IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO.65 OF 2016
AND
APPEAL NO.284 OF 2016

Dated: 02.08.2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

APPEAL NO.65 OF 2016

PUNJAB STATE POWER CORPORATION LIMITED
The Mall, Patiala-147001
Punjab ….. Appellant(s)

VERSUS

1. **BIOMASS POWER PRODUCERS ASSOCIATION**
No.870, Phase-3-B-2
Mohali-160059

2. **PUNJAB ENERGY DEVELOPMENT AGENCY**
Solar Passive Complex
Plot No.1&2, Sector 33-D
Chandigarh-160034

3. **GOVERNMENT OF PUNJAB**
[Through Principal Secretary, NRES]
Civil Secretaria-2
Sector-9, Chandigarh-160001

4. **PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**
SCO NO 220-221,Sector-34-A
Chandigarh -160022 ….. Respondent(s)

Counsel for the Appellant(s)	:	Mr. Anand K Ganesan Mr. Amal Nair Mr. Sugandh Khanna
Counsel for the Respondent(s)	:	Mr. Buddy Ranganadhan Mr. Hemant Singh Mr. Lakshyajit Singh Bagdwal Mr. Harshit Singh for R-1 Mr. Aditya Grover for R-2 Mr. Sakesh Kumar Ms. Gitanjali N. Sharma for R-4

APPEAL NO.284 OF 2016

1. **BIOMASS POWER PRODUCERS ASSOCIATION**
[Through its authorised representative]
No.870, Phase-3-B-2
Mohali-160059 ….. Appellant(s)

VERSUS

1. **PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**
[Through its Secretary]
SCO NO 220-221,Sector-34-A
Chandigarh

2. **PUNJAB STATE POWER CORPORATION LIMITED**
Through its Chairman & Managing Director]
Shed No.F-4, Shakti Vihar,
Patiala-147001

3. **PUNJAB ENERGY DEVELOPMENT AGENCY**
[Through its Principal Secretary]
Solar Passive Complex
Plot No.1&2, Sector 33-D
Chandigarh 160020

4. **GOVERNMENT OF PUNJAB**
[Through the Principal Secretary]
NRES, Civil Secretaria-2
Sector-9, Chandigarh-160009 ….. Respondent(s)

Counsel for the Appellant(s)	:	Mr. Buddy Ranganadhan Mr. Hemant Singh Mr. Lakshyajit Singh Bagdwal Mr. Harshit Singh
Counsel for the Respondent(s)	:	Mr. Sakesh Kumar Ms. Gitanjali N. Sharma for R-1 Mr. Anand K Ganesan Mr. Amal Nair Mr. Sugandh Khanna for R-2 Mr. Aditya Grover for R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. *Punjab State Power Corporation Limited* (for short, "PSPCL"), the appellant in the first captioned matter is a company incorporated under the provisions of Companies Act, it being an unbundled entity of erstwhile Punjab State Electricity Board, having been vested with the functions of generation and distribution of electricity in the State of Punjab. It has entered into *Power Purchase Agreements* ("PPAs") with power project developers, including power producers using biomass as the fuel, procuring electricity, against consideration, on the basis of tariff determination by the fourth respondent *Punjab State Electricity Regulatory Commission* (hereinafter referred to as "PSERC" or the "State Commission"). In absence of any regulations governing the subject framed by the State Commission, it had adopted and has been following the guidance provided, *inter alia,* by the regulations framed by *Central Electricity Regulatory Commission* ("CERC"), i.e. *CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009*and the tariff determined by CERC, as issued or modified from time to time. The last such order governing the field, preceding the present controversy, was issued by the State Commission

on 24.07.2015 in petition no.43/2015 (s*uomotu*) adopting *Station Heat Rate* ("SHR") of 4126kCal/kWh and fuel *Gross Calorific Value* ("GCV") of 3174Kcal/kg, specific fuel consumption of 1.3 kg/Kwh for calculating the variable tariff component considering fuel prices of Rs.3500.42 per metric ton, as per CERC norms, for biomass based power plants to be commissioned during Financial Year (FY) 2015-2016.

2. The *Biomass Power Producers Association* (for short, "the Association"), the appellant in the second captioned matter, had approached the State Commission by petition no.57/2015 in September, 2015 with the prayer that same variable cost be allowed to all biomass based power projects operating in the state of Punjab including those commissioned prior to FY 2015-2016. By order dated 29.01.2016, the State Commission upheld the contentions of the Association qua GCV, and, on the ground of parity, extended the benefit of dispensation on the subject by earlier order dated 24.07.2015 to the existing projects alongwith new projects commissioned during FY 2015-2016. It, however, rejected the contention of the Association respecting applicability of the same SHR for the existing projects and disallowed the prayer to that extent.

3. Both parties, the PSPCL (the procurer) as well as the Association (biomass power producers), have come up by their respective appeals challenging the view taken by the impugned order dated 29.01.2016, it being the contention of the former (procurer) that the decision extending the decision of 24.07.2015 to existing projects amounts to impermissible change of the terms and conditions of the individual PPAs at the behest of the third party (Association), no case of parity having been properly made out. *Per contra,* the Power Producers Association while defending

the order to the extent of the grant of the benefit of the new GCV question the disallowance of the prayer qua SHR contending that the denial is for reasons which are not sound.

4. We have heard the learned counsel for the parties at length. The core reasoning on the basis of which the benefit of GCV determined for power projects to be commissioned in FY 2015-2016 has been extended to existing projects, has been articulated in the impugned order by the Commission as under:

> *"The Commission opines that the case of calorific value is different as compared to SHR and the same arguments as in case of disallowing SHR, which is particular to a project/plant as held by the Commission, will not hold good. All the developers, existing or new, have access to the same biomass fuel available in the State. It has been established by the Commission in the discussion in the foregoing paras that it had allowed fuel cost parity to the existing projects with the new projects to be commissioned in the year in which the fuel cost was allowed to the developers. However, by virtue of the option exercised by them, the parity with the fuel cost for new projects was lost. It could very well have been the other way. It is just that the fuel price escalation index has been higher than 5% opted by the developers during the last few years. There is all possibility that in future it might get reversed and the developers may gain in that eventuality. Since all the developers including existing have access to the same fuel during the year, there is a strong case to allow parity in calorific value to the existing projects with the new projects to be commissioned in FY 2015-16. Accordingly, the Commission allows the revised calorific value of 3174 kCal/kg to the existing projects also. PSPCL is directed to allow the variable cost to all the biomass based power projects in the State, irrespective of being members of the Biomass Power Producers Association or not, considering the calorific value of fuel as 3174 kCal/kg from the date of issuance of this Order. Other terms & conditions of the PPAs signed by the developers of these biomass based power projects shall remain unchanged."*

5. We find merit in the submission of PSPCL that alteration of the financial terms binding the parties in terms of the *inter se* contracts (PPAs) at the instance of the Association was impermissible and therefore, improper, particularly against the backdrop of facts that members of this very Association had earlier approached the State Commission by raising similar contentions vis-à-vis the components of the applicable tariff, such contentions having been repelled by previous orders. We find that objections to this effect had been expressly taken by PSPCL before the Commission, the maintainability of the petition in which the impugned order was passed having been questioned, reference having been made to the previous litigation having a bearing on the matter, noted at length in Para 7 of the order of the Commission. We must also note here that the appeal, when it was originally presented before this Tribunal, included five individual members of the Association (shown in the array as second to sixth appellants), the appeal being accompanied by application on their behalf for leave to file appeal being granted (IA no.386/2016). The said application was withdrawn and dismissed accordingly on 06.09.2016, leaving the Association only in the fray.

6. The fact, however, remains that the petitioner before the State Commission, and the appellant before this Tribunal (to the extent of non-grant of benefit of same SHR) remains the Association which is nothing but the mouthpiece of the same power producers who had earlier failed to persuade the State Commission to accept similar contentions in the past on their individual petitions respecting their individual PPAs.

7. The Association concededly is not a party to the PPAs, it being a separate legal entity, such being the position taken even by the

Association. It is trite that the terms of the contract(s) cannot be varied at its instance, it being a stranger thereto. We may quote with advantage the ruling of the Supreme Court in *M.C. Chakov. State Bank of Travancore (1969) 2 SCC 343*holding as under:

> *"9.Kottayam Bank not being a party to the deal was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In Krishna Lal Sadhu v. PrimilaBalaDasi [ILR 55 Cal 1315] Rankin, C.J observed:*
>
> > *"Clause (d) of section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in india in certain cases in which the English Law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of 'promisor' and 'promisee'."*
>
> *Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: Dunlop Pneumatic Tyre Co. v. Selfridge & Co. [1915 AC 847]. It has however been recognised that where a trust is created by a contract, a beneficiary "may enforce the rights which the trust so created has given him The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case Khwaja Muhammad Khan v. HusainiBegam [(1910) 37 IA 152]. In a later case Jaman Das v. Ram Autar [(1911) 39 IA 7]the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a*

> *beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract."*
>
> *[Emphasis supplied]*

8. There is no dispute as to the fact that the decision on the question of GCV would alter the terms of the individual PPAs. The order at hand amounts to indirectly allowing to the power producers what was denied to them directly and, therefore, is questionable.

9. At the cost of repetition, it may be stated that the individual PPAs entered into by the members of the Association with PSPCL, including the financial terms set out there in bind the parties. It is settled law that concluded PPAs cannot be reopened so as to vary the terms, there being a sanctity attached to the contracts entered into by the parties of their own volition.

10. The Association relies on the ruling of the Supreme Court in the matter of *Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Ltd.[Gujarat UrjaVikas Nigam Ltd. V. Tarini Infrastructure Ltd., (2016) 8 SCC 743 : (2016) 4 SCC (Civ) 284]*, holding as under:

> *"17. As already noticed, Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply. As held by this Court in V.S. Rice & Oil Mills v. State of A.P. [V.S. Rice & Oil Mills v. State of A.P., AIR 1964 SC 1781], K. Ramanathan v. State of T.N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116 : 1985 SCC (Cri) 162] and D.K. Trivedi & Sons v. State of Gujarat [D.K. Trivedi & Sons v. State of Gujarat , 1986 Supp SCC 20] the power of regulation is indeed of wide import.*
>
> *…*

> *18. All the above would suggest that in view of Section 86(1)(b) the Court must lean in favour of flexibility and not read inviolability in terms of the PPA insofar as the tariff stipulated therein as approved by the Commission is concerned. It would be a sound principle of interpretation to confer such a power if public interest dictated by the surrounding events and circumstances require a review of the tariff. The facts of the present case, as elaborately noted at the threshold of the present opinion, would suggest that the Court must lean in favour of such a view also having due regard to the provisions of Sections 14 and 21 of the General Clauses Act, 1898. ..."*

11. As was explained subsequently by Hon'ble Supreme Court in its decision reported as *Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Limited, (2017) 16 SCC 498,* the case of *Tarini Infrastructure* (*supra*) involved the question as to whether tariff fixed under the PPA was sacrosanct and inviolable, beyond the review and correction by the regulatory commission. The power producer in that case had sought revision of tariff by the Commission primarily on the ground of longer distance to which the power was to be evacuated than the one envisaged in the concession agreement. In that context, the Court had ruled to regulate the prices of sale and purchase of electricity and to "re-determine the tariff rate".

12. In the case of *Solar Semiconductor* (*supra*), however, the Supreme Court held thus:

> *"60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15 per unit for twelve years, the first respondent should*

commission the Solar PV Power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.

61. As pointed out earlier, the Appellate Tribunal has taken the view that the control period of the Tariff Order was fixed by the State Commission itself and hence the State Commission has inherent power to extend the control period of the Tariff Order. It may be that the tariff rate as per Tariff Order, 2010 as determined by the Committee has been incorporated in clause 5.2 of the PPA. But that does not in any manner confer power upon the State Commission to exercise its inherent jurisdiction to extend the control period to the advantage of the project proponent-first respondent and to the disadvantage of GUVNL who are governed by the terms and conditions of the contract. It is not within the powers of the Commission to exercise its inherent jurisdiction to extend the control period to the advantage of any party and to the disadvantage of the other would amount to varying the terms of the contract between the parties.

…

64. As pointed out earlier, the State Commission has determined tariff for solar power producers vide order dated 29-01-2010 and tariff for next control period vide order dated 27-01-2012 [Hiroco Renewable Energy (P) Ltd. V. Gujarat Urja Vikas Nigam Ltd., Petition No.1126 of 2011, order dated 27-1-2012 (Comm)]. The order dated 29-01-2010 is applicable for projects commissioned from 29-01-2010 to 28-01-2012 and the order dated 27-01-2012 [Hiroco Renewable Energy (P) Ltd. V. Gujarat Urja Vikas Nigam Ltd., Petition No.1126 of 2011, order dated 27-1-2012 (Comm)]is applicable for projects commissioned from 29-01-2012 to 31-03-2015. As pointed out earlier, the tariff is determined by the State Commission under Section 62. The choice of entering into contract/PPA based on such tariff is with the Power Producer and the Distribution Licensee. As rightly contended by the learned Senior Counsel for the appellant, the State Commission in exercise of its power under Section 62 of the Act, may

conceivably re-determine the tariff, it cannot force either the generating company or the licensee to enter into a contract based on such tariff nor can it vary the terms of the contract invoking inherent jurisdiction.

Sanctity of power purchase agreement

65. It is contended that Section 86(1)(b) of the Act empowers the State Commission to regulate the price of sale and purchase of electricity between the generating companies and distribution licensees and the terms and conditions of the PPA cannot be set to be inviolable. Merely because in PPA, tariff rate as per Tariff Order, 2010 is incorporated that does not empower the Commission to vary the terms of the contract to the disadvantage of the consumers whose interest the Commission is bound to safeguard. Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the generating company, Respondent 1 and disadvantage of the appellant. Terms of PPA are binding on both the parties equally.

66. In Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182 : (2016) 4 SCC (Civ) 624], facts were similar and the question of law raised was whether by passing the terms and conditions of PPA, respondent can assail the sanctity of PPA. This Court held that Power Producer cannot go against the terms of the PPA and that as per the terms of the PPA, in case, the first respondent is not able to commence the generation of electricity within the 'control period' the first respondent will be entitled only for lower of the tariffs.

…

68. In exercise of its statutory power, under Section 62 of the Electricity Act, the Commission has fixed the tariff rate. The word 'tariff' has not been defined in the Act. Tariff means a scheduleof standard/prices or charges provided to the category or categories for procurement by licensee from generating company, wholesale or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61(a) to (i), the State Commission determined the tariff rate for various categories including Solar Power PV project and the same is applied uniformly throughout the State. When the said

tariff rate as determined by the Tariff Order (2010) is incorporated in the PPA between the parties, it is a matter of contract between the parties. In my view, respondent No.1 is bound by the terms and conditions of PPA entered into between Respondent1 and the appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties."

13. In another ruling reported as *Gujarat Urja Vikas Nigam Limited v. EMCO Limited &Anr. (2016) 11 SCC 182.*The Supreme Court has held thus:

"32. Apart from that, the conclusion of the Tribunal in the instant case is wrong. First of all the PPA does not give any option to the respondent to opt out of the terms of the PPA. It only visualises a possibility of the producer not commissioning its PROJECT within the "control period" stipulated under the 1st Tariff Order and provides that in such an eventuality what should be the tariff applicable to the sale of power by the 1st respondent. Secondly, the PPA does not "entitle" the 1st respondent to the "tariff as determined by the" 2nd respondent by the Second Tariff Order. On the other hand, the PPA clearly stipulates that in such an eventuality:

…

34. The real question is: what is the point of time at which the power producer can exercise such right to seek the determination of a separate tariff?

…

37. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

38. The 1st respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that "the tariff is determined by Hon'ble Commission vide tariff order for solar based power project dated 29-1-2010"."

14. The terms of the contract (PPA here) cannot be varied except with the result of rendering the rights and obligations of the parties to be non-binding. It is clear that the State Commission has failed to bear in mind that responsibility and risk of fuel purchase, under the individual contracts, has been of the individual project developers wherein the tariff payable in terms of determination by the State Commission, as at the time of inception, was voluntarily incorporated.

15. The tariff orders passed by the State Commission from time to time specifically set the applicability of the tariff for such projects as were commissioned during the corresponding control period.Even amendments to the relevant regulations cannot have retrospective effect. The impugned direction to permit higher variable costs (result of retrospective effect to GCV) for period prior to the tariff order on the basis of which the Association had approached the Commission is clearly erroneous.

16. Indisputably, each renewable energy project has its own characteristics, the procurement of the fuel being the obligation of the power producer and there is no restriction imposed on the price or source of such procurement, the same being at varied norms, and parameters being distinct and unique for each, the GCV cannot be fixed uniformly for all such projects.

17. We, thus, do not approve of the extension of the benefit of revised GCV to projects that were commissioned prior to FY 2015-2016, the

ground of parity being unavailable. The impugned order to that extent cannot be upheld.

18. On the issue of SHR, the Commission has articulated its views as under:

> *"The Station Heat Rate was specified as 3800 kCal/kWh in the CERC RE Regulations, 2009 and is applicable for the projects commissioned in the control period 2009-10 to 2011-12 as per the Regulations. Further, the same was specified as 4000 kCal/kWh in the CERC RE Regulations, 2012 and is applicable for the projects commissioned in the control period 2012-13 to 2016-17. Vide CERC RE Regulations (Third Amendment), 2015, the same has been revised to 4126 kCal/kWh and applicable to the projects to be commissioned in FY 2015-16 onwards. For variable cost parity pleaded by the petitioner, the same would need to be made applicable to the projects commissioned in the control period of the 2009 Regulations as also in the first three years of the 2012 Regulations.*
>
> *The tariffs are mandated to be worked out by the Commission in a particular control period as per the capital cost and norms/parameters specified in the applicable Regulations. There is no provision in the Regulations to allow applicability of norms/parameters retrospectively. The petitioner has pleaded that in the statement of reasons to the Regulations, CERC brought out that the revised norms/parameters may be prospectively applicable to existing projects if agreed to by the distribution licensee through appropriate amendments to the PPA and approved by the Commission. The provision in the statement of reasons carries no force having not been made part of the substantive Regulations. Neither PSPCL nor any developer approached the Commission for approval of an amendment in the PPA signed between them for revision of norms/parameters. Rather, PSPCL has vehemently opposed any revision in tariff. SHR is specific to the generating station/project as also pleaded by PSPCL and projects coming up in a particular control period would procure the equipment accordingly. The argument of the petitioner that SHR increases over time due to normal wear & tear resulting in higher fuel consumption does not hold good as the norms/parameters as*

well as period for which the tariff determined by the Commission would remain applicable as per the Regulations, are well known to the developers at the time of conceiving the project. The Commission in its Order dated 05.09.2014 in petition no. 42 of 2014 (Suo-Motu) had expressed the view that efficiency is a function of SHR and inversely proportional to it i.e if SHR is reduced, efficiency increases resulting in fuel saving, which should be the endeavour of the developers.

In view of the discussions above, the Commission holds that there is no case for allowing revised SHR applicable for new projects to be commissioned in FY 2015-16 and later to the existing projects."

19. The prime argument of the Association is that the Commission has allowed lower SHR for older plants and higher SHR for new plants which implies that the older plants have been considered as more efficient. Apart from the reasons already set out as to impermissibility of a stranger to a contract attempting to meddle with its terms, and the previous litigation on the subject, we find the reasons set out by the Commission in the order under challenge declining the relief on this issue to be correct. The SHR is different for every project, it being dependent upon the boiler design, varying from machine to machine. There can be no uniformity in such regard for all the projects since SHR would vary according to fuel characteristics, operational parameters and other modalities. The SHR forms part of the tariff determined which was admitted at the time the project was conceived and established. It is specific to the generating stations and projects which came up in the particular control period when the necessary equipment were procured. The Association cannot make out a case to seek higher SHR for machinery that may have not only become aged but also obsolete. Such approach, we agree, would amount to disrupting the due procedure for determination of relevant norms and parameters.

20. For the foregoing reasons, the appeal of PSPCL must succeed while that of the Association must fail. In the result, the impugned order to the extent it granted parity of GCV to such members of the Association whose projects had been commissioned prior to FY 2015-2016, extending to them the benefit of the GCV determined by order dated 24.07.2015 in *suomotu* petition no.43/2015, is hereby set aside. Resultantly, the petition no.57/2015 of the Association, on which the impugned order was passed, stands disallowed.

21. The appeals are disposed of in above terms.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

tp