

No.N/19/12/1836

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION, BANGALORE

Dated 2nd November, 2012

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

APPLICATION No.1/2012

CONNECTED WITH

OP NO.10/2012

ORDER ON APPLICATION NO.1/2012

BETWEEN :

Sree Rayalaseema Alkalies &
Allied Chemicals Limited
Gondiparia
KURNOOL – 518 004
(Represented by M/s. Shridhar Prabhu Associates, Advocates)

Petitioner

AND

- 1) Power Company of Karnataka Limited
5th Floor, KPTCL Building
Cauvery Bhavan
BANGALORE-560 009
- 2) Karnataka Power Transmission Corporation Limited
Cauvery Bhavan
BANGALORE-560 009
- 3) Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001
- 4) Mangalore Electricity Supply Company Limited
Paradigm Plaza
A.B. Shetty Circle
BANGALORE-575 001

RESPONDENTS

[R1, R3 & R4 represented by Shri Arvind Kamath, Advocate
R2 represented by M/s.Justlaw, Advocates]

1) The Petitioner has initiated proceedings in OP No.10/2012, making the following Prayers and also has sought for an Interim Prayer :

- “(a) Declare that the letter bearing No.PCKL/A12/23(b)/2011-12/69852-54, dated 3rd February, 2012 at Annexure-P31, issued by Respondent Nos. 2 to 4 and the Demand Letter bearing No.CGM(OP)/GM/(PP/OP)6253 dated 25th February, 2012, issued by the 3rd Respondent at Annexure-P35, are invalid and non-est in the eyes of law;
- (b) Direct the 2nd Respondent to make payment of Rs.1,10,53,000/- (Rupees One Crore Ten Lakhs Fifty Three Thousand only) towards construction of a separate Transmission line facility for the project site, along with interest of Rs.2,12,36,295/- (Rupees Two Crores Twelve Lakhs Thirty Six Thousand Two Hundred Ninety Five only) to the Petitioner and further direct them to construct the Transmission Line which is their lawful obligation as per Article 3.3 of PPA executed between the Petitioner and the Respondent;
- (c) Direct the 3rd and 4th Respondents to make payment of Rs.6,50,61,302/- (Rupees Five Crore Fifty Lakh Sixty One Thousand Three Hundred Two only) calculated up to February, 2012 towards interest on belated payments on the Tariff Bills, to the Petitioner;
- (d) Direct the Respondents to make payment to the Petitioner for the amount due towards the deemed generation, variable charges, fixed charges and rebate , amounting to Rs.1,83,27,835/- (Rupees One Crore Eighty Three Lakh Twenty Seven Thousand Eight Hundred Thirty Six only), which now along with interest of Rs.2,39,85,637/- (Rupees Two Crores Thirty Nine Lakh Eighty Five Thousand Six Hundred Thirty Seven only) at the rate of 18% per annum up to February, 2012, amounts to Rs.4,23,13,473/- (Rupees Four Crores Twenty Three Lakh Thirteen Thousand Four Hundred Seventy Three only);

- (e) Direct the 3rd and 4th Respondents to pay the invoice dated 1st March, 2012 for the month of February, 2012 amounting to Rs.1,65,65,345/- (Rupees One Crore Sixty Five Lakh Sixty Five Thousand Three Hundred Forty Five only) raised on them by the Petitioner;
- (f) Direct the 3rd and 4th Respondents to pay the Petitioner the Net Tax liability payable as per Article 11.5 of the PPA for the first ten years of operation amounting to Rs.1,22,03,454/- (Rupees One Crore Twenty Two Lakh Three Thousand Four Hundred Fifty Four only);
- (g) Direct the Respondents to open an ESCROW Account as per Article 9.5 of the PPA in favour of the Petitioner for the due payments of the bills raised by the Petitioner;
- (h) Award costs of the proceedings in favour of the Petitioner and against the Respondents;
- (i) Pass such other or further order(s) direction(s) as may be deemed fit and proper in the facts and circumstances of the case and to secure the ends of justice.

INTERIM PRAYER

WHEREFORE, it is most respectfully prayed that this Hon'ble Commission may be pleased to pass an interim order staying the operation of the demands raised vide letter bearing No.PCKL/A12/23b)/2011-12/6852-54 dated 3rd February, 2012 issued by Respondent No.2 to 4 at **ANNEXRE-P31** and the Demand Letter bearing No.CGM(OP)/GM(PP/OP)DGM (F&C)/AGM(F&C/BESCOM/BC-39/6253 dated 25th February, 2012 issued by the 3rd Respondent at **ANNEXURE-P35**, in the interest of justice and equity till the final adjudication of the present petition."

2) The Petitioner has also separately filed Application No.1/2012 (Interlocutory Application), seeking reference of the disputes in OP No.10/2012 to an arbitration, as provided in the Power Purchase Agreement (PPA) dated

15.12.1997. The Respondents have filed their objections to Application No.1/2012.

3) As the prayer made in Application No.1/2012 (Interlocutory Application) virtually questions the jurisdiction of this Commission in adjudicating the disputes raised in the main Petition, with the consent of the parties, the Commission has heard the Counsels of all the parties only on the Interlocutory Application.

4) It is submitted by the Petitioner that the disputes raised in the main Petition, viz., OP No.10/2012 need to be referred to an arbitration, as provided under Article 15 of the PPA. It is further submitted by the Petitioner that in view of the Judgment of the Hon'ble Supreme Court in the case of *Union of India –Vs- R. Gandhi, President, Madras Bar Association*, reported in JT 2010 (5) SC 553 (1), this Commission is not competent to adjudicate the disputes raised in the Petition.

5) Per contra, it is contended by the Respondent No.1 that under Section 86(1)f) of the Electricity Act, 2003, it is only this Commission which is competent to adjudicate the disputes between the Generator and the Distribution Company, and the Arbitration Clause, which the Petitioner has relied upon, cannot be pressed into service after coming into force of the Electricity Act, 2003 and the Judgment of the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Limited –Vs- ESSAR Power Limited*, reported in 2008 (4) SCC 755. It is further submitted that the Judgment relied upon by the Petitioner in the case of

Union of India –Vs- R. Gandhi President, Madras Bar Association has no application to the present case.

6) We have considered the averments made by the Petitioner in the Interlocutory Application (Application No.1/2012), and the Rejoinder, the averments made by the Respondents and the Judgments cited. We have also heard the oral submissions made by the counsels for the parties.

7) Article 15 of the PPA dated 15.8.1997 provides for a reference of the disputes to an arbitration. It is the submission of the Petitioner that in view of the existence of this provision, this Commission has to refer the disputes arising out of the Contract to an arbitration. Further, it is submitted by the Petitioner that the claims to be adjudicated, arising between the parties, need a certain expertise and therefore it is only an Arbitrator competent to examine the claims who should decide the matter.

8) Per contra, it is submitted on behalf of the Respondent that under Section 86(1)(f), as per the Judgment of the Hon'ble Supreme Court in the case of *Gujarat Urja Visas Nigam Limited –Vs- ESSAR Power Limited*, reported in 2008 (4) SCC 755, it is only this Commission which has to decide the dispute Or refer it to an arbitration and the Petitioner, relying upon a provision in the PPA, cannot demand for a reference of the dispute to arbitration.

9) In our view, the issue raised in the Interlocutory Application is no more *Res Integra* in view of the Judgment of the Hon'ble Supreme Court in the above case. The Hon'ble Supreme Court in the above case, in unequivocal terms, has negated a similar contention raised therein. The Hon'ble Supreme Court, while dealing with the question whether an application under Section 11 of the Arbitration Act, as per the Arbitration Clause in the Agreement, is maintainable, in view of the statutory specific provisions contained in the Electricity Act, 2003, providing for the adjudication of the disputes between the Licensees and the Generating Companies, has held at Paragraphs-24 to 31 that :

"24. The main question before us is whether the application under Section 11 of the Act of 1996 is maintainable in view of the statutory specific provisions contained in the Electricity Act of 2003 providing for adjudication of disputes between the licensee and the generating companies.

25. In our opinion, the submission of Mr. K.K. Venugopal has to be accepted.

26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word 'and' in Section 86(1)(f) between the words 'generating companies' and 'to refer any dispute for arbitration' means 'or'. It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and' (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p.404).

27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word 'and' between the words 'generating companies' and the words 'refer any dispute' means 'or', otherwise it will lead to an anomalous situation because obviously the State Commission

cannot both decide a dispute itself and also refer it to some arbitrator, Hence the word 'and' in Section 86(1)(f) means 'or'.

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

29. This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted above. We may clarify that the agreement dated 30-5-1996 is not a part of the licence of the licensee. An agreement is something prior to the issuance of a licence. Hence, any provision for arbitration in the agreement cannot be deemed to be a provision for arbitration in the licence. Hence also it is the State Commission which alone has power to arbitrate/adjudicate the dispute either itself or by appointing an arbitrator.

30. Shri Jayant Bhushan, learned counsel appearing for one of the parties in the connected case submitted that Section 86(1)(f) is violative of Article 14 of the Constitution of India because it does not specify when the State Commission shall itself decide a dispute and when it will refer the matter to arbitration by some arbitrator. In our opinion there is no violation of Article 14 at all. It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator. Some leeway has to be given in the legislature in such matters and there has to be judicial restraint in the matter of judicial review of constitutionality of a statute (vide Govt. of A.P. v. P. Laxmi Devi).

31. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly

technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India."

The Hon'ble Supreme Court has further held at Paragraphs-58 and 59 of the above Judgment that :

"58. In our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilizing the samanasya, badha and gunapradhana principles of Mimansa. This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.

59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence, on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation

Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003, (unless there is a conflicting provision in the Electricity Act, 2003 in which case such provision will prevail)."

10) In our view, the contention raised in the Interlocutory Application appears to be an afterthought. The very same Petitioner had approached the Hon'ble High Court of Karnataka in W.P.Nos.12261 & 12263 of 2011, seeking a declaration that the Petitioner is not liable to pay a sum of Rs.16 Crores and odd in terms of Article 15 of the PPA, etc. It was submitted before the Hon'ble High Court, both by the Petitioner and the Respondent, that the Petitioner may be permitted to approach this Commission in order to seek redressal of their grievances under Section 86(1)(f) of the Electricity Act, 2003. The Hon'ble High Court of Karnataka, considering this submission, by its Order dated 28.4.2011, disposed of the Writ Petitions, with a direction to the Petitioner to file a Petition before this Commission within eight weeks from 28.4.2011, and issued a direction to the Respondent not to precipitate the matter till then, and also issued a direction to this Commission to consider the Petition of the Petitioner without reference to limitation and to pass appropriate orders on merits. Pursuant to this Order of the Hon'ble High Court, the Petitioner did file a Petition in OP No.24/2011 before this Commission against the claim made by the Respondents and has suffered an Order dated 24.11.2011 passed in the said Petition on merits, and it is brought to the Notice of this Commission that the Petitioner has filed an Appeal against the said Order of the Commission and the said Appeal is dismissed by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.164/2012 on 18.10.2012. Pursuant to the orders of this Commission, the Respondent has proceeded further in determining

the amount payable by the Petitioner. As against this, the Petitioner has filed the present Petition OP 10/2012 and also Application No.1/2012 (Interlocutory Application) praying for referring the determination of the claim to an arbitration.

11) We are constrained to observe that the Interlocutory Application filed in the present Petition appears to be a deliberate attempt of the Petitioner to delay the implementation of the Order of this Commission passed in OP No.24/2011 on 24.11.2011. This, in our opinion, cannot be appreciated. However, we are not expressing our opinion on the merits of the original Petition, since it is yet to be heard.

12) In the light of the Order dated 28.4.2011 of the Hon'ble High Court of Karnataka in the Writ Petitions referred to above, the Judgment of the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Limited –Vs- ESSAR Power Limited*, reported in 2008 (4) SCC 755, we have no hesitation in rejecting the prayers made in the Interlocutory Application (Application 1/2012) for referring the dispute for arbitration.

13) Further, we observe that the case *Union of India –Vs- R. Gandhi, President, Madras Bar Association*, reported in JT 2010 (5) SC 553 (1), referred to by the Petitioner in support of its Interlocutory Application, has no application, in view of the direct Judgment of the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Limited –Vs- ESSAR Power Limited*, reported in 2008 (4) SCC 755, referred to above.

14) For the foregoing reasons, the Interlocutory Application No.1/2012 is liable to be rejected and accordingly it stands rejected.

Sd/- (M.R. SREENIVASA MURTHY) CHAIRMAN	Sd/- (VISHVANATH HIREMATH) MEMBER	Sd/- (K.SRINIVASA RAO) MEMBER
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