

No.N/30/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 21st October 2009

1. Sri K.P. Pandey	Chairman
2. Sri Vishvanath Hiremath	Member
3. Sri K. Srinivasa Rao	Member

Case No. OP 20/2009

Between

1. MESCOM

Paradigm Plaza, A.B.Shetty Circle
M A N G A L O R E – 575 001

2. Power Company of Karnataka Limited

KPTCL Building, Cauvery Bhavan
B A N G A L O R E - 560 001

(Represented by its Advocate Sri Sriranga)

... Petitioners

Vs.

M/s Kalyani Power Development Pvt. Ltd.

No.25, Unmol, Yeshwanth Ghatge Nagar
Range Hill Corner

P U N E - 411 007

(Represented by its Advocate Sri Gopal Choudhari)

... Respondent

1. This petition is jointly filed by M/s Mangalore Electricity Supply Company Limited (hereinafter referred to as MESCOM) and M/s Power Company of Karnataka Limited (hereinafter referred to as (PCKL) against M/s Kalyani Power Development Private Limited (hereinafter referred to as Kalyani Power) seeking direction to the respondents to–

- declare that the Respondent in breach of terms of Letter of Intent and the subsequent assurance failed to return the energy;
- pay a sum of Rs.39.32 crores being the maximum UI charges fixed by CERC, i.e., Rs.10.29 for the energy of 38.209143 MUs;

- c) direct the Respondent to pay interest @ 18 % p.a. from 01.03.2009 on the amount due till date of payment;
- d) grant cost of this proceedings; and
- e) pass such orders as this Hon'ble Commission may deem fit in the facts and circumstances of the case, in the interest of justice.

2. The 1st petitioner MESCOM is a deemed distribution and supply licensee under the provisions of Electricity Act, 2003 (hereinafter referred to as Act) and is carrying on the business of distribution and supply of electricity in the area assigned to it which comprises of the districts of Mangalore, Udupi, Shimoga and Chickmagalur. The 2nd petitioner is a Government company and engaged in the business of procuring power on behalf of ESCOMs. The respondent is a trading licensee and is in the business of trading of electricity.

3. The petitioners have alleged that the respondent is in breach of the terms of letter of intent and has failed to ensure return the energy supplied through it to M/s BSES Rajdhani Power Ltd., Delhi and therefore is liable to pay a sum of Rs.39.32 crores for the energy that has been supplied at its instance to M/s BSES Rajdhani Power Ltd.

4. On notice the respondent has appeared and has raised preliminary objections on the maintainability of the petition itself. The petitioners have filed their rejoinder to the preliminary objections raised.

5. In the preliminary objections, respondent has contended that the dispute in question relates to an inter-state transaction for supply and return of power and is therefore beyond the jurisdiction of this Commission. It is further contended that the petition is beyond the territorial jurisdiction of this Commission. It is also contended by the respondent that since M/s BSES Rajdhani Power Ltd., which is a party to the transaction and which is

supposed to return the power supplied by the petitioners shall have been impleaded as a party to the petition and having not impleaded M/s BSES Rajdhani Power Ltd., as a respondent, the petition suffers from defect of non-joinder of necessary party. On these preliminary grounds, the respondent prays for rejection of the petition in limine.

6. Both the petitioners in reply have contended that this Commission has a jurisdiction to decide the dispute under Section 86(1)(f) of the Act as the dispute is between two licensees. It is further contended by the petitioners that M/s BSES Rajdhani Power Ltd., is not a necessary party to the petition as essentially the transaction is between the petitioners and the respondent and there is no privity of contract between the petitioners and M/s BSES Rajdhani Power Ltd.,

7. Since the preliminary issues raised by the respondent goes to the very root of the matter we have decided to consider them before proceeding further. We have heard Mr. Gopal Chowdhary, counsel appearing for the respondent and Sri Sriranga, counsel appearing for the petitioners.

8. It is submitted by Sri Gopal Chowdhary that the respondent is not a licensee of Karnatak Commission and hence does not fall within the jurisdiction of this Commission. He further submits that the transaction between the petitioners and the respondent is in the nature of inter-state transaction therefore it is beyond the territorial jurisdiction of this Commission. He submits that the role of his client in the transaction is only of an intermediary and not of trading, even if it is held that this Commission has a jurisdiction under Section 86(1)(f). According to him, it is M/s BSES Rajdhani Power td., which is responsible for the breach of contract if any.

9. In reply, Sri Sriranga, counsel for the petitioners has submitted that under Section 86(1)(f) of the Act, any dispute between two licensees is maintainable before this Commission. According to him as petitioners and respondent are admittedly licensees and the transaction in question falls within their sphere of licensee activity and the nature of the transaction is not material at all. As regards impleading M/s BSES Rajdhani Power Ltd., he contends that he cannot maintain a petition against M/s BSES Rajdhani Power Ltd., as M/s BSES Rajdhani Power Ltd., is not a privy to contract and it is only the respondent who has entered into the contract for supply of power to M/s BSES Rajdhani Power Ltd.

10. We have anxiously considered the preliminary issues raised by the respondent in the light of material placed before us and also submissions made for and against by the counsels appearing for the parties.

11. The Electricity Act has been enacted as a special enactment to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for constitution of the Regulatory Commissions. Section 174 of the Act provides for overriding effect over the general law.

Section 174 of the Act reads as under :-

*“**Act to have overriding effect** – Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act”.*

12. The language of Section 86(1)(f) of the Act does not convey a meaning that the adjudicatory power of the Commission is limited to the licensees to whom licenses have been granted by this Commission. The word ‘licensee’ has been defined under the Act to mean “[Section 2(39)]– a person who has been granted a licence under Section 14”.

Section 86(1)(f) read with the definition of licensee does not make any distinction between the licensees. In our considered view it include all licensees irrespective of the fact which Commission has granted the licence.

Section 86(1)(f) of the Act states that the State Commission shall adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.

Since Section 86(1)(f) being provision under special Act in our view it overrides the provisions of the general law for the time being in force which provides for adjudication of disputes between two parties to a contract. As Section 86(1)(f) provides for adjudication of disputes between two licensees also this Commission shall have to consider the dispute filed before it for adjudication.

13. The Hon'ble Supreme Court while interpreting the provisions of Electricity Regulatory Commission Act, 1998, in the case of BSES Limited Vs. Tata Power Company Limited and others [reported in 2004(1)SCC 195] at Para 12, Page 206 has held the Regulatory Commission Act shall be interpreted in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned so that the purpose for which the Act has been enacted may be achieved.

In our view, Electricity Act 2003 shall also have to be interpreted as held in the above case while considering the jurisdiction of the Commission for adjudication of disputes between licensees.

14. The Hon'ble Supreme Court in the case of M/s Gujarat Urja Vikas Nigam Ltd., Vs. Essar power Limited (which is relied upon by the petitioners) reported in 2008(4)SCC 755 has held "that Section 86(1)(f) of

the Act is a special provision for adjudication of disputes between the licensees and the generating companies and where a statute provides for a thing to be done in a particular manner it has to be done in that manner and in no other manner. Section 86(1)(f) provides a special manner of making reference to an arbitrator in disputes between the licensee and a generating company. Hence by implication all other methods are barred".

15. The law laid down as above by the Hon'ble Supreme Court supports our view taken as above.

16. The contention of respondent that the transaction involves interstate transfer of power and hence this Commission has no territorial jurisdiction cannot be accepted as the agreement between petitioners and respondent has taken place within the territorial jurisdiction of this Commission. Mere transfer of power from Karnataka thereafter to Delhi does not take away the jurisdiction of this Commission. Only issues mentioned in clause 79(1)(c) & (d) are beyond the jurisdiction of this Commission and are to be dealt by CERC.

17. Therefore we hold that under Section 86(1)(f) of the Act, this Commission has jurisdiction to adjudicate the dispute that has arisen between the petitioners and the respondent.

18. As regards impleading M/s BSES Rajdhani Power Ltd., as a party to the proceedings we hold that it is not a necessary party being not a privy to the contract in question. Perusal of the documents produced by the petitioners prima facie indicate that the agreement of the petitioners is with the respondent Kalyani Power which has undertaken the responsibility of taking power from petitioners to supply to M/s BSES Rajdhani Power Ltd., and returning the same by M/s BSES Rajdhani Power

Ltd. to the petitioners. This is not a gracious act undertaken by the respondent. The respondent under the contract entered with the petitioners as well as M/s BSES Rajdhani Power Ltd., has a right to receive the trading margin of Rs.0.03/kwh, in keeping with CERC Regulations. The contention of the respondent that M/s BSES Rajdhani Power Ltd., is one who has received electricity of the petitioner and therefore returning of power has to be done by them cannot be accepted at this juncture. The letter of intent clearly imposes an obligation on the respondent for return of power by M/s BSES Rajdhani Power Ltd. If the respondent's role was only of an intermediary as contended, then respondent would not have agreed to give a bank guarantee equivalent to the electricity to be drawn by M/s BSES Rajdhani Power Ltd., at Rs.5/- to the petitioners.

19. In the light of the above discussion, we overrule the objections raised by the respondent on the question of maintainability of the petition and hold that the petition filed before this Commission is maintainable.

20. The application of the petitioners for change of the name of respondent and the cause title is allowed, as the respondent has no objection to the same. The petitioners may amend the cause title as sought for.

21. Post the matter for further hearing on 12.11.2009. In the meanwhile, the respondent may file its objections on the merits so that the matter can be decided expeditiously.

Sd/-
(K.P. PANDEY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER