PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 57 of 2022
&
58 of 2022
Date of Order: 18.01.2023

Petition under Section 86 (1) (b) & (f) of the Electricity Act, 2003 regarding deployment of CSIR-CIMFR to undertake sampling and analysis of coal received at the project site of Talwandi Sabo Power Limited, the Respondent herein.

And

In the matter of: Punjab State Power Corporation Limited (PSPCL), Shakti – Vihar, PSPCL, Patiala - 147001

....Petitioner

Versus

Talwandi Sabo Power Limited, Mansa- Village Banawala, Distt. Mansa, Punjab - 151302

....Respondent

And

Petition No. 58 of 2022

Petition under Section 86 (1) (b) & (f) of the Electricity Act, 2003 regarding deployment of CSIR-CIMFR to undertake sampling and analysis of coal received at the project site of Nabha Power Limited, the Respondent herein.

In the matter of: Punjab State Power Corporation Limited (PSPCL), Shakti – Vihar, PSPCL, Patiala - 147001

....Petitioner

Versus

Nabha Power Limited, P.O. Box No. 28, Nalash Village, Distt. Patiala, Rajpura, Punjab, 140401.

....Respondent

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

ORDER

1. The above two petitions filed by PSPCL have a common issue and were taken up together for hearing on admission. After hearing the Ld. Counsel for the petitioner and the respondents on 07.12.2022, Order was reserved. PSPCL has filed the subject cited petitions seeking directions to engage the Council of Scientific and Industrial Research-Central Institute for Mining and Fuel Research (CSIR-CIMFR) to carry out the sampling and analysis of the coal received at the project site of the respondents. The Ld. Counsel for the petitioner submitted that such directions have become necessary since there has been a consistent degradation in the coal quality received at the project site leading to a substantial increase in the tariff being paid by PSPCL to the respondents and ultimately the consumers at large. The respondents are required to take up the issue with the coal suppliers MCL & CIL to obtain credit for the poor quality of coal received which is to be passed on to PSPCL as only actual cost of coal received at the site is to be paid to the respondent companies. Since the testing at the receiving site is being done by a joint team of PSPCL and the respondents, the results are not accepted by the coal supplier companies resulting in substantial overpayment for the coal received. The joint sampling being carried out is not meeting the objective and is resulting in substantial extra cost and loss to PSPCL. The Ld. Counsel further submitted that PSPCL is not contesting the earlier orders of the Commission, APTEL and the Hon'ble Supreme Court however, none of those orders stipulate that full payment has to be made for inferior coal supplied by coal companies. The respondents can claim compensation from MCL/CIL for such inferior supplies which would have no adverse impact on TSPL/NPL but would result in reduced costs for PSPCL and

finally the consumer in reduced tariff. PSPCL has filed the present petitions so that a common, independent third party CSIR–CIMFR could be deputed to undertake coal testing at the receiving site in order to obtain accurate results which the coal companies would be obliged to accept.

2. The Ld. Counsel for the respondents stated that the joint sampling and testing of coal carried out at the receiving site is based on an agreed condition approved by the Commission vide Order dated 19.02.2014 in petition No. 57 of 2013 (NPL) and Order dated 11.02.2014 in Petition No 60 of 2013 (TSPL) which have attained finality. If PSPCL has now to seek any change then it needs to approach APTEL/Supreme Court again. The petition has been filed u/s 86 (1) (f) and no dispute qua the respondents has been raised as per the definition and dispute resolution sections of the PPA. PSPCL has no locus to come before the Commission and the petition is barred by limitation. Further, relief sought by PSPCL cannot be granted by the commission in light of the judgments passed by the Hon'ble APTEL and the Supreme Court and therefore the petition automatically becomes infructuous. Moreover, the sampling and testing is being done in the presence of PSPCL's team and the price of coal is paid as tested at the loading side so the testing by CSIR –CIMFR at the generation site will have no substantial benefit.

Observations and Decision of the Commission

3. The Commission has examined the submissions made by the parties. PSPCL filed the present petition for seeking directions to engage CSIR-CIMFR to carry out the sampling and analysis of the coal received at the project site of the respondents. The respondents have opposed the relief claimed by the petitioner and have submitted that the petition is not maintainable as the issue relating to sampling and testing of coal at the

unloading end has already been settled vide Order dated 19.02.2014 and 11.02.2014 passed by the Commission in petition No. 57 of 2013 and 60 of 2013 respectively which have attained finality and the petition is hit by issue estoppel and suffers from delay and latches and is barred by limitation. The respondents further submitted that even the FSA contains no provision for sampling and analysis of coal at the unloading end. The main objection raised by the respondents is that the testing of coal at the unloading end has been decided by the Commission vide Order dated 11.02.2014 and 19.02.2014 which is upheld by the Hon'ble APTEL and noticed by the Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 and so the petition is barred by the principal of issue estoppel.

Whether, the Order dated 11.02.2014 and 19.02.2014 passed by the Commission in petition No. 60 of 2013 and 57 of 2013 regarding testing of coal at the unloading has become final and the petition is barred by the principal of issue estoppel.

The Petitioner has filed the present petition seeking deployment of CSIR-CIMFR for undertaking sampling and analysis of coal received at the project site of the respondents. The issue relating to the sampling, analysis and testing of coal at the Power Plant end /unloading end stands already covered by this Commission's Order dated 11.02.2014 in Petition No. 60 of 2013 and Order dated 19.02.2014 in petition No. 57 of 2013. Sampling, analysis and testing is jointly done by the Petitioner and Respondents under an order of the Commission. The Commission vide above Orders had directed the parties to conduct the joint sampling and testing of coal at the unloading end and directed the Petitioner to permanently deploy its team at the said Power Plants for the purposes of conducting sampling and

testing of coal at the unloading end. The relevant portion of Orders is as under:

> "*36. Although under the Act, the Commission is not mandated to approve procurement of material yet taking a holistic view and considering that the competitive bidding process has been overseen by PSPCL and its representatives signed the technical and price bids opened on 15.10.2013 & 21.10.2013 respectively during bid opening, the Commission approves the competitive bidding process undertaken by TSPL for procurement of coal from alternative sources to operate the power plant as per terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of Unit-1 of the project on coal subject to the following terms & conditions and modalities for passing through cost of this coal:*
>
> *……..*
>
> ***(vi) Joint sampling and testing of coal 'as received' and 'as fired' shall be conducted and certified by TSPL and PSPCL. For this purpose, a PSPCL team shall be permanently posted at TSPL premises."***

In compliance of the aforementioned directions, the sampling and analysis of coal at the said Power Plant/unloading end is being conducted jointly by the Petitioner and Respondent. As per the version of the respondents a coal laboratory has been set up at the power plant site/unloading end for conducting the joint sampling and analysis of coal which is running smoothly and the petitioner is actively involved in the sampling and analysis of coal at the power plant site. The issue of sampling and testing at the unloading end has been finally decided and the petitioner is trying to reopen the whole issue by this present petition. The petitioners have not challenged the Orders passed by the

Commission in Appeal before the Hon'ble APTEL and the aforesaid Orders passed by the Commission have attained finality and are binding on the parties. The respondents have relied in this regard on the judgment passed by the Hon'ble Supreme Court in ***Premier Tyres Ltd. v. Kerala State Road Transport Corpn., 1993 Supp (2) SCC 146***, wherein it has been explained that non-filing of an Appeal qua any Order/Judgment would make such an Order/Judgment final and binding on parties. The relevant portion of the aforesaid decision is quoted below is as under:

> "*4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed.* ***The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from***."

The respondents have further relied on the judgment passed by the Hon'ble Supreme Court in case of ***Tatoba BhauSavagave v. Vasantrao Dhindiraj Deshpande, (2001) 8 SCC 501*****, which reads as under:**

> "*9. The first contention of Mr Lalit need not detain us. Firstly, the question of partition of lands of the joint family was found against the appellants in the first round of litigation by the Revenue Authorities. On 3-7-*

1979, in Special Civil Application No. 744 of 1975, the High Court held that by virtue of partition in 1944, the first respondent did not get any share in Survey No. 98 while his brothers got 1/3rd share each in Survey No. 99. The status of the joint family had come to an end and the shares of the members of the erstwhile joint family had been defined. Further, the High Court upheld the order of the Additional Commissioner that the first respondent was entitled to apply under Section 43-1B of the Act for possession of the 1/3rd share in Survey No. 99 and it was made clear that the order would be subject to the findings of the Collector on Issues 5 and 6. ***Thus, having confirmed the findings recorded by the Revenue Authorities the case was remanded to the Collector to decide Issues 5 and 6 which related to determination of the total land held by the first respondent and the extent of the land he would be entitled to resume. The appellants are now barred from agitating the same point by the principle of "issue estoppel". (See: Hope Plantations Ltd. v. Taluk Land Board [(1999) 5 SCC 590] .)*** *Secondly, when the Revenue Authorities concurrently found that there was partition of joint family lands by metes and bounds which was accepted by the High Court in the earlier round of litigation, this Court in its jurisdiction under Article 136 will not permit the appellants to agitate the concurrent findings of fact in proceedings after remand.*"

The respondents have further relied upon the judgment passed by the Hon'ble Supreme Court in case of ***Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787*** **as under:**

"*29. There is a distinction between "issue estoppel" and "res judicata". (See Thoday v. Thoday [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] .)*

30. ***Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.***

31. In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise*. In Thoday [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] Lord Diplock held: (All ER p. 352 B-D)*

> *"… 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment.… If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam." [Ed.: The rest of the extract from Thoday [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] may usefully be referred to (All ER p. 352, B-F)"Estoppel per rem judicatam is a generic term which in modern law includes two species. The first species, 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment, or for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim, 'nemo debet bis vexari pro una at eadem causa'. In this application of the maxim, causa bears its literal Latin meaning.* ***The second species, 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action Involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in***

order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was*.”]*

32. The said dicta was followed in Barber v. Staffordshire County Council [(1996) 2 All ER 748 (CA)] . ***A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion****. [See C. (A Minor) v. Hackney London Borough Council [(1996) 1 All ER 973 : (1996) 1 WLR 789 (CA)] .]*”

Further, the Hon’ble Supreme Court while responding to the contention of PSPCL that there is no such methodology of measuring the calorific value at the project site observed in para No. 68 of the Order dated 05.10.2017 in Civil Appeal No. 179 of 2017 as under:

> *“The Plea of the first respondent that there is no such methodology of measuring the calorific value at the project site is belied by the sample reports of different financial years filed by the appellant along with the synopsis, which itself referred to the joint sampling and testing of the coal received and is duly signed by both sides. It is surprising how such a bald denial was made despite the position existing at the side. These sample reports are for years 2014, 2015, 2016 and 2017”*

The Commission has examined the submissions made by the parties and is of the view that the issue relating to sampling, analysis and

testing of coal at the unloading end was decided in Petition No. 60 of 2013 and 57 of 2013 vide Order dated 11.02.2014 and 19.02.2014 respectively and the Commission directed the petitioner and the respondents to deploy their teams at the unloading end for joint testing and sampling of coal which has also been upheld by the Hon'ble APTEL vide Order dated 16.03.2016 in Appeal No. 68 of 2013. Even during the hearing of the petitions, the above position has not been contested by the petitioners and has been conceded. The petition has been filed on the ground that there would be benefit to the petitioners and thus to the consumers/public at large without any loss to the respondents.

No Appeal has been filed by PSPCL against the said orders and these findings cannot be reopened now in the present Petition and the present petitions filed by PSPCL are not maintainable. In fact, the petition does not raise any issue of dispute although it has been filed under Section 86 1 (f) of the Electricity Act 2003.

Accordingly, the petitions are not fit for admission and disposed of accordingly.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 18.01.2023