

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

I.A. No.14 of 2017
in
Petition No. 14 of 2017

Date of Order: 06.06.2017

Present: Shri D.S. Bains, Chairman
Shri S.S. Sarna, Member

In the matter of: Application seeking adjudication of the issue with respect to undue influence of the counsel representing the Petitioner in the captioned matter before this Hon'ble Commission, filing of petition under Section 9 of Arbitration and Conciliation Act, 1996 before the Learned Court of ADJ, Chandigarh, seeking similar relief which was dismissed vide order dated 04.03.2017 and wrongly invocation of jurisdiction of this Hon'ble Commission, which are gravely prejudicing to the rights of the Applicant-Respondent-PEDA and for other reliefs as prayed for.

AND

In the matter of: Photon Suryodaya Pvt. Limited, New Delhi
.... Petitioner / Non Applicant

Versus

1. Punjab State Power Corporation Limited (PSPCL)
2. Punjab Energy Development Agency, (PEDA)
Applicant / Respondent
3. Syndicate Bank Limited, Arunachal Building, 19,
Barakhamba Road, New Delhi through its Manager.

.... Respondents

For petitioner: Shri Puneet Jindal, Sr. Advocate
with Shri Varun Goyal, Advocate
Shri Pardeep Malhotra AGM (Legal)
Shri Vaibhav Sharma Manager (Legal)

For PEDA Shri Aditya Grover, Advocate
Shri R.K. Gupta SM
Shri Lovkesh Khanna, PA to Jt./ Dir

For PSPCL: Shri Ashok Kumar Goyal, ASE/TR-5
Shri Mohinder Singh, Sr.Xen/IPC
Shri Munish Thakur, Adv. for Shri Pankaj Bhardwaj, Adv.

ORDER

Photon Suryodaya Pvt. Limited, New Delhi filed petition No.14 of 2017 under Section 86(1)(f) of the Electricity Act, 2003 along with an I.A. No.04 of 2017 against the respondents No. 1 and 2 be restrained from invoking and / or encashing the remaining performance bank guarantee to the tune of Rs.2.00 Crores;

and for issuance of directions to the respondents No.1 and 2 prohibiting them from cancelling and / or terminating the Letter of Award dated October 19, 2015 as also the implementation Agreement dated November 30, 2015 and PPA dated January 13, 2016.

The petitioner has further sought directions to be given to the respondents No.1 and 2 to not to take any steps to the detriment of the petitioner in relation to the said project.

The petition along with the I.A. was taken up for admission on 07.03.2017. However, due to paucity of time, arguments could not be completed and the matter was adjourned for 17.03.2017. In the meantime, the parties were directed to maintain status quo. PEDDA was directed not to encash the remaining performance bank guarantee to the tune of Rs.2.00 Crore. PEDDA was further directed that LOA, I.A. as well as PPA shall not be terminated till the next date of hearing.

The matter was taken up on 11.04.2017. The petition No.14 of 2017 was admitted and notice was issued to all the respondents further directing the respondents to file replies to the petition and I.A. No.4 of 2017 by 18.04.2017.

During the hearing, PEDDA, respondent / applicant herein also filed an I.A. No.14 of 2017 which was taken on record directing the petitioner to file a reply to the said I.A. by 18.04.2017. In the meantime parties were directed to maintain status quo.

The respondent / applicant filed the present I.A. No.14 of 2017 seeking prior adjudication of the issues by the Commission before proceeding any further in the said matter.

The respondent applicant has alleged in the said I.A. as under:

- (a) That Counsel for the petitioner exercises undue influence over the Hon'ble Commission and submitted that the non-applicant / petitioner is being represented before the Hon'ble Commission through its Counsel Shri Aashish Chopra, Advocate in the matter and the applicant / respondent has attained knowledge on perusal of the record maintained by it that the Counsel for the petitioner Shri Aashish Chopra is from the office of Shri Ashwani Chopra, Senior Advocate who has been representing this Hon'ble Commission before other Courts / Forums. Shri Ashwani Chopra, Senior Advocate and Shri Aashish Chopra, Advocate have been representing this Commission before the Hon'ble Punjab & Haryana High Court in CWP No.17804 of 2015 titled as Supreme Infrastructure India Ltd. & another Versus Punjab State Power Corporation Limited & others. In a nutshell, the Advocate for the petitioner is from the office of the Counsel of this Hon'ble Commission and he is appearing before the Commission against PEDDA while representing the petitioner, which is totally unethical, wrong and prejudicial to the rights / interests of Punjab Energy Development Agency. It was alleged that Mr. Aashish Chopra, Advocate be not permitted to represent the petitioner before this Commission, as he is from the office of Counsel representing this Commission before other Courts and more so Shri Aashish Chopra, Advocate himself has appeared for this Commission before the Hon'ble Punjab & Haryana High Court in CWP No.17804 of 2015.
- b) It has been further submitted by the respondent / applicant that the petitioner filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 before the Learned Court of ADJ, Chandigarh seeking similar relief, which was dismissed vide order dated 04.03.2017. In this regard, it has been further submitted that by way of filing the present petition, the applicant has indulged in forum shopping. The petitioner had filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 seeking interim protection against the encashment of performance bank guarantee of the petitioner. However, the Learned ADJ, Chandigarh vide its order

dated 17.02.2017 declined the interim injunction and since the petitioner did not succeed in its ulterior motive in getting stayed the encashment of performance bank guarantee on account of extension fee due to delay in commissioning of the project, it withdrew the said petition from the Court of ADJ, Chandigarh which was then dismissed by the Court vide order dated 04.03.2017. It was also submitted that the said petition was never withdrawn by the petitioner seeking liberty to approach the Hon'ble Commission by filing a fresh petition. It has been submitted that once the petitioner has deliberately withdrawn the petition filed before the Learned ADJ, Chandigarh, the petitioner is not entitled to file the present petition before the Commission seeking the same relief, i.e. the stay of the encashment of the same performance bank guarantee as the same is hit by the principle of res-judicata and as such, the petitioner cannot be granted any relief in the present petition.

- c) That the jurisdiction of this Hon'ble Commission has been wrongly invoked by the petitioner and the petition is barred by the jurisdiction of this Hon'ble Commission as the dispute raised by the petitioner purely happens to be a contractual matter which does not fall under the jurisdiction of the Commission, therefore, the petition deserves to be dismissed.
- d) That the order passed by this Hon'ble Commission to entertain the petition and to maintain status quo as to the performance bank guarantee has gravely prejudiced the rights of the applicant which warrants consideration of the Hon'ble Commission at the very outset before carrying out further proceedings and passing any interim / final orders in the said petition. The petitioner has accordingly prayed to decide the grievances of the applicant/ respondent at the very outset before proceeding any further with the matter and to vacate the interim stay granted to the petitioner vide order dated 8.3.2017 and to dismiss the petition filed by the petitioner at the very outset with exemplary costs.

2. The petitioner / respondent in reply to the I.A. No.14 of 2017 has filed its reply, which in brief, is as under:-

- i) That the petitioner preferred the Petition No.14 of 2017 under Section 86(1) (f) of the Electricity Act, 2003 on account of acts of omission and commission on the part of Respondents No.1 and 2 including wrongful, partial encashment of the performance bank guarantee to the tune of Rs.3.00 Crores with a further issuance of show cause notice by Respondent No.2 / Applicant to encash the balance amount of Rs.2.00 Crores as well as disputes arising under Implementation Agreement dated November 30, 2015 executed between the petitioner and PEDDA read along with the provisions of PPA dated January 13, 2016 executed between the petitioner and PSPCL.
- ii) That the application under reply is unfortunate and a gross abuse of process of law and has been preferred in a malafide attempt to scourge and delay the adjudication of the petition. The conduct of the applicant shows that it has no response on merits qua the dispute as a result of which it is attempting to devise novel methods to delay and / or obfuscate the issues from determination and as such, the application is required to be dismissed on this ground alone.
- iii) That the alleged plea that there is an undue influence of the counsel for the petitioner over the Learned Commission is not only false, misconceived, erroneous and misplaced, but also an abuse of process of law.
- iv) It is a matter of record that the Counsel for the petitioner is not and has never been empanelled by the Commission to represent and / or act for and on behalf of the same in any capacity before any Court / Tribunal / Forum. The counsel for the petitioner has even otherwise never been engaged or signed vakalatnama, to act for or represent the Commission before any Court / Tribunal or Forum.
- v) That reference made to CWP No.17804 of 2015 titled as Supreme Infrastructure India Ltd. & another versus Punjab State Power Corporation Ltd. & others suggest that the counsel for the respondent who has been representing this Commission, is also not a correct projection of the true and complete facts as for the past many years, the institution

- register(s), files, statement of grounds etc. in respect of the petitioner's counsel, clients is separate from those of Shri Ashwani Kumar Chopra, Senior Advocate. The appearance of the counsel for the petitioner in an order dated 31.08.2015 appears to be an inadvertent mistake as no such case appears in the Institution Register of the counsel for the petitioner nor his name has been shown in the other orders and neither in the judgment dated 06.09.2015 passed in the aforesaid matter.
- vi) That the averment that the counsel of the petitioner is from the office of the counsel representing the Learned Commission before other courts is false, misconceived and erroneous. The applicant has deliberately referred to the Senior Counsel Shri Ashwani Kumar Chopra as a 'counsel' though knowing that he is a designated Senior Advocate and as per his designation, he does not sign / execute or file a vakalatnama. There is no direct or proximate professional relationship between the Senior Advocate, as referred to in the application in respect of the present petition.
- vii) That mere appearance of the name of the said Senior Advocate, which in fact is an email, Annexure A/2, written and sent by the counsel for the petitioner, is inconsequential and completely disingenuous. A projection is sought to be given through the said document as in fact the engagement of a client by the counsel for the petitioner and his dealings in respect thereto are separate and distinct from that of the Senior Advocate. It cannot be even remotely suggested that the counsel for the petitioner is from the office of the Senior Advocate.
- viii) That the subject matter of the petition filed before the Commission, wherein the petitioner is the litigant and is being represented through its counsel, is different from the case wherein the Commission is the litigant and is being represented by the said Senior Advocate. There is no bar upon the counsel for the petitioner to appear before this Commission and the allegation of the applicant that the Commission may get unduly influenced by the counsel for the petitioner is not only baseless and based on surmises and conjectures, but is also false, misconceived and erroneous. The Commission is a statutory body constituted under the

- provisions of Section 82 of the Electricity Act, 2003 and is tasked with adjudicating upon disputes as provided under Section 86(1)(f) of the Electricity Act, 2003 and the objections raised by the applicant are without any basis.
- ix) That an allegation of bias, as unfounded as it may be in the present case, can at best be raised against a particular person / officer and not against the whole authority itself and as such, the application under reply is not only an abuse of process but also a deliberately designed stratagem to avoid adjudication of the dispute in the present petition.
- x) That the counsel for the petitioner has been its counsel for many other matters for past many years and has not only been rendering legal advice to the petitioner, but has also been appearing on its behalf before various courts / fora / authorities and the allegation of the applicant that there would be an undue influence of the counsel representing the petitioner is without any basis.
- xi) That the plea taken by the applicant that the petition under Section 9 of the Arbitration and Conciliation Act, 1996 filed before the Additional District Judge, Chandigarh seeking similar relief has been dismissed vide order dated 04.03.2017 is misconceived, erroneous and is a wrong projection of the facts. The petitioner has in a bonafide manner disclosed in paragraph 78 of the petition filed before the Commission that it had preferred a petition under Section 9 of the Arbitration and Conciliation Act, 1996. It is also an admitted position that vide order dated 17.02,2017, prayer qua ad-interim directions was declined by the court of ADJ Chandigarh and not the prayer for directions on which the application under Section 9 of the Arbitration and Conciliation Act, 1996 had been filed and the same was rather kept pending.
- xii) The petitioner preferred to move the petition before the Hon'ble Commission on March 03, 2017 and filed an application before the Learned Trial Court categorically submitting that it has sought to avail the remedy available to it under Section 86(1)(f) of the Electricity Act, 2003 by

- filing a petition before the Learned Commission, without prejudice to its rights and interests.
- xiii) That any order on an application for grant of ad-interim injunction does not decide the dispute finally between the parties as the orders are subject to subsequent alterations / modifications and as such, the principle of res-judicata would not apply. The provisions of CPC in any event are not applicable in the present proceedings before the Commission. Moreover, for the application of principle of res-judicata under Section 11 of CPC in the subsequent proceedings, it is required that not only the parties and the issues are identical, but there has to be a final adjudication of the dispute and has been finally decided by the Court.
- xiv) That the alleged objection pertaining to the fact that the disputes inter-se the parties are contractual in nature and purportedly does not fall within the jurisdiction of this Commission are unfounded. The relevant clause of the Implementation Agreement and the PPA also clearly states that any dispute between the parties pertaining to the determination of Tariff shall be dealt with by the Punjab State Electricity Regulatory Commission and the Commission is empowered to adjudicate upon all disputes, notwithstanding the fact that the same is contractual or not.
- xv) The application is misconceived, erroneous and designed to frustrate the rights of the petitioner and is an abuse of process, aimed solely to delay the adjudication of the dispute. The applicant Respondent No.2 was directed to file the reply to the petition, which it has failed to do so for the reasons best known to it and has rather preferred the erroneous and misconceived application under reply.
- xvi) That it is incorrect, misconceived and erroneous to state that the petitioner had any ulterior motive of getting stayed the encashment of performance bank guarantee on account of extension fee due to alleged delay in the commissioning of the project.
- xvii) That the petition has been preferred under the provisions of the Act read along with the regulations notified by the Commission which do not exclude adjudication upon contractual disputes, as such, the objections

raised by the applicant that the dispute raised by the petitioner happens to be a contractual matter which does not fall under the jurisdiction of the Commission is incorrect and without any basis.

- xviii) That the averments made by the applicant that the grievance raised warrants consideration of the Commission at the very outset before carrying out further proceedings and passing any interim/final orders on the petition as the same shall gravely prejudice the rights of the applicant are wrong and denied.

Observations, findings and decision of the Commission

We have duly examined the application filed by Respondent-PEDA, the reply submitted by the petitioner, the documents adduced on record and have heard the arguments advanced by the parties. The issues raised by the applicant are decided as under:-

I. Undue influence of the counsel for the petitioner over the Commission:

It has been agitated by the applicant that the non-applicant petitioner is being represented before the Commission through its counsel Shri Aashish Chopra, Advocate who is from the office of Shri Ashwani Kumar Chopra, Senior Advocate who has been representing this Commission before other courts / fora, which is totally unethical, wrong and prejudicial to the rights / interests of Punjab Energy Development Agency. The petitioner vehemently rebutting the allegations of the applicant, has submitted that the counsel for the petitioner is not, and has never been empanelled by the Commission to represent or act for or on behalf of the same in any capacity before any court, tribunal or forum. Shri Aashish Chopra Advocate vide his letter dated 08.05.2017 has denied the allegations of any undue influence as alleged by the applicant. He has recused/withdrawn himself as a counsel for the petitioners, especially to ensure that the interests of the petitioners are not prejudiced. In reference to appearance of Shri Aashish Chopra, Advocate in CWP No. 17804 of 2015 titled as Supreme Infrastructure India Ltd. Vs. Punjab State Power Corporation Ltd., it has been submitted that his name has been recorded inadvertently. Shri Puneet Jindal, Senior Advocate while arguing the matter has also stated that Shri Aashish

Chopra, Advocate never appeared in the aforesaid case as an advocate. **Thus, the Commission is of the considered opinion that the allegations levelled by the applicant that Shri Aashish Chopra may have undue influence on the Commission is without any substance and merits dismissal. Moreover, every case/application is decided by the Commission on merits keeping in view the facts, documents adduced on records and the law applicable in the particular case and as such, the allegation of undue influence of the Advocate is unwarranted and without any basis.**

II. Filing of petition under Section 9 of Arbitration and Conciliation Act, 1996 before the Learned Court of ADJ, Chandigarh – seeking similar relief which was dismissed vide order dated 04.03.2017.

It has been alleged by the applicant that the petitioner by way of the present petition filed before the Commission has indulged in forum shopping. As the petitioner had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996, before the Learned ADJ, Chandigarh for seeking interim injunction against the encashment of performance bank guarantee, which was dismissed vide order dated 17.02.2017 and the petition was ordered to be dismissed vide order dated 4.3.2017 by the Court of Learned ADJ, Chandigarh. However, replying to the allegations of the applicant, it has been submitted by the petitioner that petition under Section 9 of the Arbitration and Conciliation Act, 1996 pertains to only interim relief. The petitioner had filed petition under Section 9 of the Arbitration and Conciliation Act, 1996 along with an ad-interim application for stay. The ad-interim application was dismissed by the Learned trial court vide order dated 17.02.2017, however, the petitioner preferred to file petition under section 86(1)(f) of the Electricity Act, 2003 and withdrew the petition filed under section 9 of the Arbitration and Conciliation Act, 1996 categorically stating that the petitioner intends to prefer a petition before the Commission. The petition was dismissed as withdrawn by the Court vide order dated 04.03.2017. It has been further submitted that the relief claimed under Section 9 of the Arbitration and Conciliation Act, 1996 and the relief claimed under section 86(1)(f) of the Electricity Act are not similar as alleged by the

applicant. Whereas Section 9 of the Arbitration and Conciliation Act, 1996 pertains to interim relief, but the relief sought in the petition under section 86(1)(f) of the Electricity Act, 2003 cannot be said to be similar. **The Commission finds force in the arguments advanced by the Ld. Counsel for the petitioner. The issue raised by the applicant is without any substance and is not tenable is hereby dismissed.**

III. Wrong invocation of the jurisdiction of this Commission:

It has been alleged by the applicant that the petition filed by the petitioner is barred by the jurisdiction of the Commission as the purported dispute happens to be a contractual matter which does not fall under the jurisdiction of the Commission and the grievance raised by the applicant warrants consideration before carrying out further proceedings and passing any interim / final order in the petition. It has been further submitted by the petitioner that the relevant clauses of the Implementation Agreement and the PPA clearly state that any dispute between the parties pertaining to the determination of tariff shall be dealt with by the PSERC, which clearly shows that the Commission is empowered to adjudicate upon the disputes raised in the petition. Moreover, section 86(1)(f) of the Electricity Act, 2003 pertains to the functions of the State Commission clearly stipulates that the Commission shall adjudicate upon the disputes between the Licensees and generating companies and may refer any dispute for arbitration. Section 158 of the Electricity Act, 2003 pertains to dispute resolution also stipulates that where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the license of the Licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party. **Keeping in view the above, the Commission notes that the contentions of the applicant are misplaced and thus not sustainable in law.**

The issues raised by the applicant are disposed of accordingly. The facts of the I.A. No.13 of 2017 in Petition No.13 of 2017 and I.A.No.15 of 2017 in

petition No.15 of 2017, are similar to the facts of the present I.A. No.14 of 2017 in petition No.14 of 2017 and the same are disposed of in terms of the order passed in I.A. No.14 of 2017 in Petition No.14 of 2017.

Sd/-
(S.S. Sarna)
Member

Sd/-
(D. S. Bains)
Chairman

Chandigarh
Dated: 06.06.2017