

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**  
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

**Petition No. 41 of 2020**

**Date of Order: 12.04.2021**

Petition under Section 86(1) (f) of the Electricity Act, 2003 read with Rule 10, 69, 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005 read with Section 94 of the Electricity Act, 2003, for setting aside/quashing of the order/letter dated 08.10.2020 issued by the respondent No.1/Punjab State Power Corporation Ltd. vide which the Power Purchase Agreement (PPA) dated 23.12.2016 and Supplementary PPA dated 05.02.2019 executed between the petitioner and PSPCL for sale of upto 30 MW surplus power to PSPCL from petitioner Company's Non-Fossil fuel based 40 MW Co-generation Power Project has been wrongly and illegally terminated and for extension of period of commissioning of the project upto 31.10.2021 with applicable tariff of Rs. 6.22 per kWh.

AND

In the matter of:

M/s Indian Sucrose Limited, having its Registered office at G.T. Road, Mukerian, Distt. Hoshiarpur, Punjab, through its authorized Signatory Sh. Vedprakash Gupta, Vice President of the company.

....Petitioner

Vs

1. Punjab State Power Corporation Ltd. through its Chairman cum Managing Director, The Mall, Patiala
2. Punjab Energy Development Agency, through its Director, Solar Passive Complex, Plot No. 01 & 02, Sector 33-D, Chandigarh.

...Respondents

Present:

Ms. Kusumjit Sidhu, Chairperson  
Ms. Anjuli Chandra, Member  
Mr. Paramjeet Singh, Member

**ORDER:**

M/s Indian Sucrose Limited has filed the present petition for setting aside/quashing of the Order/letter dated 08.10.2020 issued by PSPCL vide which, PPA dated 23.12.2016 and supplementary PPA dated 05.02.2019 executed between the petitioner and PSPCL for sale of upto 30 MW surplus power to PSPCL from its non-fossil fuel based 40 MW co-generation Power Project at Mukerian, district Hoshiarpur, has been terminated.

2. The petition was admitted vide order dated 10.12.2020. The respondents were directed to file their respective reply by 30.12.2020 and the rejoinder thereto, if any, by the petitioner by 06.01.2021. PSPCL filed reply to the petition vide memo No. 5434 dated 24.12.2020 and PEDDA filed its reply vide letter No. 798 dated 04.02.2021. The petitioner filed rejoinder dated 12.02.2021 to the reply filed by PSPCL and PEDDA. The learned counsel for the parties addressed their respective arguments during hearing on 17.02.2021 and further requested to file written submissions. The Commission vide Order dated 19.02.2021 allowed the parties to file their written submissions by 24.02.2021 and the next date of hearing, if so required, was to be intimated to the parties separately. PSPCL filed written submissions vide memo No. 5392 dated 26.02.2021 and the petitioner submitted the written arguments vide letter dated 05.03.2021.

**3. Submissions of the Petitioner**

3.1 The petitioner has submitted that it is having a bagasse based co-generation power plant in its sugar factory at Mukerian, District Hoshiarpur. The capacity of the Co-generation plant is 12 MW. The petitioner used 6 MW capacity in its own consumption and for remaining 6 MW capacity, the petitioner had entered into a PPA

dated 27-6-2014 with PSPCL. The petitioner company had taken up up-gradation of the sugar mill for value addition to the products which required to set up a new power plant with higher steam pressure and temperature. The petitioner approached PEDA under NRSE Policy 2012 for signing of Implementation Agreement for proposed baggasse based Co-generation Power Project and IA was signed on 30-11-2016. In pursuance to the I.A., the petitioner company entered into a PPA dated 23-12-2016 with the Punjab State Power Corporation Ltd. As per clause 12 of the PPA, except where terminated by default, this agreement shall remain in force for a period of 20 years from the date of commissioning of the Project which could be extended through mutual agreement. As per the PPA, the Scheduled Commercial Operation Date ('SCOD') is two years from the signing of the PPA and the SCOD of the project was 23-12-2018.

3.2 The petitioner submitted necessary documents with PSPCL for getting Grid Feasibility regarding 66/132 KV transmission line to export upto 30MW power to PSPCL. The case of the petitioner was not put before the Feasibility Clearance Committee and the petitioner sent a letter dated 17-03-2017 to the Chief Engineer (PP&R), Punjab State Power Corporation Ltd., Patiala for putting the case of the petitioner before the Feasibility Clearance Committee and thereafter sent letters dated 07.04.2017, 27.04.2017, 09.05.2017, 24.05.2017, 15.06.2017, 08.07.2017, 16.07.2017, 20.07.2017 for granting feasibility clearance and despite sending various letters and personal meetings with the concerned officers no feasibility clearance was granted. The Superintending Engineer/ Planning-2 sent a letter dated 24-07-2017 to the petitioner that the case of the

petitioner was discussed by the feasibility clearance committee in its meeting dated 21-07-2017, intimating as under:

- 1) *Your firm has asked for feasibility clearance for sale of power upto 30 MW to be produced from 40 MW co-gen project. The committee observed that your firm is already supplying 6 MW power from its 12 MW co-gen plant. There was no reference of 6 MW power already being supplied to PSPCL in new Power Purchase Agreement made on dated 23-12-16. So committee decided that office of CE/PP&R should take clarification and make suitable amendments/ revisions in the PPA with your firm.*
- 2) *In case 30 MW power which is to be supplied to PSPCL is in addition to 6 MW or extension of 6 MW, then suitable provisions in PPA needs to be incorporated indicating whether power is to be evacuated from same transmission line. Works or new transmission line/ work.*
- 3) *In case the utilization of already erected 66 KV transmission line is to be made, in that case clear cut instructions need to be incorporated in new PPA viz a viz the provision of transmission line in old PPA.*

*The case for granting feasibility clearance to your firm will be considered again after completing the above formalities....”.*

3.3 The petitioner sent a detailed reply to the letter dated 24-07-2017 and again submitted letter dated 09-09-2017 to the Director/

Distribution, PSPCL, Patiala requesting for grant of feasibility clearance. However, instead of granting feasibility clearance the S.E/ Planning-2, PSPCL, Patiala sent a letter dated 18-09-2017 that the petitioner has not submitted amended PPA in compliance to the office letter dated 24-07-2017 and asked the petitioner to submit the amended PPA at the earliest. However, it was intimated by PSPCL vide letter dated 17.01.2018 that feasibility clearance committee has not granted the feasibility clearance. The petitioner filed petition No. 13 of 2018 before the Commission praying to direct PSPCL to grant grid feasibility. PSPCL agreed to grant grid feasibility clearance and thereafter supplementary PPA dated 05.02.2019 was executed and the petition was disposed of vide order dated 11.02.2019. As per the amended PPA the SCOD was fixed as 31.03.2020. The petitioner also agreed for reduction of tariff of the project from 6.59 per kWh to 6.22 per kWh.

3.4 PSPCL give feasibility clearance vide letter dated 29.03.2019 received on 11.04.2019 and as per the original PPA the Petitioner was entitled to get clear two years for completion of project from the date of signing of PPA. Out of these two years the Petitioner virtually got only 11 months and 20 days as the feasibility was granted only on 11-04-2019.

3.5 That after the IA dated 30-11-2016 and PPA dated 23-12-2016 were executed the Petitioner placed the Purchase Orders to M/s ISGEC, Noida vide P.O. No. 623 dt. 23.02.2017 for supply of 200 TPH Boiler and M/s GE - Triveni Engineering & Ind. Ltd., Bangalore for purchasing of 40 MW Turbine & Generator vide P.O. No. 718 dt. 30.03.2017. The petitioner also paid 20% of the cost of these machines as advance money to the different vendors. But as the Feasibility Clearance was not granted the project was delayed and

the above said orders for supplying Turbine, TG Set , boiler , machinery etc. were also kept pending. Till the Grid feasibility was granted the petitioner had incurred more than 50% amount out of total value of the project. After Feasibility Clearance was given by PSPCL, the Petitioner contacted the concerned parties / vendors to supply the Boiler, Power Turbine and other material required for completion of the power project as per the orders already placed with them. But the parties refused to supply the above said material on the price and terms & conditions of previous orders and the Petitioner re-negotiated with M/s ISGEC for supply of boiler and M/s ISGEC agreed for supplying the same boiler with an escalated cost of Rs.4.25 Crore. The Petitioner also re-negotiated with the party for supplying of 40 MW Power Turbine of 125 Kg Pressure and the said company agreed to supply the Power Turbine but after increasing the price of Power Turbine by Rs.7.00 crores. This type of power turbine is a special turbine, which is being supplied to the Petitioner company 1<sup>st</sup> time in India. It will take time to manufacture & trial at least 16-18 months, due to special metallurgy Power Turbine and lot of material are imported and the cost of these two parts of the plant has escalated by Rs. 8.60Crore and the remaining parts of the plant would also increase the cost of the project. Moreover the Civil Construction cost of the plant has also increased by 36%.

3.6 The project could not be commissioned upto 31-03-2020, the SCOD as mentioned in supplementary PPA, and accordingly the petitioner sent letters dated 17.02.2020, 14.03.2020, 02.04.2020, 10.04.2020, 24.04.2020, 11.05.2020, 29.05.2020, 10.06.2020 & 20.06.2020 to PSPCL and requested for extension of SCOD and specifically mentioned the facts regarding delay in supplying the Boiler, Power turbine etc. As per clause 10.1.0 of the PPA and

Supplementary PPA, the time of SCOD could be extended by PEDDA but as the Supplementary PPA was executed by the PSPCL so the petitioner was under impression that the SCOD can be extended by PSPCL and sent the above said request letters to PSPCL for extension of SCOD.

3.7 That starting from 22<sup>nd</sup> March, 2020 there was pandemic of COVID-19 and the plants of the vendors of the Petitioner were closed down and the completion of the project was further hampered. The vendors of the Petitioner have also sent letters to the Petitioner invoking Force Majeure clause. The effect of the Pandemic is still visible on the economy of the whole country though Unlock Process is already on.

3.8 That instead of replying the above said letters of the petitioner PSPCL sent a default notice dated 24-06-2020 under clause 13.1.0(c) of the PPA. It was mentioned in the said notice that as the petitioner has failed to commission the project upto 31-03-2020 so this amounts to default. The petitioner has to cure this default in 60 days otherwise the PPA would be terminated by PSPCL. Clause No. 13 of the PPA pertains to defaults and termination of the PPA and on a perusal of the said provisions it is clear that PSPCL could not issue any default notice as there was no default on the part of the petitioner.

3.9 That as per clause 10.1.0 of the PPA and supplementary PPA, PEDDA is competent to extend the Commissioning date of the project. Accordingly the petitioner sent a request letter dated 17-08-2020 to PEDDA for extension of SCOD upto 31-10-2021. The copy of this letter was also sent to PSPCL. The petitioner also submitted the status report of the project alongwith photographs to PEDDA on 31-08-2020 and a copy of the same was also sent to PSPCL. The team

of PSPCL lead by Addl.S.E., Distribution also inspected and noted the status of the project of the petitioner in the second week of September, 2020. The petitioner sent a reminder dated 18-09-2020 to PEDDA requesting for extension of SCOD and also met personally to the concerned officers of PEDDA.

3.10. That Government of India, Ministry of New & Renewable Energy (MNRE) has issued letter dated 13-08-2020 and granted time extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to Lock Down due to COVID-19 as force majeure and to the surprise of the petitioner PSPCL sent the impugned letter/ order dated 08-10-2020 and terminated the PPA dated 23-12-2016 and Supplementary PPA dated 05-02-2019. The petitioner has given detailed reasons in its reply dated 24-8-2020 to show that there is no event of default. The petitioner has invested heavily on the project and gave photographs of the site to show that the work at site is progressing. The petitioner never asked for any increase in tariff and rather had decreased the tariff at the time of supplementary agreement and so there was no loss to PSPCL. The petitioner has applied for extension of time of SCOD to the PEDDA and same was still pending. The alleged default notice dated 24-06-2020 and letter/order dated 08-10-2020 issued by PSPCL terminating the PPAs is totally wrong and illegal and against the provisions of the IA, PPA and Supplementary PPA executed by the generating company. That as per the definition of 'Duration' of Agreement and clause 12 of the PPA it is very much clear that the PPA would remain in force only after the commissioning of the project is achieved by the generating company and the obligations on the part of the generating company, as mentioned in clause 13 of the PPA, would



start only once the SCOD is achieved by the generating company. As per Clause 13.3.0 of the PPA, (a) generating firm has to cure the default and resume supply within 60 days of receipt of notice, (b) in case the project is sold or assigned then the said third party is required to resume the supply and the third stage if the supply is not resumed then the PPA can be terminated. So one thing is clear that the supply of electricity has to be resumed. Meaning thereby the SCOD is already there and there is some interruption in supply of electricity, only then default notice for resumption of supply can be issued. As per clause 13.6.0 of the PPA the PPA can be cancelled on the ground of non starting of Generating facility but only after three years from the Scheduled Commercial Operation Date. In the present case the SCOD is 31-03-2020 and in case the generating company fails to achieve the same within three years i.e. up to 31-03-2023 then only the PPA could be cancelled on this ground. PSPCL had no power to terminate the project in question. The non-commissioning of the project does not come under 'event of default' so the impugned order/ letter dated 08-10-2020 is liable to be set aside by the Commission. The situation of the COVID-19 is still bad in the country and due to this reason also the project could not be completed in time as per supplementary PPA. The Hon'ble Supreme Court through Suo Moto Writ Petition(C) No-3/2020 has also extended vide order dated 23.03.2020, 06.05.2020 and 10.07.2020 all periods of limitations w.e.f 15<sup>th</sup> March, 2020 till further orders.

3.11 That the petitioner has incurred about 65% of total cost of the project on equipments i.e. boiler, cooling tower, chimney, fuel handling and turbine etc and the petitioner sincerely wants to complete the project but due to the reasons which were beyond the control of the petitioner, faults of the respondent No. 1 and Force

Majeure events the project could not be commissioned till now and it will take some more time. The petitioner has prayed to

- (a) set aside/ quash the order / letter dated 08-10-2020 issued by the respondent No.1/PSPCL vide which the PPA dated 23-12-2016 and Supplementary PPA dated 05-02-2019 executed between the petitioner and PSPCL for sale of upto 30MW Surplus Power to PSPCL from petitioner Company's Non-fossil fuel based 40 MW Co-generation Power Project has been wrongly and illegally terminated;
- (b) grant project Specific extension of period of commissioning of the project upto 31-10-2021 with applicable tariff of Rs.6.22 per kWh, as the delay in commissioning is occurring due to the reasons which were beyond the control of the petitioner, force majeure events and faults of the respondent No. 1/ PSPCL.
- (c) The respondent No. 2 may kindly be restrained from terminating the I.A. during the pendency of the present petition before the Commission.
- (d) Cost of the petition may kindly be awarded in favour of the petitioner.
- (e) pass such or further orders as the Commission may deem just and proper in the circumstances of the case.

#### 4. Submissions of PSPCL

4.1 PSPCL has submitted that the petitioner has referred to provisions of Regulation 69, 71 and 73 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005

which are procedural Regulations related to conduct of proceedings before the Commission. The Conduct of Business Regulations framed by the Commission can be traced to Section 92 of the Electricity Act, 2003 and the powers provided to the State Commission in the Regulations also relate to procedural aspects and cannot be used for granting substantive relief. PSPCL relied in this regard upon the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited -v- Solar Semiconductor Power Company (India) Private Limited and Another (2017) 16 SCC 498. Wherein it has been held that inherent power of the Commission is available to it for exercise only in those areas where the Act or rules are silent. Thus the issue has to be considered in terms of the agreement between the parties and there can be no extension of time or any other relief granted de hors the contract.

4.2 That when the Petitioner applied for Technical Feasibility Clearance from PSPCL for its Project, issues arose in granting the Technical Feasibility Clearance due to the following reasons:

- (i) The Petitioner failed to provide clarity regarding the status of the existing 6 MW of power being supplied to PSPCL under the PPA dated 27.06.2014;
- (ii) The Petitioner failed to provide a copy of the amended PPA to the Feasibility Clearance Committee, in spite of a request being made for the same by PSPCL and
- (iii) The Petitioner vide letter dated 17.03.2017 requested PSPCL's CE/Planning through CE/PP&R for granting of feasibility clearance to the Petitioner. The Petitioner has attached with this letter the following documents:
  - (a) A paper of authorized signatory.
  - (b) An affidavit mentioning therein:

- i. That it has no dues-payment to be paid to PSPCL;
- ii. That it has land for the project; and
- iii. That the Petitioner does not have any dispute with PSPCL.

However, when the matter was taken up with the concerned authorities of PSPCL for providing technical details to the Feasibility Clearance Committee i.e. CE/DS North Jalandhar, for intimating eligibility of the Petitioner for obtaining feasibility clearance, it was intimated that case amounting to Rs.6.02 Crore has been filed by the Petitioner before the Hon'ble Appellate Tribunal for Electricity for refund of 66kV bay and transmission line costs. As per directives of the Hon'ble Appellate Tribunal, out of the above amount, a Civil Case amounting to Rs. 2.89 Crore as defaulting amount has been filed by the Petitioner in Civil Court, Mukerian. Thereafter, the Petitioner approached the Commission and filed a Petition being no. 13 of 2018 for issuance of necessary directions to PSPCL for granting Grid Feasibility Clearance to the petitioner.

4.3 That on the directions of the Commission dated 22.11.2018, meetings were held between PSPCL and the Petitioner to sort out the issues amicably. Accordingly Supplementary PPA was signed with the Petitioner on 05.02.2019 wherein it was decided to terminate the old PPA dated 27.06.2014 on Commissioning of the new project of 40 MW and the new power project would be commissioned by 31.03.2020. In terms of the order dated 11.02.2019 passed by the Commission in petition No. 13 of 2018, PSPCL was to seek approval of the PPA. PSPCL filed petition No. 17 of 2020 before the Commission for approval of 65 PPAs relating to procurement of power from the non-conventional generation

stations including the PPA and the supplementary PPA with the petitioner. The Petitioner did not raise any objection on the scheduled date of commercial operation agreed as 31.03.2020 and in fact not only did the Petitioner sign the Supplementary PPA but made a specific statement before the Commission during the hearing on 06.02.2019 that the issues have been amicably settled vide the Supplementary PPA. It is not open to the Petitioner to raise any issue in this regard.

4.4 That in terms of the Supplementary PPA dated 05.02.2019, the feasibility clearance was sought from PSPCL by the Petitioner and it was approved by the Feasibility Clearance Committee in its meeting held on 12.03.2019, and PSPCL vide letter dated 29.03.2019 communicated the same to the petitioner. The grant of the Feasibility Clearance by PSPCL was well within the time agreed to in the Supplementary PPA (i.e. 60 days from the date of the fulfilment of all formalities). Thus there was no delay or default on part of PSPCL. Despite the Supplementary PPA dated 05.02.2019 providing for timeline of 31.03.2020, the Petitioner did not take appropriate steps in a timely manner and delayed its activities and the delay is entirely attributable to the Petitioner's lack of effort.

4.5 That the Petitioner failed to commission the project by 31.03.2020 (SCOD under the Supplementary PPA dated 05.02.2019). The Petitioner vide letter dated 17.02.2020 sought for extension of time of SCOD upto 31.10.2021. The Petitioner in the said Letter did not claim force majeure or even otherwise, the alleged reasons cannot be contended to be covered by force majeure.

4.6 That PSPCL had written initially to PEDDA but PEDDA vide letter dated 18.05.2020 stated that the Supplementary PPA dated

23.12.2016 has been signed between PSPCL and the Petitioner in pursuance to the directions of the Commission in Petition No. 13 of 2018 and that PEDDA was not involved at any stage.

4.7 That thereafter, on 24.06.2020, PSPCL issued Notice of Default under Article 13.3.0 of the PPA and called upon the Petitioner to cure the default within 60 days failing which PSPCL shall retain the right to terminate the PPA. Thus the Petitioner was given the chance to cure the event of default within 60 days in terms of Article 13.3.0 of the PPA. The period of 60 days expired on 22.08.2020, however the default was not cured.

4.8 That On 17.08.2020, the Petitioner wrote to PEDDA requesting extension of the Scheduled Commissioning Date of the project up to 31.10.2021. The grounds raised by the Petitioner in the letter seeking extension are not tenable. PEDDA forwarded a copy of the Petitioner's letter dated 17.08.2020 to PSPCL on 25.09.2020. PEDDA did not grant any extension to the Petitioner and it is clear that PEDDA is not inclined to consider any such issue. The Petitioner in its letter dated 17.08.2020 also raised the plea of COVID-19 Pandemic as a ground for seeking extension of the scheduled commissioning date. This issue was raised for the first time only in August 2020 and it cannot be claimed that this was in compliance of the force majeure conditions under the agreement.

4.9 That due to COVID-19 Pandemic, curfew was imposed in the State of Punjab from 23.03.2020 and was lifted on 18.05.2020. From 01.06.2020 various restrictions were relaxed, and the default notice was issued only after said period on 24.06.2020. In any case as far as essential services are concerned, they remained functional even during the period of lockdown. The construction of renewable energy projects was also permitted vide the Ministry of Home Affairs,

Government of India, Order No. 40-3/2020-DM-I(A) dated 15.04.2020 issuing the Consolidated Guidelines of MHA on Lockdown measures on containment of COVID-19. Further, vide the Order dated 01.05.2020, construction of renewable energy project in both rural and urban areas was permitted throughout all areas. The Petitioner also relied on the Office Memorandum 13.08.2020 of the Ministry of New and Renewable Energy, Government of India (MNRE) pursuant to which a time extension of five months has been given from 25.03.2020 to 24.08.2020 for the projects under MNRE. The said Office Memorandum has not been made binding on the state entities but is only for consideration of the state entities.

4.10 That in the present case, the time for the Petitioner has not been affected by COVID 19 as the Petitioner had already sought for extension upto 31.10.2021 in February 2020. Even after the spread of COVID 19, the Petitioner had sought for extension to 31.10.2021 and even in the Petition has sought extension upto 31.10.2021. Therefore it is clear that there is no impact of COVID 19 on the Petitioner and therefore the Petitioner cannot claim any extension under the same.

4.11 That the SCOD of the project could only have been extended upto 24.08.2020 (or 31.08.2020) as per the MNRE Office Memorandum dated 13.08.2020. However, the Petitioner had been seeking extension up to 31.10.2021 and this was not acceptable as the Project is already delayed from the original date of 23.12.2018 and wherein PSPCL had to purchase Non-Solar RECs from the market for RPO compliance.

4.12 That PSPCL, vide letter dated 03.09.2020, directed its local officials in the Mukerian- Division to visit the premises of the

Petitioner and send a report and it has been stated that the plant was nowhere near commissioning.

4.13 That PSPCL has to purchase power from the Petitioner at a tariff of Rs. 6.22/ kWh (Fixed costs of Rs. 2.73/kWh and variable cost of Rs. 3.49/ kWh with 5% annual escalation on variable cost). The only advantage to PSPCL from the said transaction was that the power is accounted towards Non-Solar Renewable Purchase Obligation. However, PSPCL has not been able to avail this benefit as the Petitioner has failed to commission the project in time, and is seeking unreasonable extensions on erroneous grounds.

4.14 That while the Petitioner has referred to the clause for force majeure but at no time did the Petitioner raise any claim for force majeure event. There is no force majeure event that has taken place and in any case the Petitioner has failed to give notice in terms of clause 7.4 of the IA. In terms of the IA the Petitioner upon facing any force majeure event must give notice within 5 days, however no such notice has been given by the Petitioner. The Petitioner had also not provided requisite data to verify the claim of Force Majeure in terms of PPA. The issuance of notice is a mandatory requirement under the PPA and without such notice, there can be no claim made or relief granted for force majeure.

4.15 That the Contract requires a notice to be issued, such notice is required to be issued within the time frame provided and as per the requirement of the contract. In this regard PSPCL has relied upon the Order dated 27.06.2016 passed by the Commission in Raichur Sholapur Transmission Company Limited Vs Power Grid Corporation of India Limited in Petition No. 419/MP/2014 read with Order dated 24.01.2019 passed in Review Petition No. 4/RP/2018, Krishna Kilaru & Another Vs Maytas Properties Limited (2013) [176] Comp Cas 483



[AP] - Order dated 21.08.2012, and the Order passed by the Hon'ble Appellate Tribunal for Electricity in Talwandi Sabo Power Limited Vs Punjab State Power Corporation Limited & Ors in Appeal No. 97 of 2016 dated 03.06.2016.

4.16 That though the PPA recognized the extension of time by PEDDA, the same cannot be without reason and in any case, there is no such extension by PEDDA. In fact the Petitioner was not proactive in approaching PEDDA and only approached PEDDA on 17.08.2020 seeking extension in SCOD after issuance of the default notice by the Petitioner.

4.17 That the alleged issues of feasibility are not relevant as a Supplementary PPA had been executed on 05.02.2019 with new time lines for feasibility clearance as well as the SCOD. The Petitioner is unnecessarily referring to the various letters and correspondence which are of no relevance to the present petition. The same issues cannot be raised again in the present Petition and the Petitioner is barred by res judicata. More over there was no delay by PSPCL. The feasibility clearance is of no consequence to the construction of the power project as is clear from the letter dated 17.03.2017 of the Petitioner itself wherein it is stated that the civil work had commenced and expected to be completed in November 2017 and the commercial production was to be in January 2018.

4.18 That the contention of the petitioner is incorrect that it had no choice and that PSPCL was in a dominating position while negotiating the terms of the Supplementary PPA. There was no compulsion on the Petitioner to agree to the revised SCOD of 31.03.2020 and the Petitioner did not raise these grounds while signing of the Supplementary PPA. It is not open for the Petitioner to

approve and reprobate its stand now after it expressly agreed to the revised SCOD on 31.03.2020.

4.19 That similarly, the Supply Contract cum Purchase Order of the Generator, dated 30.03.2017 provided for commissioning on or before 9 months or 24.12.2017 whichever was earlier. Further the performance test was to be within 1 month. Further, in July, 2017 the Petitioner had written to PSPCL stating that it wants to start its plant by November, 2017, i.e. within 4 months. The Petitioner had not raised this plea then that it needed another 12 to 16 months, and therefore the claim now is clearly an afterthought and therefore inadmissible. Further the Petitioner only wrote to the contractors on 21.11.2019 and 04.02.2020. The work order was placed on 10.01.2020 for civil work. Thus, clearly there was a delay by the Petitioner itself. There is no reason or justification for why the Petitioner waited until November 2019, January 2020, February 2020 to write to its contractors about amendment to contract agreement.

4.20 That the contention of the petitioner that there was no default on its part and therefore PSPCL could not issue default notice is incorrect. The default notice was issued under Article 13.1.0(c) of the PPA i.e. failure or refusal by the Petitioner to perform its material obligations under the PPA. It is submitted that even after nearly 4 years from signing of the PPA on 23.12.2016 and nearly 1.5 years since the signing of the supplementary PPA dated 05.02.2019, the Petitioner has been unable to commission the project, and has been seeking a further extension until 31.03.2021. The Petitioner had failed to execute the project in terms of the Scheduled Date of 31.03.2020. Due to this failure of the Petitioner to commission,

PSPCL was well within its rights to issue the default notice under the express terms of the PPA.

4.21 That the contention of the petitioner that duration of the agreement is for 20 years only after the commissioning is incorrect as this would mean that the agreement does not come into force on the signing of the agreement. Further similar provision exists under Clause 4.3 of the IA and it cannot be that the IA also does not come into effect until the commissioning. Clause 12 of the PPA provides for end date and does not mean that the agreement would not come into force on signing of the PPA. This would render the effective date as meaningless. Thus the same is only a reference to the end date of the Agreements since the Agreements would commence from effective date.

4.22 That the contention of the petitioner is incorrect that the only ground for termination due to non-starting of generating facility is only from 3 years from the SCOD under Article 13.6.0. The termination under Article 13.6.0 is a no-default termination, and the PPA under this clause can be terminated by either party for any reason. However the PPA under Article 13.1.0 provides for events of default by the Petitioner (Generating Firm), and failure to perform material obligations is a ground under the said clause. If the argument of the Petitioner with respect to Article 13.6.0 were to be accepted, it would not only tantamount to providing an automatic three year extension to the Petitioner in achieving commissioning, but in fact the Petitioner seems to be suggesting that PSPCL has no option to terminate the PPA due to inordinate delay in commissioning and it must be forced to continue with the PPA since termination can only be done once some power is injected. Such an inference renders the provisions of the PPA dealing with SCOD, and

its extension thereof (if any) by PEDA, as well as events of default, infructuous and otiose.

4.23 That the contention of the petitioner is incorrect that non-commissioning does not constitute an event of default. If the submissions of the Petitioner were to be accepted, the Petitioner could keep on inordinately delaying commissioning and PSPCL would have to carry on with the PPA and keep facing losses. Non-commissioning within the stipulated time mutually agreed to between the parties, is a breach of material obligation by the Petitioner and therefore squarely covered under Article 13.1.0 (c) of the PPA as an event of default. PSPCL had rightly issued the termination notice and the contentions of the Petitioner are not tenable.

4.24 That the Petitioner is not entitled to seek a higher tariff or any compensation as the tariff was specifically agreed to in the Supplementary PPA. The alleged increase in cost of project, if any, is to be borne by the Petitioner as generator. This is particularly when the delay is attributable to the Petitioner and the petitioner is not entitled to any relief as alleged.

## **5. Submissions of PEDA**

5.1 In reply to the petition PEDA has submitted that the petitioner has preferred the present petition seeking relief(s) against PSPCL and as such there is no role attributable to PEDA. PEDA granted approval to the petitioner for setting up of 40 MW Baggasse based Co-generation power plant within its sugar mill premises vide communication date 17.11.2016 and Implementation Agreement date 30.11.2016 was signed by the petitioner with PEDA. The said Implementation Agreement was forwarded to PSPCL vide communication date 06.12.2016 with a request to sign Power Purchase Agreement with the petitioner for sale of 30 MW surplus

power at the rate of Rs. 6.59/kWh as per the order date 03.11.2016 for F.Y. 2016-17, passed by the Commission. The petitioner vide its communication date 07.12.2016 addressed to PSPCL, while informing entering into Implementation Agreement with PEDDA, submitted that since it is not getting up to mark utilization from its existing plant of 12 MW capacity, the petitioner has decided to replace the same with 40 MW high pressure efficient power plant. PSPCL, without any objection, protest or demur entered into a Power Purchase Agreement with the petitioner for 40 MW high pressure efficient power plant for a period of 20 years @ Rs. 6.59/kWh from the date of commercial operation (COD) and submitted a copy of the same to PEDDA vide letter date 04.01.2017. As per the PPA, the SCOD of the project was date 23.12.2018.

5.2 That in the meanwhile, the petitioner and PSPCL on their own, without taking into confidence PEDDA, mutually agreed and entered into a supplementary PPA dated 05.02.2019, wherein while deviating from the earlier terms and conditions inter-alia with regard to tariff and date of commissioning qua the project, it was decided that the applicable tariff for the project shall be Rs 6.22 paisa per kWh and the date of commissioning of the project was fixed as 31.03.2020.

5.3 That in the meanwhile, in the year 2020 an unwarranted outbreak of Global Pandemic- COVID -19 took place which led to Forced lock down in the entire country including State of Punjab, with effect from 23.03.2020 and realizing the difficulties being faced in the commissioning of the projects, even the Govt. of India came out with a relief while extending the date of commissioning of the projects for a period of 5 months from 25.03.2020 to 24.08.2020.

5.4 That in the meanwhile PEDDA received a communication dated 08.05.2020 from PSPCL requesting for terminating IA dated

30.11.2016 as the petitioner has failed to commission the project by 31.03.2020, i.e. the mutually agreed date of commissioning of the project between PSPCL and the petitioner, to which the answering respondent was not a party.

5.5 That since the terms for setting up the project with regard to tariff and date of commissioning etc. were mutually settled between PSPCL and the petitioner, which was reduced into writing by way of amended PPA on 05.02.2019, to which PEDDA was not made a party, thus PEDDA requested that PCPCL may take further action in this matter with intimation to PEDDA. PEDDA also enclosed the representation of the petitioner seeking extension of COD with an email to the petitioner.

5.6 That PSPCL had categorically asked PEDDA, with regard to promotion and development of RE Projects, not to take any action without seeking concurrence of PSPCL and also issued in this regard communication dated 08.05.2020 to PSPCL. PEDDA received letter dated 08.10.2020 from PSPCL whereby PPA dated 23.12.2016 and supplementary PPA dated 05.02.2019 stood terminated with immediate effect on the ground that the petitioner has failed to commission the project by 31.03.2020 i.e the revised SCOD in terms of supplementary PPA.

## **6. Rejoinder of the Petitioner**

The petitioner filed rejoinder to the replies filed by PSPCL and PEDDA denying the averments made by the respondents further reiterating its earliest submissions made in the petition and also annexed the photographs of the project site.

## **7. Observations and Decision of the Commission**

The Commission has carefully gone through the petition, replies of PSPCL & PEDDA and other submissions made by the parties. The observations and decision of the Commission is as under:

7.1 The petitioner is praying to set aside/quash the PSPCL's order/letter dated 08.10.2020 terminating the PPA dated 23.12.2016 and Supplementary PPA dated 05.02.2019 executed between the petitioner and PSPCL for sale of upto 30MW Surplus Power to PSPCL from petitioner Company's Non-fossil fuel based 40 MW Co-generation Power Project and to grant project Specific extension of period of commissioning of the project upto 31.10.2021 with applicable tariff of Rs.6.22 per kWh citing delay in commissioning occurring due to the reasons beyond the control of the petitioner, force majeure events and faults of PSPCL. It was submitted, that, Clause 10 of the supplementary PPA provides that the generating company shall commission the project by 31.03.2020 or any extension allowed by PEDDA.

Whereas, PSPCL's contention is that there was no force majeure event nor any such event claimed within relevant time by the petitioner. The petitioner has failed to commission the project in terms of the scheduled date i.e. 31.03.2020. In the reply to its communication to PEDDA, PEDDA stated that PSPCL has to decide and take action in terms of the PPA. As such, PSPCL, within its rights, issued the default notice under the terms of the PPA and terminated the PPA.

PEDDA in its reply initially submitted that it has nothing to say as the petitioner and PSPCL had mutually amended the terms and conditions without taking any concurrence from PEDDA. However, subsequently PEDDA submitted that, it is open to consider the extension in SCOD in case it is directed by the Commission.

7.2 The Commission refers to Section 86(1) of the Electricity Act, 2003, which specifies as follows:

*“86. Functions of State Commission. -*

*(1) The State Commission shall discharge the following functions, namely:-*

*(a) .....*;

*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

*(c) .....*;

*d).....;*

*(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee*

*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;*

*.....”*

As per the above provisions of the Act., in addition to the primary function to regulate electricity purchase and procurement



process of the distribution licensee including the price at which electricity shall be procured from the generating companies or from other sources through agreements for distribution and supply in the State, the Commission is also mandated to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid & specification of RPO and adjudication of the disputes between the licensees and generating companies.

7.3 Accordingly, the detailed procedure for obtaining/granting Connectivity to the Grid and distribution licensee stand specified in the PSEERC (Terms and Conditions for Intra-state Open Access) Regulations, 2011. The Commission has also specified the RPO and is mandating progressive increase in the same, year after year to promote co-generation and generation of electricity from renewable sources. The Commission does intervene whenever any issue of connectivity or non-compliance of RPO is brought to its notice. The petitioner had previously approached the Commission through Petition No. 13 of 2018 for grant of grid feasibility clearance to its co-generation project. However, on the submission by the petitioner and PSPCL that they will sort out the issues amicably, the parties were directed to endeavour for an amicable settlement of the issue(s). Thereafter, upon submission by the parties that the issues were amicably settled between the parties vide supplementary PPA dated 05.02.2019, nothing survived in the petition. However, the petitioner/PSPCL were to apply for seeking approval of the PPA by the Commission in terms of section 86 (1) (b) of the Electricity Act 2003 and the applicable regulations framed there under, the petition was disposed of in terms of above.

7.4 However, the issue under the instant petition is to adjudicate the disputes regarding termination of PPA by the distribution licensee with the petitioner company. The petitioner is citing delay in commissioning occurring due to the reasons beyond the control of the petitioner, force majeure events and faults of PSPCL. However, PSPCL's stand is that it has acted as per the procedure and manner agreed between the parties. Whereas, PEDDA is continuously changing its stand.

7.5 As per Section 86 (1) (f) of the Electricity Act, 2003, the State Commission is empowered to adjudicate upon the disputes between the licensee and generation companies and to refer any dispute for arbitration, therefore it means that the Commission may either adjudicate upon the dispute or refer the matter for arbitration at its own discretion and as such is not bound or compelled to refer the matter for arbitration. Accordingly, the Commission has jurisdiction to entertain disputes between the licensee and also the generation companies as in the present matter and thus, the scope of regulatory jurisdiction of the Commission is very wide. It involves all disputes between the licensees which relate to the regulatory jurisdiction of the State Commission therefore, the basic issue to be adjudicated in the instant matter to be considered is, if there was a default in the terms of the PPA and whether the termination of the PPA by PSPCL was in accordance with the PPA or not. This was duly clarified by PSPCL while submitting that in terms of the IA dated 30.11.2016, PSPCL entered into another PPA dated 23.12.2016 with the petitioner for purchase of surplus power upto 30 MW from the petitioner Biomass fuel based 40 MW co-generation power project and SCOD was 22.12.2018. When the petitioner applied for technical feasibility clearance for PSPCL for its project issues arose

in granting the same and thereafter the petitioner approached the Commission vide petition No. 13 of 2018 for issuance of necessary directions to PSPCL for granting grid feasibility clearance to the petitioner. On the directions of the Commission dated 22.12.2018 meetings were held between PSPCL and the petitioner. Following which a supplementary PPA was signed with the petitioner on 05.02.2019 wherein it was decided to terminate the old PPA dated 27.06.2014 on the commissioning of new project of 40 MW which would be commissioned by 31.03.2020. The petitioner failed to commission the project by 31.03.2020 and on 24.06.2020 PSPCL issued the notice of default as under Article 13.3.0 and called upon the petitioner to cure the default within 60 days. The 60 days expired on 22.08.2020, however the default was still not got cured and thereafter PSPCL issued the termination noticed dated 08.10.2020 as the petitioner failed to cure the default event of default under Article 13.3 of the PPA. PSPCL clarified that the petitioner did not take appropriate steps in a timely manner and delayed its activities and had failed to commission the project by 31.03.2020, and was seeking extension of SCOD to 31.03.2021 therefore, the petitioner should not be entitled to grant of extension of SCOD as a defaulting event of the terms and conditions of the supplementary PPA.

7.6 PSPCL submitted that the petitioner agreed to the schedule date of 31.03.2020 and thereafter it cannot claim that it needs more time to achieve the commissioning from the date of feasibility clearance.

7.7 The petitioner had not issued any notice for force majeure to PEDA and PSPCL and without such issuance of notice the petitioner is not entitled to claim any relief on account of force majeure. The petitioner for the first time raised the issue that it was not agreeable

to the date of 31.03.2020 and no such of objections was raised and the time of discussing the issues and petitioner voluntarily signed the supplementary PPA. In fact, after the execution of the PPA, in the hearing held before the Commission, the petitioner did not raise any objection and had specifically submitted alongwith PSPCL that the issues had been mutually resolved. This was on record in the order dated 11.02.201 in petition No. 13 of 2018, thus the supplementary PPA dated 05.02.2019 and the Order dated 11.02.2019 resolved the issue with respect to the feasibility clearance.

7.8 PSPCL also clarified that there was no impact of COVID-19 on the Petitioner's project and MNRE Office Memorandum dated 13.08.2020 granting extension of time is not applicable to the Petitioner's project because the petitioner has to not raised the plea of COVID-19 pandemic as a ground for seeking extension of SCOD and no notice of force majeure was sent in this regard. In fact in the letters written in March, April, May and June 2020 no issue of COVID was raised. This issue was raised for the first time only in August 2020. Even before the COVID 19 the petitioner project was delayed, as in February 2020 (even before the spread of COVID 19) the petitioner had already sought for extension upto 31.10.2021 and after the spread of COVID 19 the petitioner has sought for extension upto 31.03.2021. This makes its clear that the petitioner has the same intended date of completion and commissioning and there is no impact of COVID 19 on the petitioner and therefore the petitioner cannot claim any extension under the same. The reliance on the office memorandum 13.08.2020 of MNRE pursuant to which time extension of 5 months was given from 25.03.2020 to 24.08.2020 for the projects under MNRE, cannot be applied to petitioner as the same has not been made binding on the state entities but it only for

consideration of the state entities and in this regard PSPCL has not considered it fit to grant any extension as the petitioner's project was already delayed and COVID 19 was used to hide the pre existing delays and therefore the reasons for delay in the commissioning of the project is not related to COVID 19.

7.9 Also the Petitioner cannot seek extension under the pretext of delay by its equipment manufacturers/contractors as the petitioner has agreed to 31.03.2020 under the expectation that it would be able to negotiate with its contractors but there were delays in such negotiations which could not be completed until November 2019/ February 2020. Thus, it is clear that the issue was not of any compulsion by PSPCL as petitioner had willingly agreed to the timelines. The issues with contractors or sub-contractors cannot be an excuse for seeking extension. The time taken for negotiations on price and time cannot be claimed as reasons for extension.

7.10 The contention that PEDDA is the appropriate authority under the PPA to grant extension of SCOD is correct. As per PPA 23.12.2016 extension of SCOD, if any, can be granted by PEDDA keeping in mind the interest of PSPCL. Similarly, under the supplementary PPA, the extension can be considered by PEDDA. In any case there cannot be any extension granted by PEDDA as there was no reason for the same, and no claim of force majeure event and no notification issued at any relevant time by the petitioner. Therefore, while the PPA recognized the extension of time by PEDDA, the same cannot be without reasons. It was submitted by PSPCL that PEDDA cannot grant extension at this belated stage, once the PPA has already been terminated. PEDDA can only grant extension in case there existed force majeure conditions and it is not the blanket extension based on merits which the petitioner is seeking. Moreover,

PEDA itself has taken the stand that the issue is between PSPCL and petitioner and asked PSPCL to take appropriate steps and hence it is not open to PEDA to now claim otherwise. However, the Petitioner had not sought any extension and no extension had been granted when PSPCL had issued Default Notice and thereafter termination Notice.

It is pertinent to note that Power Procurement from the said project has not yet been approved by the Commission. In such a situation, the Power Purchase Agreement between the two consenting parties is the governing document. The Commission refers to Article 16 of the of the PPA as under:

**“16.0.0 DISPUTES AND ARBITRATION**

16.1.0 Both Parties shall comply with the provisions of the Agreement and discharge their respective obligations. In the event any Dispute arises out of or in connection with any of the terms of this Agreement between the parties, hereto, the Parties shall attempt resolving the Dispute by mutual discussions, to be held between designated representatives of the Generating Firm and the officer In-charge/Power Purchase and Regulation Organization or any other officer authorized by him. In case the Dispute remains unresolved, it shall be resolved in accordance with the provisions of Clause 16.2.0.

16.2.0 All Disputes between the Parties arising out of or in connection with this Agreement which the Parties are unable to resolve by mutual discussions in terms of procedure set

out in Clause 16.1.0, shall be determined by arbitration, by such person or persons as the Commission may nominate in that behalf on receipt of application by either party (unless it is otherwise expressly provided in the license issued to the PSPCL or its successor entity) in terms or provisions of the Electricity Act, 2003. The venue for arbitration shall be Patiala, Punjab.

16.3.0 The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 as amended from time to time.

16.4.0 Notwithstanding the existence of any question, disputes and difference referred to arbitration the Parties hereto shall continue to perform their respective obligation under this Agreement and the payment of any bill preferred shall not be with-held by the PSPCL for any reason whatsoever including the pendency of the arbitration.”

It is felt that any disputes arising out of or in connection with the Power Purchase Agreement have to be dealt with as per the terms and conditions laid therein. The Power Purchase Agreement between the parties was never approved by the Commission at any stage. Hence, the agreement would only be deemed to be an agreement between two individuals. Violation of any terms and condition of this agreement (which has been terminated by one party on account of non compliance) would not give jurisdiction to this Commission to adjudicate regarding its legality. The parties are to adopt the forum for redressal of their grievance in accordance to the procedure enshrined in the agreement itself. The Commission is

therefore of the view that there is no cause for any intervention by the Commission in the matter at this stage.

**The petition is dismissed accordingly.**

Sd/-

(Paramjeet Singh)  
Member

Sd/-

(Anjuli Chandra)  
Member

Sd/-

(Kusumjit Sidhu)  
Chairperson

Chandigarh  
Dated: 12.04.2021

