

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

**Petition No. 49 of 2021
Date of Order: 06.04.2022**

Petition under Section 86(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes between the petitioner and the Respondent in relation to the computation of the Energy Charges claimed by the Respondent.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall, Patiala-147001 (Punjab)

.....Petitioner

Versus

Nabha Power Limited PO. BOX No. 28 Near Village Nalash, Rajpura Punjab 140401.

.....Respondent

Present: Sh. Viswajeet Khanna, Chairperson
Ms. Anjuli Chandra, Member
Sh. Paramjeet Singh, Member

Punjab State Power Corporation Limited (PSPCL) has filed the present petition seeking adjudication of disputes and differences under the Power Purchase Agreement dated 18.01.2010 executed with Nabha Power Limited (NPL) on the computation of the energy charges claimed by NPL. The petition was fixed for hearing on admission on 29.09.2021. Intervening by mentioning the learned counsel for NPL submitted a chart giving a comparative table depicting that the contentions raised by PSPCL in the present petition are identical to the contentions already raised

and decided before the Hon'ble Supreme Court and hence the petition is not maintainable. It was decided to hear the parties on the issue of maintainability of the petition. NPL, vide letter No. NPL/CD/PM/PSERC/REG/211018/1 dated 18.10.2021, filed preliminary objections to the maintainability of the petition and PSPCL filed its reply thereto vide memo No. 7729 dated 29.11.2021. NPL further submitted rejoinder/rebuttal submissions dated 05.01.2022 on the maintainability of the petition and further submitted additional points for rejoinder/rebuttal vide letter dated 07.01.2022. After hearing the learned counsel for the parties on 21.01.2022, Order on maintainability of the petition was reserved. It will be relevant to examine the submissions of the parties for proper adjudication of the issue of maintainability of the petition..

Submissions of PSPCL

2. PSPCL has submitted that NPL has established a 1400 MW (2x700 MW) generating station at Rajpura in the State of Punjab. Power Purchase Agreement (PPA) of this project was executed between (PSEB) and NPL on 18.01.2010. Various disputes and differences had arisen between the parties and NPL had filed petition No. 52 of 2014 before PSERC in relation to the energy charges, particularly the following.
 - (a) NPL had claimed the washing charges being incurred for washing of coal as a part of the energy charges, which were disputed by PSPCL;
 - (b) NPL had claimed the GCV of coal to be considered as measured at the project site, whereas PSPCL had claimed that the GCV ought to be as measured at the point of delivery at the mine;

- (c) NPL had claimed the GCV of coal to be considered on the basis of Total Moisture basis, whereas PSPCL had claimed that the GCV ought to be considered on equilibrated basis;
- (d) NPL had claimed transit and handling losses, 3rd party testing charges etc. to be considered as a part of the energy charges, which were denied by PSPCL.

The Commission, vide order dated 01/02/2016, dismissed the Petition No. 52 of 2014. The Order passed by the Commission was challenged before the Hon'ble APTEL in Appeal No. 64 of 2016. Hon'ble Appellate Tribunal vide judgment dated 14/12/2016 upheld the contentions raised by PSPCL and rejected the claims of NPL. NPL filed an Appeal in the Supreme Court of India against the Order passed by Hon'ble APTEL vide Civil Appeal No. 179 of 2017. Hon'ble Supreme Court, vide judgment dated 05.10.2017, disposed of the Appeal holding that the washing charges be paid by PSPCL to NPL as a part of the energy charges formula as contained in the PPA. Hon'ble Supreme Court further held that the GCV of coal to be considered was the actual GCV as delivered at the project site and not as delivered at the mine end.

- 2.1 That PSPCL does not dispute and has complied with the following principles in terms of the decisions of the Hon'ble Supreme Court.
- (a) The washing charges incurred by NPL for washing of coal to comply with the environmental norms is required to be paid for by PSPCL as a part of the cost of purchase of coal as provided for in the energy charges formula under the PPA;
 - (b) The washing charges would also include the yield loss of coal on account of washing of coal, which loss is required to be considered

for the purposes of the energy charges computation under the PPA between the parties;

- (c) The GCV of coal for the purposes of the energy charges formula under the PPA is to be taken as the GCV as received at the project site on total moisture basis;

However, the present petition is raising aspects only on the discrepancies in the details and the records as maintained and provided for by NPL for the computation of energy charges from time to time. NPL is suppressing records and materials which are required to be maintained and available with NPL, with a view to artificially inflate the energy charges as claimed by NPL from PSPCL. PSPCL specifically raised this issue in the proceedings before the Hon'ble Supreme Court, when NPL had filed the contempt Petition as to the non-payment of charges for washing and GCV as received at the project site. The Hon'ble Supreme Court while directing PSPCL to comply with its judgment, has held vide order dated 09/03/2021 passed in Contempt Petitions Nos. 1174-1177 of 2019 in Civil Appeal No. 179 of 2017 as under:

13. The last aspect which arises for consideration is a plea which was sought to be advanced on behalf of the respondents that in their perspective, there is some problem arising from the records maintained for the GCV unwashed coal and the washed coal as according to them the reject worked out more and their apprehension is that unrealistically the GCV is being varied to cause larger financial commitments from the respondents. What they seek to contend as per the note is that the discrepancy in terms of yield loss and quality of washed coal usually happens when good quality of coal is diverted under the garb of rejects in the washing process which should have been used for generation of power and this in turn raises the issue of mismatch of GCV. On perusal and calling for certain datas, it is a view of the respondents that their apprehension is not without merit. It is thus their

submission that having found this aspect, the respondents cannot be left remedy less as it is a dispute which needs adjudication for which the relevant authority is the SERC and they seek to invoke the jurisdiction of the forum for the said purpose for which notice has been issued.

14. We have examined the aforesaid plea and it is our view that insofar as the liabilities of the respondents to the appellants arising from the judgment are concerned, the matter stands closed in terms of our judgment dated 05.10.2017 and orders passed on the applications from time to time. What is said to be raised is really in the nature of a fresh dispute. If that be the position, we have not precluded the respondents from raising all future disputes as we were concerned with adjudication of certain aspects where we accepted part of the claims of the appellants and rejected part of the claims of the appellants. In our view, it will be for the authority to consider whether any of the claims sought to be preferred by the respondents can really be open to any fresh adjudication in view of the judgment rendered by us and the orders passed by us referred to aforesaid. We make it clear that the liberty to approach the SERC arises from the contract itself but that certainly cannot open the chapters which have been closed and that would be taken care of by the SERC while adjudicating the claim now sought to be raised by the respondents.

The present petition has been filed in the above background only on the discrepancies and the records in relation to the yield loss and coal rejects that form part of the monthly energy charges claimed in the invoices raised by NPL, issue of under loading charges, differential debit /credit notes, actual payment proof, reconciliation etc.

- 2.2 The nondisclosure of the said information and reports by NPL clearly evidences the fact that NPL is inflating the cost in relation to coal. This would be clear by the following factors:

- (a) Taking out coal of higher quality than 2200 kcal/kg in the washing process as coal rejects, contrary to the fact that the coal rejects ought to be less than/of 2200 kcal/kg only. In fact average value of GCV of rejects should be about 1500 Kcal/KG on E-GCV basis, which corresponds to 1200 kcal/kg (ARB-TM basis);
- (b) Not providing the details of the coal rejects, thereby resulting in higher washing charges and not taking into account the income from disposal of coal rejects;
- (c) Not providing the quality of coal upon washing.

This information clearly ought to be within the obligation of NPL as it is required to be jointly certified by the representative of the coal washery and NPL. The quality of coal even as per this report would be only as claimed by NPL, without even going into the correctness of the quality report. The same has not been provided by NPL.

The only explanation for the lower GCV of the coal received and the non-provision of the coal rejects details, is that higher quality of coal is being diverted in the washing process to third parties or used for other purposes. The costs in relation to coal and the consequent energy charges are being artificially inflated by NPL to the prejudice of PSPCL and the consumers in the state. It is for this reason that NPL is also refusing to provide the details in relation to disposal of coal rejects, quality report of washed coal as product and also the reconciliation of coal under the washery contracts with the coal washery contractor.

2.3 That as per Clause 11 of the FSA, charges resulting from under loading of coal in railway wagons are to be adjusted in the coal bills in favour of NPL by the coal company. In case of direct rail mode supply, it has been

observed that adjustment of under loading charges as being provided by the coal companies is less than the amount of under loading as determined from respective RR. However, these details are not being provided by NPL, despite repeated requests of PSPCL. NPL is not disclosing the details in order to avoid refund of additional charges wrongfully recovered from PSPCL.

- 2.4 That the quality of coal with respect to GCV, Equilibrated Moisture, Ash and Total Moisture is being determined by third party (CIMFR) deputed at the loading end. NPL is not providing month-wise details of compensation admissible as per FSA between NPL and SECL on account of variation of quality parameters of coal such as oversized stone, excessive surface moisture, grade slippage etc. Based upon the quality determined by CIMFR, debit/Credit notes are to be issued by Coal Company. Either NPL is not disclosing the credit notes being issued by SECL in terms of the quality determination by CIMFR, or otherwise not enforcing the contract with SECL, in both cases the consequences ought to be on NPL. NPL cannot retain the additional charges recovered by PSPCL and not enforce the contract with SECL. Further, the reconciliation is also required for treatment of taxes, royalties and other levies based on debit and credit notes raised by NPL arising out of the third-party analysis of quality of coal reports. It is seen that while additional taxes and royalties have been raised by SECL or any other subsidiary of CIL in case of debit note, such refund/adjustment of proportionate taxes or royalties has not been included in the credit notes. As a result, the taxes and royalties that have been claimed by NPL from PSPCL as part of energy charges, is in excess of actual tax and royalties that are payable by NPL to SECL. PSPCL cannot be made to suffer for any omission on the part of NPL to claim refund/adjustment towards actual taxes and royalties where the quality of coal is lower than that which has been indicated in the SECL invoices. In

certain cases of credit note even GST amount has not been reimbursed by the coal company, which is generally reimbursed. Further, NPL has also not provided the proof of payments made by NPL to the washery, the transporter of coal under RCR mode, the procurement of imported coal etc and PSPCL has submitted the copies of communications dated, 05/07/2019, 22/07/2019, 03/10/2019, 07/02/2020, 17/02/2020, 14/10/2020. It is in the above facts and circumstances that PSPCL has been constrained to file the present petition seeking adjudication of the disputes and differences between the parties under the PPA in relation to the charges claimed by NPL.

2.5 That PSPCL has paid the invoices for energy charges as claimed by NPL, without prejudice to its rights for such adjudication of disputes. Further, considering the discrepancies in the charges being claimed by NPL, PSPCL has worked out the energy charges from the FY 2014-15 to FY 2020-21 and submitted the computation sheets on month wise basis, based on the details made available by NPL has submitted the amount recoverable from NPL on account of under loading charges from February 2020 to March 2021 and has also submitted the details in case of differential treatment of tax/levies with regard to debit note and credit note issued by the Coal Company. NPL is required to refund the excess energy charges collected from PSPCL together with late payment surcharge thereon as provided for in the PPA and PSPCL is also entitled to the refund of excess amounts paid for the period after 31/03/2021. PSPCL has prayed to:

- (a) Hold and direct that NPL is required to render due and correct accounts and details of washing of coal, the coal quality reports, details of coal rejects and disposal thereof, reconciliation details with the coal washery M/s Spectrum Coal and Power Limited, ACB

(India) Limited, Mahavir Coal Washeries Private Limited, Hind Energy and Coal Beneficiation India Ltd. , Phil Coal Beneficiation Pvt. Ltd, Pars Power and Coal Beneficiation Ltd., PHIL, Chhattisgarh Power and Coal Beneficiation Ltd, and to continue to provide the details in future;

- (b) Hold and direct that NPL is liable to refund a principal amount of Rs. 386.80 Crores as computed up to 31/03/2021 and such further amounts as found due on rendition of details and reconciliation towards the excess energy charges billed and recovered by NPL from PSPCL;
- (c) Hold and direct that NPL is liable to pay the Late Payment Surcharge on the principal amount payable in terms of prayer (b) above;
- (d) Hold and direct that NPL is required to refund amounts if any recovered after 31/03/2021 together with late payment surcharge thereon, on the same basis as the computation of the amount of Rs. 386.80 Crores up to 31/03/2021;
- (e) Award costs of the present proceedings in favour of the Petitioner and against NPL; and
- (f) Pass such other further order (s) as the Hon'ble Commission may deem just in the facts of the present case.

Submissions of NPL

3. NPL has submitted that petition filed by PSPCL is not maintainable and deserves to be dismissed *in limine*. The liabilities of PSPCL have already been decided by the Hon'ble Supreme Court vide Judgment dated 05.10.2017 passed in Civil Appeal No. 179 of 2017, Order dated 15.12.2017 passed in M.A No. 1562 of 2017 filed by PSPCL in Civil Appeal No. 179 of 2017, Order dated 07.08.2019 read with the correction order dated 03.09.2019 passed in contempt petition (Civil) No. 1277-78 of 2018, the

Order dated 25.11.2019 passed in M.A No. 2396-2397 of 2019 filed by PSPCL and finally closed vide Order dated 09.03.2021 passed by the Hon'ble Supreme Court in contempt petition No. 1174-1177 of 2019. The Hon'ble Supreme Court has already affirmed and closed the liability of PSPCL vis-à-vis the bills raised by NPL, payable since 2014, till the passing of the Final Order dated 09.03.2021 and the said position further gets ratified from the fact that while recording the contentions raised by PSPCL in the Final Order in relation to the issue of improvement of extent of GCV improvement, the Hon'ble Supreme Court directed PSPCL to pay the entire arrears as on the date of the Final Order, dated 09.03.2021. The direction in this regard is neither contingent upon nor subject to contentions of PSPCL. PSPCL has deliberately raised claims in relation to the same issues which stand settled by the Hon'ble Supreme Court. The Petition is nothing but a deliberate attempt by PSPCL to somehow reduce its liability that has already been decided upon and issue is closed by the Hon'ble Supreme Court.

- 3.1 That Articles 141 and 144 of the Constitution of India stipulate that judgments of the Hon'ble Supreme Court have the effect of law and such law declared by the Hon'ble Supreme Court shall be binding on all courts and that all civil and judicial authorities are required to act in aid of the Hon'ble Supreme Court. Therefore the aforementioned orders passed by the Hon'ble Supreme Court are binding on this Commission. PSPCL repeatedly raised these contentions before the Hon'ble Supreme Court that unless the issues pertaining to improvement in GCV of coal pursuant to washing and its co-relation to yield loss and corresponding ascertainment of GCV of rejects are determined, no payment in terms of the Hon'ble Supreme Court's Judgment can be made. However, PSPCL's assertions were adjudicated upon and rejected by the Hon'ble Supreme Court. The exact same contentions in effect are being sought to be raised before this

Commission in the Petition. Thus, entertaining the Petition will inevitably violate the finality of PSPCL's liability as concluded by the Hon'ble Supreme Court by virtue of the Judgments passed by the Hon'ble Supreme Court and in particular the Final Order dated 09.03.2021. NPL has relied upon in this regard on the judgment passed by the Hon'ble Supreme Court in case of Palitana Sugar Mills (P) Ltd. & Anr. v. State of Gujarat & Ors., reported as (2004) 12 SCC 645, Kalyan Chandra Sarkar v. Rajesh Ranjan Alias Pappu Yadav & Anr., reported as (2004) 7 SCC 528 and Supertech Limited v. Emerald Court Owner Resident Welfare Association and Others, in M.A. No. 1572 of 2021 in Civil Appeal No. 5041 of 2021.

- 3.2 That the same issues were also raised by PSPCL in its Affidavit in Reply dated 14.01.2020 to the Second Contempt Petition. During the pendency of the Second Contempt Petition, PSPCL filed various interim applications bearing I.A. No. 106244 of 2020 and I.A. No. 44294 of 2020, raising the same contentions before the Hon'ble Supreme Court. The same contentions are now being raised by PSPCL before the Commission by way of the present Petition. In fact, the conduct of PSPCL is evident from the fact that it has placed the very same expert opinion on record before the Commission as Annexure C to the Petition, which was sought to be placed by it before the Hon'ble Supreme Court by way of I.A. No. 44294 of 2020. The Hon'ble Supreme Court vide order dated 09.03.2021 has categorically held that the orders passed by it have not been complied with by PSPCL and thus, PSPCL was held to be in contempt of the same. However, PSPCL has raised the same issues in the present petition.
- 3.3 That the claims raised by PSPCL are barred in terms of the doctrine of res-judicata and constructive res-judicata. In terms of the settled proposition of law, the doctrine of res-judicata and constructive res-judicata and principles analogous to Section 11 (Explanation IV) of the Code of Civil Procedure, 1908, PSPCL was required to raise all such grounds of defence which might

and ought to have been raised, at the very first round of litigation before this Commission. PSPCL failed to raise the issues that are now being raised by it by way of the Petition, at the time of the pendency of the Petition No. 52 of 2014 before this Commission or even before the Hon'ble Appellate Tribunal for Electricity in Appeal No. 64 of 2016. PSPCL has taken the conscious decision of only raising the defence that NPL was not entitled to washing charges. NPL has relied in this regard on the judgment dated 05.05.1978 passed by the Hon'ble Supreme Court of India in case of Workmen of Cochin Port Trust vs. Board of Trustees of The Cochin Port Trust and Ors, (1978) 3 SCC 119 and judgment dated 05.10.2021 passed in Civil Appeal no. 4557 of 2012 titled as Dipali Biswas & Ors. v. Nirmalendu Mukherjee & Ors. PSPCL chose to raise the said claims for the first time before the Hon'ble Supreme Court, after passing of the judgment dated 05.10.2017. No party can be permitted to take undue advantage of its own wrong. NPL has relied in this regard on the judgment passed by the Hon'ble Supreme Court in case of Kushehwar Prasad Singh Vs State of Bihar reported as (2007) 11 SCC 447. Thus, the Commission should not allow PSPCL to raise claims that have been consciously relinquished by it.

- 3.4 That the claims raised in the petition are also barred by limitation. Article 113 of the Schedule of the Limitation Act provides a limitation period of 3 (three) years from the date when the right to sue accrues. In the present case, the right to sue accrued from the date on which there was an alleged discrepancy in the Energy Charges being claimed by NPL in its very first monthly bill, i.e. on 20.02.2014. However, the Petition has been filed before this Hon'ble Commission as late as July 2021 and is therefore, grossly time barred. The Petition is thus liable to be dismissed in limine. NPL has relied in this regard on the judgments dated 16.10.2015 passed by the Hon'ble Supreme Court in case of A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., reported as (2016) 3 SCC 468.

- 3.5 That the very basis of the claims raised by PSPCL is flawed and erroneous. PSPCL has placed reliance upon the Ministry of Coal, Government of India's Notification bearing number F. No. CCT-13011/3/2007-CA-I (Vol-III) dated 27.05.2021 to allege that there are substantial discrepancies in the data submitted by NPL. Further, it is this Notification that is very basis for the calculation of the claims raised by PSPCL. The Notification, which was issued only on 27.05.2021, cannot be applied retrospectively. The Notification is applicable prospectively as there is no intention of the legislature to give it a retrospective effect and it has been issued without expressly specifying that the same will be applicable retrospectively. In support NPL has cited the judgment dated 01.09.2020 passed by the Hon'ble Supreme Court in case of L.R. Brothers Indo Flora Ltd v. Commissioner of Central Excise; 2020 SCC On Line SC 705.
- 3.6 That the Hon'ble Supreme Court vide its Order dated 09.03.2021, has permitted PSPCL to raise disputes for the future period only. Upon perusal of the said order, it is clear that PSPCL can only raise future disputes, i.e., for the period beyond after 09.03.2021. However, PSPCL by way of the Petition has sought payment from Financial Year 2014-2015, till date even though the same has been expressly barred in terms of the Order dated 09.03.2021.
- 3.7 The malafide conduct of PSPCL is apparent from the glaring inconsistencies in the stand taken by PSPCL before various fora, *inter alia* including:
- (i) The stand taken by PSPCL is completely contrary to its own admissions on oath, recorded at para 6.3 of this Commission's order dated 24.12.2019 passed in Petition No. 25 of 2019, wherein PSPCL has *inter*

alia admitted that "...Further any adjustments of under loading/ over loading charges and treatment of rebate for reject is coal being done a per terms & conditions of washery contracts/POs while paying washing charges to NPL.

- (ii) PSPCL has filed its Reply dated 20.10.2018 in Contempt Petition No.1766-67 of 2018 filed by Talwandi Sabo Power Limited before the Hon'ble Supreme. It has been categorically admitted that *"I say that unlike Nabha Power Limited, the full data regarding the washing of coal was given namely as regards the quantum of coal and the amount payable by PSPCL to NPL for washing cost of coal has been duly determined and paid including the surface transportation charges.* However, despite such categorical admission on oath before the Hon'ble Supreme Court, PSPCL is taking a completely contradictory stand before the Commission.
- (iii) In its written submissions filed before the Commission in Petition No. 31 of 2014 *vide* letter dated 14.11.2014, PSPCL took the stand that *"....it is submitted that eGCV is the equilibrated GCV at standard conditions of relative humidity of 60% and temperature of 40 degree centigrade when maintained for minimum 72 hours whereas GCV on 'As Received Basis' takes into account all the moisture present."* The same has been recorded in the order dated 23.11.2015 passed by this Commission in Petition No. 31 of 2014. However, by way of its letter dated 12.12.2017 addressed to NPL, PSPCL took a complete volte face and alleged that *"The measurement of GCV 'as received' relates to the place where the GCV is measured. TM GCV basis or E-GCV basis is the methodology to be adopted for measurement of GCV."*

- 3.8 That the judgments of the Hon'ble Supreme Court are to bring a quietus and a finality to a dispute. However, PSPCL seems to be intent on reopening even those issues which have attained finality.

Reply filed by PSPCL to the Preliminary Objections filed by NPL.

4. PSPCL filed reply to the preliminary objections on maintainability of the petition filed by NPL. PSPCL reiterating its earlier submissions made in the petition and has further submitted that the preliminary objections raised by NPL are grossly misconceived, devoid of any merit and are not maintainable both in law and on the facts of the present case. The entire attempt on the part of NPL is only to avoid producing the details and information sought by PSPCL which are required for verifying and determining the adjustment to be given by NPL in regard to the issues referred to in the present Petition. NPL is raising issues in an attempt to cover-up its own failure to duly account for the advantages it had secured in handling coal and make undue profits by diverting the coal made available under the coal linkage and also not enforcing the terms of the contract entered into with the coal washery. The claims of PSPCL had arisen upon the decision by the Hon'ble Supreme Court that PSPCL is required to pay to NPL the washing charges and also the coal charges on the GCV as measured at the site of the power plant and on "as received" basis. Prior to the said decision of the Hon'ble Supreme Court and as per the decision of the Commission and the Hon'ble Appellate Tribunal, PSPCL was only liable to pay the price of coal as per the coal supplied by the coal companies at the mine end and in addition thereto the transportation charges through railways and loading and unloading charges.

- 4.1 PSPCL has brought out in the petition suppression of details and data in regard to the washing of coal, the failure to provide the reconciliation exercise and also the diversion of coal evidently camouflaged as coal rejects by NPL. The attempt on the part of NPL to avoid providing the said information clearly reinforces the apprehension of PSPCL that NPL has not accounted for the monetary benefit and advantage it had derived while undertaking the activities of washing of coal and transportation thereof.
- 4.2 PSPCL relying upon the judgment dated 18/10/2012 passed by the Hon'ble Supreme Court in case of PTC India Limited v. Gujarat Electricity Regulatory Commission_has submitted that the Hon'ble Supreme Court has issued specific directions to the Regulatory Commissions under the Electricity Act, 2003 that the Regulatory Commissions are mandated to decide together all issues arising in the petition and not deal with issues of maintainability and jurisdiction separately. It is surprising that NPL, while specifically relying on Article 141 of the Constitution of India which lays down that decisions of the Hon'ble Supreme Court shall be binding on all, is seeking from this Hon'ble Commission to not follow the above law laid down by the Hon'ble Supreme Court and to entertain preliminary objections to be decided separately.
- 4.3 NPL is seeking to apply the principles under the Code of Civil Procedure, 1908. The Commission is not bound by the provisions of the Code of Civil Procedure, 1908. In fact, the Commission is required to follow the provisions of the Code of Civil Procedure, 1908, only in relation to the matters falling under Section 94(1) of the Electricity Act, 2003. In any event, the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 are restrictive in nature inasmuch as that a plaint can be considered on preliminary aspects for rejection only on limited grounds. Further, Order XIV Rule 2 of the Civil Procedures Code, 1908 provides for all issues to be tried together except in regard to very limited exceptions.

4.4 The Petition filed by PSPCL clearly discloses the cause of action. The same was also raised in the proceedings before the Hon'ble Supreme Court. There was no dismissal of such claim of PSPCL by the Hon'ble Supreme Court while deciding the other matters in favour of NPL in the said proceedings. Hon'ble Supreme Court considered it to be in the nature of a fresh dispute. In terms of Order XIV Rule 2 of the Code of Civil Procedures, 1908, it has been provided as under:

“2. Court to pronounce judgment on all issues.—

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to— (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

In the present case there is no issue on the jurisdiction of the Commission and there is no bar created by any law for the time being in force. The issue of limitation, res-judicata etc. alleged by the NPL are both questions of facts and law are not issues of the preliminary nature that can be decided at the preliminary stage. In view of the above, the contentions raised by the NPL are without any merits and are liable to be rejected.

4.5 That the preliminary objection on the maintainability of the plaint is to be decided based on what is stated in the plaint, and not based on what the respondent/defendant states as a defence to the suit. Further, such preliminary objection or maintainability is to be determined on the basis what is stated in the suit which is prima-facie considered to be correct. It is not permissible for the defendant to dispute the contents of the suit and

seek the dismissal of the suit on the issue of maintainability. This is the well-settled principle of law. PSPCL has relied in this regard on the judgment in case of Soumitra Kumar Sen v. Shyamal Kumar Sen, (2018) 5 SCC 644.

- 4.6 PSPCL has specifically stated that it does not dispute the principles to be followed in terms of the decision of the Hon'ble Supreme Court, namely that washing charges are required to be paid to NPL, the washing charges also include the yield loss of coal on account of washing of coal and that the GCV of coal is to be taken as-received at the project site and on total moisture basis. No such dispute can possibly be raised again by PSPCL once the principles have been settled by the Hon'ble Supreme Court based on the interpretation of the terms of the PPA. PSPCL therefore is not reagitating any issue which has been settled by the various decisions of the Hon'ble Supreme Court. The allegations made by NPL in this regard have been an attempt to confuse the issue without there being any merit in the same.
- 4.7 NPL's contention that PSPCL *cannot open the chapters which have been closed* applies not only in respect of the issues that have been raised by PSPCL but also points to the time period for which the issues have been raised. NPL by the above averments itself admits that certain issues which may have not been settled should also not be examined by the Commission. Further, in para 49 of the preliminary objections, it is specifically the case of NPL that PSPCL has failed to raise the issues now raised in the petition earlier, during the 1st round of litigation before the Commission, before the Hon'ble Appellate Tribunal and that these were raised for the 1st time only before the Hon'ble Supreme Court after the passing of the judgment dated 05/10/2017. Thus, NPL has cited

constructive res-judicata as a reason to challenge deny maintainability. This being the case, NPL itself admits that the issue which is now being raised were not before the Commission, Hon'ble Appellate Tribunal or the Hon'ble Supreme Court prior to the passing of the judgment dated 05/10/2017. Further, in Para 50, NPL states that PSPCL ought not to be permitted to raise contentions, which PSPCL failed to raise in the previous proceedings and is raising only after judgment of the Hon'ble Supreme Court and its subsequent orders. This itself establishes that these issues being raised now were not subject matter in the previous proceedings. Whether PSPCL's contentions are justified or not are subject to the final adjudication by this Commission. However the present petition has been demonstrated to be maintainable by the very contentions of NPL raised in the preliminary objections.

- 4.8 That it is not even the case of NPL that the discrepancies in the data have been explained in any of the proceedings. It is also not the case of NPL that it has provided the data on reconciliation exercises carried out with the coal washeries. It is also not the case of NPL that PSPCL is not entitled to the data as sought by PSPCL. The issues that arise in the present petition cannot be adjudicated upon without examination of the factual records and the nature of coal rejects claimed by NPL. The present petition not only relates to past period where the issues of coal diversion and coal rejects (based on the records presently available) and discrepancies in the data made available by NPL is in issue, but also affects the ongoing obligations of the parties and performance of the PPA. NPL cannot take the position that it is entitled to divert good quality coal as coal rejects and deny the production of data including the reconciliation exercise carried out with the coal washeries for all times to come. The other contentions of NPL raised on the issue of *res judicata* and constructive *res judicata* are also

completely misconceived and do not arise for consideration on the issue of maintainability of the present petition. PSPCL relying on the judgment in case of Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58 has submitted that It is a well-settled principle of law that the principle of *res judicata* (and naturally constructive *res judicata*) are mixed questions of fact and law. The contentions raised by PSPCL are only to avoid the data which would show that NPL has been diverting good quality coal as coal rejects.

- 4.9 The contentions of NPL that the claims of PSPCL are barred by limitation are also misconceived and liable to be rejected. Such contentions in any case do not arise at the stage of maintainability of the petition. It is a well-settled principle of law that limitation is a mixed question of fact and law. Further, the said objection on the part of NPL itself establishes the maintainability of the present petition, as the claims of PSPCL are not only related to the data and discrepancy for the past period, but also on an ongoing basis.

Rejoinder/Rebuttal submissions on behalf of NPL.

5. NPL filed its rebuttal submissions to the reply filed by PSPCL on the maintainability of the petition raised by NPL. NPL reiterating its earlier submissions has further submitted that the Hon'ble Supreme Court recorded PSPCL's contentions in the Order dated 09.03.2021 and observed that **if** the disputes raised by PSPCL are fresh disputes, PSPCL is not precluded from raising all **future** disputes. The disputes raised by PSPCL by way of the present Petition are not "fresh disputes" as these issues were repeatedly raised by PSPCL before the Hon'ble Supreme Court and were rejected. Further, it was PSPCL's contention during the course of arguments before the Commission that "Future Disputes" as

mentioned in paragraph 14 of the Order does not mean disputes arising between the parties post 09.03.2021 but any dispute between the parties other than the issues covered in paragraph 1(a) to 1(d) of the Order dated 09.03.2021.

5.1 The Hon'ble Supreme Court's observation that "insofar as the liabilities of the respondents to the appellants arising from the judgment are concerned, the matter stands closed in terms of our judgment dated 05.10.2017 and orders passed on the applications from time to time" is to be read in the context of the Hon'ble Supreme Court's decision in paragraph 11 of the order dated 09.03.2021, whereby imprimatur has been granted to the arrears as on 09.03.2021. NPL has submitted that judgment dated 09.03.2021 passed by the Hon'ble Supreme Court has to be read as a whole and has relied in this regard on the judgment in P.S. Sathappan (Dead) by LRS. v. Andhra Bank Ltd. & Ors., reported as (2004) 11 SCC 672 and Susme Builders Pvt. Ltd. vs. Chief Executive Officer, Slum Rehabilitation Authority & Ors. (2018) 2 SCC 230. The Hon'ble Supreme Court vide order dated 09.03.2021 has issued an imprimatur to the arrears as on 09.03.2021 i.e authorised and approved by the Court and the issue of the amounts payable by PSPCL to NPL upto 09.03.2021 stands closed. NPL has relied in this regard on the decision passed by the Hon'ble Supreme Court in case of Rama Narang v. Ramesh Narang, reported as (2006) 11 SCC 114 . Moreover, the issues raised by PSPCL in the petition have already been rejected by the Hon'ble Supreme Court and PSPCL cannot be permitted to do indirectly which it was prohibited from doing directly and the petition deserves to be dismissed in limini.

5.2 PSPCL's contention that prior to interpretation of the PPA by Hon'ble Supreme Court vide its Judgment dated 05.10.2017 there was no

occasion or relevance for PSPCL to raise the present issues is entirely erroneous and misconceived. If PSPCL's contention is accepted then there would be no finality to any litigation as a litigant would first defend a claim on one ground and upon being unsuccessful, relitigate the same issue by raising another ground of defense. The petition is liable to be dismissed at the admission stage and NPL has relied in this regard on the judgments in case of *M. Nagabhushana v. State of Karnataka & Ors.* (2011) 3 SCC 408, *Commissioner of Income Tax, Bombay v. T.P. Kumaran* (1996) 10 SCC 561, *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra* (1990) 2 SCC 715, *Abdul Rahman v. Prasony Bhai & Anr.*, reported as (2003) 1 SCC 488, *Jamia Masjid v. K.V. Rudrappa* (2021) SCC On Line SC 792 and judgment dated 22.08.2014 in Appeal No. 279/2013 "*Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission and Ors.*

5.3 With reference to the submission of PSPCL that the maintainability of the petition should be decided alongwith merits, NPL has submitted that Order XIV Rule 2 of CPC clearly stipulates that a bar to be suit created by any law from the time being in force can be decided as a preliminary issue. NPL has relied in this regard on the judgment dated 11.10.2018 passed by the Hon'ble APTEL in case of *Punjab State Power Corporation Limited v. Everest Power Private Limited & Ors.* and judgment dated 22.08.2014 in Appeal No. 279/2013 titled *Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission & Ors.*

5.4 The allegation of diversion of coal under the garb of rejects is completely based on conjectures and surmises. PSPCL has failed to substantiate any of its allegations against NPL and therefore, the Petition deserves to be dismissed in limini and NPL has placed reliance on the following.

- (i) Coal washing is a process of physically separating lower ash content pieces of coal (product) from higher ash content pieces of coal and impurities (rejects). The effectiveness of washing depends on inherent characteristics, i.e., washability characteristics of coal. Improvement in GCV is a resultant effect and not a fixed percentage as is being claimed by PSPCL.
- (ii) There is no established formula/study based on which improvement in GCV of washed coal can be definitely co-related/predicted with the percentage of yield loss. There is no benchmark issued by any such organization (namely CIMFR, CMPDIL, ISM, etc.) which establishes a definitive co-relation between the three parameters namely - increase in the GCV of washed coal, GCV of unwashed coal and yield.
- (iii) PSPCL has itself admitted the futility of mathematically correlating various parameters before the Commission during adjudication of Petition 66 of 2012.

Observations and Decision of the Commission.

6.0 The Commission has examined the prayer made in the petition as well as the preliminary objections raised by the respondents on the maintainability of the same and reply thereto by the petitioner. The present petition has been preferred by PSPCL for seeking adjudication of its dispute under the PPA dated 18.01.2010 regarding the computation of the energy charges claimed by the respondent NPL. However, NPL has raised objections to the maintainability/ admission of the petition with the contention that the Hon'ble

Supreme Court has already affirmed and closed the liability of PSPCL vis-a-vis the bills raised by NPL payable since 2014 till the passing of the Order dated 09.03.2021; the claims raised by PSPCL are barred by the doctrine of res-judicata/constructive res-judicata as well as the Limitation Act. Learned Senior Counsel for NPL has emphasized that Hon'ble Supreme Court judgments are a law under Article 141 and all courts in the country are obligated to follow and implement such law under Article 144 of the Constitution of India. NPL has asserted that it is a settled law that if issues of res-judicata are raised at the threshold, it should be decided as a preliminary issue.

However, PSPCL's plea is that the issues raised in this petition have not been decided by the Hon'ble Supreme Court in the Order dated 05.10.2017 or any subsequent Order; PSPCL does not dispute the principles to be followed in terms of the decision of Hon'ble Supreme Court and it has duly paid the entire amount along with interest as per the Order dated 09.03.2021 within the specified timeline. The present issue is with respect to the discrepancies in the details and the records required to be maintained/provided by NPL for quantification of the washing charges and computation of energy charges. PSPCL has also pleaded that the Regulatory Commissions are mandated to decide all issues arising in the petition in totality and not deal with issues of maintainability and jurisdiction separately.

In view of the important issue of law involving the principle of res-judicata/constructive res-judicata at the preliminary stage of admission of the petition questioning its maintainability, the Commission decides to first examine the same. Although there have been substantial arguments made before the Commission by both sides on the merits of the case, these are to

be addressed at a later stage in case it is decided that the present petition is maintainable.

The Commission refers to the relevant Section 11 of the Code of Civil Procedure 1908 regarding doctrine of res-judicata as well as constructive res-judicata, which stipulates as under.

“..No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-- The expression former suit shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation II.-- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-- Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.-- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .

1[Explanation VII.-- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

Thus, the only core issue to be determined at this stage is whether the Hon’ble Supreme Court judgments have already adjudicated upon and decided the matter as professed by the objecting respondent, or whether it is a fresh dispute in the light of the Hon’ble Supreme Court judgment dated 09.03.2021 as claimed by PSPCL. The Commission refers to the para 13 & 14 of the Hon’ble Supreme Court judgment dated 09.03.2021 in Contempt Petitions No. 1174-1177/2019 in Civil Appeal No. 179/2017, which both contesting sides have quoted to support their assertions:

“

13. *The last aspect which arises for consideration is a plea which was sought to be advanced on behalf of the respondents that in their perspective, there is some problem arising from the records maintained for the GCV unwashed coal and the washed coal as according to them the reject worked out more and their apprehension is that unrealistically the GCV is being varied to cause larger financial commitments from the respondents. What they seek to contend as per the note is that the discrepancy in terms of yield loss and quality of washed coal usually happens when good quality of coal is diverted under the garb of rejects in the washing process which should have been used for generation of power and this in turn raises the issue of mismatch of GCV. On perusal and calling for certain datas, it is a view of the respondents that their apprehension is not without merit. It is thus their submission that having found this aspect, the respondents cannot be left remedy less as it is a dispute which needs adjudication for which the relevant authority is the SERC and they seek to invoke the jurisdiction of the forum for the said purpose for which notice has been issued.*

14. *We have examined the aforesaid plea and it is our view that insofar as the liabilities of the respondents to the appellants arising from the judgment are concerned, the matter stands closed in terms of our judgment dated 05.10.2017 and orders passed on the applications from time to time. What is said to be raised is really in the nature of a fresh dispute. If that be the position, we have not precluded the respondents from raising all future disputes as we were concerned with adjudication of certain aspects where we accepted part of the claims of the appellants and rejected part of the claims of the appellants. In our view, it will be for the authority to*

consider whether any of the claims sought to be preferred by the respondents can really be open to any fresh adjudication in view of the judgment rendered by us and the orders passed by us referred to aforesaid. We make it clear that the liberty to approach the SERC arises from the contract itself but that certainly cannot open the chapters which have been closed and that would be taken care of by the SERC while adjudicating the claim now sought to be raised by the respondents.

.....

18. Needless to say, we have not expressed any view on the merits of the disputes raised by the respondents as the occasion for the same has not arisen.”

From the bare reading of the aforesaid Hon'ble Supreme Court judgment dated 09.03.2021, it is apparent that the Hon'ble Court while closing the proceedings in terms of its judgment dated 05.10.2017, has referred to the issues raised by PSPCL as "really in the nature of a fresh dispute". Further, while not choosing to express any view on the merits of the disputes raised by PSPCL, the Hon'ble Court has clarified that "if that be the position" it will be for the Regulatory Authority to consider whether any of the claims sought to be preferred by PSPCL can really be open to any fresh adjudication in view of the judgment/orders rendered/ passed by it. Although an emphasis has been laid by the objecting respondents NPL on the word 'future' in para 14 of the Hon'ble Supreme Court judgment reproduced above to suggest that all past chapters are closed and only matters relating to any future dispute after the judgment date 09.03.2021 can be considered by PSERC, the Commission considers this inference to be erroneous since the perusal of the entire para of the Hon'ble Supreme Court judgment indicates that the issue raised by PSPCL relating to NPL not furnishing the requisite information/details for reconciliation of the invoices/bills has been referred to as "in the nature of a fresh dispute" and no view on the merits of the same has been expressed by the Hon'ble Supreme Court. The Hon'ble Supreme Court has in effect, directed that the liberty to approach SERC arises from the contract itself. PSERC would be expected to examine and weigh the issue in the petition, consider the data/evidence and hear the arguments to arrive at a conclusion whether it is a fresh dispute or not, while keeping in mind all the Hon'ble Supreme Court judgments to ensure that an already decided issue is not reopened. Therefore, the contention of NPL, that the dispute raised by PSPCL in the present petition is already

decided by the Hon'ble Supreme Court and is thus barred by the principle of res-judicata and constructive res-judicata, is not tenable at this juncture. Being a question of fact and law, the same would be decided after the examining the record by the Commission.

6.1 Whether the claim of the petitioner is barred by Article 113 of the Limitation Act ?

NPL has contended that the petition filed by PSPCL is time barred as per the Limitation Act, whereas, PSPCL's plea is that there was no occasion for PSPCL to raise this dispute earlier as it was not paying the washing charges at all and the Commission as well as Hon'ble APTEL had also held in its favour that no washing charges are payable. However, after it was decided by the Hon'ble Supreme Court that PSPCL is liable to pay the washing charges to NPL, the issue of computation of its liability and requirement of necessary information and details for reconciliation of invoices and bills in this regard arose and PSPCL raised the said aspects before the Hon'ble Supreme Court in various Miscellaneous Applications after the Order dated 05.10.2017. PSPCL also sought the requisite details from NPL vide letters dated 05.07.2019, 22.07.2019, 07.02.2020, 06.04.2020 and issued the default procurement notice on 14.10.2020, but to no avail.

The Commission observes that PSPCL had raised the issue of problems arising from the records maintained for the GCV of unwashed coal and the washed coal and the discrepancy in terms of yield loss and quality of washed coal in the Hon'ble Supreme Court through miscellaneous applications which were dismissed. However, the issue was finally discussed and decided in the later Order of the Hon'ble

Supreme Court in judgment dated 09.03.2021, where, without expressing any view on the merits of the same and observing that the issue raised in it is really in the nature of fresh dispute it was left to the Regulatory Authority to consider whether any of the claims sought to be preferred can really be open to any fresh adjudication keeping in view the judgments rendered by the Hon'ble Supreme Court. Thus the Commission is of the view that the contention of the NPL that the claim of the petitioner is barred by the Limitation Act is not tenable. The limitation period is to be considered from the date of the final judgment of the Hon'ble Supreme Court dated 09.03.2021. Since the Commission needs to examine the details before determining the outcome of the dispute as directed by the Supreme Court, the Commission considers it to be maintainable and admits the petition.

The matter is fixed for hearing on 27.04.2022 at 11.00 AM.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Anjuli Chandra)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: **06.04.2022**