

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 85/MP/2022 along with IA No.24/IA/2022 & 9/2023

Subject : Petition under Section 79(1)(b) and (f) read with Section 63 of the Electricity Act, 2003 for adjudication and directions in regard to the Power Purchase Agreement dated 22.4.2007 with Coastal Gujarat Power Limited.

Petitioner : Punjab State Power Corporation Limited (PSPCL)

Respondents : Coastal Gujarat Power Limited (CGPL) and 9 Ors.

Petition No. 123/MP/2022 alongwith I.A.No.10/2023

Subject : Petition under Section 79(1)(b) and (f) read with Section 63 of the Electricity Act, 2003 for adjudication and directions in regard to the Power Purchase Agreement dated 22.4.2007 with Coastal Gujarat Power Limited.

Petitioner : Uttar Haryana Bijli Vitran Nigam Limited and Anr.

Respondents : Coastal Gujarat Power Limited and 8 Ors.

Petition No. 246/MP/2022 alongwith I.A/Nos.8,12/2023

Subject : Petition under Section 79(1)(b) and (f) read with Section 63 of the Electricity Act, 2003 for adjudication and directions in regard to the Power Purchase Agreement dated 22.4.2007 with Coastal Gujarat Power Limited.

Petitioner : Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)

Respondents : Coastal Gujarat Power Limited and 9 Ors.

Date of Hearing : **16.2.2023**

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
Shri Ghanshyam Prasad, Member

Parties Present : Shri M. G. Ramachandran, Sr. Advocate, PSPCL & HPPC
Shri Basava Prabhu Patil, Sr. Advocate, MSEDCL
Shri Chetan Sharma, AAG, MSEDCL
Ms. Poorva Saigal, Advocate, PSPCL & HPPC
Shri Shubham Arya, Advocate, PSPCL & HPPC
Shri Ravi Nair, Advocate, PSPCL & HPPC
Ms. Pallavi Saigal, Advocate, PSPCL & HPPC
Ms. Reeha Singh, Advocate, PSPCL & HPPC
Ms. Shikha Sood, Advocate, PSPCL & HPPC

Ms. Anumeha Smiti, Advocate, PSPCL & HPPC
Shri G. Saikumar, Advocate, MSEDCL
Shri Akash Lamba, Advocate, MSEDCL
Shri Ravi Prakash, Advocate, MSEDCL
Shri Geet Rajan Ahuja, Advocate, MSEDCL
Shri Sanjay Sen, Sr. Advocate, CGPL & TPCL
Shri Sajan Poovayya, CGPL & TPCL
Shri Shreshth Sharma, Advocate, CGPL & TPCL
Ms. Shubhi Sharma, Advocate, CGPL & TPCL S
Ms. Raksha Agrawal, CGPL & TPCL
Ms. Mandakini Ghosh, CGPL & TPCL
Shri Neel Rahate, Advocate, CGPL & TPCL
Shri Deepak Thakur, CGPL & TPCL
Shri Ashok Rajan, WRLDC
Shri Alok Mishra, WRLDC

Record of Proceedings

Learned Additional Advocate General appearing on behalf of MSEDCL submitted that MSEDCL has filed Petition on the subject and requested to list the matter along with present Petitions. He submitted that the Petitioner has not intended to invoke Article 14 of the PPA in Petition No. 85/MP/2022. After breach of contract, the Petitioner is left with two possible remedies one is interim order for specific performance of contract by directing WRLDC to schedule the availability in accordance with the PPA and other one is to seek damages. After the 2018 amendment of the Specific Relief Act, 1963, it is no longer a discretionary power of the court to grant specific performance. The court is now obliged to enforce the specific performance of a contract subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16.

2. Learned senior counsel appearing for the Petitioners in Petitions No. 85/MP/2022 and 123/MP/2022 handed over a note on rebuttal submissions and a compilation of judgments and mainly submitted as under:

(a) Hon`ble Supreme Court in its various judgments including judgments passed in B. Santoshamma and Anr. v. D Sarla and Anr. (2020), M.L. Devender Singh v. Sayed Khaja (1973) and Prakash Chnadra v. Angadlal & Ors. (1979) has held that now it is the mandate of court to enforce the specific performance of a contract subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16.

(b) Hon'ble Supreme Court, the Appellate Tribunal as well as this Court in catena of judgements have considered the ambit and definition of a determinable contract to be a contract that is terminable at will.

(c) Reliance placed by Tata Power on the decision of the Rajasthan Breweries Limited v. The Stroh Brewery Company, 2000 [(55) DRJ (DB)]; Shri Dinesh Chadha v. Hotel Queen Road Private Limited; and IOCL v. Amritsar Gas Service and Others, [(1991) 1 SCC 533] is misplaced. The above decisions are on an entirely different factual footing and do not contemplate a contract in the nature of the PPA in the instant matter which is not terminable at will. Hence, the specific performance

of the PPA dated 22.4.2007 can be validly sought by the Procurers unless there is a breach of contract from the procurer's side.

(d) The specific performance is a statutory right and remedy available to the Petitioners/ procurers and can be sought even in the absence of any provision in the PPA. The substitution rights of lenders cannot render the PPA determinable. Further, there is no option with the Petitioners to terminate the PPA at will as per the provisions of the PPA above. The provision in the PPA providing for liquidated damages does not bar the Procurers seeking specific performance. Even otherwise, Article 17.4 of the PPA provides that the parties shall continue to perform their obligations.

(e) As per decision of Hon'ble Supreme Court, the Procurers are entitled to seek specific performance under the Specific Relief Act, 1963 along with damages in terms of Section 73 of the Contract Act, 1872.

(f) Since the beginning, the LC furnished by HPPC has been in the same format as the present LC. There is no particular evidence being furnished by TPCL to show as to how or why the LCs are conditional and the same has been stated so in the PSM portal maintained by WRLDC without any basis whatsoever. The LC furnished are in accordance with the provisions of Article 11.4.1 of the PPA.

(g) The existence of substitution rights under Article 14.3.4 read with Schedule 17 of the PPA is for the lenders to decide. The Procurers do not exercise the right to compel the lenders to substitute. There is a legal requirement under Article 14.3.4 read with Schedule 17(2) for the Procurers to send a copy of the Preliminary Notice of Events of Default of TPCL to the lenders. It is then for the lenders to decide. The PPA continues for the entire term even if there is substitution by lenders. Therefore, the PPA is not determinable by the existence of such substitution rights.

(h) HPPC had clarified vide its letter dated 15.9.2022 that the LC furnished are unconditional, irrevocable, and revolving in nature. Further the bank issuing the Letter of Credit had also clarified the same by emails dated 09.09.2022 and 19.09.2022.

(i) The plea raised by Respondents No. 1 & 2 that the PPA dated 22.4.2007 is a determinable contract and therefore in terms of Sections 10 & 14 of the Specific Relief Act, 1963, it cannot be specifically enforced is patently erroneous.

3. Learned senior counsel for MSEDL, submitted that as per the contract, both Tata power and the petitioners are required to perform certain functions. The question that can the contract be enforced in case of a breach because Tata Power is not wanting to supply. The response of TPCL in this regard is that under 14 (1) (d) of the Specific Relief Act, 1963 the Petitioners cannot enforce the contract but can only seek for the damages which are there in the contract, is wrong and denied. A determinable contract is a contract where the parties to a contract can terminate the contract without any reason. A termination of a contract subject to a default due to certain terms is not determinable contract. WRLDC must assist the commission in correct spirit. Section 32 A of the Electricity Act, 2003 provides that RLDC(s) have to comply with the contract approved by the Commission. WRLDC cannot rely on letters/communications between TPCL and other procurers and LPS Rules over the statute which is enacted by the Parliament.

4. Learned senior counsel on behalf of Tata Power submitted that no payment has been received till date. He further submitted that in the email dated 31.08.2022 issued by HPPC to the bank (SBI) instructing it to procure certain list of documents before

invoking LC. He added that the list of documents sought are clearly beyond the scope of Article 11.4.1.4 and it proves that the LC is a conditional LC especially since it is HPPC's own version that LCs as submitted by it are unconditional. He also emphasized on email dated 9.9.2022 of Bank filed by HPPC which itself does not mention LC as unconditional.

5. Learned counsel for the Tata Power sought permission to file written submission and requested to list the matters.

6. On the request, learned senior counsel for Tata Power was directed to file its written submissions before the next date of hearing.

7. The matters remain part-heard and shall be listed for hearing on **21.2.2022** at **4:00PM**.

By order of the Commission
SD/-
(T.D. Pant)
Joint Chief (Law)