100% availability of TSPL's plant shall be required for the forthcoming

summer season (from June 2017 to September 2017). PSPCL requested that suitable arrangements for coal be made by TSPL well in advance so as to ensure 100% availability of TSPL's plant during the abovementioned period. PSPCL further requested TSPL to re-schedule annual maintenance of the units, which had been scheduled in August 2017 to beyond September 2017.

**38.** On 02.03.2017, PSPCL wrote to TSPL and, *inter alia*, stated that pursuant to Order dated 06.09.2016 passed by PSERC, PSPCL has already written letters to MCL, South Central Railways and East Coast Railways for signing of the agreements and also for assignment of the agreements in terms of the above Orders. Further, PSPCL is taking steps with MCL for implementing the above. It is also stated in the said letter that PSPCL will not in any manner be liable for TSPL not pursuing the procurement of coal from MCL in pursuance of the existing FSA and not getting the coal. PSPCL suggested that the representatives of PSPCL and TSPL should visit the Office of MCL at the earliest to pursue the implementation of the arrangement proposed in the Order dated 06.09.2016 passed by Ld. PSERC

**39.** On 22.03.2017, a meeting was held between the representatives of TSPL, Nabha Power Ltd., PSPCL and CIL to discuss the matter of coal availability and strategy to meet shortfall of coal during paddy

season. CIL had indicated that CIL would come out with a workable solution in the next meeting which was scheduled on 29.03.2017.

**40.** On 29.03.2017, TSPL wrote to MCL informing that TSPL has a FSA with MCL with Annual Contracted Quantity (“**ACQ**”) of 7.72 Million MT and currently lifting coal from Ib Valley and Talcher Coalfields of MCL. TSPL further informed that 203 Nos. Linkage coal rakes lapsed from June 2016 to February 2017 owing to reasons beyond control of TSPL. MCL was requested to re-allocate the Linkage coal lapsed to TSPL to avoid loss of availability of units or unit outage due to shortage of domestic coal.

**41.** On 05.04.2017, TSPL wrote to PSPCL requesting PSPCL to participate in the tender process for alternate coal procurement since with the present linkage coal availability from MCL, TSPL will not be in a position to be 100% available for the paddy season of 2017, which may result in huge damage to the State and consumers of Punjab. Vide its e-mail dated 06.04.2017, CIL informed TSPL that CIL is fully geared up to meet TSPL’s entire requirement of coal through FSA and other available windows. CIL has also informed TSPL various steps taken by it and requested TSPL to indicate its coal intake plan including import substitution for 2017-18 from various schemes, viz. FSA and additional requirement beyond FSA through

Special Forward e-auction. On 11.04.2017, PSPCL informed CIL that in a meeting held on 22.03.2017, it was decided that CIL will come back with a workable proposal which will be discussed on 29.03.2017. PSPCL also requested CIL to take necessary action in this regard without any further delay for ensuring the additional supply of coal to TSPL and NPL.

**42.** On 17.04.2017 an unforeseen major fire incident beyond reasonable control of TSPL occurred in the coal conveyor in the Coal Handling Plant ("**CHP**") of the Project resulting in damage to the conveyors. On 24.04.2017, Force Majeure Notice bearing no. TSPL/PSPCL/PPR/AK/APR-17/77 was issued by TSPL to PSPCL, wherein the full particulars of the event of Force Majeure describing the factors which lead to the forced shutdown of the power plant units due to the uncontrollable fire broke out at TSPL's power plant was conveyed to CE Thermal Designs and CE PPR, PSPCL. In the Force Majeure Notice it was stated that the force majeure event started at 10.48 PM on 17.04.2017 and ceased at 01.40 AM on 18.04.2017. Accordingly, TSPL could not requisition any coal in May, 2017 and lesser coal in April and June 2017. After the alleged fire incident, the coal was requisitioned on 02.06.2017. The coal handling plant became functional on 10.06.2017 and the receipt and unloading of coal at the plant started on 18.06.2017. The plant was finally re-synchronized on 20.06.2017.

**43.** On 24.04.2017, PSPCL again informed CIL that no confirmation on making the additional coal available to NPL and TSPL had been so far received from CIL. PSPCL requested that necessary action in this regard may be taken immediately without any further delay for ensuring the additional supply of coal to NPL and TSPL. On 04.05.2017, in continuation of its previous letters dated 11.11.2016 and 24.11.2016, TSPL again wrote to Chief Engineer (PPR), PSPCL and requested the Standing Committee on TSPL Project for the approval of the cost incurred in arranging coal from alternate sources to meet the shortfall in coal supplied by CIL and its subsidiaries. On 10.05.2017, TSPL wrote to MCL informing that an unforeseen major fire incident beyond the control of TSPL had occurred in the Coal conveyor in the Coal Handling Plant ("**CHP**") on 17.04.2017 resulting in damage of Conveyors. 94 Nos. Linkage coal rakes lapsed in April 2017 and TSPL was not able to lift coal owing to above reason. MCL was requested to re-allocate the lapsed Linkage coal to TSPL to ensure sufficient coal availability to meet power requirements of Punjab.

**44.** On 10.05.2017, TSPL wrote to CIL and, *inter alia*, stated that for TSPL to arrange alternate imported coal, the necessary steps for ordering, transporting and stocking of coal at the project site require a lead time of minimum 2-3 months. Thus, it was high time for TSPL to initiate process for procurement of alternate coal to ensure sufficient

coal availability on time. Thus, CIL was requested to expedite the process and inform TSPL regarding availability of coal, grade of coal, pricing mechanism, delivery points etc. at the earliest so that TSPL could take necessary steps in arrangement of alternate coal under agreement with PSPCL. Failure to arrange the additional coal in time would affect the power supply to the state of Punjab in the peak paddy season. TSPL also enclosed a copy of the minutes of meeting dated 22.03.2017 and PSPCL's letter to MCL dated 11.04.2017 and CIL's email dated 06.04.2017.

**45.** On 17.05.2017, PSPCL wrote to TSPL informing that the generation from TSPL shall be required so as to meet the peak demand of state of Punjab during the peak paddy season. PSPCL requested that arrangement shall be made to put TSPL into operation for generation before the 25.06.2017. On 18.05.2017, PSPCL wrote to Under Secretary, Govt. of India informing that the matter regarding FSA signing by PSPCL is getting delayed and compliance with PSERC order dated 06.09.2016/ 08.09.2016 is to be made by PSPCL at the earliest. Accordingly, it was requested that a meeting be arranged of PSPCL officers with higher officers in Ministry of Coal for holding further discussion regarding signing of FSA for Talwandi Sabo Power Project and convey the date of meeting to PSPCL at the earliest.

46. On 25.05.2017, TSPL informed MCL that due to major fire incident on 17.04.2017, TSPL was not able to lift allocated coal quantity due to which 243 Nos. rakes got lapsed i.e., 94 Nos. linkage coal rakes in April 2017 and 149 Nos. linkage coal rakes in May 2017. (Approx. 9.46 Lac MT). TSPL again requested MCL to re-allocate the lapsed linkage coal to TSPL for ensuring sufficient coal availability to meet power requirement of Punjab in paddy season. On 26.05.2017, TSPL wrote to MCL informing that TSPL had been receiving intimation to ensure 100% availability of power plant for the upcoming paddy season from PSPCL and by reallocation of linkage coal of April 2017 and May 2017 through RCR mode will provide TSPL coal security and avoid any loss of linkage coal. MCL was requested to reallocate the lapsed linkage coal through RCR mode to TSPL for ensuring sufficient coal availability to meet power requirement of Punjab in paddy season. On 02.06.2017, PSPCL wrote to TSPL informing that PSPCL will need full generation from TSPL during the month of June to September 2017 to meet with peak demand of power in the state. TSPL was requested that 100% plant availability and sufficient coal stock be ensured during summer/paddy season. On 07.06.2017, TSPL again wrote a letter requesting PSPCL to grant permission to TSPL to arrange coal from alternate sources / imported coal and to pay costs thereof to TSPL in the light of established shortfall during the upcoming



paddy season or in the alternative, pay TSPL deemed capacity charges in accordance with its availability which TSPL is not able to generate due to coal shortfall.

47. On 21.06.2017, since no response was received from PSPCL regarding the request to grant permission to arrange coal from alternate sources and to pay costs thereof, TSPL filed Petition No. 43/2017 before PSERC seeking a direction to PSPCL to pay the cost of alternate coal to be arranged by TSPL to run the plant at full capacity during the paddy season (June' 2017 to September' 2017) or in the alternate pay the deemed capacity charges proportionate to the TSPL's availability which could not be generated due to coal shortfall. It is pertinent to note here that the relief sought in Petition No. 43 of 2017 was limited to the period June 2017 to September 2017. However, coal shortfall at TSPL's Plant has continued even beyond the peak paddy season, i.e., after September 2017. TSPL vide its various communications dated 22.06.2017, 28.06.2017 and 29.08.2017 requested the Railways for addressing the issue of rake unavailability by loading at least 2 rakes from Talcher and 5-6 rakes from IB valley to avoid any coal stock out situation at TSPL's Project. On 05.07.2017, TSPL also informed PSPCL that in the month of June 2017, TSPL had a quota of 120 rakes, out of which only 47 rakes were loaded, and the balance rakes lapsed due to non-availability of rakes and

due to diversion of coal rakes to select few IPPs only. In the month of July' 2017 TSPL had a quota of 131 rakes out of which only 4 rakes were loaded till 04.07.2017, and there was a requirement of 6 rakes to be loaded further on a daily basis. TSPL had represented to MCL, CIL, Railways and other agencies through various communications regarding urgent requirement of rakes for TSPL and increasing loading of coal rakes. PSPCL was requested to write to and pursue with CIL, MCL and Indian Railways for loading of coal rakes for TSPL to meet PSPCL's peak paddy season requirement as well as enhancement of coal supply to overcome supply shortfall under the FSA.

**48.** On 10.07.2017, Principal Secretary, Department of Power, Govt. of Punjab wrote to CIL stating that he was given to understand that for TSPL, MCL had restricted its allocation to 90% of ACQ from MCL's Ib Valley/Talcher area. CIL was requested to look into the matter and resolve the coal shortage issue of the IPPs of Punjab so that there may not be any problem in meeting with the requirement of Power to the consumers of Punjab for want of coal. On 26.07.2017, TSPL wrote to PSPCL providing a summary of the outcome of the bidding process conducted by TSPL for supply of 120 KT Non-Coking Steam coal vide tender no.TN/16/CM/TSPL/2017-18 dated 13.06.2017. TSPL informed that

it was procuring this coal in the larger interest of the project considering the peak paddy season, and TSPL understood that PSPCL would be paying the actual coal cost incurred in procuring this coal and bringing it to TSPL site for meeting PSPCL's power requirements. On 03.08.2017, TSPL informed PSPCL that in a meeting held on 27.07.2017 CIL had indicated possibilities for additional domestic coal supply from Gourideep mines of Western Coal fields Ltd. ("**WCL**"). PSPCL was requested to accord its approval for procurement (and consequent full cost reimbursement through energy charges as per the PPA) of this additional coal. PSPCL never responded to this letter. On 10.08.2017, TSPL informed PSPCL that it has floated a tender for procurement of coal through competitive bidding process. PSPCL was requested to depute its official to participate in the competitive bidding process.

**49.** On 14.08.2017, TSPL filed Civil Appeal No. 10525 of 2017 before the Hon'ble Supreme Court challenging this Tribunal's Judgment dated 03.07.2017 in Appeal No. 36 of 2016 regarding washing and other components of energy charges.

**50.** On 01.09.2017, TSPL informed PSPCL the outcome of the bidding process conducted by TSPL for procuring non-coking steam coal. TSPL informed PSPCL that it will be procuring this coal in the

larger public interest and considering the peak paddy season. PSPCL never responded to this letter. On 04.09.2017 PSPCL requested TSPL to take all necessary steps at its end to ensure that there is no loss of power generation. As is clear, PSPCL did not respond to TSPL's requests but only communicated its requirements. PSPCL was least concerned about TSPL's issues even when obligation to supply coal was that of PSPCL. Vide its letters dated 06.09.2017 and 18.09.2017, MCL offered to supply coal by Road-cum Rail mode to TSPL to the extent of 5% of MSQ for the month of September 2017 from Basundhara OCP, Hingula OCP and Lingraj OCP of MCL.

51. TSPL again approached Government of Punjab vide its letters dated 09.09.2017 and 13.09.2017 requesting the Government of Punjab to communicate with CIL for increasing the allocation of coal rakes and increasing the allocation of coal under the FSA. TSPL vide its letter dated 20.09.2017 and 25.09.2017 requested for PSPCL's approval for procurement of lapsed coal being offered by MCL through Road-cum-Rail Mode. However, PSPCL did not approve the request and no approval communication was received from PSPCL.

52. On 06.10.2017, TSPL served a Force Majeure notice ("**Force Majeure Notice**") to PSPCL in terms of Article 12.5 of the PPA.

**53.** On 06.10.2017, TSPL informed PSPCL that it had published a tender No.TN/18/CM/TSPL/2017-2018 dated 04.10.2017 for procuring 280 KT of alternate coal and requested for deputation of officials of PSPCL to participate in bidding coal process and to witness the opening of financial/technical bids. Subsequently by a letter to PSPCL on 10.10.2017 requested for PSPCL's approval for procurement of coal through RCR mode. But there was no response. TSPL undertook all measures and made consistent efforts to avoid a coal stock out situation at the Project. Therefore, PSPCL is obligated to compensate TSPL for the costs incurred by TSPL for procurement of alternate coal/imported coal.

**54.** On 23.10.2017, TSPL wrote to PSPCL requesting PSPCL to sign the FSA with appropriate CIL subsidiary and sign the FTA with Indian Railways / transportation agencies by taking up the matter with relevant authorities including CEA, Ministry of Power, Ministry of Coal, CIL etc. PSPCL was requested to ensure that such FSA and FTA be signed for coal of the quality as was assured during bid submission i.e. Grade E of 4500-4600 GCV with ash content less than or equal to 34% as per currently prevailing grading system and of the quantity sufficient to ensure 100% plant availability of three units of 660MW.

**55.** On 23.10.2017, PSPCL wrote to Ministry of Coal to discuss and expedite the matter regarding signing of FSA between PSPCL and MCL and further assignment of the same to TSPL in substitution of the existing FSA. PSPCL requested that the matter may be expedited, and suitable directions may be given to CIL in this regard. On 01.11.2017, PSPCL wrote to TSPL stating that PSPCL has been vigorously pursuing with MCL and other departments of GoI for signing of the FSA. It was intimated that officers of PSPCL would be visiting the offices of Director, MoC and MoP on 03.11.2017 for expediting signing of FSA. On 06.11.2017, in response to PSPCL's letter dated 01.11.2017, TSPL informed PSPCL that TSPL's officials could not accompany PSPCL officials for the visit on 03.11.2017 owing to such short notice. PSPCL was requested to send invitations for such meetings at least one week in advance so that appropriate arrangements could be made by TSPL.

**56.** On 09.11.2017, TSPL wrote to PSPCL and stated that to meet the shortfall in coal supply by MCL and to tackle the higher ash content of domestic linkage coal by MCL, TSPL, on PSPCL's behalf has already ordered for supply of 75 KT (1 KT = 1000 Metric Tonnes) coal in October 2017. Due to the critical coal stock position, TSPL had invited price bids for supply of additional 80 KT of alternate coal in November-December 2017 to meet PSPCL's power requirement. PSPCL was informed that the coal supplier would be chosen and order for supply of

coal would be placed based on the competitive prices as offered by the coal suppliers. Accordingly, on 13.11.2017, TSPL entered into a sale and purchase agreement with Adani Global PTE Ltd. for supply of 80000 MT of coal.

**57.** On 13.11.2017, TSPL wrote to Punjab SLDC stating that the DC considered in the State Energy Account of October 2017 was not in line with the DC declared by TSPL. TSPL stated that the lower DC was declared by TSPL due to coal shortage which was not resolved by PSPCL.

**58.** On 14.11.2017, TSPL wrote to PSPCL stating that by letter dated 17.10.2017, Ministry of Railways has stated that Indian Railway and CIL are jointly working out the feasibility of coal importing power stations to enter into long term contracts with Railways where the landed price of coal are based on import price parity. Ministry of Railways has requested to provide details qua volume of coal, price of imported coal, source, along with projection for next 5 years, proposed coal linkages for power plants willing to enter in long term contracts with railways. It was also stated in the said letter that as per the PPA and the Tribunal's judgment dated 07.04.2016, the obligation of signing FSA and FTA is that of PSPCL.

**59.** By its letter dated 18.11.2017, TSPL informed PSPCL that on behalf of PSPCL, in order to cope with the critical coal stock position had ordered for supply of 80 KT coal from Adani Enterprises Ltd. at the price discovered post competitive bidding and negotiations. Such procurement was done without prejudice to TSPL's rights and in terms of PSPCL's obligation to arrange the coal for TSPL's project. On 20.11.2017, TSPL wrote to the Government of Punjab and stated that the domestic coal stock position at TSPL was approximately 138166 MT. In November 2017, only 54 rakes of coal were loaded in 16 days (from 04.11.2017 to 19.11.2017) as against the quota of 149 rakes. With such rake loading pattern, it was expected that 45-50 rakes may get lapsed due to non-loading of rakes by MCL/unavailability of rakes from Indian Railways. The Govt. of Punjab was requested to send a communication to CIL, MCL and Indian Railways so that rake loading and coal dispatch to TSPL's project could be improved.

**60.** On 21.11.2017, pursuant to TSPL's request, Government of Punjab wrote to CIL and Ministry of Railways requesting CIL to arrange for dispatch of sufficient coal to TSPL's Project. In order to ensure adequate supply of coal to meet full operational capacity of the Plant, TSPL vide its letter dated 22.11.2017 requested Secretary, Ministry of Coal, Government of India to load 5-6 rakes from Ib Valley area & 2 rakes from Talcher Area on daily basis to avoid coal stock out situation.



**61.** Vide its letter dated 30.11.2017, TSPL again repeated the request and highlighted that Plant will shut down in absence of loading of minimum 7 rakes daily from MCL. Similar letters were also sent to different authorities of Railways and MCL Chairman.

**62.** On 01.12.2017, TSPL wrote to PSPCL in reference to the discussion regarding increasing coal allocation from MCL in July-September quarter to 28% of ACQ as compared to 22% allocation by MCL. It was stated that the allocation of 22% of ACQ may be revised to January-March quarter and 28% to July-September quarter to help mitigating the chronic coal shortage being faced by TSPL during peak paddy season every year. PSPCL was requested to take up the matter with CIL/MCL.

**63.** In view of the continuous shortage of linkage coal as supplied by MCL which was affecting TSPL's plant to generate power as per its technically available capacity, TSPL by its letter dated 07.12.2017, inter alia, requested the Govt. of Punjab to: -

- (i) Take up the matter with MCL/CIL for allocating additional coal of around 12.9 MT so that the plant can be operated at a capacity of 100% PLF.
- (ii) Allow TSPL usage of coal from coal blocks allotted to PSPCL for power generation.

- (iii) Allow TSPL to procure alternate coal from CIL/other sources in the interim, till the additional coal is allotted.
- (iv) PSPCL to sign the FSA with MCL/CIL subsidiary for requisite quantity and quality (Grade E coal with GCV in the range of 4500-4600 kcal/kg and ash content in the range of 33-34%) so that the plant can be operated at 100% PLF.

**64.** TSPL vide its letter dated 07.12.2017, again requested Secretary, Ministry of Coal, Government of India to load 5-6 rakes from Ib Valley area & 2 rakes from Talcher Area on daily basis to avoid coal stock out situation. By its e-mail dated 08.12.2017, TSPL informed Punjab SLDC that though the plant is technically available for injecting 1841.4 MW, the plant could only be operated up to 1250 MW due to non-availability of sufficient coal. On 10.12.2017, Punjab SLDC wrote an email and issued directions to TSPL to Box Up any one unit immediately. In terms of the said directions issued by the SLDC, TSPL immediately boxed up one unit despite being technically available. On 12.12.2017, PSPCL replied to the Force Majeure Notice and notice relating to State Energy Account for October 2017 dated 13.11.2017.

**65.** The Punjab SLDC vide its email dated 12.12.2017 directed TSPL to light up and synchronize Unit No. 3 on 13.12.2017 at 06.00 AM. It is pertinent to note that the said unit was boxed up in terms of SLDC's directions dated 10.12.2017. TSPL vide email dated 12.12.2017

responded to the said instructions by stating that total duration from actual stoppage to light up of Unit 3 is approximately 48.5 Hours. TSPL also highlighted that boiler of the said Unit 3 is under cold condition and it will take approximately 30 hours to bring back unit in operation. Therefore, in light of the same, Unit 3 can be synchronized approximately at 24:00 Hrs. of 13.12.2016. On 14.12.2017, PSPCL wrote a letter and alleged that TSPL has undertaken intentional mis-declaration of available capacity after 10.12.2017 at 18.15 Hrs., therefore it has violated Clause 11.3.4 of the Punjab State Grid Code, 2013 ("**Grid Code**"). The said letter also intends to convey that TSPL is not entitled for fixed charges pertaining to false declaration of available capacity i.e. reserve shut down after 10.12.2017 at 1800 Hrs. In response to the said letter dated 14.12.2017, TSPL vide its letter dated 18.12.2017 denied violation of Clause 11.3.4 of State Grid and any intentional mis-declaration of available capacity.

**66.** On 27.12.2017, in continuation of its previous letters, TSPL addressed a letter to Addl. Chief Secretary, Power Department, Government of Punjab and PSPCL and stated that the ongoing shortfall in availability of linkage coal at TSPL's Plant is affecting its availability to meet PSPCL's power requirement. TSPL also stated that the persisting coal shortfall is caused due to insufficient fuel linkage quantity and lower GCV coal being supplied by MCL against the specifications

assured at the time of bidding. Accordingly, TSPL requested the Standing committee on TSPL Project to approve the cost incurred in arranging coal from alternate sources to meet the shortfall in supply of linkage coal supplied by MCL.

**67.** Despite PSLDC's directions for boxing up of Unit, the DC & associated capacity charges for the intervening period till the Unit got re-synchronised have not been considered for payment by PSPCL. This shows the *mala fide* intent of PSPCL, wherein PSPCL has neither fulfilled its obligation to arrange coal for the assured quality and quantity for the project nor granted approval for procurement of alternate coal from CIL & other sources. According to TSPL, there has been persistent and continuing failure of PSPCL to fulfill its obligation to arrange adequate quantity and assured quality of coal to enable TSPL to run its plant at full capacity. As a consequence of PSPCL's failure to fulfill the aforesaid obligations and low supply of coal by MCL/CIL under the interim FSA, TSPL has been, *inter alia*, compelled to declare lower operational availability [Declared Capacity (DC)] of its Plant and consequently suffered revenue losses affecting the viability of the Project due to PSPCL not paying capacity charges for such loss in availability. Further, TSPL was also compelled to procure coal from alternate sources including imported coal and suffer huge revenue losses affecting the viability of the Project due to PSPCL not paying for

such coal procurement from alternate sources despite availing the power generated from such alternate source coal. In this regard, it is pertinent to note that the consequences following PSPCL's non-fulfilment of its obligations and unreasonable refusal to allow procurement of and pay for coal from alternate sources is due to reasons beyond the control of TSPL and for no fault of TSPL.

**68.** According to TSPL, the coal shortfall continued even beyond the peak paddy season, i.e., after September 2017. In view thereof, on 22.01.2018 TSPL filed Petition No. 03 of 2018 before PSERC seeking certain directions and guidance to avoid forceful declaration of lower operational availability of its Plant and revenue losses for entire life of the Project.

**69.** On 18.04.2018, TSPL filed an I.A. No. 05 of 2018 in Petition No. 03 of 2018 before PSERC seeking interim orders restraining PSPCL from imposing any penalty on TSPL on account of cumulative availability of the Power Plant being below 75% in the Contract Year 2017-18. On 30.05.2018, TSPL also filed I.A No. 7 of in Petition No. 03 of 2018 wherein TSPL *inter-alia* sought a declaration from PSERC that the 'Standing Committee on TSPL Project' ("**Standing Committee**") constituted in terms of Order dated 11.02.2014 passed by PSERC in Petition No. 60 of 2013 ("**Order dated 11.02.2014**") is valid for the term of the PPA. By its Order dated 06.06.2018, passed in Petition No. 03 of

2018 and I.A. No. 05 of 2018, PSERC *inter-alia*, held that the Standing Committee constituted in terms of the Order dated 11.02.2014 shall determine the quantum of shortfall in coal supply and be the final authority to decide the shortfall of domestic coal from CIL or its subsidiaries for operation of the project in terms of the PPA. It was also held that PSPCL shall not deduct any amount on account of penalty on TSPL on account of availability of the power plant being below 75% till final order in Petition No. 03 of 2018.

**70.** On 23.07.2018, PSPCL filed Appeal No. 285 of 2018 challenging the said Order dated 06.06.2018 passed by PSERC.

**71.** By its order dated 11.04.2019, passed in Petition No. 43 of 2017, PSERC disallowed the incremental cost incurred by TSPL in procuring imported coal for supplying power to PSPCL during the peak paddy season of 2017. Appeal No. 220 of 2019 is filed against the Order dated 11.04.2019.

**72.** On 30.08.2019, PSERC passed the Impugned Order in Petition No. 03 of 2018 disallowing the incremental cost incurred by TSPL in procurement of alternate/imported coal on behalf of PSPCL for the period from September 2016 to May 2017 and October 2017 onwards for supplying power to PSPCL and Deemed Capacity

Charges. Appeal No. 317 of 2019 is filed challenging the order dated 30.08.2019 seeking following reliefs.

- (a) “Allow the Appeal and set aside Ld. PSERC’s Impugned Order dated 30.08.2019 passed in Petition No. 03 of 2018 to the extent stated in the present Appeal;
- (b) Direct PSPCL to pay the cost of alternate/imported coal incurred by the Appellant along with Late Payment Surcharge as per PPA from the date of billing;
- (c) Direct PSPCL to pay Deemed Capacity Charges from October 2017 onwards; and
- (d) Pass such other orders as this Hon’ble Tribunal deems fit.”

**73.** It is the case of the Appellants that right from the beginning there was non-cooperation on the part of PSPCL so far as its obligation for arranging coal for the project. According to them, PSPCL accepting the deficit in quantity and quality of coal wrote to TSPL that it had requested CEA for enhancement of coal linkage from 7.72 MTPA to 9.6 MTPA vide letter dated 26.03.2009.

**74.** We have already referred to the earlier litigation between the parties with regard to signing of FSA and the obligation of supply of coal.

**75.** After entering into interim FSA without prejudice to the rights and obligations of the Appellant, TSPL undertook bidding process for

procurement of Non-coking Steam Coal from alternate sources. By 25.08.2016, all the three units of the Appellant were declared under commercial operation.

**76.** We have also referred above, the details of letters addressed by TSPL to the Power Secretary, Government of Punjab etc., to convene a meeting before the Standing committee, which was constituted for approval of cost incurred in procurement of alternate coal by the Appellant.

**77.** In spite of persistent and relentless persuasion by the Appellant with Respondent-PSPCL and so also several authorities concerned with the allocation of coal, the deficiency in supply of quantity and quality coal in terms of agreements between the parties, especially the presentation of the PSPCL (the then PSEB)\_ was not complied with by the PSPCL. Therefore, the Appellant contends that alternate coal had to be arranged at the project site to meet the shortage from MCL linkage coal.

**78.** Appellant contends that the entire contracted capacity of the three units of the Appellant's plant was tied up with PSPCL and the quality and quantity of the coal, which was to be arranged/supplied by PSPCL to TSPL at the project site was not complied with, therefore the Appellant was facing various problems. Hence, they even have



cautioned PSPCL by letter dated 10.12.2016 that any adverse consequences arising out of non-compliance of PSPCL's obligation, the same has to be borne by the PSPCL as indicated in the judgment of this Tribunal dated 07.04.2016.

**79.** According to the Appellant, there was intimation to PSPCL well in advance that 100% availability of TSPL plant requires during the summer season, therefore, suitable arrangement for supply of coal has to be made, otherwise the consumers of the State of Punjab would suffer immensely. In spite of these cautions from time to time, PSPCL never kept up its obligation to secure not only adequate quality but also quantity of the coal in terms of agreements between the parties.

**80.** So far as various litigations between the parties and its outcome including pending adjudication of Civil Appeals before the Hon'ble Supreme Court are already narrated in the previous paragraphs, therefore there is no need to repeat the same.

**81.** The Appellant has sought the following reliefs in Appeal No. 220 of 2019.

(a) "Allow the Appeal by directing PSPCL to make payment of differential amount of approximately Rs. 29.57 along with applicable late payment surcharge as per PPA provisions since the due date of respective monthly bills for the period June 2017, July 2017, August 2017 and September 2017 and set aside the Impugned Order dated

11.04.2019 passed by the Ld. Punjab State Electricity Regulatory Commission in Petition No. 43 of 2017; and

- (b) Direct PSPCL to make payment for 75% of the amount on immediate basis i.e. Rs. 22.18 Crores to TSPL.
- (c) Pass such other orders as this Hon'ble Tribunal deems fit."

**82. *Per contra*, the 1<sup>st</sup> Respondent Commission filed reply, in brief, as under:**

According to the State Commission, the Appellant had an opportunity of hearing and the Commission has taken all the submissions made by the parties into consideration. The State Commission submits that so far as assignment of FSA in favour of TSPL and the obligation to arrange fuel has been a controversy between the parties in various litigations. The State Commission has duly considered every aspect and held the issue against the Appellant in terms of the various orders i.e., (i) judgment dated 07.04.2016 passed by this Tribunal in Appeal Nos. 56 & 84 of 2013, (ii) judgment dated 03.07.2017 passed in Appeal No. 36 of 2016, (iii) Orders passed by the Hon'ble Supreme Court in the Civil Appeals pending before it, and (iv) order passed by the State Commission.

**83.** According to the Commission, the observations made by them are justified on various facts and circumstances. They further submits that the Appellant was not seeking or sending requisition for full quantum of

coal from MCL in terms of FSA. According to them, there was no necessity for TSPL to use alternate/imported coal between June 2017 to September 2017. The contention of the Appellant is without any basis so far as allegation of inadequate quantity of coal and inadequate quality of coal in terms of FSA. The contention of the Appellant pertaining to force majeure event for short requisition of coal is also without any basis. All these facts are considered in the impugned order.

**84.** Further, according to the Commission, from the data pertaining to supply by Appellant, it is clear that they have requisitioned 3.27096 lakh ton of coal in September as against the ACQ of 5.66133 lakh ton of coal. The data collected clearly indicate that quantity of coal requisitioned from October 2016 to September 2017 and the requisition clearly indicate that the Appellant themselves had sought less coal i.e., much lesser than ACQ. The month-wise breakup is as follows:-

(a) June 2017 – 1.76053 lakh ton.

(b) July 2017 – 0.56019 lakh ton.

(c) August 2017 – 0.56019 lakh ton.

(d) September 2017 – 0.56019 lakh ton.

**85.** Therefore, according to the Commission, they were justified that the Appellant was not utilizing its full storage capacity of 10 lakh ton even during the period from 2016-17. The observation of the State Commission in the impugned order clearly demonstrates that there is no justification in the claim of the Appellant. On the other hand, the impugned order is passed after taking into account, as stated above, quantity and quality of linkage coal and/or force majeure event. According to them, the force majeure commenced on 17.04.2017 at 10.48 PM and ended at 01.40 AM on 18.04.2017. But there is no justification why coal was not requisitioned in May 2017. After the alleged fire incident, coal was requisitioned on 02.06.2017 and the plant was re-synchronized on 20.06.2017. Therefore, the State Commission after considering the Appellant's claim that they had sourced alternate coal, was not accepted because there was short requisition of coal between June 2017 to September 2017. The impugned order makes it clear that in fact the State Commission took into account the lower GCV than what was claimed by the Appellant before the State Commission. In spite of that they reveal that there was short requisition of linkage coal by the Appellant.

**86.** The Commission further submits that from the data placed on record for September 2016 to September 2017, but for short requisition the Appellant would have easily been able to meet its requirement from

linkage coal. Therefore, there is no justification in the contention of the Appellant pertaining to force majeure event etc.

**87.** The State Commission on consideration of facts on record found that there was no justification for the claim of procurement of alternate coal and on the other hand, the Appellant has violated stipulations made in the order dated 11.02.2014. Therefore, the Commission was justified that the Appellant was required to make requisition of 100% linkage coal in terms of monthly/quarterly/yearly contracted quantity as per the FSA. Therefore, the claim of the Appellant against PSPCL to pay the cost of alternate coal which was arranged by TSPL to run the plant at its full capacity between June 2017 to September 2017 was not established as contended by the Appellant before the Commission. Therefore, the Commission submits that the impugned order does not require any interference.

**88. The reply filed on behalf of the 2<sup>nd</sup> Respondent – PSPCL, in brief, is as under:**

According to PSPCL, the main judgment by the State Commission in disallowing the incremental cost incurred by the Appellant for the so-called procurement of alternate/imported coal for the months of June 2017 to September 2017 is based on sound reasoning, therefore, it does not call for any interference. According to PSPCL, the Appellant

has pleaded its case which is contrary to facts and on wrong interpretation of terms of PPA so far as obligations of the parties. They further contend that the Appellant relies upon definition of FSA in the PPA in a selective manner to wrongfully contend that the 2<sup>nd</sup> Respondent had the total obligation of supply of coal.

**89.** 2<sup>nd</sup> Respondent further contends that in terms of the Agreement, it was agreed between the parties that the 2<sup>nd</sup> Respondent shall execute the FSA and assign it to the Appellant for the life of the PPA which means all the rights and obligations pertaining to procurement of coal will be the responsibility of the Appellant. The assignment of FSA is nothing but making FSA as integral part of the PPA.

**90.** According to PSPCL, from RFQ, it is clear that the bidder was selected as per the tariff based competitive bidding process under Section 63 of the Act. The RFP was issued for selection of the bidder as indicated in the RFP wherein the FSA was agreed to be assigned by the 2<sup>nd</sup> Respondent procurer and the fuel supply with a condition that the procurer has a right to assign themselves agreement for a specific period within the term of the FSA to a third party. The PPA signed between the parties provided for definitions of fuel and fuel supply agreement, so also the responsibility of obtaining consent from various authorities for the purpose of establishment of the project.

**91.** PSPCL further contends that the MOU dated 02.09.2008 between the Appellant and the 2<sup>nd</sup> Respondent provides for assignment of FSA. Therefore, it is very clear from the terms of document and also numerous correspondences between the parties that the Appellant was ready and willing to sign the FSA with the coal supplier. Prior to the bidding process, there was no developer. Therefore, the FSA had to be signed by PSPCL with a condition that it can assign the same to the developer who upon assignment was to take over all the rights and obligations. Much prior to the bidding, MCL had issued a letter of linkage for coal supply. This letter of linkage was issued in the name of the Appellant and not in the name of PSPCL or its predecessor PSEB

**92.** According to 2<sup>nd</sup> Respondent, the monthly charges quoted include the fuel cost payable by the Appellant to MCL. Therefore, it naturally means that purchase of coal is the obligation of the Appellant which is used for generation of energy to be supplied to PSPCL and on such supply, PSPCL has to pay tariff which includes monthly energy charges. Therefore, the 2<sup>nd</sup> Respondent was not required to have any sort of obligation with MCL for procuring coal and make over the same to the Appellant.

**93.** PSPCL further contends that in terms of PPA, the Appellant undertook the generation and to make available the contracted capacity in terms of 4.3 of the PPA. The only obligation of the 2<sup>nd</sup> Respondent is

to pay the tariff in terms of Schedule VII of PPA. In terms of MOU, TSPL is responsible for achieving all milestones/benchmark in terms of LOA of MCL for execution of FSA. The Appellant who has stepped into the shoes of 2<sup>nd</sup> Respondent upon assignment will have all the rights and obligations belonging to the 2<sup>nd</sup> Respondent. This is well settled position, is the stand of the 2<sup>nd</sup> Respondent.

**94.** 2<sup>nd</sup> Respondent further contends that there is no ambiguity whatsoever pertaining to assignment of FSA in favour of the Appellant because once assignment is done, it becomes the responsibility of the Appellant to procure coal from MCL. Therefore, the 2<sup>nd</sup> Respondent's contention is that the entire case of the Appellant is contrary to the terms of agreement pertaining to Rights and obligations of the parties under the PPA and MOU. PSPCL further contends that according to Appellant, the interpretation of observations of the Tribunal in Appeal No. 56 and 84 of 2013 so far as procuring and supplying coal to the Appellant are misconceived by the Appellant.

**95.** PSPCL further contends that the orders pertaining to the said issue in the above Appeals both with reference to the Commission and this Tribunal run contrary to the contentions raised by the Appellant; so also in Appeal No. 36 of 2016, the very same issue was raised by the Appellant and the said contention was rejected by the Commission. Therefore, according to 2<sup>nd</sup> Respondent, even pertaining to the



controversy of washing charges of coal and GCV of coal, this Tribunal rejected the contention of the Appellant and an Appeal is pending before the Hon'ble Supreme Court.

**96.** They further contend that the issues pertaining to washing charges and GCV of coal, the Hon'ble Supreme Court decided the said matter on 07.03.2018 on similar lines of Judgment of ***Nabha Power Limited***. The reliance placed by the Appellant so far as Civil Appeal No. 4085-4086 of 2016 is misconceived because in that matter, the Hon'ble Supreme Court only directed to pay the energy charges in terms of PPA and nothing else. The PSPCL is only obliged to pay the cost of coal which is part of energy charges, but it has no obligation to procure the coal for the Appellant.

**97.** According to PSPCL, the alternate procurement of coal by the Appellant was made only to meet electricity demand and supply during paddy season in the year 2017 i.e., between April to September 2017, since such procurement has to be made only after obtaining permission from the State Commission by the Appellant and the Appellant is required to act in a prudent manner. The alternate coal requirement comes into play only when the supply of domestic coal falls short of the requirement of the Appellant. So far as procurement of alternate coal, the Commission by its Order dated 11.02.2014 in Petition No. 60 of 2013 has approved, subject to terms and conditions referred to in the

said Order. Therefore, the Appellant having failed to procure the linkage coal substantially cannot seek approval for the alternate coal to be procured by the Appellant.

**98.** PSPCL further contends that the Appellant allowed huge amount of coal to be lapsed during June 2017 to September 2017. Further, in the proceedings before the State Commission, the Appellant came with the statement of fire accident at the plant site on 17.04.2017 which resulted in non-procurement of coal and unloading the same at the plant site. This was between 17.04.2017 to 18.06.2017. But this statement of the Appellant is not correct, according to 2<sup>nd</sup> Respondent. The Appellant having chosen to procure coal linkage sources and having permitted the entire coal to be made available during this period lapsed cannot claim now that he is entitled for the benefit of higher cost of alternate coal and that too it has to be considered based on the linkage coal. Further, the Appellant failed to take delivery of any coal without any reason. The Appellant was doing so at his own risk and cost. The Appellant is not entitled to pass on the same to the consumers by taking advantage of his own wrong.

**99.** PSPCL further contends that between 17.04.2017 to 28.04.2017, the Appellant procured 38 rakes within a period of 12 days, therefore it is clear that it was possible for the Appellant to receive and unload coal, but failed to do so. In fact, records point out that on 24.07.2017, the

Appellant received 23761 MT of coal which was the highest during the said month including the period prior to the fire accident. Therefore, the case of the Appellant cannot be accepted which seems to be false and incorrect.

**100.** According to PSPCL, similarly, the contention of unloading small quantities of coal by manual method is also false, if the data is considered. Except for 10 days after the accident, there seems to be no plausible reason why coal could not be procured thereafter. Therefore, non-availability of coal at the instance of MCL was for the reason attributable to the Appellant and not anyone else. In fact, when the officer of PSPCL visited the site following the fire accident, certain observations were recorded in terms of the Annexure. Even otherwise, according to PSPCL, since delivery of coal could not be taken at the plant's site due to the fire accident if any, arising from that, cannot be passed on to the Respondent and consumers. Due to the inability of the Appellant to take delivery of the coal when it was available, the Appellant has to face the consequences and is not entitled for additional cost for alternate coal.

**101.** According to 2<sup>nd</sup> Respondent – PSPCL, the Appellant has made short requisition for coal. For the period from October 2017 to June 2018, the Appellant requisitioned 54.89 lakh ton linkage coal against the contracted quantity of 60.22 lakh ton i.e., 5.33 lakh ton was

requisitioned less. The coal received against this was 42.86 lakh ton (including 1.15 lakh ton washed coal from April onwards). Every month the Appellant is requisitioning less quantity of coal as against contracted quantity for each month based on ACQ of the coal. It is not utilized its full storage capacity of 10 lakh ton even during the period between October 2016 to September 2017. The maximum opening balance of coal stock was in the month of June 2017 which was about 5.14347 lakh ton.

**102.** PSPCL further contends that there is no concept of deemed capacity charges in the absence of due declaration of availability in accordance with the provisions of PPA and the applicable Regulations. It was incumbent upon the Appellant to take steps for arranging the inputs especially the coal required for generation of electricity namely, domestic coal from MCL. At the instance of the Appellant, no requisition for linkage coal was made in full and now the Appellant is claiming alternate coal compensation during paddy season i.e., June 2017 to September 2017. Therefore, the Commission was justified in rejecting the Petition of the Appellant seeking approval for the procurement of alternate coal, is the stand of PSPCL.

**103.** With these averments, the 2<sup>nd</sup> Respondent – PSPCL has sought for dismissal of the Appeal.

**104. More or less, rejoinder to reply of both the Respondents has same contentions on behalf of the Appellant. The gist of the same is as under:**

According to Appellant, the averments set out in the reply of the Respondents are contrary to the statement of submissions made in the present Appeal and rejoinder. The obligation of procurement of adequate quantity and quality of fuel for generating station of the TSPL (project) has been that of PSPCL, since the very inception, which is evident from the following:

(a) In 2007, PSPCL [then Punjab State Electricity Board ("**PSEB**")] had invited bids under Case 2, Scenario 4 of the Competitive Bidding Guidelines issued by the Ministry of Power, Government of India wherein fuel was to be arranged by the Procurer.

(b) In terms of Clause 2.1.3 of the RfP dated 18.01.2008 issued by PSEB, FSA was to be signed between the Procurer (PSPCL) and the fuel supplier.

(c) PSPCL in its presentation dated 08.05.2008 before the bidders had agreed to supply "E" grade coal up to 5.00 MT during 2011-12 and 7.70 MT from 2012-13 onwards for the Project. The specification of fuel during RFP Bid Conference was Grade "E", with Gross Calorific Value ("**GCV**") of 4500-4600 kCal/kg, having an ash content of 33-34%.

Based on the said specific representations and assurances, on 23.06.2008, TSPL had submitted its bid for the Project.

(d) Following provisions of the PPA dated 01.09.2008 executed between TSPL and PSPCL are relevant;

(i) Definition of “Fuel Supply Agreement” in Article 1.1 categorically provides, as under: -

*“Fuel Supply Agreements means the agreement(s) entered into between the Procurer and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Procurer and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Procurer and the Fuel Supplier for the supply of the Fuel.”*

(ii) Schedule 7 (Tariff) which, *inter-alia*, provides that the Monthly Energy Charges (Energy Charges) to be paid by PSPCL (Article 1.2.3) shall be calculated using weighted average of actual cost to the Seller/TSPL of purchasing, transporting and unloading the coal most recently supplied to and at TSPL’s Project, i.e., the cost of coal as delivered/supplied to TSPL’s Project by the Procurer/PSPCL.

**105.** Appellant further contends that way back in March 2012, PSPCL filed a Petition No. 11 of 2012 before the Punjab Commission seeking initiation of proceedings on the issue of signing FSA by TSPL with the coal companies for sourcing required coal for the project for generation and supply of electricity to PSPCL. The direction sought was to replace the word 'Procurer' with 'Seller' in the definition of 'Fuel Supply Agreement' dated 01.09.2008. In spite of this, dispute pertaining to supply/availability/sufficiency of coal were not resolved between the parties. Therefore, TSPL filed Petition No. 46 of 2012 wherein directions was set against PSPCL directing PSPCL to arrange adequate quantity of domestic coal and also quality as represented and assured at the time of bidding up to the project site (including transportation) during the life time of the project i.e., for 25 years. This was for the purpose of project to operate at its ultimate capacity of 1980 MW. They also sought for directions to PSPCL to allow deemed generation benefit and to pay capacity charges and incentives to TSPL in case the project could not operate at its ultimate capacity as stated above, due to shortfall in supply of coal which was assured with regard to quality/grade/origin or non-availability of fuel for the project.

**106.** Appellant further contends that by Order dated 27.09.2012, Petition No. 11 of 2012 and on 24.12.2012, Petition No. 46 of 2012 were disposed of wherein the Commission opined that TSPL is obliged

to sign the FSA with the fuel supplier and arrange fuel for the Project. Challenging these orders, TSPL filed Appeal Nos. 56 and 84 of 2013 before this Tribunal. As an interim direction, this Tribunal passed the following Orders:

(a) Order dated 18.04.2013; directed that TSPL shall sign the FSA without prejudice to its rights and contentions subject to outcome of Appeal Nos. 56 & 84 of 2013.

(b) Order dated 21.08.2013; wherein TSPL was allowed to procure alternate coal to meet the expected shortfall of coal from MCL for a period of 12 months from the expected commencement of operation of the first unit of the Project. This Tribunal further clarified that the interim order is to enable TSPL to take advance action for procurement of coal from alternative sources.

**107.** According to Appellant, it is clear from the above orders that the TSPL will enter into FSA with MCL for supply of annual contract quantity of 7.72 MTPA coal without prejudice to its rights. Ultimately, on 07.04.2016, both the Appeals were disposed of by this Tribunal opining as under:

(a) PSPCL is under obligation to sign FSA with the Fuel Supplier, namely Mahanadi Coalfields Limited.



- (b) It is PSPCL's obligation to arrange adequate quality and quantity of fuel for TSPL's Generating Station and the Procurer i.e., PSPCL cannot be absolved of its obligation.
- (c) As per the RFP, LoA, PPA & MoU, it is the obligation of PSPCL to arrange for fuel for the Generating Station.
- (d) Due to transfer of 100% share of the then TSPL (SPV of PSPCL) in the name of lowest bidder (TSPL), the liability of signing of FSA does not fall in the jurisdiction of the seller, TSPL.

The relevant extracts of the Judgment are as under:

*"12.3 After hearing the contention of the Appellant TSPL and Respondent PSPCL we come to the conclusion that **the real controversy** is whether the Appellant or the Respondent No.1, Punjab State Power Corporation Ltd (PSPCL) is **responsible for the execution of the FSA and for making arrangements for the Fuel requirements of the project...***

*12.16... The Power Purchase Agreement clearly spells that the Fuel Supply Agreement (s) has to be entered into between the procurers and the Fuel Supplier...*

*12.18... MoU specifically stated that the **Fuel Supply Agreement shall be signed by PSEB** with the coal company within six months from the date of the finalisation of the model FSA at the request of TSPL subject to the conditions that TSPL shall achieve all milestones/bench marks as stipulated in the Letter of Assurance (LoA) dated 28.4.2008 issued by MCFL and **PSEB shall thereafter assign the same in favour of the TSPL under Clause 3 of the MoU...***

*12.19... Thus, we feel that as per MoU, **the obligation to sign the FSA lies with the Respondent only viz PSPCL...***

12.23... Due to shifting of shares of TSPL in the name of Lowest Bidder (SEL), the obligation of signing FSA and shifting of obligations of assigning the Fuel for the Generating Station cannot be shifted in the name of the Appellant because as per the Clause of PPA and MoU, the liability of signing of the Fuel Supply Agreement lies with the procurer PSEB...

12.30 We feel that the Commission is legally not right in directing the Appellant to sign the FSA even though the PPA, MoU clearly specifies the obligations of the Procurer...

12.32 In our opinion, **it is the Obligation of the Respondent as per RfP, LoA, PPA & MoU to arrange for the Fuel for the Generating Station.** Further, we also direct the Appellant to pursue with Ministry of Coal, MCFL and other relevant departments for the fuel even though the Obligation of arranging Fuel lies with the Respondent PSPCL for smooth and timely operation of the Plant..."

12.33 The Obligation of signing FSA was clearly specified in the PPA and MoU including arrangement of fuel for the generating plant. Further, the bidding was conducted under Case-2, Scenario-4 of the Standard Bidding documents and as per guidelines specified by Govt of India under Section 63 of Electricity Act, 2003, **the procurer has to arrange fuel for the contracted capacity of the Generating Plant.**

13. In view of the above discussion and analysis of the provisions of law including guidelines issued by the Government of India, RFP's request for proposal, Power Purchase Agreement (PPA) and Memorandum of Understanding, we clearly **hold that the Respondent No. 1, PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited and the Procurer cannot be absolved of its obligation to supply fuel to the Appellant/Petitioner for its power generating station and further to**

*sign the Fuel Supply Agreement with the coal supplier.” [Doc. 14 @ Pg. 270-330 of Vol. II Compilation]*

**108.** Appellant further contends that by the above said Order, this Tribunal reversed the findings of the Punjab State Commission which effectively rewrote the contract between the parties. By the said Order, TSPL should be paid for differential cost of import coal procured and used due to shortfall in supply of domestic coal from MCL of the assured grade and quality. This was challenged before the Hon’ble Supreme Court. The Hon’ble Supreme Court declined to grant stay of the operation of said Judgment and on the other hand, the counsel for PSPCL gave an undertaking before the Hon’ble Supreme Court that PSPCL will pay the energy charges which would also include fuel charges as per the PPA. Subsequently, on 12.07.2016, the Hon’ble Supreme Court directed that the undertaking given by PSPCL will continue. The Appeal is pending adjudication. Therefore, signing of FSA and arrangement of coal for the Project is the obligation of PSPCL, which is established from the following facts:

(a) This Tribunal’s judgment dated 07.04.2016 passed in Appeal Nos. 56 & 84 of 2013;

(b) PSPCL’s undertaking before the Hon’ble Supreme Court on 02.05.2016.

**109.** According to Appellant, in spite of these directions of the Tribunal and the Hon'ble Supreme Court, the Punjab State Commission has taken a stand that issue regarding signing of FSA has been duly considered by the State Commission in the impugned order, which is totally false. To conclude like this, the State Commission relied on the Order dated 03.07.2017 of this Tribunal in Appeal No. 36 of 2016. This Appeal was filed by TSPL pertaining to TSPL's claim for coal washing and associated charges which were withheld wrongly by PSPCL. The Tribunal by Order dated 03.07.2017 disallowed the relief sought by TSPL. However, this Order was struck down by the Hon'ble Supreme Court by its Judgment dated 07.03.2018 wherein the Apex Court relied upon the Judgment of ***Nabha Power Limited vs. PSPCL & Anr.*** [(2018) 1 SCC 508] and allowed the claim of TSPL towards coal washing and associated charges. The Hon'ble Supreme Court opined that **GCV as received** at the TSPL project site needs to be considered for calculating energy charges. When PSPCL failed to comply with the Orders of the Hon'ble Supreme Court, a Contempt Petition came to be filed against PSPCL.

**110.** Appellant further contends that in the Order dated 07.08.2019, the Hon'ble Supreme Court not only reaffirmed its Order dated 07.03.2018 but also directed PSPCL to make payments of amounts withheld by PSPCL. Therefore, in the impugned order, the Respondent

Commission was not justified placing reliance on orders of this Tribunal dated 03.07.2017 which was finally settled by the Hon'ble Supreme Court. Therefore, the directions of the Hon'ble Supreme Court alone will prevail and no other directions are of any relevance. This order clearly establishes that it was not a question about who has to arrange coal for the project. It was only pertaining to washing charges. Till date, in spite of the directions of the Tribunal and the Punjab State Commission, PSPCL has failed to sign FSA with the fuel supplier. The Punjab Commission was a party to all the proceedings and the Punjab Commission is aware of the fact that the obligation to arrange adequate quantity and quality of fuel is the responsibility of the PSPCL.

**111.** Appellant further contends that the finding of the Punjab Commission and disallowing the cost incurred by TSPL in procuring alternate/imported coal for generating power during peak paddy season on the pretext that if only TSPL had requisitioned full quantum of coal as per the ACQ and FSA, there was no necessity for the Appellant to purchase alternate/imported coal during the afore-said period, on facts, according to Appellant, the Punjab Commission is totally wrong and made erroneous decision. The quantity and quality of coal assured and supplied and the interim FSA signed by TSPL is not adequate to meet the demand of PSPCL to maintain 100% availability of TSPL's Project during the peak paddy season. Therefore, TSPL was constrained to

arrange coal from alternate sources and the same is established in view of the following:

- (a) **Short requisitioning due to Force Majeure event:** On 17.04.2017, fire broke out in the coal handling system of TSPL's plant causing extensive damage to the coal conveyors - a Force Majeure event beyond the control of TSPL. The fire in the Coal Handling Plant rendered mechanical unloading of coal impossible at site and led to forced shut down of Plant. Owing to this reason, 8,19,620 ton less coal was requisitioned by TSPL in the months of May 2017 and June 2017. PSPCL was duly informed about the said incident vide Force Majeure Notice dated 24.04.2017.
- (b) **Refusal of PSPCL to pay surface transportation charges:** TSPL could not lift 5% of the FSA quantity offered through RCR mode for each month (amounting to 3,49,973 ton) owing to the refusal of PSPCL to pay surface transportation charges. It is only after the Order dated 07.03.2018 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 10525-26/2017, wherein the Hon'ble Supreme Court allowed the claim of TSPL towards surface transportation and associated charges, that TSPL was able to requisition the same. Moreover, the coal through RCR mode would have been costlier for PSPCL. Prior to 07.03.2018, TSPL had written multiple letters to PSPCL seeking its approval for

requisitioning this coal offered through RCR mode. However, PSPCL never responded to any of the letters sent by TSPL.

- (c) **Imported coal from MCL:** TSPL could not lift 5% of the FSA quantity offered as import component through RCR Mode for each month (amounting to 3,49,973 ton) since this coal was expensive and of inferior quality. Further, TSPL had requested for PSPCL's approval to lift the same. However, PSPCL never approved the lifting of such imported coal from MCL.
- (d) **Re-allocation of lapsed coal:** TSPL could not have received the lapsed quantity of 17.09 lakh ton (for the period September 2016 to March 2017 and April 2017 to September 2017) as the FSA itself does not provide for the reallocation of lapsed quantity of coal. TSPL has time and again requested to MCL for reallocation of lapsed coal, however, MCL has not acceded to TSPL's request. Even otherwise, had such lapsed coal been received by TSPL, TSPL would have been able to operate the Plant at a PLF of around 50% which implies that the so-called lapsed coal even if procured would have been utilized and not stored. The correct way of looking at coal quantity is on Financial Year basis on which MCL also settles the ACQ allotted to TSPL and the same is detailed below.

**112.** According to Appellant, the Punjab State Commission failed to consider the following reasons which led to short requisition in coal by TSPL's Project:

(a) The Punjab Commission has erroneously calculated the coal requirement of TSPL's Project based on day to day Scheduling issued by PSPCL. In this regard, it is noteworthy that coal requirement (including imported coal) for a TPP has to be assessed/computed in advance as the process for coal procurement through competitive bidding takes around 2 months. The generator can only compute the requirement of additional coal on the basis of coal expected to be received from linkage sources and additional coal needed for declaring 100% availability (subject to planned outages etc.) and not on the basis of scheduling issued by the Procurer for a particular day at 23:00 Hrs or later on the previous day. TSPL can only foresee/forecast the availability of the plant as the same is under its control. However, PLF/Scheduling is solely controlled by PSPCL/ Load Dispatch Centre and issued on day ahead basis and is subject to multiple revisions even in a single day. Therefore, computing imported coal requirement based on Scheduling issued by PSPCL/Load Dispatch Centre is erroneous and against prudent utility practice. Even today coal approved by Standing Committee is not based on day ahead scheduling. It is



important to note that PSPCL does not issue an advance intimation regarding the schedule.

(b) The Punjab Commission is mixing multiple financial years with one another whereas as per FSA provisions the settlement of annual quantity is done for Financial Year. The Punjab Commission has adopted this methodology in Petition No. 28 of 2018, however, it has failed to appreciate the same in TSPL's case. This has resulted into the Commission giving unreasonable justification for denying TSPL its rightful dues.

(c) Further, the Punjab Commission has denied cost of imported coal for the period June 2017 to September 2017 in Petition 43 of 2017 by holding that had the lapsed coal in April to June 2017 made available to TSPL, there was no need for procuring imported coal from June 2017 to September 2017. The Punjab Commission has considered the same lapsed quantity to deny cost of alternate coal procured by TSPL during the period September 2016 to May 2017 and October 2017 to July 2018 as if the said quantity of coal was non-extinguishable and was available for usage on multiple occasions.

(d) The Punjab Commission has acknowledged the shortage of imported coal equivalent to approximately 12 Lakh ton of Linkage Coal for the period from October 2017 to July 2018. This does not include the shortfall from the period from September 2016 till June 2017.

**113.** According to Appellant, it did not receive the lapsed quantity of 7.09 lakh ton between September 2016 to September 2017, since FSA itself did not provide for reallocation of lapsed quantity of coal. In spite of several requests and demands by TSPL, MCL has not acceded to the said request. Therefore, there was no justification for the Punjab Commission to observe that TSPL did not procure this coal and if procured there was no need for alternate coal. Even if it is assumed that the lapsed coal was received by TSPL, the TSPL would have been able to operate the plant at a PLF of around 50%. The TSPL's plant had operated at PLF of 48 to 61% during the period between April to June in the FY 2016-17 and FY 2018-19. Therefore, even if the so-called lapsed coal was procured, would have been utilized and by sourcing the same, it would not have been enough to meet the requirement from linkage coal. Therefore, the State Commission has totally erred on this aspect.

**114.** They further contend that the Appellant cannot be made to suffer on account of capacity charges for the months when TSPL was affected by fire incident and again it cannot be saddled with the loss for energy charges due to usage of alternate/imported coal. This is nothing, but double penalty for the same incident.

**115.** Therefore, the Appellant contends that the Respondent Commission was not justified in considering the scheduling provided by

PSPCL to compute the whole requirement of TSPL. The coal requirement of TSPL's Project has to be ascertained in terms of the availability declared by the Appellant TSPL. The PSPCL through letters dated 28.02.2017 and 02.06.2017 directed TSPL to make suitable arrangement of coal well in advance to ensure plant availability at 100% during June 2017 to September 2017 (peak paddy season). The computation of the total linkage coal required for meeting the said demand by PSPCL of 100% availability vis-à-vis the linkage coal actually received is as under:

Period	Opening Balance of Linkage Coal (Lakh tonne)- A	Linkage Coal Received in the Month (Lakh tonne)- B	Total Linkage Coal (A+B) (Lakh tonne)	GCV of Linkage Coal (kCal/kg)	NSHR (kCal/kg)	Possible generation with this quantity of coal (Million Units)	Availability at 100% (Million Units)	Availability Declared by TSPL (Million Units)	Total Linkage Coal required for 100% Availability (Lakh tonne)
June '17	5.14347	1.05763	6.20110	3038*	2400	784.956	1425.60	273.79 **	11.26
July' 17	4.65983	4.72774	9.38757			1188.310	1473.12	1,225.17	11.64
Aug' 17	2.38947	4.55301	6.94248			878.802	1473.12	1,223.13	11.64
Sept' 17	0.55353	4.58625	5.13978			650.610	1425.60	1,090.02	11.26

**116.** Therefore, the coal assured and supplied by the interim FSA signed by TSPL was not adequate in terms of quantity and quality to ensure 100% plant availability. Therefore, it was incumbent upon the TSPL to arrange coal from alternate source in order to supply power to PSPCL during the peak paddy season. Capacity declaration was done on daily basis. Further, imported/alternate coal cannot be procured and arranged on day ahead basis since the competitive bidding process as directed in the Order of the Tribunal dated 21.08.2013 takes more than 1½ to 2 months' time.

**117.** Appellant further contends that TSPL has not violated any of the condition for procurement of alternate coal as stipulated in the Orders of the Commission dated 11.02.2014. The Punjab Commission has not assigned any cogent reasons for the opinion of the Respondent Commission that TSPL has flouted all the three conditions specified in the above said Order. The terms and conditions which are to be complied with by TSPL in terms of the above said order are as under:

- (a) Since the signing of FSA with MCL, TSPL has been regularly requisitioning coal from MCL. It is only for the period when the plant was affected to due to force majeure incident that TSPL was not in a position to unload the coal from MCL. Since TSPL was prevented due to Force Majeure event, the same cannot possibly be attributed as TSPL's failure to requisition linkage coal. In fact,

coal materialisation from MCL is one of the highest in the entire country at TSPL site as mentioned below: -

Sl No.	Plant & Location	Coal FSA with	Approximate distance from mine to Plant	Materialisation (April'17-Oct'17)	Materialisation (July'17-Oct'17)
1	TSPL	MCL	1536-1834 kms (IB/Talcher)	62% #	93.4%
2	Kheddar, HPGCL	MCL	1539 kms (IB)	59%	77%
3	Panipat, HPGCL	MCL	1432 kms (IB)	30%	33%

*Note: 1) # TSPL materialisation from April 2017 to October 2017 was affected by non-availability of CHP. It has been calculated after excluding allocation for 94, 149 and 73 rakes of April, May and June 2017 respectively. As can be seen from above, once CHP was restored, materialization of TSPL improved dramatically.*

*2) TSPL allocation from MCL is 90% of ACQ on Monthly Basis.*

(b) TSPL gave preference to coal supplied by MCL over coal to be directly arranged by it from alternate sources.

It is submitted that TSPL has always preferred Linkage coal from MCL over procurement from any other source, which is evident from TSPL's continuous efforts to avail the full quantum assured under the FSA and to resolve the issue of short supply of linkage coal as detailed in the Appeal viz.:-

- (i) Consistent follow-ups done by TSPL with CIL/MCL for additional domestic coal from other CIL mines;
- (ii) Consistent follow-ups done by TSPL with CIL/MCL for reallocation of lapsed coal

- (iii) Request to CIL through Principal Secretary, Department of Power, Government of Punjab for providing additional coal;
- (iv) Additional domestic coal CIL offer for supply of coal from WCL's Gourideep mines which was not responded to by PSPCL;
- (v) Consistent follow ups by TSPL and Government of Punjab with Railways for increasing rake loading; and
- (vi) Additional coal offer by CIL through Rail Cum Road Mode which was not responded to by PSPCL
- (vii) Multiple requests to standing committee for allowing alternate coal procurement

It was only due to the shortfall of coal under the interim FSA that TSPL was constrained to procure alternate/imported coal in order to supply power to PSPCL during the peak paddy season in the interest of the consumers of Punjab.

- (c) TSPL will not use coal supply from alternative sources unless warranted by exigencies of short supply of coal by MCL that too on 'Minimal Usage' basis.

From the above, it is evident that the assured quantity and quality of coal under the interim FSA was insufficient to meet the coal

requirement of TSPL's Project to maintain 100% availability during peak paddy season. Consequently, TSPL was constrained to procure coal from alternate/imported sources through competitive bidding to cater to the demands of PSPCL during the peak paddy season.

- (d) Due to the shortage of coal supply from MCL, TSPL had requested PSPCL to arrange coal from alternative sources. However, PSPCL failed to do so. In such event, TSPL had no other option but to procure imported coal through competitive bidding.
- (e) The procurement/usage of alternate coal was on 'Minimal Usage' basis, as TSPL has only procured limited quantum of alternate coal to be able to cater to the demands of PSPCL during the peak paddy season. The same can be seen from the fact that average blending ratio for the period from September 2016 to September 2017 is approximately 10%.

**118.** Appellant further contends that in spite of TSPL regularly requisitioned coal from MCL under the FSA, still there was shortage of linkage coal. TSPL has always given preference to MCL linkage coal and has made possible efforts to secure maximum quantity of linkage coal. But all these efforts were continuously negated by inaction on the part of the PSPCL as it never given approval for procuring coal from

other mines i.e., other CIL mines or coal offered by CIL through rail-cum-road mode. The use of alternate/imported coal by TSPL is on minimum usage basis.

**119.** According to Appellant, the Respondent Commission was not justified to opine that the imported coal was not required as sufficient linkage coal was available. The Punjab Commission has failed to evaluate the coal requirement of TSPL for the months of June 2017 to September 2017 by considering the Scheduling given by PSPCL, totally ignoring the stand of TSPL. The requirement of coal has to be computed in advance, since the process for procurement of competitive bidding takes around minimum of 1.5 to 2 months. On the basis of coal expected to be received from the linkage source and addition coal needed for declaring 100% availability, the generator can compute the requirement of additional coal and not on the basis of Schedule issued by the procurer during the relevant period on day ahead basis. After computing the requirement of coal at peak paddy season, considering the PSPCL's direction for 100% availability from the expected available linkage coal, definitely TSPL could not have maintained 100% availability.

**120.** Appellant further contends that on account of clear situation evident in shortage of coal, TSPL was considered to procure imported coal. If TSPL would not have procured and used alternate/imported



coal, it would neither have been able to operate the plant at 100% capacity nor supply the scheduled power to PSPCL, which would have resulted in difficulties for consumers of Punjab considering the high demand during peak paddy season. In spite of requests for arranging coal from alternate sources, PSPCL failed to do so. In such event, there was no option for TSPL than to procure imported coal through competitive bidding process. This was only a minimal usage basis in order to cater to the demands of PSPCL during the peak paddy season. Alternate coal cannot be used without blending. Therefore, it is not a situation that TSPL will first use all linkage coal and thereafter it will use alternate/imported coal.

### **ANALYSIS & CONCLUSION**

**121. We heard arguments of the parties at length, we have also gone through the written submissions filed by the parties in the above appeals.**

**122.** The above two appeals are directed against the orders of the Respondent-Commission. Apparently, Punjab State Commission has rejected the claim of incremental cost said to have incurred by the Appellant in respect of procurement of alternate/ imported coal on behalf of the Respondent No.2-PSPCL to whom the Appellant was supplying power.

**123.** The PPA dated 01.09.2008 with Punjab State Power Corporation is for supply of 100% installed capacity from the power plant of the Appellant having 1980 MW (3 X 660 MW) thermal power project at Talwandi Sabo in the district of Mansa.

**124.** According to Appellants, the impugned order is incorrect both on facts and question of law. The Respondent Commission totally ignored the directions of this Tribunal and so also the Hon'ble Supreme Court in several litigation between the parties prior to the impugned order. According to the Appellant, on account of failure on the part of PSPCL to supply assured quantity and quality of coal, the litigation between the parties kept on cropping up.

**125.** In response to guidelines dated 19.01.2005 notified for determination of tariff by bidding process to procure power by distribution licensees, guidelines were published along with the standard Request for Proposal for long term power procurement under Case 2 bidding in terms of Section 63 of the EA Act, 2003. It is not in dispute that Clause 2.2 of the above said guidelines provide two types of competitive bidding i.e., Case 1 and Case 2. There is vast difference between Case 1 bidding and Case 2 bidding, which is better understood in terms of the table below:

<b>Attributes*</b>	<b>Case 1</b>	<b>Case 2</b>
Location, Technology & Fuel	Not Specified	Provided by Procurer
Procurers	Bidding is generally done by the individual state	Bidding can be done by one or more states by the formation of SPV
Capacity bid out	Bids for a portion or total power requirement of Procurer.	Bidder to develop a power plant to supply entire power generated to the procurer.
Clearances	Bidder responsible for clearances/ approvals etc.	States responsible for facilitating all the clearances
Responsibility Risk Allocation	All performance obligations are cast on developer with limited risk for State/ Procurers.	Significant implementation instrument of State/Procurers.

*\* Clause 3.2(I) of the CBG for Case 2 and Clause 3.2(II) of the CBG for Case 1*

From reading the above differences between Case 1 and Case 2, the distinction/difference between the two is procurement. Pertaining to Case 2, it is a “fuel specific procurement” having a pre-identified site. At the time of bidding itself, the bidder has the information about the type, source and quantity of fuel for the project, which is to be arranged either by the procurer or the bidder, as the case may be, in terms of contract agreed between the parties.

**126.** Standard Case 2 RfP contemplates in terms of Clause 2.7.14, five scenarios for bidding under Case 2 route, which are as under:

Scenario 1 – in case where captive coal block is provided.

Scenario 2 – in case where imported fuel is arranged by seller.

Scenario 3 – in case where domestic fuel is arranged by seller.

**Scenario 4 – in case where fuel linkage is provided by procurer.**

Scenario 5 – in case of Hydro Power Projects.

**127.** It is also seen that if the procurer has the obligation to arrange fuel, such fuel linkage has to be finalised before publication of RfQ. All obligations on the part of the procurers for the bid process becomes complied with only when each and every procurer completes all the obligations set out in the RfP. RfP provides maximum period, within which selected bidder must commence supply of power after the PPA becomes effective. This is subject to compliance of obligations of the procurer. Ordinarily this takes about four years from the date of PPA becoming effective if it is pertaining to long term procurement. In the case on hand, it is a long term procurement. Even after FSA has been assigned to the seller of energy, any penalty for non-procuring the minimum guaranteed fuel shall be borne by the procurer, if the availability of the generating plant has been more than the minimum off take guaranteed by the procurer.

**128.** The pre-bid meeting was only to clarify any confusion or issues pertaining to RfP. The parties cannot dispute the fact that the provisions of the competitive bidding guidelines shall be binding on the parties including the procurers.

**129.** At the instance of the then PSEB, present Respondent No.2 PSPCL invited bids under Case 2 scenario 4 of the Competitive Bidding

Guidelines from power developers to set up the thermal plant at Talwandi Sabo. It has assured absolute obligation to procure and supply qualitative and quantum of fuel required for the project, which was duly approved by PSERC. By inviting the bids and presentation made before pre-bid, the then PSEB assured all bidders that the obligation of providing adequate quantity and quality of coal is the responsibility of the PSEB and actual cost of supply of fuel will be paid to the bidders by way of energy charges.

**130.** Talwandi Sabo Power Limited was created as a Special Purpose Vehicle (SPV) and it was entrusted with the project.

**131.** From the arguments and the pleadings placed on record, we note that RfP dated 18.01.2008, in fact, was issued by PSEB acting through SPV or PSEB i.e., PSPCL for procurement of power on long term basis.

This RfP envisaged the following:

- (a) Clause 1.4 of the RFP provides details regarding the activities/milestones which were to be completed prior to the issuance of the RFP.
- (b) Clause 2.1.3 of the RFP provides that the Fuel Supply Agreement (“**FSA**”) will be signed between the Procurer i.e., PSPCL and the Fuel Supplier.
- (c) Clause 2.1.3A(a) of the RFP explicitly affirms a continued obligation of the Procurer even after the fuel supply agreement

has been assigned to the Seller,

- (d) In terms of Clause 2.7.1.4 (1) of the RFP, bids were invited only on the basis of Capacity Charges and Net Quoted Heat Rate.
- (e) In terms of Clause 2.7.1.4 (6) of the RFP, bidders had to only factor the cost of secondary fuel in the quoted tariff. Cost of primary fuel/coal was not to be considered for bidding purpose.

**132.** RfP bid conference was on 08.05.2008, wherein the then PSEB (acting through PSPCL) informed the bidders through a presentation that MCL by way of its letter dated 28.04.2008 agreed to supply fuel to the project having following specifications :

- a) "E" grade coal.
- b) With Gross Calorific Value ("GCV") of 4500 to 4600 kCal/kg.
- c) With ash content of 33% to 34%.
- d) A quantity of 5.00 MT during 2011-12 and 7.70 MT from 2012-13 onwards.

**133.** The bid was submitted on 26.03.2008, therefore, the cut-off date was 16.06.2008. ***Is it open to Respondent No.2-PSPCL to deny the whole obligation as indicated above?***

**134.** On 14.08.2008, MCL issued letter of assurance in the name of TSPL assuring the quantum and Grade of coal for 1800 MWs project in question. This letter was addressed to Chairman and Managing

Director of TSPL, which was completely owned by PSEB at that time. It is pertinent to note that this letter was according to Appellant not shared with the bidders. This was given to TSPL after execution of PPA and especially after transfer of share by agreement dated 01.09.2008 and so also MOU dated 02.09.2008.

**135.** In terms of PPA dated 01.09.2008, the procurer i.e., PSPCL and fuel supplier enter into FSA for purchase, transportation and handling of the fuel required for the operation of the power plant. In terms of Schedule 2 Recital B of the PPA, the PSPCL is obligated to obtain all the initial consents for the project which, includes long term coal linkage.

**136.** In terms of Article 4.2(e) of the PPA, the PSPCL is required to fulfil all the obligations undertaken by them under PPA, which include fuel linkage as part of initial consents.

**137.** So far as MOU dated 02.09.2008, it came into existence between the then PSEB and TSPL. This also refers to the specific obligation of PSPCL to execute the FSA with the fuel supplier and thereafter assign the same in favour of Appellant. Apart from the above dates, the following dates are relevant;

(a) On 23.06.2008, based on the specific representations and assurances made by PSEB, Sterlite Energy Ltd. (now Vedanta Ltd.) submitted its bid for setting up the Project in order to supply

entire power from the Project to the Procurer (i.e., PSEB now PSPCL) in terms of the PPA. Hence the **bid-cut off date is 16.06.2008.**

- (b) Pursuant to the competitive bid process, Sterlite Energy Ltd. (now Vedanta Ltd.) was selected as the Successful Bidder. On 04.07.2008, PSEB issued Letter of Intent (“**LoI**”) in favour of Sterlite Energy Ltd. (now Vedanta Ltd.) calling upon it to acquire 100% shareholding of TSPL.
- (c) On 01.09.2008, a Share Purchase Agreement (“**SPA**”) was executed between PSEB, TSPL and Sterlite Energy Ltd. (now Vedanta Ltd.) transferring 100% shareholding of TSPL in favour of Sterlite Energy Ltd. (now Vedanta Ltd).

**138.** There are several controversies between the parties of which some issues according to Appellants are in their favour, which is denied by the Respondent No.2-PSPCL.

**139.** Pertaining to signing of FSA and arrangement of fuel, whether the obligation is that of PSPCL or the Appellant has to make arrangement of fuel on its own as contended by the Respondents. On perusal of the various orders, directions, and judgments of not only this Tribunal but also the Hon’ble Supreme Court we note the following:

- i) In the year 2007, the then PSEB (now PSPCL) has invited bids under Case 2 Scenario of competitive bidding guidelines issued by MoP, Government of India, wherein the procurer,



the then PSEB, was required to arrange necessary fuel for the plant of the Appellant. This was in terms of competitive bidding guidelines.

- ii) In the Request for Proposal again issued by PSEB in terms of Clause 2.1.3, it says fuel supply agreement (FSA) was to be signed between the procurer, the then PSEB and present PSPCL and the fuel supplier.
- iii) Apart from the above, the then PSEB in the presentation made by it dated 08.05.2008 before all the bidders, it agreed to supply "Grade E" coal up to 5 MT during 2011-12 and 7.70 MT from 2012-13 onwards for the Appellant's project. The specification fuel during RfP bid conference was also "Grade E" having Gross Calorific Values (GCV 4500 to 4600 kCal/kg with an ash content of 33 to 34%. Based on the above assurances and representations made by the PSPCL (the then PSEB), the bid was submitted for the project.

It is relevant to refer to certain provisions of PPA dated 01.09.2008 executed between TSPL and PSPCL:

- (i) Definition of "Fuel Supply Agreement" in terms of Article 1.1 reads as under:

***"Fuel Supply Agreements means the agreement(s) entered into between the Procurer and the Fuel Supplier***

*for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Procurer and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Procurer and the Fuel Supplier for the supply of the Fuel”*

(II) Schedule 7 (Tariff) which, *inter-alia*, provides that the Monthly Energy Charges (Energy Charges) to be paid by PSPCL (Article 1.2.3) shall be calculated using weighted average of actual cost to the Seller/TSPL of purchasing, transporting and unloading the coal most recently supplied to and at TSPL’s Project, i.e., the cost of coal as delivered/supplied to TSPL’s Project by the Procurer/PSPCL.

**140.** It is seen from the pleadings and arguments of the parties that there was a dispute between the parties regarding signing of the FSA i.e., whether the Appellant shall sign the PPA or the procurer shall sign the same, in terms of RfP, Representation of PSPCL and Clauses of PPA. In the said context, Respondent No.2-PSPCL filed a petition before the Respondent-Commission seeking a direction against the Appellant-TSPL that FSA has to be signed between the Appellant-TSPL and the coal companies for supply of required coal for the project of the Appellant in order to supply power to PSPCL. They also sought a

direction directing the Appellant-TSPL to sign FSA and sought amendment in the PPA dated 01.09.2008 pertaining to Article 1.1 to replace the word “procurer” with “seller” in the definition of fuel supply agreement.

**141.** Meanwhile, the Appellant TSPL also filed petition against Respondent No.2 in Petition 46 of 2012 for resolution of disputes pertaining to supply of coal/availability/sufficiency. In this Petition, they sought a direction against Respondent No.2 to arrange adequate quantity of domestic coal including transportation with quality as represented and assured before the bidders at the time of bidding, up to the project site during the life time of the project for 25 years so as to allow the project to operate at its ultimate capacity of 1980 MWs. The Appellant also sought directions to PSPCL to allow the benefit of deemed generation and to pay capacity charges and incentives to the Appellant in case the Appellant project could not operate at its ultimate capacity of 1980 MWs due to short supply of coal having assured quality/grade/origin or non-availability of fuel for the project. The Respondent-Commission by Orders dated 27.09.2012 and 24.12.12 disposed of the Petition Nos. 11 of 2012 and 46 of 2012, respectively, opining that the Appellant-TSPL has an obligation to sign the FSA with the fuel supplier for arranging fuel to the Appellant’s plants.

**142.** Aggrieved by these orders, Appellant approached this Tribunal in Appeal Nos. 56 and 84 of 2013. It is noticed that as an interim measure the Tribunal passed directions in Appeal No. 56 of 2013 on 18.04.2013 directing that Appellant-TSPL shall sign the FSA without prejudice to its rights and contentions, subject to outcome of Appeal Nos. 56 and 84 of 2013.

**143.** On 21.08.2013, Appeal No. 84 of 2013 was disposed of. By this order, Commission opined that TSPL, the Appellant was allowed to procure alternate coal to meet the expected shortfall of coal from Mahanadi Coalfields Limited for a period of 12 months from the expected commencement of 1<sup>st</sup> unit of the project. In this order, the Tribunal further clarified that the interim order was issued only to enable the Appellant-TSPL to take action in advance for procurement of coal from alternate sources, if any.

**144.** In terms of orders pertaining to Appeal No. 56 of 2013, the Appellant without prejudice to its rights and contentions, on 04.09.2013 entered into FSA with MCL for supply of annual contracted quantity (ACQ) of 7.72 MTPA coal.

**145.** However, this Tribunal on 07.04.2016 allowed both Appeal Nos. 56 of 2013 and 84 of 2013 filed by Appellant-TSPL and passed the judgment opining that Respondent No.2-PSPCL is under an obligation

to sign the FSA with fuel supplier, namely Mahanadi Coalfields Limited (MCL) and arrange for adequate quality and quantity of coal. It further opined that the procurer (PSPCL) cannot be absolved of its obligation to supply fuel to TSPL for generating the power to be supplied to PSPCL. The relevant paragraphs of the judgment are as under:

*“12.3 After hearing the contention of the Appellant TSPL and Respondent PSPCL we come to the conclusion that **the real controversy** is whether the Appellant or the Respondent No.1, Punjab State Power Corporation Ltd (PSPCL) is **responsible for the execution of the FSA and for making arrangements for the Fuel requirements of the project...***

*12.16... The Power Purchase Agreement clearly spells that the Fuel Supply Agreement (s) has to be entered into between the procurers and the Fuel Supplier...*

*12.18... MoU specifically stated that the **Fuel Supply Agreement shall be signed by PSEB** with the coal company within six months from the date of the finalisation of the model FSA at the request of TSPL subject to the conditions that TSPL shall achieve all milestones/bench marks as stipulated in the Letter of Assurance (LoA) dated 28.4.2008 issued by MCFL and **PSEB shall thereafter assign the same in favour of the TSPL under Clause 3 of the MoU...***

*12.19... Thus, we feel that as per MoU, **the obligation to sign the FSA lies with the Respondent only viz PSPCL...***

*12.23... Due to shifting of shares of TSPL in the name of Lowest Bidder (SEL), the obligation of signing FSA and shifting*

*of obligations of assigning the Fuel for the Generating Station cannot be shifted in the name of the Appellant because as per the Clause of PPA and MoU, the liability of signing of the Fuel Supply Agreement lies with the procurer PSEB...*

*12.30 We feel that the Commission is legally not right in directing the Appellant to sign the FSA even though the PPA, MoU clearly specifies the obligations of the Procurer...*

*12.32 In our opinion, **it is the Obligation of the Respondent as per RfP, LoA, PPA & MoU to arrange for the Fuel for the Generating Station.** Further, we also direct the Appellant to pursue with Ministry of Coal, MCFL and other relevant departments for the fuel even though the Obligation of arranging Fuel lies with the Respondent PSPCL for smooth and timely operation of the Plant...*

*12.33 The Obligation of signing FSA was clearly specified in the PPA and MoU including arrangement of fuel for the generating plant. Further, the bidding was conducted under Case-2, Scenario-4 of the Standard Bidding documents and as per guidelines specified by Govt of India under Section 63 of Electricity Act, 2003, **the procurer has to arrange fuel for the contracted capacity of the Generating Plant.***

*13. In view of the above discussion and analysis of the provisions of law including guidelines issued by the Government of India, RFP's request for proposal, Power Purchase Agreement (PPA) and Memorandum of Understanding, we clearly **hold that the Respondent No. 1, PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited and***

*the Procurer cannot be absolved of its obligation to supply fuel to the Appellant/Petitioner for its power generating station and further to sign the Fuel Supply Agreement with the coal supplier.”*

**146.** What we notice is by order dated 27.09.2012 in Petition No. 11 of 2012, the Respondent-Commission, in fact, re-wrote the terms of PPA by directing the Appellant to sign the FSA with the fuel supplier, but this Tribunal by judgment dated 07.04.2016 reversed the said finding. The controversy pertaining to the party, who has to sign the FSA and arrange adequate quality and quantity of fuel to Appellant's project was determined in favour of the Appellant in the above said judgment.

**147.** However, this judgment of the Tribunal dated 07.04.2016 was questioned before the Hon'ble Supreme Court by Respondent No.2-PSPCL in Civil Appeal Nos. 4085 to 4086 of 2016. Admittedly, the Hon'ble Supreme Court did not grant any stay of the operation of the judgment dated 07.04.2016. The said appeals are pending adjudication. During pendency of the above Civil Appeals before the Hon'ble Supreme Court, when the issue of short payment of dues raised by the present Appellant, the learned counsel appearing for PSPCL gave an undertaking that PSPCL will pay the energy charges as envisaged under PPA, which include fuel charges as per PPA. This

undertaking of the learned counsel for PSPCL was directed to be continued by PSPCL in terms of order dated 12.07.2016.

**148.** As of today, the direction of the Tribunal dated 07.04.2016 in Appeal No. 56 and 84 of 2013 stands as it is. So also undertaking of PSPCL dated 02.05.2016 continued by the order of the Hon'ble Supreme Court on 12.07.2016 stands as it is. In other words, the said Civil Appeals are pending adjudication with the above directions.

**149.** According to Respondent No.2, the Appellant is not justified in relying upon the definition of FSA in the PPA in a selective manner to contend that the entire obligation for supply of coal is that of PSPCL. According to PSPCL, once the FSA is executed by PSPCL, then it has to be assigned to TSPL for life time of the PPA. Therefore, the consequence is that all rights and obligations with regard to procurement of coal was that of PSPCL. So far as this question is concerned, this Tribunal directed PSPCL to sign FSA with MCL and then supply fuel to TSPL for generating power by virtue of judgment dated 07.04.2016. However, this judgment is challenged before the Hon'ble Supreme Court and Civil Appeals are pending. In the said Civil Appeals, no doubt, the Hon'ble Supreme Court has to ultimately decide the Appeals on merits. As already stated above, in the bid document of 2007, RfP and the presentation of PSPCL on 08.05.2008 before the bidders, it was clearly declared that PSPCL (the then PSEB)



has the obligation of signing FSA and arranging for fuel. The definition of 'fuel supply agreement' and Clause 1.2.3 of Schedule '7' says that the energy charges have to be paid by PSPCL by calculating using weighted average of actual cost to the TSPL of purchasing, transporting and unloading the coal most recently supplied to and at TSPL's project by the procurer. Therefore, according to PSPCL, the Clause 1.2.3 of 7<sup>th</sup> Schedule merely provides the methodology for computation of energy charges for the purpose of merit order despatch. According to Appellant, RfP, MOU and the definition of FSA conclusively provide that FSA has to be entered into between PSPCL and fuel supplier for purchase, transportation and handling of the fuel. All the provisions of the Contract have to be harmoniously interpreted, and any interpretation, which results in absurdity, cannot be allowed since it is cardinal rule of interpretation. It is also seen that the bidding documents show that it is Case 2 Scenario 4, where the fuel is the obligation of the procurer i.e., PSPCL. PSPCL was aware of this obligation to supply fuel, which is evident from the fact that PSPCL itself applied for LOA and fuel linkage. PSPCL issued RfP, MOU and PPA wherein PSPCL undertook to sign the FSA but later it wanted the Appellant to take the obligation of sourcing of required coal by filing a Petition.

**150.** The Appellant also approached the Commission with Petition No. 46 of 2012, as stated above. As stated above, the Civil Appeals are pending before the Hon'ble Supreme Court pertaining to controversy of signing of FSA and arranging the supply of fuel transportation to the site of the plant. In those proceedings, the Hon'ble Supreme Court has to consider all the clauses of bid documents RfP, PPA and MoU, as referred to above. As on today, the direction of this Tribunal dated 07.04.2016 is in favour of the Appellant and against Respondent No.2. The undertaking of the PSPCL is also very relevant.

**151.** It is seen that in the appeals preferred before the Hon'ble Supreme Court against the judgment dated 03.07.17 of this Tribunal, a submission was made before the Hon'ble Supreme Court that only the issues pertaining to washing of coal, GCV of coal and other charges are being agitated in those appeals and so far as fuel obligation in terms of RfP, MOU, PPA including the obligation of signing FSA and assigning the same are pending for consideration in Civil Appeal Nos.4085 and 4086 of 2016. The interim FSA was signed without prejudice to the rights and duties of the Appellant. The fact remains that in terms of judgment dated 07.04.2016, the obligation of fuel as per RfP, LOA, PPA and MOU is fastened against the Respondent-PSPCL. The said direction of this Tribunal, as stated above, is not set aside or modified as on today.

**152.** It is also seen that the Respondent-PSPCL was directed to sign FSA, but till date, FSA is not signed by Respondent No.2-PSPCL. The reason for non-execution of FSA between Respondent No.2-PSPCL and MCL according to Respondent No.2 is MCL is not agreeing for the same. It is seen from the documents that in terms of PPA after execution of FSA between the procurer i.e., Respondent No.2 and the supplier i.e., MCL, the FSA could be assigned to third parties. This was expressly explained and declared by the very Respondent No.2 in the presentation made before the bidders prior to the bid. If there is any dispute between Respondent No.2 and coal supplier so far as signing of FSA, it cannot be found fault with the Appellant or the Appellant cannot be held responsible for non-execution of FSA. In that view of the matter, Respondent No.2 cannot contend that by assignment of LOA in favour of Appellant, the FSA automatically is assigned. This stand of Respondent No.2 cannot be appreciated for the simple reason that at the time of issuance of LOA the Appellant was totally a subsidiary company of the then PSEB. On being a Special Purpose Vehicle created by the then PSEB, on behalf of PSEB the SPV had addressed letters etc. Therefore, the stand of the Respondent-PSEB that since LOA was addressed to TSPL, there is assignment of FSA in favour of the Appellant. As on today, signing of FSA and arrangement of coal for

the project or payment of coal charges as arranged by TSPL is totally the obligation of PSPCL.

**153.** Then coming to Respondent Commission disallowing the cost of alternate/imported coal for the reason that TSPL has not been requisitioning/procuring full quantum of coal from MCL as per the ACQ under the interim FSA which has led to shortfall in availability of coal, which compelled the usage of imported coal by the Appellant. The Appellant has referred to various reasons and facts, which are completely ignored by the Respondent Commission.

They are as under:

- i) The Respondent No.2 directed the Appellant to make suitable arrangement to supply coal well in advance to ensure hundred percent of plant availability. The coal assured and supplied under the interim FSA did not adhere to the terms of quantity and quality to ensure hundred percent plant availability.
- ii) Respondent Commission in the impugned order recognising the fact that coal supplied by MCL was lesser than the requisition made by Appellant.
- iii) The Appellant was unable to send a requisition for 6.90 lakh MT coal both for the months of May and June 2017 on

account of fire in the coal handling plant due to force majeure, which led to shut down of Appellant's plant.

- iv) The request of the Appellant to procure approximately 10% linkage coal offered by MCL through road-cum-rail method was not agreed to by Respondent No.2. Adjustment of 2 lakh MT coal (provided by CIL for commissioning the 3<sup>rd</sup> unit) from the MCQ in the month of September 2016 and November 2016 was not taken into consideration.
- v) The fact of MCL not allowing reallocation of lapsed coal.

**154.** As per the data placed on record, it is seen that the coal supplied under FSA was inadequate to operate the plant at 100% capacity since the coal which was envisaged to be supplied by MCL under FSA is only 6.43 lakh MT per month on annual average basis which comes to 77.2 lakh MT coal per annum. Whereas the Appellant requires approximately 11 lakh MT coal of GCV 2957 kCal/kg every month to run the plant at full capacity which comes to 121.70 lakh MT coal annually.

**155.** In terms of RfP, the assured Grade of coal was 'E' with GCV 4500- 4600 kCal/kg with ash content of 33-34%, but MCL actually supplied in the range of 2900-3000 kCal/kg having ash content of approximately 42%. This was definitely not in line with assured grades of coal promised by PSPCL during bidding. Usage of lesser GCV coal with high ash percentage definitely increases the quantum of coal

required for the same amount of generation. The annual and monthly coal requirement of TSPL project at normative availability of 80% and the availability at 100% is provided as under:

Availability at 80% and Availability at 100% is provided below:-

Coal quantity in lakh tonnes	Coal GCV at 4500-4600 kcal/kg (average 4550 kcal/kg)	Coal GCV at 3150 kcal/kg	Coal GCV at 2957 kcal/kg
Annual Coal requirement at Normative (80%)	68.06 lakh MT	98.32 lakh MT	104.73 lakh MT
Monthly Coal requirement at Normative (80%)	5.67 lakh MT	8.19 lakh MT	8.72 lakh MT
Annual Coal requirement at 100%	85.08 lakh MT	122.9 lakh MT	130.9 lakh MT
Monthly Coal requirement at 100%	7.09 lakh MT	10.24 lakh MT	~11 lakh MT

*Note: Coal quantity is worked out by taking contracted SHR 2400 kcal/kWh, contracted capacity at 1841.4 MW for normative (80%) and total (100%) requirement of power station.*

**156.** The non-requisition of coal from MCL between 17.04.2017 to 10.06.2017 was due to force majeure event. If the Appellant was prevented from requisitioning coal on account of force majeure event, it cannot be called as failure of the Appellant to requisition linkage coal. According to Appellant, on account of fire in the coal handling plant, the mechanical unloading of coal became impossible, and the coal was unloaded with significant difficulty using manual support. Though the

coal rakes reached the site, Appellant was unable to unload the rakes since manual unloading could not be undertaken on a regular basis. During the repairs of the coal handling system, the operation of the plant has to be stopped. Therefore, between 17.04.2017 to 10.06.2017 unloading of coal became impossible. The Appellant started requisitioning of coal after restoring the site when operation and coal handling system became possible. It actually started functioning from 10.06.2017 onwards. In this process, for the orders placed on 02.06.2017, receiving and unloading of coal at the plant has commenced on 18.06.2017 and the plant was synchronised on 20.06.2017.

**157.** The Appellant's case is that the alternate coal procured during June 2017 to September 2017 was equal to coal lapsed due to non-requisitioning of coal on account of fire incident. They calculated 243 rakes of coal as lapsed coal between April and May 2017. According to the Appellant, in spite of persistent follow up with MCL/CIL for allocation of lapsed coal, they could not secure re-allocation of lapsed coal. MCL replied accordingly on 06.09.17 and 19.09.2017. It is also noticed that as an alternate arrangement, MCL offered to supply 28307 MT of coal to Appellant through rail-cum-road mode. Apparently, this was not accepted by PSPCL by its inaction in not giving the approval for procuring coal from CIL mines from other CIL mines.

**158.** It is noticed that in the reply filed by the Respondent No.2 PSPCL, on 26.04.2018 before the Commission in Petition No. 43 of 2017, Respondent No.2 admitted that the quantity of alternate coal procured by TSPL did not exceed the quantity of lapsed coal from MCL. Therefore, the Appellant is justified in saying that it had procured such quantum of imported coal on behalf of Respondent No.2 which was essential to ensure continuous supply of power to PSPCL during the peak paddy season.

**159.** According to Appellant, due to shortage of domestic coal in the country at the relevant point of time, MCL was not supplying full quantum of coal assured under FSA to TSPL. They contend that the linkage coal in respect of the project was 77.2 lakh MT per annum. According to Appellant, as against this obligation, only 90% of ACQ of FSA was allotted by MCL through rail mode and the remaining was allotted by rail-cum-road mode. The permission was not granted by PSPCL to procure the remaining 10% of coal offered through RCR mode. In the impugned order, Respondent Commission recognised the fact that the quantity of coal received was much less than that was requisitioned. According to Appellant, it seems to be correct in saying that even if coal corresponding to 90% of ACQ with average GCV of 3000 kCal/kg was made available to the Appellant, even then it could generate power on an average plant load factor/availability of only 54%,



which was not sufficient to cater to the demand of PSPCL in terms of PPA.

**160.** Whether Respondent No.2 was aware of the above said position and its correspondence over the same is established through the following events:

- (a) PSPCL's letter dated 25.11.2016 and 07.02.2017 to the Under Secretary to the Govt. of India requesting for directions to CIL for supplying more coal to TSPL under the FSA.
- (b) On 22.03.2017 a meeting was organized by PSPCL with representative of CIL and TSPL for discussing supply of additional domestic coal to TSPL's Project to meet Punjab's peak paddy season requirement.
- (c) Post meeting dated 22.03.2017, PSPCL has written to CIL regarding the same on 11.04.2017 and 24.04.2017.

**161.** The Principal Secretary, Department of Power, Government of Punjab has also recognised the coal shortage for TSPL's Project, viz: -

- (a) Letter dated 10.07.2017 written to CIL stating that linkage coal being supplied to TSPL under the interim FSA is not sufficient to ensure 100% Availability.

- (b) Letter dated 16.05.2019 to MoP, GoI requesting to recommend to the Ministry of Coal to enhance coal allocation of TSPL's Project from 77.20 lakh MT to 121.70 lakh MT.

**162.** As stated above, the Appellant-TSPL would not procure linkage coal offered by CIL through RCR mode due to following reasons:

- (a) Import component coal offered through RCR mode is of inferior quality (low GCV) and costlier (as confirmed by PSPCL in letter dated 16.09.2019) than regular linkage coal procured through railway mode. Therefore, TSPL was restrained from using/procuring this coal since PSPCL never approved such procurement.
- (b) Procurement of coal through RCR mode entail the element of Surface Transportation Cost ('**STC**'), which PSPCL refuses to pay. TSPL had written multiple letters to PSPCL on 20.09.2017, 25.09.2017 and 10.10.2017 seeking its approval for procurement of linkage coal through RCR mode, as being offered by MCL. However, PSPCL neither replied nor accorded its approval for procurement of such coal through RCR mode. Considering the uncertainty and deemed rejection of PSPCL, TSPL was not able to procure 10% of the ACQ offered through RCR mode.

**163.** It is also noticed that only after the direction of the Hon'ble Supreme Court by order dated 07.03.2018 in Civil Appeal 10525-26 of 2017, wherein the claim towards STC and associated charges was allowed. TSPL was able to requisition coal through RCR mode. The Appellant has furnished year-wise total quantity of coal offered by CIL through RCR mode, which TSPL was unable to procure due to refusal of the same by PSPCL.

PSPCL's refusal is as under: -

Period	5% through RCR mode (MT)	5% Import component coal through RCR mode (MT)
September 2016 to March 2017	2,32,887	2,32,887
April 2017 to March 2018	3,13,947	3,86,000
April 2018 to July 2018	*	1,32,527

*\*TSPL started requisitioning 5% RCR coal as PSPCL started making payment of the Surface Transportation Charges post Hon'ble Supreme Court Order dated 07.03.2018.*

**164.** As stated above, the Appellant was not able to get re-allocation of lapsed linkage coal from MCL. In terms of FSA the quantum of linkage coal which lapsed on account of the fire incident at the project was not

re-allocated by CIL and MCL. PSPCL persistently directed the Appellant to ensure 100% of availability of power plant during the peak paddy season of 2017, but lapsed coal due to prior incident was not re-allocated. The fuel available was insufficient to meet the power requirement of Punjab during the peak paddy season, therefore, the Appellant is justified in contending that it had to secure alternate coal. We have to see whether TSPL had any other viable course to procure coal to meet its demand or whether the steps taken by PSPCL was not reasonable steps to mitigate the loss and arrange coal to cater to the demand of PSPCL demanding 100% availability of the plant. If the Appellant was not able to secure coal due to fire accident in the month of April and if there was shortage of supply of coal by MCL/CIL, in spite of efforts made by TSPL to set right the things, one cannot blame the appellant. It is seen that if the Appellant had not used alternate coal it would have been difficult to operate the plant at the declared capacity and would have failed to supply the scheduled power to Respondent No.2-PSPCL, which would have affected the consumers of Punjab during high demand i.e., peak paddy season. Appellant has placed the details of actual quantum of linkage coal, which was not requisitioned due to various factors as stated above. This is pertaining to linkage coal. The details are as under:

various uncontrollable factors is as under:-

Period	ACQ	Requisitioned	Received	Short-Requisitioning (SR) as per Impugned Order	Reason for Short Requisitioning		
					Fire incident	Adjustment of commissioning coal	RCR Mode Coal
Sep 2016	5.66	3.27	3.31	17.09	6.90	2.00	8.27
Oct 2016 to Sept 2017	77.2	62.50	46.65				
Oct 2017 to June 2018	60.22	54.89	42.86		5.33	0	0
					TOTAL SR BY TSPL = 4.69		
July 2018 to Sept 2018	16.98	20.36*	15.96	0	0	0	0
<b>TOTAL</b>	<b>160.66</b>	<b>141.02</b>	<b>108.78</b>	<b>22.42</b>	<b>21.79</b>		

\* All number are in lakh ton

\* During July 2018 to September 2018 TSPL had requisitioned 3.38 lakh ton coal more than the ACQ for the said period.

**165.** From the above table, it is seen that between September 2016 to September 2018 Appellant had requisitioned 141.02 lakh ton of coal against the ACQ of 166.66 lakh ton. The Appellant was not able to requisition the balance ACQ on account of fire accident, non-approval of RCR mode supply of coal and adjustment of coal meant for commissioning of 3<sup>rd</sup> unit of the plant. The balance coal could not be met as against the requisition of 141.02 lakh ton also, only 108.78 lakh ton of linkage coal was supplied. The shortage in requisition due to fire accident etc., as stated above comes to 21.79 lakh ton of coal, which was not requisitioned due to the reasons explained which are beyond the control of the Appellant. Even if 21.79 lakh ton of coal was

requisitioned, the Appellant would have still required to procure alternate/imported coal supply to meet the demand of PSPCL.

**166.** It is seen that TSPL has used only 14.86 lakh ton of imported coal for supplying power to PSPCL. This was definitely due to short supply of linkage coal by MCL against the requisition made by TSPL. Appellant has furnished data indicating shortfall in linkage coal assured under FSA, which was not sufficient to operate the plant at 100% availability.

The details are as under;

- (a) Monthly Contracted Quantity of linkage coal under the FSA and total quantity requisitioned by TSPL during the period September 2016 to July 2018.
- (b) Linkage coal received by TSPL against the quantity requisitioned and the GCV of such linkage coal as received at the Project site for the period September 2016 to July 2018.
- (c) Electricity supplied to PSPCL (as per PSPCL's Scheduling) as compared to the electricity that could have been generated using the available linkage coal and quantity of alternate/imported coal used by TSPL to generate and supply electricity to PSPCL during the period September 2016 to July 2018.

**167.** The Respondent Commission in the impugned order opined that TSPL ought to have taken strong and vigorous action with the MCL to ensure supply of full linkage coal under the FSA apart from requisitioning the full contracted quantity of coal. The Appellant has placed several details/data regarding the efforts made by it to show that it was persistently pursuing with MCL to ensure supply of full linkage coal under FSA.

- (a) **Consistent follow up with CIL for additional domestic coal:** In continuation of the meeting organized by PSPCL on 22.03.2017 with CIL for additional domestic coal supply to TSPL's Plant, TSPL by letters dated 29.03.2017, 10.05.2017 and 26.05.2017 was continuously following up with CIL/MCL to supply additional coal to meet Punjab's peak paddy season requirement. Despite TSPL's repeated requests, the coal requirement for the Project remains un-attended.
- (b) **Request to CIL through Principal Secretary, Department of Power, Government of Punjab:** TSPL on numerous occasions had approached Government of Punjab and requested to communicate with CIL for allocating additional quantity of linkage coal to TSPL. On request of TSPL, Government of Punjab had written letter dated 10.07.2017 to CIL demanding additional coal for TSPL's Plant during peak paddy season. Further, TSPL again

approached the Government of Punjab vide its letters dated 09.09.2017 and 13.09.2017 requesting the Government of Punjab to communicate with CIL for increasing the allocation of coal rakes and increasing the allocation of coal under the FSA. Pursuant to TSPL's letters, the Government of Punjab on 14.09.2017 wrote to CIL requesting to arrange for dispatch of sufficient coal to TSPL's Project to avoid coal stock out position.

- (c) **Meeting with CIL:** Based on GoP letter dated 10.07.2017, TSPL met CIL officials requesting for additional coal supply. CIL during the meeting held on 27.07.2017 had indicated possibilities for additional domestic coal supply from Gourideep mines of Western Coal Fields Ltd. Accordingly, TSPL took up the matter with PSPCL for allowing procurement of this additional domestic coal by letter dated 03.08.2017. PSPCL did not respond to the said request of TSPL.
- (d) **Consistent follow up with Railways for increasing rake loading:** TSPL by letters dated 22.06.2017, 28.06.2017 and 29.08.2017 requested the Railway Department, Gol, for addressing the issue of rake unavailability by loading at least 2 rakes from Talcher and 5-6 rakes from IB valley to avoid any coal stock out situation at TSPL's Project.



- (e) **TSPL's efforts for re-allocation of coal lapsed due to fire incident at TSPL's Plant:** TSPL by letters dated 10.05.2017, 25.05.2017, 26.05.2017 and 01.06.2017 requested MCL to re-allocate the lapsed Linkage coal to TSPL to ensure sufficient coal availability to meet the power requirements of Punjab during the peak paddy season. However, MCL by letters dated 06.09.2017 and 18.09.2017 instead of reallocating the lapsed coal, informed that only 28307 MT coal could be allowed/allocated to TSPL through RCR Mode. Therefore, TSPL by letters dated 20.09.2017 and 10.10.2017, requested for PSPCL's approval for procurement of linkage coal through RCR mode, as being offered by MCL. However, PSPCL never replied. Considering the uncertainty and deemed rejection of PSPCL, TSPL was not able to procure coal through RCR mode. This inaction of PSPCL seems to have resulted in loss of opportunity to secure 28307 MT of linkage coal for the Project.
- (f) **Procurement of linkage coal through RCR mode:** Since inception, PSPCL has not allowed TSPL to procure coal (10% of ACQ) being offered through RCR mode. Consequently, for the period between September 2016 to July 2018, total 12.96 lakhMT Coal which was offered through RCR mode could not be procured by TSPL.

(g) **Continuous follow up with Standing Committee:** TSPL by letters dated 11.11.2016, 24.11.2016, 04.05.2017 and 27.12.2017 has, time and again requested the Standing Committee to convene meetings and sought approval of the cost incurred by TSPL in arranging coal from alternate sources to meet the shortfall in coal supplied by CIL and its subsidiaries. Despite the same, the Standing Committee convenes its meeting intermittently but TSPL has not paid for the cost incurred by it in arranging coal from alternate sources (which seems to have been paid to TSPL by PSPCL till July 2016).

**168.** It is noticed from the records that during the period between September 2016 to July 2018 the TSPL had written about 103 letters apart from meeting the officials of CIL and MCL. This correspondence and the exercise done by the Appellant shows that the Appellant was preferring linkage coal from MCL than the procurement from any other source. Though the Appellant had taken all possible steps to procure linkage coal but was unsuccessful to get any favourable response from the authorities of the Government, therefore, one has to opine that it was beyond the control of the Appellant. Though the Respondents tried to point out that there was laxity on the part of the Appellant to procure linkage coal, they are not able to establish that there was such laxity on the part of the Appellant. On the other hand, the Appellant is able to

establish that it took all possible exercise to secure re-allocation of lapsed coal and so also to rectify the deficit coal from linkage coal.

**169.** We also notice that the Respondent Commission by order dated 11.02.2014 in petition N. 60 of 2013 indicated terms and conditions, which are required to be adhered to by TSPL while procuring and using alternate and imported coal for the project.

The details are as under;

- (a) From the time of signing of FSA with MCL, TSPL has been regularly requisitioning coal from MCL. TSPL's requisitioning of linkage coal was affected due to:-
  - (i) Fire in coal handling system of the Plant, which is a Force Majeure event restricting TSPL to unload coal at the site;  
and
  - (ii) PSPCL's refusal to allow procurement of 10% linkage coal offered by MCL through RCR mode.
- (b) Since TSPL was prevented by PSPCL and due to Force Majeure event, the same cannot possibly be attributed as TSPL's failure to requisition linkage coal. It is settled position of law that a party ought not be penalised for the wrong occasioned by others.

- (c) In fact, linkage coal materialisation from MCL at TSPL's Plant is one of the highest in the entire country. Details are as under;

S.No	Plant & Location	Coal FSA with	Approximate distance from mine to Plant	Materialisation April 17-Oct 17	Materialisation July 17-Oct 17
1	TSPL	MCL	1536-1834 kms (IB/ Talcher)	62% #	93.4%
2	Khedar, HPGCL	MCL	1539 kms (IB)	59%	77%
3	Panipat, HPGCL	MCL	1432 kms (IB)	30%	33%

Note: 1) Data Source - Indian Railways

2) # TSPL materialisation from April 2017 to October 2017 was affected by non- availability of CHP. It has been calculated after excluding allocation for 94, 149 and 73 rakes of April, May and June 2017 respectively. As can be seen from above, once CHP was restored, materialization of TSPL improved dramatically.

3) TSPL allocation from MCL is 90% of ACQ on Monthly Basis.

**170.** TSPL was giving preference to coal supplied by MCL over coal to be directly arranged by it from alternate sources

- (a) TSPL always preferred Linkage coal from MCL over procurement from any other source, which is evident from TSPL's continuous efforts to avail additional/full quantum of coal under the interim FSA and to resolve the issue of short supply of linkage coal.
- (b) TSPL had to procure alternate/imported coal only as a last option in order to supply power to PSPCL in terms of the PPA and in the interest of the consumers of Punjab. It is pertinent to mention that TSPL does not make any profit on payment of Energy Charges by

PSPSCL, since the same is pass-through on actuals. Therefore, there is no incentive for TSPL to use alternate/imported coal.

- (c) As a matter of fact, TSPL had requested PSPCL to authorize TSPL for using its unutilized linkage coal in order to mitigate the coal shortfall from MCL.

**171.** TSPL was not using coal supply from alternative sources unless warranted by exigencies of short supply of coal by MCL that too on 'Minimal Usage' basis.

- (a) PSPCL had directed TSPL to make suitable arrangement of coal, well in advance to ensure Plant availability at 100%. Since, the coal assured and supplied under the FSA was not adequate in terms of quantity and quality, TSPL was constrained to arrange coal from alternate sources through competitive bidding to cater to the demands of PSPCL.
- (b) But for using alternate/imported coal during June 2017 to July 2018 by TSPL, it would not have been able to cater to the scheduling of PSPCL.
- (c) Because of shortage of coal from MCL, TSPL had requested PSPCL to arrange coal from alternative sources, grant permission to procure coal from other mines of MCL or through RCR mode

from MCL and permission to use PSPCL's linkage coal. But PSPCL failed to do so. In such situation, TSPL had no other option but to procure imported coal through competitive bidding.

- (d) The procurement/usage of alternate coal was on 'Minimal Usage' basis, as TSPL has only procured limited quantum of alternate coal to be able to cater to the demands of PSPCL during June 2017 to July 2018. There seems to be no excessive procurement of alternate coal, therefore TSPL has acted prudently.

**172.** We note that even usage of alternate coal was on minimum basis, which is evident from the following;

- (a) Coal stock availability at TSPL's Project.
- (b) Linkage coal to be received at TSPL's Project (including the requisitioned coal expected from MCL).
- (c) Minimum coal stock to be maintained at TSPL's Project.
- (d) Imported coal of higher GCV cannot be utilized by TSPL without blending with linkage coal from MCL.
- (e) Ash content less than or equal to 34% on quarterly average usage basis to be maintained as prescribed by the environmental authorities at the relevant point in time.

**173.** We note that TSPL's entire capacity was tied up with PSPCL and it was only for catering to PSPCL's demand, TSPL had to procure alternate coal on behalf of PSPCL due to PSPCL's failure to arrange the assured quantity and quality of coal for operating the Project.

**174.** The Respondent Commission opined that there was no requirement for imported coal since sufficient linkage coal was available for scheduled generation. The Respondent Commission opined that at the project site during June 2017 to September 2018 there was sufficient quantity of linkage coal available for the Appellant to generate power against the schedule issued by Respondent No.2-PSPCL. It is seen that the potential power generated from TSPL plant using available linkage coal was less when compared to the actual energy supplied to PSPCL in all the months between September 2016 to March 2017 and April 2018 to July 2018 for about 9 months during FY 2017-2018. The potential generation from Appellant's plant using available linkage coal was less when compared to the actual energy supplied to Respondent No.2. This could be because the Appellant-TSPL was compelled to use alternate/imported coal since it had to arrange beforehand such coal taking into consideration the perpetual shortfall in supply of linkage coal.

**175.** According to Respondents, the Respondent Commission was justified in evaluating the coal requirement at Appellant's plant by taking

into consideration the total scheduling given by PSPCL. According to Appellant, coal requirement was worked out well in advance to make the plant fully available at 100% or normative of 85% availability, but not on the basis of scheduled generation, since scheduling had to be day-to-day basis but coal has to be arranged well in advance. We see force in this argument of the Appellant. One cannot expect the Appellant to make arrangement of coal, the day PSPCL schedule the required quantity of power. In order to meet the schedule declared by PSPCL, the Appellant has to keep the coal ready well in advance not on day-to-day basis. Even otherwise, payment of capacity charges is linked to the availability of the power plant. Naturally, the endeavour of the generator would be to declare maximum availability. To declare maximum availability, if there is inherent shortfall in the supply of linkage coal, the generator is compelled to arrange alternate/imported coal to enable its plant to generate up to maximum capacity. Therefore, the Respondent commission was not justified to consider coal requirement based on the schedule issued by PSPCL. It is also noticed that scheduling is definitely not a certain factor. Depending upon the demand for that day, scheduling is issued to TPPs on a day ahead. The scheduling issued by PSPCL can be equal to or less than the capacity declared by the generator. Therefore, one cannot expect the generator to foresee the actual coal requirement for each month in advance. A



prudent generator, definitely, would arrange coal for maximum availability since it cannot see or calculate in advance the quantum of scheduling of power to be done by the procurer, in advance. It is not a commodity that one can go to the market and purchase immediately. Hence, there is justification in the stand of the TSPL that it has to take action with regard to coal procurement well in advance. The competition of the requirement of additional coal can be done based on the coal expected to be received from linkage sources. If 100% availability declaration is needed, definitely, there has to be additional coal, therefore, the Appellant is justified in computing the requirement of coal considering 100% availability. Therefore, one cannot find fault with the Appellant for procuring imported coal well in advance so as to declare maximum availability.

**176.** The linkage coal supplied by MCL was insufficient to cater to the scheduling given by PSPCL seems to be for the following reasons:

- i) TSPL was directed to keep availability of the plant at 100% capacity.
- ii) The correspondence between the Appellant and MCL indicates that there was continuous/perpetual shortfall in the supply of linkage coal, in spite of best efforts to avail additional linkage coal, which was not adhered by MCL. In fact, Appellant requested PSPCL to procure alternate /imported coal to enable

the plant to operate at full capacity. However, this was not acceded to by PSPCL. Similarly, the request of TSPL to PSPCL and Standing Committee to allow it to use alternate coal in terms of Commission's order dated 11.02.2014 was never approved. As a prudent utility practice to adhere to the commitment/obligation under the PPA, if the Appellant has to make the plant availability at 100% capacity in order to cater to the demand and also to ensure uninterrupted power supply to PSPCL, the Appellant-TSPL in the absence of any other option worked out by the Respondents, has to make necessary arrangement for procuring alternate coal.

- iii) In fact, the Appellant has informed PSPCL during every month of 2017 July onwards that it is procuring alternate imported coal and even requested the PSPCL to participate in the bidding process. However, PSPCL never responded to this request of the Appellant. Even though PSPCL was aware of all these facts, it never objected or cautioned TSPL in procuring or using alternate/imported coal. If the Appellant had not procured alternate coal, it would have led to shortage of power supply and PSPCL would have been forced to implement power cuts in the state of Punjab or it would have compelled PSPCL to procure expensive power from the power exchange.

Therefore, we cannot find fault with the suitable arrangement of alternate coal being made well in advance by TSPL through competitive bidding process.

**177.** It is not in dispute that the power generated by TSPL by using alternate or imported coal was utilised by the PSPCL to supply the same to its consumers. Then the PSPCL is obliged to make payments to the Appellant. As a matter of fact, Respondent No.2 undertook before the Hon'ble Apex Court that it will pay energy charges to the Appellant, which includes fuel charges. But cost of coal used to supply power to Respondent No.2, TSPL is entitled to recover entire cost incurred by it for arranging alternate or imported coal to supply power to PSPCL. We place reliance for this on the judgment of Hon'ble Supreme Court, already referred to above, in the case of **Nabha Power**. We also place reliance on the judgment of the Apex court dated 02.07.2019 in the case of ***M/s Adani Power (Mundra) Limited v. Gujarat Electricity Regulatory Commission And Ors.*** (Civil Appeal No. 11133 of 2011) wherein it was held that principles of economic justice and business efficacy requires that the expenditure incurred by the generating company towards running the project including expenditure in obtaining coal from open market has to be taken into consideration and must be paid for the same along with interest, if the payment is delayed. It is also seen that in the past, TSPL was allowed

usage of imported coal by the PSPCL and payments were made in that regard. After giving intimation to PSPCL alternate coal was procured through competitive bidding process, which was never objected to by PSPCL.

**178.** Coming to the issue of payment of Deemed Capacity Charges, according to the Appellant, the thermal plant of the Appellant was available and was declared based on the technical capacity to generate and coal stock position. As envisaged in the PPA and coupled with the Judgment dated 07.04.2016, the Respondent-PSPCL was obliged to arrange adequate quantity and quality of coal to the Appellant's plant. Apparently, the said obligation was not kept up by the Respondent-PSPCL. Added to this, the inaction of the PSPCL to give approval for procuring coal from other CIL mines and so also coal offered by CIL through RCR mode has resulted in continuous shortage of coal for running the plant of the Appellant. Ultimately, this has compelled the Appellant to declare lower operational availability of its plant though it was technically available to generate and supply much higher quantum of electricity to Respondent No.2-PSPCL. We see the force in the contention of the Appellant that the obligation of the Appellant to operate the Plant at its full capacity is interdependent and linked to the obligation of PSPCL to supply adequate quantity and quality of coal. The terms of agreement between the parties, discussed above, goes to

show the fulfilment of obligation depends upon the mutual compliance of reciprocal commitments. Therefore, the failure of PSPCL to discharge its obligation, definitely, affects TSPL adversely. Hence, we are of the opinion that the Appellant is justified in claiming deemed capacity charges between September 2016 to May 2017 and October 2017 till 2018 for the reasons stated above.

**179.** According to Respondent No.2 PSPCL its obligation was limited to arranging LOA from MCL and thereafter it is TSPL, which has to duly fulfil the milestones provided under the LOA to execute the FSA and simultaneously assign the same to TSPL.

**180.** This happens only if valid contract is in existence. One cannot dispute that signing of contract come into effect only if it is in existence and valid. Till bid cut-off date and even till today, PSPCL has not executed the FSA.

**181.** PSERC has acknowledged the shortage of fuel supplied by CIL. Having the risk of generation capacity and the commitment the Appellant had to discharge, Appellant was pushed to seek permission from this Tribunal to secure alternate coal, whether imported or otherwise. This was without prejudice to the rights of the Appellant. In fact, in terms of orders of this Tribunal dated, 18.04.2013 and 21.08.2013, as discussed above, in A. Nos. 56 and 84 of 2013, said

permission was granted, which are unaltered as on today, since the appeals are pending before the Hon'ble Supreme Court, where no stay was granted.

**182.** In the present case, apparently, PSPCL undertook "coal obligation". At the cost of repetition, we state that the assignment of fuel supply agreement was envisaged in clause 2.1.3 and 2.1.3(A) of the RfP documents as under:

*"2.3.1 A Fuel Supply Agreement will be signed between the Procurer and the fuel supplier. The same agreement has a clause whereby the Procurer has a right to assign this agreement for a specific period, within the term of the Fuel Supply Agreement (FSA) to a third party. Accordingly, the FSA will be assigned to the Selected Bidder during the term of the PPA. (This clause shall also not be applicable in case the Bidder has to arrange for the fuel and in case where captive coal block is allocated)"*

*"2.3.1A Once the FSA as per 2.1.3 has been assigned to the Seller, any penalty for not procuring the minimum guaranteed fuel shall be borne by:*

- a) *The Procurer, if the availability of the Seller's generating plant has been more than the minimum offtake guaranteed by the Procurer; and*
- b) *The Seller, if the availability of Seller's generating plant has been less than the minimum availability guaranteed by the Seller."*

**183.** By the judgment of this Tribunal dated 07.04.2016 in Appeal Nos. 56 and 84 of 2013, this Tribunal opined that PSPCL cannot be absolved

of its obligation to supply fuel to Appellant-TSPL for its power plant and further directed to sign the fuel supply agreement with the coal supplier.

The following relevant facts are to be seen:

- (i) PSPCL has to assign the rights in the FSA to the privatised TSPL for the purpose of procuring minimum guaranteed quantity and quality of fuel (numbers are already stated in the above paragraphs). This was to ensure that the Appellant can generate and supply power to PSPCL, for which PSPCL shall bear the fuel price apart from paying energy charges.
- (ii) It is also seen from the above Clauses, that if Respondent-PSPCL could not keep its coal obligation to make good any shortfall in the minimum guaranteed quantity and quality of fuel for the entire term of the PPA even after assignment of FSA, it is responsible for penalty.

**184.** If assignment assigns everything in its entirety, there was no need to keep such obligation to make good any shortfall by the PSPCL. PSPCL has not kept up its obligation by signing FSA with MCL as per the terms of Rfp/pre-bid meeting, PPA and MOU by assigning FSA to TSPL. On the other hand, we note that almost after 3 years from the bid cut-off date, PSPCL approached the Commission in Petition No. 11 of 2102 to seek replacement of the word “procurer” with the word “seller” in the definition in the PPA. This seems to be an afterthought to

escape from the obligation of signing the FSA with fuel supplier. In all probability to come out of imminent risk of keeping the 1980 MW capacity of Appellant's plant being idle due to shortage, TSPL took permission of this Tribunal without prejudice to its rights and contentions against the PSPCL to execute the FSA, which is referred to as interim FSA. However, by judgment dated 07.04.2016, this Tribunal opined that PSPCL had obligation to secure fuel supply to TSPL project for the entire term of the project. According to us, this position is consistent with the Case 2 type bidding scenario 4, apparently elected by the then PSEB (present PSPCL). It is reiterated that this Tribunal opined in its judgment dated 07.04.2016, that even after transfer of 100 % shares of TSPL (the then SPV of PSEB), the liability of signing the FSA does not fall in the jurisdiction of seller i.e., the Appellant.

**185.** We also see that the fuel allocation for the project was based on submission of an Application made by PSPCL for its wholly owned subsidiary company i.e., TSPL (SPV). Bid process was conducted by PSPCL knowing fully well that PSPCL had the responsibility to sign the FSA and supply fuel to the site of Appellant's project. Till date, PSPCL has not ensured the implementation of its promise to sign the FSA.

**186.** Even if we presume for a moment that there is assignment of contract, but automatically there cannot be transfer of rights and obligations from one party to the other. There is, definitely, distinction



between two Clauses of assignment i.e., assignment of right and assignment of obligation as contended by Appellant. As a rule, any obligation under a contract cannot be assigned except with the consent of promisee, though rights under the contract are assignable, for which no consent of the promisee is required. We place reliance on the following judgments:

- (a) *Kharchah Co. Ltd. v. Raymon & Co. Pvt. Ltd.:* (1963) 3 SCR 183 [Para 7]
- (b) *Indu Kakkar v. Haryana State Industrial Development Corporation Ltd.:* (1999) 2 SCC 37 [Para 19]
- (c) *ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd.:* (2010) 10 SCC 1 [Para 48]

**187.** So far as placing reliance on the judgment dated 03.07.2017, which was referred to by PSPCL, we note that this judgement was passed on 03.07.2017 in Appeal No. 36 of 2016. Obviously subsequent to the Judgement dated 07.04.2016, according to Respondent No.2-PSPCL, the real effect of judgment dated 07.04.2016 has to be read as enunciated in the subsequent judgment of this Tribunal dated 03.07.2017. This Tribunal opined by its judgment dated 03.07.2017 as under:

- (a) PSPCL's obligation to supply fuel to TSPL is to be understood in terms of PSPCL's responsibility to arrange fuel linkage and signing of FSA with MCL and then assigning the FSA to TSPL.
- (b) Assigned FSA is to be operated by TSPL and PSPCL shall pay energy charges as per the PPA.

**188.** Whether the argument of Respondent No.2-PSPCL is justified is to be seen. Challenge to the judgment dated 07.04.2016 of this Tribunal is till pending before the Apex Court in Civil Appeal Nos. 4085-86 of 2016 filed at the instance of PSPCL. As stated above, no stay is granted in the said appeals staying the operation of the judgment dated 07.04.2016. The judgment of this Tribunal dated 03.07.17 was challenged by the Appellant-TSPL in Civil Appeal Nos.10525-10526 of 2017. This came to be disposed of by the Hon'ble Supreme Court by its order dated 07.03.2018. The judgment dated 03.07.2017 is set aside by the Hon'ble Supreme Court and further allowed the claims of TSPL towards coal washing and associated charges. It is relevant to mention that in this regard, there was two rounds of contempt proceedings before the Hon'ble Supreme Court and ultimately the Hon'ble Supreme Court passed two orders dated 07.08.2019 and 09.03.2021 re-affirming the order dated 07.03.2018. Apart from that, it directed PSPCL to make payment of amounts withheld by the PSPCL along with late payment surcharge. As a matter of fact, the Hon'ble

Supreme Court cautioned PSPCL not to compel the Supreme Court to re-visit the proceedings in contempt.

**189.** According to the Appellant, the contention of PSPCL by placing reliance on the judgment dated 03.07.2017 is only to mislead this tribunal, since selectively it was referring to certain observations and findings, which were referred to in a different context. However, the fact remains that the Hon'ble Supreme Court has set aside the order dated 03.07.2017. We have to see whether the observations made in the judgment of this Tribunal dated 03.07.2017 has any impact in the present proceedings. As already stated above, in the light of the proceedings in C.A. No. 4085-86 of 2016 is still pending adjudication, any observation made in the order dated 03.07.2017 will not have any effect, since the issue of obligation of coal is the subject matter of Civil Appeal in 4085-86 of 2016. That apart, the Appellant seems to have made a submission before the Hon'ble Apex Court at the time of disposal of C.A. No. 10525-26 of 2017 that only issues related to washing of coal GCV of coal and other related charges are contested, since other issues especially fuel obligation for the project is the subject matter of other appeals pending adjudication before the Apex Court in Appeals C.A. Nos. 4085-86 of 2016. The issue pertaining to fuel obligation was never raised in Appeal No. 36 of 2016 which is evident from question of law framed by this Tribunal in A. No. 36 of 2016.

**190.** It is well settled position of law that it is only the ratio decidendi of a judgment has binding precedent. Neither every observation found therein nor what logically flows from the various observations made in the judgment amounts to ratio decidendi. Reliance is placed on the following judgments:

- (a) In ***Municipal Corpn. of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101** [Para 10-12].
- (b) In ***Krishena Kumar v. Union of India*, (1990) 4 SCC 207** (Para 19 & 20).
- (c) In ***Union of India v. Dhanwanti Devi*, (1996) 6 SCC 44** (Para 9)

**191.** The Hon'ble Supreme Court had an occasion to distinguish/explain the difference between "Ratio Decidendi and Obiter Dicta" of a judgment. In the case of ***Director of Settlements, A.P. vs. M.R. Apparao*, (2002) 4 SCC 638** at Para 7 it is explained. In the opinion of the Hon'ble Supreme Court that is the principle found out upon reading of a judgment as a whole with reference to questions framed before the court forms the ratio, and not every particular word or sentence. An Obiter Dicta is an observation by the court on a legal question suggested in the case before it, but not arising in such manner as to require a decision. Therefore, an Obiter Dicta cannot have a binding precedent because such observation was not necessary for the decision rendered. Therefore, the judgment of the Court has to be

read in the context of questions, which arose for consideration in the case in which the judgment was delivered.

**192.** With the above principles, one has to observe the findings of this Tribunal in the judgment dated 03.07.2017 regarding the opinion expressed by the Tribunal pertaining to PSPCL's obligation for supply of coal. According to us, such observations/findings qualify only as an obiter dictum because of the following reasons:

- (i) Appeal No. 36 of 2016 pertained to adjudication of TSPL's claim regarding pass through of various components of Energy Charges (*viz*; cost of coal washing, coal transportation, etc.) and the methodology of its computation.
- (ii) The issue of coal obligation for TSPL's Project was never raised/argued by TSPL in Appeal No. 36 of 2016. The same is evident from the Question of Law framed and decided by this Tribunal in Judgment dated 03.07.2017.
- (iii) Decision/finding on the issue of coal obligation for TSPL's Project was not required in order to decide the main issues (i.e., pass through of coal washing and transportation charges) raised and contested by the parties in Appeal No. 36 of 2016.

- (iv) Tribunal's finding/observation on PSPCL's obligation for supplying coal does not co-relate to any of the questions of law decided in Appeal No. 36 of 2016.

**193.** There is yet another legal aspect. The judgment dated 03.07.2017 on the issue of obligation of PSPCL to supply coal to Appellant's project can be termed as *per incurium*, therefore it has no binding effect because it was rendered in ignorance of the ratio laid down by this Tribunal in a previous Judgment dated 07.04.2016, which is a binding authority and holds the field till date and further it did not consider the impact of the PSPCL's Coal Obligation in terms of explicit provisions of CBG, RFP and Pre-Bid conference, in particular para 2.1.3A of RFP.

**194.** We also place reliance on the judgments of the Hon'ble Supreme Court for this proposition.

- (a) In *Mamleshwar Prasad v. Kanhaiya Lal*, (1975) 2 SCC 232.
- (b) In *Municipal Corpn. of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101
- (c) In *State of U.P. v. Synthetics and Chemicals Ltd*, (1991) 4 SCC 139
- (d) In *Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189

**195.** Then coming to the letter of coal linkage dated 28.04.2008, it was issued to PSPCL, the then PSEB. PSPCL contends that MCL issued letter of linkage for coal supply in the above said letter in the name of

TSPL i.e., the Appellant, therefore this has to be taken into consideration. The fact remains that this letter of linkage was issued to TSPL when TSPL was subsidiary of the then PSEB. It is evident from the fact that it was sent to the address of PSBE office in Patiala. At the cost of repetition, we refer to the fact that TSPL in 2007 was the wholly owned company of the then PSEB (present PSPCL) to function as a Special Purpose Vehicle (SPV) for establishment of 1980 MW thermal power plant at Talwandi Sabo. Only subsequent to the execution of Share Purchase Agreement on 01.09.2008, that 100% shareholding of TSPL was transferred to Sterlite Energy Limited, who was the lowest bidder. Sterlite Energy Limited is now Vedanta Limited. Therefore, we are of the opinion that this letter dated 28.04.2008 was addressed to TSPL as subsidiary of Sterlite Energy Limited/Vedanta Limited.

**196.** There is yet one more fact, which is relevant to be mentioned. Only after signing of MOU, the Appellant-TSPL received the letter of assurance dated 14.08.2008 issued by MCL from PSPCL, till then this LOA was not within the knowledge of the Appellant. Appellant is justified to contend that mere writing of letters do not take away the obligation of PSPCL to arrange adequate quantity and quality of fuel and this issue in detail was dealt by this Tribunal in its judgment dated 07.04.2016, which is subject matter of Civil Appeals pending adjudication before the Apex Court.

**197.** Respondent No.2-PSPCL relies upon Clause 1.2.3 of Schedule 7 to the PPA dated 01.09.2008 to contend that PSPCL has to pay only energy charges to TSPL (which includes cost of coal transporting and unloading of coal), therefore, according to PSPCL it is implied that obligation of procurement of coal is that of Appellant-TSPL. All bidding documents i.e., CBG, Rfp, MOU and the PPA expressly state that it is the obligation of PSPCL to sign the FSA and arrange adequate quantity and quality of coal to TSPL project. Therefore, anything contrary cannot be implied under the schedule of PPA. It is well settled that when express inclusions are specified, anything not mentioned expressly is excluded. Therefore, the expression '*expressum facit cessare tacitum*' applies. Even otherwise, notwithstanding the Clause of 1.2.3 of schedule 7 of PPA , the obligation of the PSPCL to arrange fuel is expressed for the following reasons:

- (a) **After the assignment of the FSA by PSPCL to TSPL:** The rights in the FSA were to be assigned by PSPCL to the privatized TSPL to procure the minimum guaranteed quality and quantity of fuel (7.7 mtpa of Grade E coal with GCV of 4500 to 4600 kCal/kg and ash content of 33-34%, or its equivalent) to ensure that TSPL can generate and supply power to PSPCL, for which PSPCL shall bear the fuel price and pay energy charges.



(b) But PSPCL has failed to do so. In the interim, in order to ensure uninterrupted power supply to PSPCL, TSPL has been arranging the coal from MCL on behalf of PSPCL in terms of interim FSA signed on 'without prejudice' basis from MCL/others as per the directions of this Hon'ble Tribunal in the Order dated 18.04.2013. Hence, in such situation when TSPL procures the coal itself then PSPCL ought to pay the energy charges.

Therefore, the Appellant is correct in contending that the obligation to supply coal does not necessarily mean that PSPCL only has to pay for the coal.

**198.** It is the contention of the PSPCL that if the Appellant would have acted prudently it would not have faced the present problems. The following facts/actions, which are exercised lead to a conclusion that Appellant did act prudently to mitigate the loss on account of fire incident in the coal handling process. It is not in dispute that there was fire accident in the coal handling system of the Appellant, which had an impact on the Appellant to operate the plant for some time. Occurrence of fire, definitely, is a force majeure event which happened at the site. We note that on account of the following facts, the Appellant did take all reasonable possible measures to mitigate the damage so as to operate the plant continuously and to avoid usage of alternate coal.

- (a) On 17.04.2017, fire broke out in the coal handling system of TSPL's Plant extensively damaging the coal conveyors - a force majeure event beyond the control of TSPL. The fire in the CHP rendered mechanical unloading of coal impossible at site and led to forced shut down of Plant.
- (b) On 24.04.2017, PSPCL was informed about the incident by force majeure Notice.
- (c) Despite the site situation, for monthly orders placed upto 28.03.2017, the rakes of coal which were in transit were unloaded at TSPL's Project site upto 28.04.2017 with significant difficulty using manual support. Unloading of each rake took an average 64 hours (even upto 98 hours in some cases). Once the rakes were unloaded and stored at available areas in TSPL's plant, further unloading could not be continued owing to the damage of coal handling system and control & communication network.
- (d) After assessing the progress in restoring the site, on 02.06.2017, TSPL requisitioned the linkage coal as soon as TSPL envisaged the operational date of CHP.
- (e) Thereafter, coal handling system at the plant became functional on 10.06.2017. For order placed on 02.06.2017, receipt and

unloading of coal at the plant resumed on 18.06.2017 and the Plant was re-synchronized on 20.06.2017.

- (f) Though TSPL took remedial measures to mitigate the damage due to the fire incident, due to the site condition and inherent limitations in offloading coal during the period after the fire incident, allocation of 243 rakes of coal lapsed in April and May 2017 (monthly order being placed on 28<sup>th</sup> of each month), i.e., 94 linkage coal rakes in April 2017 and 149 linkage coal rakes in May 2017.
- (g) TSPL has persistently following up with MCL/CIL for reallocation of lapsed coal rakes and supply of additional domestic coal through Rail cum Road Mode without any response from PSPCL. TSPL even requested the Railways department for increasing rake loading without any avail.

**199.** Apparently, the Appellant has not received various amounts due to them from PSPCL arising out of coal obligation in terms of judgment dated 07.04.2016. The Appellant claims the amount of Rs.472 crores, which was withheld since September 2016. Appellant will be in huge financial crisis and may not be able to operate its plant if its dues are not paid on time. It may ultimately lead to face NPA risk. Therefore, in the light of various judgments of this Tribunal and Hon'ble Apex Court in

Adani judgment referred to above, the Appellant is entitled for late payment surcharge in terms of provisions of PPA.

**200.** Therefore, for the reasons stated above, after analysing the facts and various judgments referred to in our discussion, we are of the opinion that the impugned orders passed by the Commission deserve to be set aside and accordingly are set aside as under:

- i) The impugned order dated 11.04.2019 is set aside. We direct the Respondent-PSPCL to make payment of differential amount as sought in the appeal No. 220 of 2019 along with late payment surcharge in terms of provisions of PPA from the date of billing for the period June 2017 to September 2017 till payments are made.
- ii) The impugned order dated 30.08.2019 pertaining to Appeal No. 317 of 2019 is set aside. We direct Respondent-PSPCL to pay the cost of alternate/imported coal incurred by the Appellant along with late payment surcharge in terms of PPA from the date of billing till payment is made.
- iii) We also direct the PSPCL to pay deemed capacity charges from October 2017 onwards along with late payment surcharge.

**201.** In view of the disposal of the Appeals, pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

**202.** Pronounced in virtual court on this the 19<sup>th</sup> day of July, 2021.

**(Ravindra Kumar Verma)**  
**Technical Member (Electricity)**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / NON-REPORTABLE**

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