

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**  
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

**Dated : 17<sup>th</sup> December, 2018**

**Present:**

Shri M.K. Shankaralinge Gowda ..	Chairman
Shri H.D. Arun Kumar ..	Member
Shri D.B. Manival Raju ..	Member

**OP No.91/2018**

**BETWEEN:**

- 1) Government of Karnataka,  
Department of Energy,  
Vikasa Soudha,  
Bengaluru – 560 001.
- 2) The Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
Bengaluru – 560 009.

.. **PETITIONERS**

*[Represented by Justlaw, Advocates]*

**AND:**

- 1) M/s. Hassan Thermal Power Private Limited,  
No.9, Kaveri Mansion,  
Next to MSIL Building,  
Near HAL Old Airport,  
Old Airport Road,  
Bengaluru – 560 017.

- 2) Ms. Nalini Vijaykumar,  
Major,  
Director,  
M/s. Hassan Thermal Power Private Limited,  
No.9, Kaveri Mansion,  
Net to MSIL Building,  
Near HAL Old Airport,  
Old Airport Road,  
Bengaluru – 560 017.
- 3) Mr. Gaurab Banerjee,  
Appointing Authority,  
Permanent Court of Arbitration,  
Peace Palace,  
Carnegieplein 2, 2517, KJ,  
The Hague,  
The Netherlands.
- 4) Mr. Ashok Kumar Shahi,  
522, Green Heavens Society,  
Plot No.35, Sector 4,  
Dwarka,  
New Delhi – 110 078.
- 5) Mr. Justice Amitava Roy (Retd.),  
A-96, Second Floor,  
Defence Colony,  
New Delhi – 110 024.
- 6) Mr. Justice S.B. Sinha (Retd.),  
D-361, Second Floor,  
Defence Colony,  
New Delhi – 110 024.

.. **RESPONDENTS**

*[Respondents 1 and 2 represented by Shri R.K. Naroola and  
Shri Sunil Narula, Advocates;  
Respondents 3 to 6 remained absent and unrepresented]*

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### **ORDERS**

- 1) In substance, the present Petition is filed, praying for a declaration that the dispute said to have been involved in PCA Case No.AA716, between

Hassan Thermal Power Private Limited (formerly known as 'Euro India Power Canara Private Limited') and the Government of Karnataka and another, is exclusively triable by this Commission, under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the 'Act') and consequently, for a declaration that the communications dated 29.06.2018 (ANNEXURE-C), 11.09.2018 (ANNEXURE-K) and 26.09.2018 (ANNEXURE-M), appointing the Respondents 4 to 6 as Arbitrators, are illegal and opposed to the mandate of the Act.

- 2) The material facts, as stated by the Petitioners in the Petition, which are relevant for the purpose of deciding the controversies involved in this case, may be stated, as follows:
  - (a) The 1<sup>st</sup> Respondent – Hassan Thermal Power Private Limited (Hassan Thermal), is a Company, incorporated under the Companies Act, 1956, which, prior to 18.05.2017, was known as 'Euro India Power Canara Private Limited' (Euro India'). The 2<sup>nd</sup> Respondent is one of the Directors of the 1<sup>st</sup> Respondent-Company, which has sought for initiation of arbitral proceedings, in accordance with the Arbitral Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). The 3<sup>rd</sup> Respondent is the 'Appointing Authority', nominated by the Permanent Court of Arbitration (PCA) at Hague, as provided in the UNCITRAL Rules. The Respondents 4 to 6 are the Arbitrators, appointed by invoking the UNCITRAL Rules.

- (b) In March, 1996, approval was accorded to Euro India for establishing a 150 MW capacity Barge Mounted Power Plant on the river Mulki, near Mangaluru. The capacity of the said Power Plant was enhanced to 195 MW and a Power Purchase Agreement (PPA) dated 22.04.1999 (ANNEXURE-A) was executed between the then Karnataka Electricity Board (KEB) and Euro India, as per the terms and conditions, agreed to, therein. Subsequently, at the request of the Euro India, there were frequent changes in the location of the Plant, fuel to be utilized, capacity of the Plant, etc., including the tariff to be paid. Ultimately, another PPA dated 25.06.2007 (ANNEXURE-B) was executed between the Electricity Supply Companies (ESCOMs) in Karnataka (the successors-in-interest of the KEB) and Hassan Thermal, as per the terms and conditions stated, therein. The Electricity Act, 2003 (Act), came into force with effect from 10.06.2003, under which, approval of the PPA was essential. The PPA dated 25.06.2007 was produced before this Commission, seeking approval, on 03.08.2007. However, this Commission, for the reasons stated in its communication dated 17.08.2007, refused to grant approval.
- (c) Thereafter, the parties negotiated certain changes in the PPA dated 25.06.2007 and a revised draft of the PPA was prepared and finalized between the parties, and on submission of the revised PPA to this Commission, this Commission raised various issues, noted in its communication dated 10.07.2013, without approving the said revised PPA. After further negotiations, the parties could not reach a unanimous decision

regarding the future course of action to be taken. The 1<sup>st</sup> Respondent has filed certain Writ Petitions, seeking certain reliefs against the 1<sup>st</sup> Petitioner and others.

- (d) It is averred by the Petitioners, in Paragraph-18 of the Petition, that during the pendency of the Writ Petitions, the Respondents 1 and 2 herein have approached the PCA, for appointment of an Arbitral Tribunal, purportedly in furtherance to the provisions of the Agreement (PPA dated 22.04.1999), contending that the disputes are arbitrable and that, as per the said clause, appointment of an Arbitrator requires to be done under the UNCITRAL Rules.
  - (e) The Petitioners addressed letters to the PCA, at The Hague, informing that, any dispute should be exclusively tried by this Commission, under Section 86(1)(f) of the Act, and inspite of it, the Arbitrators (Respondents 4 to 6) were appointed by the 3<sup>rd</sup> Respondent, who was the 'Appointing Authority', by invoking the UNCITRAL Rules.
  - (f) Therefore, the Petitioners have filed the present Petition, seeking for the reliefs stated therein.
- 3) Upon Notice, the Respondents 1 and 2 appeared through their counsel. The other Respondents remained absent, inspite of issuance of Notices.

- 4) The Respondents 1 and 2 have filed their Written Submissions, opposing the reliefs claimed by the Petitioners. The gist of the Written Submissions of the Respondents 1 and 2, may be stated, as follows:
- (a) This Commission does not have jurisdiction to adjudicate upon the dispute between the Petitioners and the 1<sup>st</sup> Respondent, for the following reasons:
- (i) The PPA dated 22.04.1999 was executed long prior to the coming into force of the Electricity Act, 2003 (Act), thereby Section 86 (1)(f) of the said Act is not applicable;
- (ii) The PPA dated 22.04.1999 contained a provision for Dispute Resolution, under which it was provided that, arbitration shall be conducted in accordance with the UNCITRAL Rules and there shall be three Arbitrators, to be appointed in accordance with the provisions contained in sub-clause (e) of Article 14.3. Some dispute arose between the parties, subsequent to the execution of the PPA dated 22.04.1999 and the 1<sup>st</sup> Respondent invoked the said clause in Article 14.3 of the PPA and an Arbitral Tribunal was constituted, for adjudication of the disputes and thereafter, a joint application, duly signed by both the parties, was filed before the Arbitral Tribunal, for terminating the proceedings, in terms of the joint application and

accordingly, a Consent Award dated 05.08.2004 was passed by the Arbitral Tribunal, which read, thus:

*“Wherefore the parties respectfully pray that the present arbitration proceedings be terminated reserving liberty to either of the parties to initiate fresh arbitration proceedings against the other on the same cause of action.”*

- (iii) The PPA dated 25.06.2007 is a revised and re-stated Power Purchase Agreement, executed between the parties. It is clear from the recitals in clause (vi) of the PPA dated 25.06.2007 that, the parties having conducted detailed negotiations, desired to incorporate the result of their consensus, by entering into a self-contained PPA, in terms of Article 16.1 of the original PPA dated 22.04.1999. The said Article 16.1 of the original PPA reads, thus: *“This Agreement (dated 22.04.1999) including the Appendices and Schedules thereto, may be amended, only by written Agreement of the parties.”* Therefore, these Respondents asserted that, a revised and re-stated PPA dated 25.06.2007 is, at best, a revised version of the original PPA dated 22.04.1999; that, as the PPA dated 25.06.2007 was not approved by this Commission, it was never acted upon by the Petitioners and the 1<sup>st</sup> Respondent, thereby nothing could be proceeded with, to design, own, operate a new Thermal Power Generating Station, as envisaged in the said PPA.

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- (iv) That, as nothing fructified, even after years of negotiations, pursuant to the PPA dated 25.06.2007 and the subsequent development, the 1<sup>st</sup> Respondent had no option but to resort to the arbitration clause, as agreed to, in writing, by the parties in the Consent Award dated 05.08.2004 and had to invoke the arbitration clause under Article 14.3 of the PPA dated 22.04.1999. That, thereafter, the 3<sup>rd</sup> Respondent was nominated as the Appointing Authority and the Respondents 4 to 6 were appointed as the arbitrators, under the UINCITRAL Rules. Thereafter, the 1<sup>st</sup> Respondent wrote to the PCA, vide its communication dated 25.06.2018, resulting in the communication dated 29.06.2018 for appointment of Arbitrator(s,) for adjudication and the same was acknowledged by the PCA, vide its communications dated 29.06.2018, 11.09.2018 and 26.09.2018 (ANNEXURES-C, K & M, respectively).
- (v) In view of the fact that the terms and conditions set out in the PPA dated 25.06.2007 having not been approved, the 1<sup>st</sup> Respondent could not set up the proposed Power Project and thereby, the 1<sup>st</sup> Respondent is not a 'Generating Company', as per the definition given in Section 2(28) of the Act. The 1<sup>st</sup> Respondent was forced to avail of the option under the Consent Award, to invoke the arbitration, in terms of Article 14.3 of the PPA dated 22.04.1999.
- (b) Therefore, the 1<sup>st</sup> Respondent has prayed for dismissal of the Petition.



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- 4) We have heard the learned counsel for the Petitioners and the Respondents 1 and 2 in the above case.
- 5) The following issues would arise, for our consideration:
- (1) Should the subject-matter of the dispute, said to have been involved in the arbitral proceedings between the 1<sup>st</sup> Respondent and the Petitioners, be exclusively triable by this Commission?
- (2) What Order?
- 6) After considering the pleadings and records of the case and the submissions made by the learned counsel for the parties, our findings on the above Issues are, as follows:
- 7) **ISSUE No.(1):** *Should the subject-matter of the dispute, said to have been involved in the arbitral proceedings between the 1<sup>st</sup> Respondent and the Petitioners, be exclusively triable by this Commission?*
- (a) The Respondents 1 and 2 have contended that, as the revised and re-stated PPA dated 25.06.2007 is not approved by this Commission, the earlier PPA dated 22.04.1999 is reviving and any dispute arising out of the PPA dated 25.06.2007, has to be adjudicated, as per the arbitration provisions contained in Article 14 of the PPA dated 22.04.1999. Therefore, they contended that the arbitral proceedings, commenced under the UNCITRAL Rules, are legally valid. The Petitioners have contended that, the PPA dated 22.04.1999 has no

existence, subsequent to the execution of the PPA dated 25.06.2007, on the principles of novation, as the earlier PPA would merge with the subsequent PPA. We are of the considered opinion that, the contention of the Petitioners that, the earlier PPA dated 22.04.1999, has no existence, after the execution of the PPA dated 25.06.2007, appears to be legally acceptable.

- (b) Even if it is considered that the PPA dated 22.04.1999 revives and survives, for one or the other reason, one has to hold that, after coming into force of the Electricity Act, 2003, where a specific provision is made for trial of the disputes between the Generating Companies and the Licensees, the disputes, if any, under the PPA dated 22.04.1999 should be brought before the Commission alone, but not before the Arbitrators, as provided in Article 14 of the PPA. Earlier to the Electricity Act, 2003, the forum for adjudicating the disputes between the Generators and the Licensees, was governed by the general law and there was no special Tribunal, to try such disputes. Therefore, an aggrieved party to a PPA had to approach Civil Court or had to resort to the arbitral proceedings, as per the Arbitration Agreement that might have been entered into between them. After coming into force of the Electricity Act, 2003, the Forum, for adjudication of such disputes, is exclusively conferred on the Commission. Therefore, for adjudicating any such dispute that might arise under the PPA dated 22.04.1999 or under the PPA dated 25.06.2007, it is only the Commission which has the exclusive jurisdiction. A litigant has a 'vested right of action', but not a 'vested right of Forum'. Therefore, when there is a

change of Forum, for trial of any cause, the cause should be brought before the changed Forum alone, but not before the existing Forum, unless there is a specific bar while creating the new Forum. This principle is clearly stated in Paragraph-60 of the Judgment of the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigarm Ltd. -Vs- Essar Power Ltd.*, reported in (2008)4 SCC 755, decided on 13.03.2008, which reads, thus:

*'In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30.5.1996. Had the Electricity Act, 2003 not been enacted there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between the licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003, there can be no adjudication of dispute between licenses and generating companies by anyone other than State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clause (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in section 86(1)(f) about the nature of the dispute.'*

From the Judgment of the Hon'ble Supreme Court, it is clear that after 10.6.2003 when the Electricity Act, 2003 came into force, there can be no adjudication of disputes between licensees and generating companies by anyone other than the State Commission or the Arbitrator (or Arbitrators) nominated by it. The exclusive jurisdiction for adjudicating a dispute or to refer

it for arbitration lies with the State Commission and no other Court or Tribunal has the authority to entertain such disputes.

- (c) The learned counsel for the Respondents 1 and 2, relying upon the definition of 'Generating Company', defined in Section 2(28) of the Act, which states that, 'Generating Company' means any company or body corporate, etc., which owns or operates or maintains a Generating Station, submitted that the 1<sup>st</sup> Respondent herein cannot be treated as Generating Company, because it has not yet established any such Generating Station, Therefore, he submitted that the dispute between 1<sup>st</sup> Respondent and the Distribution Licensee cannot be adjudicated under Section 86(1)(f) of the Act.
- (d) Though such a submission appears to be attractive, on seeing the definition of the 'Generating Company', it may be noted that, unless the context otherwise requires, the words and phrases as defined in the definition clause of an Act, hold good for interpreting the provisions contained in that Act. Therefore, if the context in which a word, defined in the definition clause, requires a different meaning, in the context in which it is used in any Section of that Act, the meaning assigned in the definition clause cannot be blindly accepted, while interpreting that Section.
- (e) It may be noted that, Section 7 of the Act states that, a 'Generating Company' may establish, operates and maintain a Generating Station, without obtaining a licence, etc. Section 10 of the Act states that, subject to provisions of the Act, the duties of a Generating Company shall be to

establish, operate and maintain Generating Stations, tie lines, etc. In these Sections, if the definition of 'Generating Company', as interpreted by the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, is accepted, it would amount to saying that, a Generating Company, currently owning or operating or maintaining a Generating Station, can alone establish a Generating Station. This would lead to an absurd result. Therefore, in these Sections, the meaning of 'Generating Company' would certainly include a prospective Generating Company, which intends to establish, operate or maintain a Generating Station.

- (f) In the same way, in Section 86(1)(f) of the Act also, the meaning of 'Generating Company' cannot be restricted to a 'Generating Company', which owns or operates or maintains a Generating Station. A Company or Body Corporate, etc., intending to set up Generating Stations, is entering into a PPA with the Distribution Licensees. Such a Company is referred to as a 'Generating Company', in the PPA. Such PPA is to be approved by the Commission, at the initial stage of establishing the Generating Station. The PPA would contain the duties and the obligations to be performed by each party, during the course of setting up of the Generating Station. If any dispute arises between the parties during the course of setting up of the Generating Station, the scheme of the Act provides that it should be adjudicated under Section 86(1)(f) of the Act. The object of Section 86(1)(f) of the Act is to exclusively entrust the State Commission with adjudication of all the disputes between the Licensees and the Generating Companies, and to refer any

dispute to arbitration. If the arguments of the learned counsel for the Respondents 1 and 2 are accepted, all the disputes that might arise before the actual establishment of a Generating Station, cannot be brought before the Commission under Section 86(1)(f) of the Act.

- (g) We are of the considered view that, such a situation is not intended by the legislature. Therefore, the meaning of 'Generating Company', referred to under Section 86(1)(f) of the Act, would also include a prospective Generating Company, which intends to set up a Generating Station.
- (h) Further, we may note that, when once a Generating Company and a Distribution Licensee enter into a PPA, all disputes between them, arising thereunder, should be tried by this Commission. The Act provides that, all disputes between a Generator and a Licensee, shall be exclusively adjudicated by the Commission.
- (j) We may note that, the phrase 'which owns or operates or maintains a generating station', in the definition of 'generating company', is in simple present tense, which form is grammatically used to express a future event that is part of a fixed time table or a fixed programme. Therefore, we are of the considered view that the interpretation of the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, cannot be accepted.

- (k) The learned counsel for the Respondents 1 and 2 submitted that, the dispute intended to be adjudicated by the Arbitral Tribunal, is excluded from the purview of Section 86(1)(f) of the Act and for which he relied upon paragraphs-29 and 58 of the *Gujarat Urja* case. However, we think, the said paragraphs are not applicable to exclude the case of the 1<sup>st</sup> Respondent, from the purview of Section 86(1)(f) of the Act. Therefore, the dispute, if any, under the PPA dated 22.04.1999 or the PPA dated 25.06.2007, shall be brought before the Commission, under Section 86(1)(f) of the Act.
- (l) For the above reasons, we answer Issue No.(1), in the affirmative.

8) **ISSUE No.(2):** *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

- (a) It is declared that, the dispute, said to have been involved in PCA Case No.AA716, between the Hassan Thermal Power Private Limited (formerly known as 'Euro India Power Canara Private Limited') –Vs- The Government of Karnataka and the Karnataka Power Transmission Corporation Limited, is exclusively triable by this Commission, under Section 86(1)(f) of the Electricity Act, 2003, and not before any other Forum;
- (b) Consequently, it is declared that, the communications dated 29.06.2018 (ANNEXURE-C), 11.09.2018 (ANNEXURE-K) and 26.09.2018

(ANNEXURE-M), appointing the Respondents 4 to 6 as Arbitrators, are illegal and opposed to the mandate of the Electricity Act, 2003; and,

- (c) The Respondents 1 and 2 are restrained from proceeding with the above-mentioned arbitral case.

Sd/-  
(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-  
(H.D. ARUN KUMAR)  
MEMBER

Sd/-  
(D.B. MANIVAL RAJU)  
MEMBER