

**BEFORE THE HIMACHAL PRADESH ELECTRICITY
REGULATORY COMMISSION SHIMLA**

Petition No: 39 of 2023
Instituted on: 26.05.2023
Heard on: 25.09.2023
Decided on: 04.11.2023

CORAM

Devendra Kumar Sharma
CHAIRMAN

Yashwant Singh Chogal
MEMBER (Law)

Shashi Kant Joshi
MEMBER

In the matter of :

M/s Brua Hydrowatt Pvt. Ltd. through,
Sh. Anil Kumar Dogra (General Manager),
Plot No.2 Industrial Area, Baddi,
Distt. Solan, HP-173205.

..... **Petitioner**

Versus

1. The HP Power Transmission Corporation Limited through its,
Managing Director,
Himfed Bhawan, Panjari, Near ISBT,
Shimla, HP-171004.
2. The HP State Electricity Board Limited, through its
Chief Engineer (System Operation),
Vidyut Bhawan, Shimla, HP-171004.
3. The State of Himachal Pradesh through,
the Additional Chief Secretary (MPP & Power),
to the Govt. of Himachal Pradesh,
Shimla, HP-171002.

.....**Respondents**

Petition under Section 86 (1) (f) and other enabling provisions of the Electricity Act, 2003 read with Regulations 53, 68 & 70 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 for adjudication of a dispute qua the demand of Transmission Charges made by the Respondent No. 1 w.e.f. 04.06.2016 to 06.04.2023 for an amount of Rs. 4,21,03,978/- in terms of Interim Power Transmission Agreement dated 23.01.2016.

Present:

For the Petitioner: Sh. L.S. Mehta, Ld. Counsel.
For the Respondent No.1: Sh. Vikas Chauhan, Ld. Counsel

For the Respondent No.2: Sh. Kamlesh Saklani, Authorised Representative.
For the Respondent No.3: Sh. Shanti Swaroop, Ld. Legal Consultant.

ORDER

This Petition has been filed by M/s Brua Hydrowatt Private Limited, a Company incorporated and registered under the Companies Act, 1956 having its registered office at Plot No. 2, DIC, Industrial Area, Baddi, Distt. Solan, H.P. (Petitioner for short) through Sh. Anil Kumar Dogra, (General Manager), Authorised Representative under Section 86 (1) (f) of the Electricity Act, 2003 read with Regulations 53, 68 & 70 of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 for adjudication of a dispute qua demand of transmission charges made by the Himachal Pradesh Power Transmission Corporation Limited (HPPTCL/Respondent No. 1 for short) w.e.f. 04.06.2016 to 06.04.2023 for an amount of Rs. 4,21,03,978/- in terms of Interim Power Transmission Agreement dated 23.01.2016.

CASE OF THE PETITIONER

2. The Petitioner's case is that the Petitioner has set up a Small Hydro Project (9 MW) on Brua Khad, a tributary of Satluj River in District Kinnaur, HP, known as Brua Hydro Electric Project (Project for short) which has been synchronized with the Grid in February, 2016, and commissioned on 14.04.2016 and the power is being sold to the

Respondent No. 2 i.e. the Himachal Pradesh State Electricity Board Limited (HPSEBL/ Respondent No. 2 for short) under Long term Power Purchase Agreement (PPA for short).

3. According to the Petitioner, the Respondent No. 1 is obligated to ensure the development of an efficient, coordinated and economical system of Intra-state Transmission Lines for smooth flow of electricity from generating stations to the load centers and to provide non-discriminatory open access to its transmission system. The Respondent No. 2/HPSEBL is the Distribution Licensee whereas the Respondent No. 3 Government of HP has the responsibility to provide conducive policy frame work and to issue directions for the promotion, development and harness optimally the huge Hydro Potential in the State and also to coordinate/facilitate programs/policies for conservation of energy and its efficient use.

4. An Implementation Agreement (IA for short) (Annexure P-2) was signed on 25.07.2006 by M/s Contransys Private Ltd. with the Govt. of H.P. for setting up of Brua SHP (5MW). Subsequently, the name of the company was allowed to be changed to M/s Brua Hydrowatt Private Limited with transfer of all the assets and liabilities, rights, obligations and benefits arising out of the said IA.

5. The Petitioner has executed a long term PPA with the HPSEBL on 06.04.2009 (Annexure P-3) for sale/purchase of power from the project. Clause 2.2.44 of the PPA defines the interconnection point as under:

“,,,,,2.2.44“Interconnection Point” means the physical touch point, where the project line (s) and the allied equipment forming a part of the Interconnection Facilities are connected to the 22kV bus-bars on the 22 kV proposed control point (unnamed) Karcham, District Kinnaur H.P.”

6. The Petitioner vide letter dated 03.12.2010 intimated the HPSEBL that the interconnection point as per PPA is given at Karcham Sub-station and the Petitioner accordingly prepared land case for the Transmission line up to Karcham Sub-station and also got it approved from the HPSEBL. It was also intimated vide the aforesaid letter that the HPPTCL convened a meeting on 05.05.2010 resolving that the Brua SHP, Shaung and Raura-II SHP will evacuate their power at Urni (Karcham) at proposed 66 kV switching-yard in Joint mode and that due to the proposal of HPPTCL, the route of Transmission line has changed for which the Petitioner has deployed survey team to revise the Transmission route for acquiring the forest land and the HPPTCL was requested to confirm the Interconnection Point.

7. The HPSEBL in response to letter dated 03.12.2010 intimated the HPPTCL vide letter dated 16.12.2010 (Annexure P-4) that the Power Purchase Agreement in respect of the Project has already been executed

with Interconnection Point at 22 kV proposed control point at Karcham and the HPPTCL was requested by the HPSEBL to confirm the latest Interconnection Point in order to enable the parties to amend the PPA accordingly.

8. The HPSEBL vide letter dated 09.02.2011 (Annexure P-5) intimated the Petitioner that the latest Interconnection Point has been confirmed by the HPPTCL as "Power from Brua & Shaung HEP shall be evacuated in joint mode at 66 kV level upto 66/22 kV pooling station located at Kilba". The Petitioner was asked to submit the draft Supplementary Power Purchase Agreement (SPPA for short) after making required amendment in the IA and in response to the letter of the Petitioner dated 17.09.2011, the HPPTCL sent the Transmission plan and intimated the Petitioner vide letter dated 30.09.2011 (Annexure P-6) that the Project shall evacuate the power in joint mode with Shaung SHP through 66 kV line upto 66 kV proposed pooling station of HPPTCL at Urni.

9. Meanwhile, the capacity of the Project was enhanced to 9 MW and the revised IA was executed by the Petitioner with the Government of Himachal Pradesh (GoHP for short) on 23.09.2011 (Annexure P-7), wherein the interconnection point was defined in Clause 1.2.32 of the said IA as physical touch point at sub-station(s) of the Board/STU/CTU, where

the project's Transmission line for evacuating the power from the project is connected to the grid.

10. The Petitioner vide letter dated 04.07.2012 submitted an application for the grant of connectivity to the HPPTCL and the HPPTCL intimated the Petitioner in this regard vide letter dated 18.03.2013 (Annexure P-9). Meanwhile, the Petitioner executed an agreement dated 27.06.2012 (Annexure P-10) with M/s Darjeeling Power Ltd. for sharing the cost of joint evacuation system including interconnection facility. The HPPTCL vide letter dated 24.05.2014, sent minutes of 35th meeting of the STU Coordination Committee that the transmission Projects within the State are planned to be built under ADB loan in Tranche-II and the time line for completion of 66 kV GIS Switching Station at Urni and 66 kV Urni-Wangtoo D/C Line was scheduled in April 2015 (Annexure P11 Colly).

11. The Petitioner signed Connection Agreement dated 04.06.2014 (Annexure P-12) with the HPPTCL providing the interconnection facility at the connection point i.e. 66kV switching station Urni. Clause (C) of the Connection Agreement provides that in the case of a generating plant seeking connection to the electrical system not owned by the STU, a Tripartite Connection Agreement is required to be entered into between the STU, the Distribution Licensee and the Petitioner.

12. The Petitioner also executed an agreement dated 14.08.2015 (Annexure P-13) with M/s Darjeeling Power Ltd. for joint evacuation of

power and for nominating an Individual Power Producer (IPP for short) to sign the Operation and Maintenance (O&M for short) Agreement and sharing the charges.

13. The HPPTCL vide letter dated 04.12.2015 (Annexure P-14) intimated the Petitioner that the Urni Switching station shall be effective only on commissioning of Urni- Wangtoo 66 kV line and 66/220/400 kV Sub-station at Wangtoo which will take more time and in order to facilitate evacuation of power from the project, an interim arrangement has been envisaged by charging one of the 220 kV Kashang-Bhaba line circuits at 66 kV and allowing solid taping at 66 kV.

14. The Project of the Petitioner was ready for commissioning in the year 2015, but on account of non-availability of permanent evacuation facility at Urni switching station, the Petitioner informed the HPPTCL vide letter dated 31.12.2015 (Annexure P-15) that the Petitioner, Rala and Shaung SHPs have been authorized by the HPSEBL to construct a 66 kV feeder bay (at their own cost) at existing 66/22 kV Nathpa Sub-station of HPSEBL for interim evacuation arrangement of power from the aforesaid SHPs till commissioning of 400/220/66 kV Wangtoo Sub-station and that the construction work of 66 kV feeder bay has been completed and they intend to connect to circuit-II of Kashang Bhaba 220 kV D/C line at Tower No. 100 as per general arrangement drawing for connection /laying of 66 kV 1Cx400Sq.mm XLPE cable, with approved SLD of the said feeder

Bay. Further intimated that Shaung SHP is also ready for commissioning and will evacuate the power through the above interim arrangement and requested the HPPTCL for appropriate directions to the site authority to allow the SHPs to connect the cable with Tower No. 100 and to accord the permission for jointing the circuit-II of 66 kV cable at Tower No. 100 of Kashang-Bhaba 220 kV D/C Transmission line to enable them to commission the bay at the earliest and also requested that the circuit-II of the 220 kV D/C Kashang-Bhaba line may be cleared for charging from Tower No. 52 to Tower No. 100 so as to enable them to synchronize their power houses with the HPSEBL grid.

15. The Petitioner also made a detailed representation on 06.01.2016 (Annexure P-16) to HPPTCL regarding the proposed interim evacuation arrangement and unrealistic Transmission Charges of Rs. 80,591/- per MW/month demanded by the Respondent No. 1 for wheeling the power from T-52 to T-100 through one circuit of 220 kV Kashang-Bhaba Transmission line and that the HPPTCL has no right to levy such transmission charges as it is the responsibility of STU/HPPTCL to provide evacuation arrangement beyond Interconnection Point proposed at 66/220kV Urni Sub-station and any delay in commissioning the same is to be accounted for by the HPPTCL and the interim wheeling arrangement would be free of cost. As per the Petitioner, a sum of Rs. 2 Crore was already incurred by the Petitioner and other SHPs for constructing the

interim evacuation arrangement. It was also brought to the notice of the HPPTCL that the HPSEBL has restricted the load of individual IPP's to be interfaced at 66 kV Nathpa bay to around 9 MW for the 3 SHPs which will result in huge generation loss to the projects in particular and royalty in general to the GoHP. Not only this, the Projects have also incurred about Rs. 5 lakh on repairs of the Kashang-Bhaba D/C line to make the same ready for evacuation. Further the power from the Projects of the Petitioner and Shaung SHP is to be sold to the HPSEBL at proposed Urni Sub-station and the charges, if any, for wheeling the power from the Urni Sub-station to the Interconnection Point and at 66 kV feeder bay to 66/22 kV Nathpa Sub-station of HPSEBL may be borne by the HPSEBL.

16. The HPPTCL vide letter dated 06.01.2016 sent the Minutes of Meeting (MoM for short) of 42nd Meeting of STU held on 15.12.2015 (Annexure P-17 Colly) that the target of completion of 66 kV GIS Switching Station at Urni and 66 kV Urni-Wangtoo D/C Line has been revised to 31.12.2016.

17. The Petitioner signed the Tripartite Connection Agreement in respect of the Project with the HPPTCL and HPSEBL on 20.11.2015 (Annexure P-18).

18. It is also averred that the Petitioner also executed the Interim Power Transmission Agreement (IPTA for short) on 23.01.2016 (Annexure P-19) with the HPPTCL for Interim Power Transmission

pending commissioning of permanent interconnection facility at Urni. The relevant provisions of IPTA are reproduced as under:-

“ AND WHEREAS 66kV Switching sub-station at Urni and 66/220/400 kV Substation at Wangtoo are under construction and Shaung and Brua have not availed open access from HPPTCL and long term access applications are still to be filed if applicable.

- *AND WHEREAS as discussed in various STU Meetings, it has been decided to provide an interim arrangement for evacuation of the power generated by the Applicant till the commission of 66 kV switching substation at Urni, 66 kV line from Urni to Wangtoo and 66/220/400 kVSub Station at Wangtoo and physical connection of the applicant at Urni S/stn.*

- *(A) As an interim power transmission arrangement in national interest the HPPTCL has agreed to the connection of Brua (9 MW) in joint mode with Shaung (3 MW) HEP's at Tower No. 52 of one of the 220 kV Kashang-Bhabha D/C Transmission line and charging it at 66 kV.*

- *(B) Subsequently after commissioning of Bhoktoo sub-station if need be the Power shall be further transmitted at 66kV level to 22/66/220 kV sub-station of HPPTCL under construction at Bhoktoo. Stepped up at 220 kV and wheeled to 220 kV system of HPSEBL at Bhabha Power house.*

- *(C) This interim agreement is not in supersession of the connectivity agreement(CON-6) already executed between the Parties.*

- *(D) Monthly transmission tariff.*

- *(a) **The Interim Transmission charges shall be calculated @ 14 paise per unit of the energy wheeled including the O&M charges. The data /Quantum of the energy generated and transmitted for the purpose of calculation of the Interim Transmission Charges shall be as per the meter reading recorded at the Power House Meters installed. In case of faulty meters at Power Houses or if there is negative difference of consumption recorded at power house and at Nathpa /Bhoktoo, the energy shall be calculated on the basis of energy recorded at Nathpa /Bhoktoo.***

(emphasis added).

19. The Chief Engineer (System Operation), HPSEBL vide letter dated 25.06.2016 (Annexure P-20) intimated the Chief Engineer (ES) of the HPSEBL with regard to letter dated 30.04 2015 of the Chief Engineer (ES) vide which power from the project of the Petitioner, Shaung SHP (3 MW) and Rala (10 MW) was allowed to be evacuated @ 3 MW each upto the Interconnection Point and that Rala HEP is not going to be commissioned

upto April 2017, and for optimum utilization of Transmission line, the project of the Petitioner may be allowed to evacuate the power upto 6 MW till the commissioning of Rala HEP. The Petitioner vide letter dated 21.12.2016 (Annexure P-21) intimated the HPPTCL that due to capacity constraint on Nathpa-Kotla line and Kotla Sub-station, the Petitioner is forced to curtail the generation by 1/3rd and loosing heavily and that there is no possibility of free flow in the near future and requested the HPPTCL to inform the Petitioner of the tentative time frame by which the Petitioner shall be able to evacuate its generation. The HPSEBL vide letter dated 24.04.2017 (Annexure P-22) intimated the Petitioner and M/s Darjeeling Power Ltd. that the IPPs are connected through solid tap to the 220 kV Kasang-Bhaba line and were requested to take immediate action for installation of main and check meters on 66 kV feeders emanating from their switchyard so that the system can be got connected to 220 kV Bhoktoo Sub-station ensuring smooth evacuation of full power through their system.

20. The HPPTCL vide letter dated 04.12.2017 intimated the Petitioner of delay in commissioning of Urni- Wangtoo line and Urni Sub-station that the same are expected to be completed by February, 2017. The HPPTCL vide letter dated 11.06.2018, sent MoM of 46th meeting of STU held on 29.05.2018 (Annexure P-24 Colly) that the 66 kV switching station at Urni in Distt. Kinnaur shall be ready for commissioning on 31.12.2018. The

same was also conveyed vide letter dated 14.08.2018 (Annexure P-26).
On the basis of MoM of the 47th meeting of STU.

21. A Supplementary Power Purchase Agreement (SPPA for short) was signed with the HPSEBL on 09.07.2018 (P-25) wherein the interconnection point was defined in Clause 2.2.44 as under:

2.2.44. "Interconnection Point" means the physical touch point, where the project line (s) and the allied equipment forming a part of the interconnection Facilities are connected to the 66kV sub-station of HPPTCL at Urni, District Kinnaur, as per the Connection Agreement signed by the Company with HPPTCL (Annexure X).

However, under the Interim arrangements envisaged in this agreement, the company shall arrange to inject the power at 66/22 KV sub-station of HPSBL at Nathpa /Bhogto 66/220 KV sub-station of HPPTCL, District Kinnaur which shall be considered as interconnection point for all intents and purposes of this agreement during the period of Interim Arrangement of power evacuation. No deemed generation benefit will be payable by HPSEBL during this interim evacuation period".

Modifications were also made in Clause 4.1.10 and some other Clauses by way of SPPA dated 09.07.2018.

22. The Commission, while approving the Tariff for 220 kV D/C Kashang-Bhabha transmission line for the period from COD to FY 2023-24 has held vide Order dated 26.08.2020 (Annexure P-28) that the transmission charges @ 9 paisa per unit are liable to be paid by only the open access users and that the Petitioner was neither made a party to said Petition nor is an open access user as the Petitioner is selling its power to HPSEBL under long term PPA.

23. Sr. Manager (Projects), PIU Bhabanagar vide letter dated 10.11.2020 (Annexure P-30) informed M/s DLI Power (India) Pvt. Ltd. that

the HPPTCL has applied for shutdown period of 15 to 16 hours on 26.09.2020 for charging of 66 kV Urni Switching station via Raura-Urni 66 kV line which was successfully charged on 26.09.2020 which clearly shows that the Urni Switching station was ready on 26.09.2020 but the Urni-Wangtoo 66 kV D/C line was still under construction. Meanwhile, the HPPTCL vide Order dated 27.04.2021 (Annexure P-31) intimated the Petitioner and M/s Darjeeling Power Pvt, Ltd. that in order to avoid mishap in the interim period, the power of the IPPs is to be evacuated via 400/220/66 kV Wangtoo Sub-station and that construction of 66 kV D/C Urni- Wangtoo transmission line will be completed within two months and soon after its completion, the power will be evacuated via 66 kV switching station at Urni.

24. The Petitioner signed revised connection agreement on 02.07.2021 (Annexure P-32) with the HPPTCL. The HPPTCL vide letter dated 17.09.2021 (Annexure P-33) intimated the Petitioner and M/s Darjeeling Power Ltd. that 66 kV D/C Transmission line from Urni to Wangtoo will be completed by the end of September, 2021 and the power from the Projects will be evacuated through Urni Sub-station and 66 kV D/C Transmission line from Urni to Wangtoo. The Petitioner vide letter dated 25.09.2021 (Annexure P-34) intimated the HPPTCL that the line of the Petitioner and Shaung Projects is ready for connectivity to Urni GIS Sub-station and draft O&M agreement be supplied. Vide email dated

03.10.2021 (Annexure P-35), the Petitioner provided a copy of draft O&M agreement to the HPPTCL.

25. The HPPTCL vide email dated 30.09.2021 (Annexure P-37) intimated the Petitioner that in the event of joint evacuation of power by two or more generators through a common bay in the system of HPPTCL, one of the generators is required to act as a lead generator and the O&M agreement is to be signed with HPPTCL by the said lead generator and to authorize one of the generators as a lead generator and also sent a Draft copy of O&M agreement to the Petitioner. The HPPTCL vide email dated 07.12.2021 (Annexure P-37) also intimated the Petitioner that before finalizing/signing the O&M agreement, the Petitioner is required to produce documentary evidence of complete payment of bay cost in respect of one number bay at 66 kV Switching Sub-station Urni. The Petitioner vide letter dated 24.01.2022 (Annexure P-38) requested the HPPTCL to complete the formalities as per Clause 2.4 of the Connection Agreement dated 02.07.2021 enabling them to deposit bay cost and sign the O&M agreement. The Petitioner vide email dated 15.03.2022 (Annexure P-39), intimated M/s Darjeeling and Raura-II SHPs to arrange their share in terms of revised Connection Agreement dated 02.07.2021 (Annexure P-32). The HPPTCL vide letter dated 14.03.2022 intimated the Petitioner to deposit bay cost for Bay No. 609 amounting to Rs. 3,42,85,447/- (Rupees Three Crore Forty Two Lakhs Eighty Five

Thousand Four Hundred Forty Seven only) alongwith detailed estimate and informed the Petitioner of commissioning of 66 kV Urni Sub-station and that Urni-Wangtoo transmission line is expected within one month after the resolution of Court case by the Hon'ble High Court in respect of one tower.

26. The Petitioner vide letter dated 30.03.2022 (Annexure P-41) intimated M/s Darjeeling SHP and Raura-II to arrange and deposit their individual share on or before 10.04.2022 so as to sign the O&M agreement. M/s Darjeeling Project vide letter dated 28.04.2022 (Annexure P-42) intimated its readiness to deposit share of bay charges of Rs. 28,57,121/- but the Petitioner vide letter dated 10.05.2022 (Annexure P-43 Colly) intimated HPPTCL that Raura-II SHP has made representation to HPPTCL on 24.05.2022 that it shall not be possible to remit its share of the bay charges at this moment due to loan disbursal till the work on the project starts but Raura-II shall deposit its share of bay cost alongwith interest at the time of commissioning of the Project.

27. The Petitioner had filed a Petition No. 35 of 2022 before the Commission regarding demand of bay charges which was dismissed vide order dated 27.12.2022 (Annexure P-45). Against the said order, the appeal No. 30 of 2023 was preferred before the Hon'ble APTEL which has been allowed on 17.03.2023 as evident from Annexure P-46.

28. It is averred that the HPPTCL had raised the Transmission Charges bills in terms of IPTA dated 23.01.2016 w.e.f. 04.06.2016 to 6.04.2023 for an amount of Rs. 4,21,03,978/- (Annexure P-48) which were paid by the Petitioner under protest. Since, the charges were paid under protest, the Petitioner lastly made a representation on dated 17.10.2022 (Annexure P-49) to the HPPTCL that the charges were illegally recovered but said representation was rejected vide letter dated 11.11.2022 (Annexure P-50). Also that in an identical matter, M/s DLI (India) Hydro Pvt. Ltd. had also filed a Petition No. 33 of 2022 titled as DLI (India) Hydro Pvt. Ltd. vs. HPPTCL and Others which has been dismissed by the Commission vide Order dated 13.02.2023.

29. The Project of the Petitioner was commissioned on 14.04.2016 and the power was wheeled to Nathpa Sub-station through the above arrangement and from 17.04.2017 the power was routed from interconnection point at Tower No. 52 through Bhoktoo Sub-station of Kashang-Bhabha line circuit-II of 220 kV and the Project of the Petitioner was finally connected to permanent connection at Urni Sub-station on 02.04.2023 as evident from power flow diagram (Annexure P-51).

30. It is averred that the Respondent has not acceded to the genuine demands of the Petitioner compelling the Petitioner to file the present Petition as it was intimated vide letter date 11.11.2022 that the charges raised by the Respondent No. 1/HPPTCL are legal and in the event of any

default in payment of said transmission charges, the HPPTCL may invoke the provisions of Clause D (b) of the IPTA.

31. It is averred that the HPPTCL in abuse of its dominant position has compelled the Petitioner to sign IPTA which has been signed under compulsion and that the HPPTCL has failed to consider that Tower No. 52 was the interim interconnection point and transmission charges beyond said point could not have been levied by the HPPTCL against the Petitioner. Further, the regular evacuation arrangement of the HPPTCL was expected to be ready within a reasonable period of time and the delay of several years cannot be thrust upon the Petitioner for no fault as the Project was commissioned on 14.04.2016. It is claimed that the Tower No. 52 being part of the Grid is the Interconnection Point during interim connectivity and the Urni Sub-station as well as the Kashang-Bhabha Line are part of the Grid and since, the Project line is evacuating power to the Grid, there is no difference between the two conditions relating to location of evacuation by Project Line and long duration of the delay of seven years in providing the permanent connectivity is to be considered as good as regular interconnection point. As Such, Clause (D) of IPTA is illegal, arbitrary, discriminatory and abuse of dominant position and liable to be set aside and transmission charges paid under compulsion are liable to be refunded.

32. Further the HPPTCL has failed to give effect to the terms and conditions of Connection Agreement especially Clause 2.1 which states that charges for inter-state transmission system are liable to be paid as and when long/ medium/ short term open access is availed and since such access has not been availed and the power is being supplied to the HPSEBL under long term PPA, the transmission charges were not liable to be paid. Further, that the transmission charges of 14 paisa per unit as per IPTA would have been applicable, if the Petitioner had supplied its power to any third party other than the HPSEBL and that the PPA and SPPA are silent about the recovery of Transmission Charges @ 14 paisa per unit.

33. Further as per Clause 4.1.10 of the SPPA, in the absence of non evacuation of power due to non-commissioning of the project line/ non-availability of evacuation system, the parties may mutually agree for evacuation of power till regular arrangement is made but no such mutual agreement has been entered, thus, the Petitioner cannot be held liable to pay the transmission charges as per IPTA. Also that the Petitioner had no option but to get the power of the project evacuated even with evacuation restrictions and had the Petitioner not paid the charges under protest, the interim arrangement, as provided, would have been disconnected. Thus, the action of the HPPTCL is arbitrary, discriminatory and not sustainable in the eyes of law. Further the Respondents have failed to redress the

grievances raised by the Petitioner vide representations dated 31.12.2015 and 06.01.2016.

34. It is also averred that the Hon'ble APTEL in Appeal No. 264 of 2019 vide Order dated 13.11.2020 in Para 12.3 has held as under:-

"It is well known fact that ownership of power changes after metering point. In distribution the licensee is responsible for system up to meter only. Beyond meter it is the responsibility of the consumer. Similarly, ownership of power changes from BHPL to UPCL after metering point. Up to metering point BHPL/TPCL remains owner of the power supplied to UPCL, after metering point power belongs to UPCL. Ideally meter should have been provided at delivery point, however, in this case Meter has been provided at BHPL power station's bus bar as a special case as it cannot be provided at delivery point i.e. at Ghansali. Accordingly, BHPL or TPTCL are not required to seek open access from PTCUL for use of its intra-state transmission system for the reason that they are not using it at all".

Therefore, the Petitioner cannot be held liable for the payment of transmission charges. Hence, the Petition.

REPLIES

35. The Petition has been resisted and contested by the Respondents No. 1 and 2 by filing separate replies.

REPLY OF THE RESPONDENT No. 1/ HPPTCL

36. The HPPTCL in its reply has submitted by way of the preliminary objections that the Petitioner has already deposited the entire transmission charges in terms of the IPTA dated 23.01.2016 (Annexure P-19) for the period w.e.f. 04.06.2016 to 02.04.2023 without any protest or objection in terms of IPTA and, as such, the Petitioner has no cause of

action to maintain the Petition. As per HPPTCL, the Petition is afterthought filed after a period of almost 7 years of execution of the IPTA and, thus, beyond limitation. As per the HPPTCL, the Hon'ble Supreme Court in Andhra Pradesh Power Coordination Committee & Others v. Lanco Kondapalli Power Limited & Others (2016) 3 SCC 468 has held that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court and such limitation upon the Commission would be only in respect of its judicial power under S.86(1)(f) of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.

37. It is averred that the Petitioner and the HPPTCL had executed a connection agreement on 20.11.2015 for interim connection (Annexure P-18) and also signed connection agreement on 02.07.2021 (Annexure P-32) finally connecting the Project in joint mode at connection point at 66 kV switching station at Urni and per clause 2.1 of said agreement, the Petitioner had agreed to pay the monthly tariff including HPSLDC charges for the use of Intra-state Transmission System as and when long/ medium/ short term access is availed in accordance with the Regulations framed by the Commission in this regard. Not only this, the agreements also permit suitable amendments and can be further amended, if mutually agreed.

38. It is averred that as per Clause (C) of IPTA, the IPTA was not in supersession of the connectivity agreement (CON-6) executed between the parties and thus, the IPTA is in addition to the connection agreements and the Petitioner was bound to pay the monthly transmission charges as agreed vide Clause (D) of IPTA.

39. It is also averred that the 66kV Switching station at Urni was under construction at the time of the proposed commissioning of the Project and, therefore, as an interim arrangement, the HPPTCL allowed the evacuation of power of the Project in joint mode with Shaung HEP (3 MW), by connecting at one of the circuits of 220 kV Kashang- Bhabha D/C Transmission line at Tower No. 52 charging it at 66 kV and vide Clause D (a) of the IPTA, interim Transmission charges were to be calculated @14 paisa per unit of the energy wheeled including the O&M Charges.

40. Also averred that the Project was declared Commercially Operative w.e.f. 14.04.2016 but has been connected to the permanent interconnection facility at Urni Sub-station w.e.f. 02.04.2023 and pending commissioning of permanent evacuation facility, the temporary evacuation was allowed.

41. As per the HPPTCL, the Petitioner is liable to pay the transmission charges for the use of the system as per Regulations 2 (32), (33), (34) Regulation 5, Regulation 16 of the Himachal Pradesh Electricity

Regulatory Commission (General Conditions of Transmission License) Regulations, 2004 and Sections 39 and 40 of the Electricity Act, 2003 which have been reproduced in verbatim in Para 7 of the reply. Further the interim arrangement of the transmission line was utilized by the Petitioner to sell the power to the HPSEBL and, therefore, the Petitioner is bound by the terms and conditions of IPTA to pay the due charges to the HPPTCL. Further averred that the Petition is not maintainable and that the Commission has already dismissed a similar Petition bearing Petition No. 33 of 2022 vide order dated 13.02.2023 as also the Review Petition No. 12 of 2023 against order dated 13.02.2023 vide order dated 15.05.2023 and appeal filed against Order dated 13.02.2023 passed in Petition No. 33 of 2022 is pending adjudication before the Hon'ble APTEL.

42. On merits, the contents of the Petition have been denied by reiterating the averments made by way of preliminary submissions.

REPLY OF THE RESPONDENT No. 2/ HPSEBL

43. The HPSEBL in its reply has averred that the IPTA was executed in the year 2016 and the Petitioner has continuously discharged its obligations as per the terms and condition of IPTA but the Petition has been filed after a period of 7 years, therefore, the Petition is hit by the law of limitation and liable to be dismissed. Further the Petitioner is estopped to file and maintain the Petition due to its act, conduct, acquiescence,

deeds and liable to be dismissed. Further, the Petitioner for a substantial period of time has discharged its obligations as per the IPTA which was executed by the Petitioner with the Respondent No.1 with open eyes which is legally binding upon the Petitioner and cannot be said to be arbitrary and discriminatory. Further the HPSEBL is stranger to the IPTA and, thus, the Petition is not maintainable against the HPSEBL on the principle of privity of contract,.

44. It is averred that the Petitioner has acknowledged in the agreement (connection agreement) to share the cost of establishment, operation and maintenance of the joint evacuation system, including interconnection facilities at the HPSEBL interfacing point. Further, the Connection Agreement dated 04.06.2014, executed by the Petitioner with the HPPTCL clearly mentions the interconnection point i.e. 66 kV Switching station at Urni and as per the PPA, the responsibility of the HPSEBL begins beyond the interconnection point. As per HPSEBL, the Petition has no merits and liable to be dismissed.

45. No reply has been filed by the Respondent No. 3.

REJOINDERS

46. In rejoinder, the contents of the replies of HPPTCL and HPSEBL have been denied by the Petitioner and those of the Petition have been reaffirmed.

Submissions of the Ld. Counsel for the Parties

47. We have heard Sh. L.S. Mehta, Ld. Counsel for the Petitioner, Sh. Vikas Chauhan, Ld. Counsel for the Respondent No. 1, Sh. Kamlesh Saklani, Ld. Counsel for the Respondent No. 2 and Sh. Shanti Swaroop, Ld. Legal Consultant for the Respondent No. 3. Sh. L.S. Mehta, Ld. Counsel has also submitted the written submissions.

48. Sh. L.S. Mehta Ld. Counsel for the Petitioner has submitted that the IPTA dated 23.01.2016 had been signed under compulsion as the Project of the Petitioner was ready for commissioning on 14.04.2016 but the permanent evacuation facility i.e. the switching station of the Respondent No. 1 at Urni but was not ready, as such, the Petitioner was compelled to pay the transmission charges under protest failing which the interim arrangement as provided would have been disconnected. He has further submitted that the interconnection facility at Urni Sub-station was delayed by several years and the temporary evacuation was also allowed with evacuation restrictions which has resulted in huge financial loss to the Petitioner and the long delay cannot be thrust upon the Petitioner. According to him, before signing the IPTA on 23.01.2016, a meeting was held between the Managing Director of the Respondent No. 1 and the Petitioner where the Petitioner was forced that the parties shall not challenge the IPTA before the Regulator or any other Court, thus, the IPTA was not challenged earlier during the interim arrangement. It is

submitted that the IPTA is result of fraud, misrepresentation and coercion. He has also submitted that several representations to the Respondent No. 1 were made that the charges @ 14 paisa per unit are excessive but the last representation was decided only on 11.11.2022, therefore, Petition is within time. Also submitted that Clause 2.1 of the Connection Agreement specifically states that the Petitioner is liable to pay charges for use of Intra-state Transmission System as and when Long Term/Medium Term/Short Term open access is availed by the Petitioner but no such access has been availed and thus, Clause 2.1 of the Connection Agreement is not applicable to the Petitioner and the charges as per IPTA are not payable. Also submitted that due to the act and conduct of the Respondent, the Petitioner has incurred huge financial loss as the evacuation was allowed with restrictions. It is also submitted that the Tower No. 52 being part of the Grid is the Interconnection Point during interim connectivity and the Urni Sub-station as well as the Kashang-Bhabha Line are part of the Grid and since, the Project line is evacuating power to the Grid, there is no difference between the two conditions relating to location of evacuation by Project Line and long duration of the delay of seven years in providing the permanent connectivity is to be considered as good as regular interconnection point and in view of the law laid down by the Hon'ble APTEL in Appeal No. 264 of 2019 vide Order dated 03.11.2020, the Petitioner cannot be held liable to pay

transmission charges as the metering of the Petitioner is at the switching yard of Project and the ownership of the power has changed at metering/delivery point at Tower No. 52, as such, Tower No. 52 is to be constituted as permanent interconnection point for all intents and purposes.

49. Sh. Vikas Chauhan Ld. Counsel for the Respondent No. 1 on the other hand has submitted that pending construction of the regular evacuation system at Urni, interim connectivity was provided to the Petitioner at its request for wheeling the energy from Tower No. 52 to the receiving point at Nathpa/Bhoktoo Sub-station of the Respondent No. 2 and the Petitioner signed the IPTA dated 23.01.2016 with Respondent No. 1 in this regard agreeing to pay transmission charges @ of Rs. 14 Paise per unit and, therefore, the Petitioner was liable to pay the charges for the use of Intra-state Transmission System of the Respondent No.1 which have rightly been paid. It is also submitted that the Petition is barred by time having been filed after lapse of a period of 7 years of signing of IPTA and liable to be dismissed. Further submitted that due to adverse climatic conditions in the area, delay in seeking clearance from the Ministry of Environment and Forest, COVID-19 breakdown and pending litigation in the Hon'ble High Court, the Urni Sub-station and the connecting line could not be completed in time but the Petitioner was apprised and updated regularly in this regard and having signed the

agreement with open eyes and having performed the same it is not open to the Petitioner to challenge the same at this belated stage.

50. Sh. Kamlesh Saklani, Authorised Representative of the Respondent No. 2 has submitted that the HPSEBL is not a party to the IPTA dated 23.01.2016 and, as such, the liability to pay the transmission charges, as agreed, cannot be shifted to the HPSEBL. He has also submitted that the Petitioner is liable to deliver the net saleable energy to the HPSEBL as per the SPPA at the permanent interconnection point at Urni Switching Station but for want of the regular evacuation system which was under construction during commissioning of the Project, the interim evacuation arrangement was provided to the Petitioner by the Respondent No. 1 connecting at 220 kV Kashang-Bhaba transmission line at Tower No. 52 and the net saleable energy to the HPSEBL during the interim evacuation period was liable to be delivered at Nathpa/Bhoktoo Sub-Station and, therefore, the HPSEBL is not liable to pay the transmission charges @14 paisa per unit as alleged by the Petitioner for interim evacuation of Power.

51. Sh. Shanti Swaroop, Ld. Legal Consultant appearing on behalf of Respondent No. 3 has stated that the dispute is inter-se the Petitioner and Respondents and the transmission charges are required to be paid as agreed upon by the parties as per the IPTA dated 23.01.2016.

POINTS FOR DETERMINATION

52. We have carefully gone through the submissions of the Petitioner and Respondents. We have also perused the record carefully. On the basis of submissions of the parties and the pleadings, the following points arise for determination in the present matter:-

Point No. 1

Whether the Petition is beyond time?

Point No. 2

Whether the liability of the Petitioner had come to an end by supplying the Power at interim interconnection point at Tower No. 52 at 220 kV Kashang Bhaba D/C transmission line and the Petitioner was not liable to pay the transmission charges @ 14 Paise per unit to the Respondent No. 1 as agreed vide agreement dated 23.01.2016 and the charges beyond Tower No. 52 were required to be borne by the HPSEBL?

Point No. 3

Whether Clause (D) of Interim Power Transmission Agreement (IPTA) dated 23.01.2016 and demand of the transmission charges amounting to Rs. 4,21,03,978/- (Rupees Four Crore Twenty One Lac Three Thousand Nine Hundred and Seventy Eight only) are illegal and the Petitioner had made the payment under protest and the charges already paid in terms of IPTA dated 23.01.2016 are required to be refunded ?

Point No. 4 (Final Order)

53. For the reasons to be recorded hereinafter in writing, while discussing the aforesaid points, our point wise findings are as under:-

Point No. 1: No

Point No. 2 : No

Point No. 3 : No

Point No. 4 : The Petition dismissed per operative part of the order
(Final Order)

Reasons for findings

Point No. 1

54. The Respondents No. 1 and 2 have come out with a plea that the Petition is barred by time as the IPTA was signed on 23.01.2016 but the Petition has been filed on 26.05.2023, after lapse of 7 years of signing of the IPTA which was required to be filed within 3 years, if the Petitioner was aggrieved of the same and, therefore, liable to be dismissed on this score alone.

55. The Petitioner on the other hand has asserted that several representations were made by the Petitioner to the Respondent No. 1 that transmission charges beyond interim connectivity at Tower No. 52 are not required to be levied upon by the Petitioner and that the Petitioner had to sign the IPTA under compulsion failing which the Power would not have been evacuated but no heed was paid to the representations of the Petitioner and the last representation was decided on 11.11.2022 (Annexure P-50) and soon thereafter, the Petition has been filed, and thus, the Petition is within time.

56. It is evident from representation dated 17.10.2022 (Annexure P-49) that the Petitioner had submitted a detailed representation on 06.01.2016 to the Respondent No. 1 (Annexure P-16) that demand of wheeling charges for providing wheeling arrangement from Tower No. 52 to Tower No. 100 of 220 kV Kashang-Bhaba Transmission line amounting to Rs. 80,591/- per MW/ per month are unrealistic and not required to be paid.

57. A careful perusal of the Petition and other record shows that the Petitioner kept on asking the Respondent No. 1 for not charging the excessive wheeling charges which ultimately have been paid. The representation made on 17.10.2022 has been decided on 11.11.2022. The Project was connected to the Permanent Interconnection point during April, 2023 and till such time the entire charges, as agreed per IPTA, have been paid meaning thereby that the cause of action is subsisting.

58. The limitation is a mixed question of law and facts and has to be gathered from the facts pleaded and material brought on record and the party alleging that the lis is beyond time must plead specifically and prove the same. Mere allegations will not suffice the purpose. In this regard, reliance may be placed in *Balasarria Construction (P) Ltd. v. Hanuman Seva Trust*, (2006) 5 SCC 658 : 2005 SCC Online SC 1596 wherein it is held in para 8 as under:-

“8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could

not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure.”

59. It is also held in *Narne Rama Murthy v. Ravula Somasundaram*, (2005) 6 SCC 614 : 2005 SCC Online SC 1197 that when the limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded. Para 5 of the aforesaid law is relevant and reproduced as under:-

“5. We also see no substance in the contention that the suit was barred by limitation and that the courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only

hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter.”

60. A careful perusal of the Petition and the material placed on record, it is apparent that the Petitioner has throughout raised the plea that the charges are unrealistic and also made representations and has made the complete payment as per the agreement (IPTA), therefore, the cause of action is subsisting. On the contrary, the Respondents have not been able to show that the Petition is barred by time. Therefore, the law laid down by the Hon'ble Supreme Court in Andhra Pradesh Power Coordination Committee & Others v. Lanco Kondapalli Power Limited & Other (2016) 3 SCC 468, which has been relied upon by the Ld. Counsel for the Respondent No. 1, is not applicable to the facts and circumstances of the present Petition.

This point is accordingly decided against the Respondents No. 1 and 2.

Points No. 2 and 3

61. Both these points being interlinked and inter-connected are being taken up together for adjudication.

62. In this case, the Petitioner, in order to substantiate its claim, has raised mainly five contentions i.e. (i) the interim interconnection point of the Petitioner is deemed to be Tower No. 52 at 220 kV Kashang-Bhaba transmission line for all intent and purposes (ii) the liability of the Petitioner is to deliver the power only at the interim interconnection point

at Tower No. 52 at 220 kV Kashang-Bhaba Transmission line and beyond which the HPSEBL is liable to transmit the same; (iii) the transmission charges @ 14 paise per unit as per agreement dated 23.01.2016 for interim evacuation are not liable to be paid by the Petitioner as the wheeling during the interim period, pending commissioning of the permanent evacuation facility should be free of cost and if at all the charges are to be paid, the same are liable to be paid by the HPSEBL; (iv) the IPTA dated 23.01.2016 is result of compulsion, fraud, misrepresentation and coercion; and (v) the transmission charges as per IPTA were paid under protest and liable to be refunded.

63. The Respondent No. 1 on the other hand has claimed that system of the Respondent No. 1/HPPTCL was utilized by the Petitioner for transmitting the energy and as agreed under IPTA dated 23.01.2016, the transmission charges are required to be paid by the Petitioner and that the Petitioner has already paid such charges upto April, 2023, without any interruption, objection and protest. It is also the contention of the Respondent No. 1 that the Petitioner has signed the IPTA with open eyes and now at this belated stage after having performed its obligations under the agreement, neither it lies in the mouth of the Petitioner that the IPTA is result of fraud, misrepresentation and coercion nor the Petitioner can impose its own terms and conditions which were not part of the contract.

64. The Respondent No. 2 on the other hand has claimed that the Respondent No. 2 is not privy to the contract and being stranger to the same, the Petition is not maintainable against the Respondent No. 2. Further the burden to pay the transmission charges as per IPTA is on the Petitioner and cannot be shifted upon the Respondent No. 2 and that the Petitioner is bound to supply the power to Respondent No. 2 at the permanent interconnection point at Urni switching station which has never been shifted and during interim period at Nathpa/Bhoktoo Sub-stations and the Petitioner cannot absolve it from liability of paying the transmission charges as agreed vide ITPA dated 23.01.2016.

65. Before appreciating the rival contentions, it is relevant to refer to the admitted facts that on the request of the Petitioner, the connectivity was provided to the Petitioner to the system of the Respondent No. 1 per connection agreements dated 04.06.2014 and 02.07.2021 clearly mentioning the interconnection point as 66 kV Switching Station Urni. It is also an admitted fact that the Project was commissioned on 14.04.2016 pending commissioning of regular evacuation system at Urni, therefore, in order to accommodate the evacuation of power, the Respondent No. 1 had approved the tapping arrangement at 66 kV circuit of 220 kV Kashang-Bhaba line at Tower No. 52 and the Petitioner had signed IPTA dated 23.01.2016 for payment of wheeling charges in lieu of the same. It is also admitted case that the Petitioner has paid all the transmission

charges as per IPTA till April, 2023. What is disputed by the Petitioner is that the IPTA has been signed under compulsion failing which the evacuation of energy from the Project would have been denied and that the transmission charges as per IPTA have been paid under protest and required to be refunded.

66. The record suggest that the connectivity as provided for the Project at Tower No. 52 on one of the circuits of 220 kV Kashang-Bhaba D/C transmission line was purely an interim arrangement so as to accommodate the power evacuation from the Project because the regular evacuation system of the Respondent No. 1 was not ready for commissioning and this interim evacuation system was to come to an end on commissioning of the regular evacuation system. Here it is also relevant to mention that the Petitioner at any stage has never requested either the Respondent No. 1 or the Respondent No. 2 for changing the interconnection point to Tower No. 52.

67. The Petitioner has also placed reliance on the SPPA signed with the HPSEBL on 09.07.2018 (Annexure P-25) that the Respondents have failed to fulfill their obligations and responsibilities to provide permanent evacuation in time, has agreed and that Tower No. 52 being part of the Grid and the Project line is evacuating the power to the Grid, there is no difference between the two conditions relating to location of evacuation by Project Line during the period of permanent and interim arrangement and

since Urni Sub-station as well as the Kashang-Bhabha Line are part of the Grid, the interim arrangement having continued for a long duration of more than seven years, the interim interconnection point at Tower No. 52 is deemed to be as good as regular interconnection point. On the strength of aforesaid, the Petitioner claims that beyond the said interim interconnection point at Tower No. 52 at 220 kV Kashang-Bhabha line, it is the responsibility of the HPSEBL to wheel energy by its own arrangement.

68. A careful perusal of the SPPA dated 09.07.2018 (Annexure P-25) nowhere shows that the permanent interconnection point of the Project has been changed or was to be changed from Urni Switching Station to Tower No. 52 at Kashang-Bhabha Transmission line. Rather, the 'interconnection point' was specifically defined in Clause 2.2.44 of the SPPA as under:

“Interconnection Point” means the physical touch point, where the project line (s) and the allied equipment forming a part of the Interconnection Facilities are connected to the 66 kV sub-station of HPPTCL at Urni, Distt. Kinnaur, as per the connection agreement signed by the company with HPPTCL (Annexure-X). However, under the Interim arrangements envisaged in this agreement, the company shall arrange to inject the power at 66/22 kV Sub-station of HPSEBL at Nathpa/Bhogtu 66/220 kV Sub-station of HPPTC Distt. Kinnaur which shall be considered as Interconnection Point for all intents and purposes of this Agreement during the period of interim arrangement of power evacuation. No, Deemed generation benefit will be payable by HPSEBL during this evacuation period.”

69. Not only this the 'Interconnection Facility' was also defined in Clause 2.2.43 as under :

"Interconnection Facilities" means all the facilities which shall include, without limitation, switching equipment, protection, control and metering devices etc. for the incoming bay(s), for the Project Line(s) to be installed and maintained by the HPPTCL at their 66 kV Switching Sub-station at Urni, District Kinnaur, at the cost of the Company, to enable evacuation of the electrical output from the Project in accordance with the agreement. The power from this Project shall be evacuated in joint mode with Shaung (3MW) by interfacing the project line from Shaung SHP (3 MW) with 66 kv transmission line from Brua (9MW) to 66 kV proposed sub-station of HPPTCL at 66 kV level. The cost of 66 kV transmission line from Brua SHP (9 MW) to 66 kV Sub-station at Urni and terminal equipment shall be shared with the developer of Shaung SHP on proportionate basis (Annexure – VIII).

However, as an interim arrangement, till commissioning of 66 kV Urni Sub-station and 400/220/66 kV Wangtoo Sub-station of HPPTCL, the power shall be evacuated through 66/22 kV Sub-station at Nathpa of HPSEBL in Distt. Kinnaur (Annexure IV) This being interim arrangement the IPP shall have to back down in the event of non-availability of power evacuation capacity of the system and no deemed generation benefit will be payable by HPSEBL during, the interim evacuation period.

Explanation: For the purpose of this clause, the expression "cost" shall include "other expenditure borne by the company like re-organisation of bays at interconnecting sub-station and associated civil works alongwith related operation and maintenance cost.

70. A careful perusal of the SPPA dated 09.07.2018 (Annexure P-25) shows that permanent and interim connections were specifically defined and the net saleable energy shall be received by the HPSEBL/ Respondent No. 2 at the permanent interconnection point which is 66 kV Urni Switching Station. The temporary arrangement by providing interim

interconnection at Tower No. 52 was on the request of the Petitioner pending construction of Inter-connection facility at Urni so as to evacuate the energy failing which the Petitioner would have waited till the commissioning of the regular interconnection facility. For this purpose, the Petitioner has signed IPTA on 23.01.2016 agreeing to pay transmission charges @ 14 Paise per unit for using the system of the Respondent No. 1. Therefore, neither the 'interconnection point' for the Project of Petitioner was ever changed to Tower No. 52 at 220 kV Double Circuit Kashang-Bhaba line nor the HPSEBL/ Respondent No. 2 had agreed to receive the net saleable energy at Tower No. 52 at 220 kV Kashang-Bhaba Double Circuit line. The HPSEBL/ Respondent No. 2 has not signed the IPTA dated 23.01.2016 and, thus, the Petitioner has unreasonably and without any basis tried to shift the burden upon HPSEBL/ Respondent No. 2 to pay the transmission charges beyond Tower No. 52.

71. The Petitioner has produced a large number of correspondence and MoM of the STU Co-ordination Committee meetings held on various dates to show that there was delay in commissioning the system at Wangtoo and Urni and since the Project has been commercially operated on 14.04.2016 with evacuation restrictions, huge generation loss has been sustained by the Petitioner. The Petitioner has not signed the Long/ Medium/ Short Term Open Access Agreement with the Respondent No. 1, as alleged in the Petition, making it entitled for the compensation for the

alleged delay. The large number of correspondence and MoM relating to the commissioning of the system at Wangtoo and Urni clearly show that there was no intentional delay on the part of Respondent No. 1 in the commissioning of the interconnection facilities at Urni and Wangtoo and the Petitioner was kept apprised of the developments time to time. The entire Petition is silent that the commissioning of regular facility at Urni/ Wangtoo was intentionally delayed by the Respondent No. 1. Rather, it is clear from the submissions of the Ld. Counsel for the Respondent No. 1 that due to adverse climatic conditions at the location/site, pending litigation in Hon'ble High Court, COVID-19 breakdown and obtaining clearance/ permission from Ministry of Environment and Forest, a significant time was consumed. Therefore, there is nothing to infer that the commissioning of the system was willfully delayed and, thus, the large number of correspondences are neither relevant for deciding the controversy in the matter nor buttress the claim of the Petitioner in any manner.

72. As observed above, for the evacuation of energy during interim period, the Petitioner had signed the IPTA on 23.01.2016, wherein it was specifically agreed to pay the transmission charges @ 14 Paise per unit of energy wheeled including the O&M charges as under at Clauses A to D:

“(A) As an interim power transmission arrangement in national interest the HPPTCL has agreed to the connection of Brua (9 MW) in joint mode with Shaung (3 MW) HEP’s at Tower No. 52 of one of the 220 kV Kashang-Bhabha D/C Transmission line and charging it at 66 kV.

- *(B) Subsequently after commissioning of Bhoktoo sub-station if need be the Power shall be further transmitted at 66kV level to 22/66/220 kV sub-station of HPPTCL under construction at Bhoktoo. Stepped up at 220 kV and wheeled to 220 kV system of HPSEBL at Bhabha Power house.*

- *(C) This interim agreement is not in supersession of the connectivity agreement(CON-6) already executed between the Parties.*

- *(D) Monthly transmission tariff.*

- *(a) The Interim Transmission charges shall be calculated @ 14 paise per unit of the energy wheeled including the O&M charges. The data /Quantum of the energy generated and transmitted for the purpose of calculation of the Interim Transmission Charges shall be as per the meter reading recorded at the Power House Meters installed. In case of faulty meters at Power Houses or if there is negative difference of consumption recorded at power house and at Nathpa /Bhoktoo, the energy shall be calculated on the basis of energy recorded at Nathpa /Bhoktoo.”*

73. Significantly, Clause (C) of IPTA dated 23.01.2016 clearly stipulates that the Agreement dated 23.01.2016 is not in supersession of the connectivity agreement already executed between the parties. The HPSEBL/ Respondent No. 2 is not a party to the IPTA dated 23.01.2016 and rightly so, the interim connectivity was provided by the Respondent No. 1 for the use of its system and the Petitioner during interim evacuation arrangement had agreed to deliver the net saleable energy at Nathpa/ Bhoktoo Sub-stations of the Respondent No. 2 and, therefore, it is the responsibility of the Petitioner to bear the charges of wheeling the energy upto Nathpa/ Bhoktoo Sub-stations as agreed.

74. It is relevant to mention here that the Respondent No. 2 has not refused to receive the net saleable energy during interim evacuation period or on commissioning of the regular evacuation system but it is for

the Petitioner to deliver the same at the defined permanent interconnection point i.e. 66 kV Urni Switching Station on commissioning of regular interconnection facility and during interim arrangement at Nathpa/ Bhoktoo Sub-stations, as agreed vide IPTA dated 23.01.2016. Also relevant to mention here that the HPSEBL/ Respondent No. 2 has never agreed or consented to receive the net saleable energy of the Project at Tower No. 52 on 220 kV Kashang-Bhaba line which arrangement was made only to facilitate the Petitioner during interim arrangement as regular connectivity was not in place. There is also nothing on record that the HPSEBL/ Respondent No. 2 had agreed to receive the power from the premises of the Power House of the Project of the Petitioner, therefore, any meters installed at the switchyard of power house of the Project are of no consequence which only had been installed for the purpose of connectivity to 220 kV Kashang-Bhaba line. The IPTA being bilateral between the Petitioner and Respondent No. 1, the same is binding upon the Petitioner and can't be thrust upon the HPSEBL/ Respondent No. 2 being stranger to the same. Thus, the Petitioner is bound to pay the transmission charges as agreed vide IPTA dated 23.01.2016.

75. It is fairly settled that the parties are bound by the terms of the contract. In this regard reliance may be placed in *Bharthi knitting Co. v. DHL Worldwide Express Courier*, (1996) 4 SCC 704 that when a person

signs a document which contains certain contractual terms, the parties are bound by such contract and when a party to the contract disputes the binding nature of the signed document, it is for said party to prove the exception.

76. It is also held in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153 : 2013 SCC Online SC 143 that when one knowingly accepts the benefit of a contract, he is estopped from denying the contract and can't blow hot and cold. Paras 15,16,23 and 24 of the judgment are relevant and reproduced as under :-

“15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide *Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593] , *CIT v. V. MR. P. Firm Muar* [AIR 1965 SC 1216] , *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713] , *Pradeep Oil Corpn. v. MCD* [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869] , *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.* [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and *V. Chandrasekaran v. Administrative Officer* [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260] .]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

23. *A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Vide United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal [(2004) 8 SCC 644 : AIR 2004 SC 4794] and Polymat India (P) Ltd. v. National Insurance Co. Ltd. [(2005) 9 SCC 174 : AIR 2005 SC 286]]*

24. *In DLF Universal Ltd. v. Town and Country Planning Deptt. [(2010) 14 SCC 1 : (2011) 4 SCC (Civ) 391 : AIR 2011 SC 1463] this Court held : (SCC pp. 14-15, paras 13-15)*

“13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.”

77. Significantly, the Petitioner has paid the charges as agreed under IPTA dated 23.01.2016 without any objection/protest upto April, 2023 and after a period of 7 years has filed this Petition. No objections, whatsoever, were made to the Respondent No. 1 that charges have been paid under protest. Similarly, there is no mention of such protest in the pleadings. So much so, even there are no pleadings that the Petitioner was compelled

to sign the IPTA. On the contrary, for the interim evacuation of power from the Project, the IPTA was signed voluntarily and with open eyes. Once the Petitioner has used the system of the Respondent No. 1 and has specifically agreed to pay the transmission charges @ paisa 14 per unit, the charges are/were required to be paid by only the Petitioner and none else. In the circumstances, the submissions of the Ld. Counsel for the Petitioner do not in any manner ameliorate the sufferings of the Petitioner. The IPTA is, therefore, binding on the Petitioner and the charges as paid upto 2nd April, 2023 are not required to be refunded.

78. The Petitioner has also raised a plea that the charges of 220 kV Kashang-Bhaba line have been determined by the Commission in Petition No. 76 of 2020 vide Order dated 26.08.2020 and, therefore, the bills/charges of the interim period are required to be modified. This plea is not tenable for the reason that the charges so recovered are subject to adjustment as per the order of Commission dated 26.08.2020 which would be done in due course in compliance of the aforesaid order of the Commission. Therefore, no prejudice, whatsoever has occurred to the Petitioner with determination of the charges of 220 kV Kashang-Bhaba line as the same are liable for adjustment.

79. Coming to other submissions of Ld. Counsel that in a meeting prior to signing of IPTA, the Respondent No. 1 had forced the Petitioner that none of the parties shall challenge the IPTA and, therefore, the

agreement was not challenged earlier and the charges levied on the basis of the IPTA are illegal. A careful perusal of Clause (M) of the IPTA dated 23.01.2016 i.e. Settlement of Disputes and Arbitration shows that the differences or disputes arising between the parties out of the agreement shall at first instance be settled through amicable settlement at the level of Managing Director and in the event of disputes remaining unresolved, the same shall be resolved under Statutory Arbitration as provided under the Electricity Act, 2003. It is thus, apparent that the parties were free to challenge the same and the understanding, if any, in the pre-meeting, as alleged above by the Petitioner that the parties mutually agreed to not to challenge the IPTA is of no consequence. Otherwise also, no such pleadings in the Petition have been made that the Petitioner was prevented in many way to challenge the IPTA. Even otherwise, in order to attract the bar under Section 28 of the Contract Act, 1872, it was required to be established by the Petitioner that the bar was absolute from enforcing the right, such restriction should be to approach by way of usual legal proceedings and lastly, the absolute restriction may also relate to the limiting of time within which the party may enforce the right. As observed above, the IPTA itself provides that parties were at liberty to raise the unresolved disputes under the Electricity Act, 2003 and there is nothing of limiting the time within which the party may enforce the right. In this regard reliance may be placed in the law laid down by the Hon'ble

Supreme Court in *Union of India v. Indusind Bank Ltd.*, (2016) 9 SCC 720 : (2016) 4 SCC (Civ) 545 : 2016 SCC Online SC 944, Para 25 thereof is reproduced as under:-

“25. Considering that the unamended Section 28 is to apply, it is important to advert to the said section and see what are its essential ingredients. First, a party should be restricted *absolutely* from enforcing its rights under or in respect of any contract. Secondly, such absolute restriction should be to approach, by way of a usual legal proceeding, the ordinary tribunals set up by the State. Thirdly, such absolute restriction may also relate to the limiting of time within which the party may *thus* enforce its rights.”

Hence, the submission of the Ld. Counsel in this regard is also not tenable.

80. It has also been submitted that the IPTA is a result of fraud, misrepresentation and coercion and charges paid on the basis of the same are required to be refunded. The submission, though attractive but is not tenable for the reason that there is not even an iota in the Petition that the IPTA is result of fraud, misrepresentation, or coercion. Similarly, there is also no mention in the Petition that the Petitioner was forced in any manner to refrain from challenging the IPTA or demand of transmission charges. In order to substantiate the plea, the Petitioner was required to plead and prove that the agreement/IPTA was result of fraud, misrepresentation and coercion and since there is nothing in the Petition, the submissions of the Ld. Counsel are of no help to the Petitioner. In this regard, reliance may be placed in the law laid down by the Hon'ble

Supreme court in 2023 live law (SC) 315 Gujrat Urja Vikas Nigam Ltd. & Others v. Renew Wind Energy (Rajkot) Pvt. Ltd. and Others, wherein it is held that in order to establish fraud or coercion, there should be express allegations and material facts in support of such allegations with high degree of precision. Paras 68,69 and 70 are reproduced as under:-

“68. In Transmission Corporation of Andhra Pradesh Ltd (supra), this court observed, in the context of a contention of coercion, as follows: “42.[.] To frustrate a contract on the ground of duress or coercion, there have to be definite pleadings which have to be substantiated normally by leading cogent and proper evidence. However, in the case where summary procedure is adopted like the present one, at least some documentary evidence or affidavit ought to have been filed raising this plea of duress specifically.[.]”

69. In Shanti Budhiya Vesta Patel & Ors. V. Nirmala jayprakash Tiwari & Ors., this court held that to establish fraud or coercion, there should be “(a) and express allegation of coercion or fraud, and (b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars.”The court had cited and applied the principle enunciated in Bishundeo Narain v. Seogeni Rai where it was held that:

“[.] Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. [See Order 6 Rule 4 of the Civil Procedure Code.]”

70. In New Indian Assurance Co. Ltd v Genus Power Infrastructure Ltd this court dealt with the standard of pleadings and evidence, needed in cases, where coercion or duress is alleged:

“8. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prime facie establish the same by placing material before the Chief Justice/his designate.”

In view of the above, there are no merits in the submissions of the Ld. Counsel that the agreement is a result of fraud, misrepresentation and coercion.

81. As observed above, net saleable energy was to be received during interim evacuation period at Nathpa/ Bhoktoo Sub-stations. Therefore, merely because a meter is installed in the Switching yard of power house of the Project for the purpose of the connectivity to the 220 kV Kashang-Bhaba line, the Petitioner cannot absolve from the liability to deliver the power at the interim interconnection point at Nathpa/Bhoktoo Sub-station, where only the net saleable energy was to be received. Hence, the law laid down by the Hon'ble APTEL in Appeal No. 264/2019 vide Order dated 03.11.2020 and relied upon by the Petitioner is not applicable to the facts and circumstances of the case.

82. The Commission has already decided a similar Petition No. 33 of 2022 on 13.02.2023 filed by M/s DLI Power (India) Pvt. Ltd. where the IPTA signed by M/s DLI Power (India) Pvt. Ltd. with HPPTCL/Respondent No. 1 was in dispute. The Commission has held in said Petition that IPTA was legal and binding. It is held in MANU/ET/0147/2014 Page I titled as Tata Motors Ltd. V/s. Maharashtra State Electricity Regulatory Commission that the Judicial Propriety demands that there should be consistency with the earlier orders passed. Para 75 of the same is reproduced as under:

“75. The judicial propriety and discipline demands that there is certainty in the decision making process; the consistency and the earlier Orders passed by the State Commission must be respected by the very same State Commission.”

83. In view of the above, the Petitioner has not been able to substantiate that Clause (D) of the IPTA is illegal and that the liability of the Petitioner had come to an end by supplying the Power at interim interconnection point at Tower No. 52 at 220 kV Kashang Bhaba D/C transmission line or that the Petitioner was not liable to pay the transmission charges @ 14 Paise per unit to the Respondent No. 1 as agreed vide agreement dated 23.01.2016. Similarly, the Petitioner has failed to substantiate that the charges beyond Tower No. 52 are required to be borne by the HPSEBL and the demand of the transmission charges amounting to Rs. 4,21,03,978/- (Rupees Four Crore Twenty One Lac Three Thousand Nine Hundred and Seventy Eight only) was illegal and the Petitioner had made the payment under protest and the charges already paid in terms of IPTA dated 23.01.2016 are required to be refunded.

Thus, Points No. 2 and 3 are accordingly decided against the Petitioner and in favour of the Respondents.

Point No. 4 (Final order)

84. In view of our aforesaid discussion and findings, there are no merits in the Petition which is accordingly dismissed. The pending applications, if any, are also disposed off.

85. Before parting with this case, the Commission would like to make it clear that though the matter was last heard on 25.09.2023 and every endeavour was made to dispose off the Petition expeditiously but due to some administrative reasons, the pronouncement of this Order has taken some time.

The file after needful be consigned to record.

Announced
04.11.2023

-Sd-
(Shashi Kant Joshi)
Member

-Sd-
(Yashwant Singh Chogal)
Member (Law)

-Sd-
(Devendra Kumar Sharma)
Chairman