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Supreme Court penalizes Punjab distribution licensee for evading payments to generator and reagitating settled issues

The Supreme Court in its judgment dated October 9, 2023 in *Nabha Power Ltd. vs. Punjab State Power Corporation Ltd.*¹, deprecated Punjab State Power Corporation Ltd. (“PSPCL”) for its attempts to reagitate settled issues through multiple judicial proceedings and wriggle out of its payment obligations towards the generator. As a result, Supreme Court imposed exemplary costs of INR 65,00,000 (Indian Rupees sixty five lakh)² on PSPCL.

Background of the dispute and the issues decided by Supreme Court

1. Dispute arose between Nabha Power Ltd. (“Nabha”) and PSPCL due to unilateral deductions made by PSPCL in tariff payments on several attributes of coal pricing including coal washery charges, road transportation cost, third party coal testing charges, consideration of midpoint Gross Calorific Value (“GCV”) of coal to calculate energy charges etc.
2. No relief for recovery of such deductions was granted either by the State Commission or Appellate Tribunal for Electricity. Thus, Nabha had preferred an appeal before Supreme Court that led to the landmark decision of *Nabha Power Ltd. v. Punjab State Power Corporation Ltd. & Anr.*³ (“Nabha SC Judgment”) which was allowed in its favour on October 5, 2017.
3. In Nabha SC Judgment, the Supreme Court decided as under:
 - a) Emphasized on the primacy of express terms of a contract. However, as an exception, it also laid down a five-fold test to be strictly satisfied by a party for reading an implied condition in a contract viz such condition being (i) reasonable and equitable, (ii) necessary to give business efficacy to the contract, (iii) so obvious that it goes without saying, (iv) clearly expressed, and (v) not contrary to express terms of such contract.
 - b) Allowed Nabha to recover washing cost of coal and cost of road transportation from PSPCL and further held GCV to be considered on “as received” basis.

¹ C.A. No. 2425 of 2023

² INR 40,00,000 (Indian Rupees forty lakh) (in favour of Nabha) + INR 25,00,000 (Indian Rupees twenty five lakh) (in favour of Talwandi)

³ (2018) 11 SCC 508

Re-opening of the issues by PSPCL already decided and settled between parties.

1. Instead of making payment (as directed) throughout, PSPCL adopted endless dilatory tactics leading to multiple judicial proceedings as under:
 - a) PSPCL filed a '**Miscellaneous Application**' and subsequently a '**Review Petition**' before the Supreme Court. Both were dismissed.
 - b) Nabha filed a '**Contempt Petition** ("**1st Contempt Petition**") before Supreme Court seeking compliance of its directions in Nabha SC Judgment (tagged along with similar petition filed by *Talwandi Sabo Pvt. Ltd.* ("**Talwandi**")).
 - c) Supreme Court disposed of the 1st Contempt Petition directing PSPCL to follow the Nabha SC Judgment in letter and spirit and make the payment within 8 (eight) weeks.
 - d) PSPCL filed a **Miscellaneous Application** in the 1st Contempt Petition which got dismissed with grant of further time for payment.
 - e) Nabha filed another **Contempt Petition** ("**2nd Contempt Petition**") against PSPCL and Supreme Court held PSPCL guilty for non-compliance of Nabha SC Judgment.
 - f) PSPCL was granted time for making payments in 2 (two) instalments i.e. by March 31, 2021 and May 31, 2021 respectively ("**2nd Contempt Order**").
2. PSPCL paid the amounts and filed a fresh Petition (No. 49/2021) before Punjab State Electricity Regulatory Commission ("**PSERC**") under Section 86 (1)(a) of the Electricity Act, 2003 for directions against Nabha seeking:
 - a) Due and correct accounts of washing of coal;
 - b) Coal quality reports etc;
 - c) Refund of principal amount of INR 386,80,00,000 (Indian Rupees three hundred eighty six crore eighty lakh) (along with late payment surcharge).
3. PSERC held the Petition maintainable. Nabha then filed a Special Leave Petition before the Supreme Court challenging such order of PSERC. PSPCL sought to justify the fresh Petition on the basis of liberty granted by Supreme Court in its 2nd Contempt Order whereby it was stated that, such order does not preclude PSPCL from raising all future disputes arising from the PPA. PSPCL alleged that Nabha diverted higher GCV coal as 'rejects' and did not disclose the same to PSPCL leading to higher washing charges and income from such disposal.

The Supreme Court reprimanded PSPCL and imposed exemplary costs.

1. Supreme Court criticized PSPCL for its attempt to evade its payment obligations by filing yet another Petition before PSERC as under:
 - a) The same thing (*issues raised in the fresh Petition*) was being raked up again and again by PSPCL to evade payment, until it was compelled to pay by virtue of the 2nd Contempt Order.
 - b) Having made such payment, PSPCL is now seeking its refund under the garb of raising a 'future dispute', thus attempting to wriggle out of its payment obligation.
 - c) "*All future disputes*" for which liberty was given by the Supreme Court in the 2nd Contempt Order cannot mean to unsettle the effect of the Nabha SC Judgment.
 - d) Pricing of coal being the crux of the problem, which was adjudicated by Supreme Court, the same cannot be raked up again.
2. Supreme Court set aside PSERC's order holding PSPCL's fresh Petition as maintainable since it was another attempt to wriggle out of its payment obligation under the Nabha SC Judgment. Exemplary costs of INR 65,00,000 (Indian Rupees sixty five lakh) (*INR 40,00,000 (Indian Rupees forty lakh (Nabha))+ INR 25,00,000 (Indian Rupees*

twenty five lakh (*Talwandi*) were imposed upon PSPCL for its repeated attempts to evade the rigors of Supreme Court's orders.

Conclusion

As a matter of practice, distribution licensees have been withholding and delaying payments to generators by rearguing issues already settled and decided between them. Therefore, the Supreme Court's judgment clearly calling out PSPCL for its evasive attempts and imposing exemplary costs thereupon, certainly sets an effective deterrent for all distribution licensees across the country. Particularly, imposition of such huge costs revalidates the finality and sanctity of the adjudicative process and strengthens firm implementation of judicial decisions. Finally, by seeking to avert delays in payments to generators, the judgment furthers the consumer interest as greater the delay, greater the carrying cost which is ultimately borne by the end-consumers.

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This Prism has been prepared by:



Poonam Verma Sengupta
Equity Partner



Subham Bhut
Associate

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