

No.N/90/11

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BANGALORE**

Dated : 2nd May, 2013

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

OP No.45/2011

BETWEEN :

Global Energy Private Limited
1st Floor, Shangri-La's Eros Corporate Plaza
19, Ashoka Road
Connaught Place
NEW DELHI – 110 001
[Represented by M/s. Adlaw Partners, Advocates]

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Petitioner

AND

Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, K.G. Road
BANGALORE – 560 009
[Represented by M/s. Justlaw, Advocates]

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Respondent

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1) This Petition is filed on 28.11.2011 under Section 86(1)(f) of the Electricity Act 2003, praying for appointment of a substitute arbitrator in terms of the letter dated 29.11.2010, sent by the Petitioner to the Respondent proposing the names of two former Chief Justices of India, and requesting the Respondent that either of them be chosen as sole arbitrator within a period of 30 days, and to pass such other orders as may be deemed fit and proper in the facts and circumstances of the case.

2) When this matter was being heard on the question of maintainability, Hon'ble Shri Vishvanath Hiremath, Member, has recused himself from the proceedings in this case.

3) The material facts for the disposal of the Petition may be stated as follows :

(a) The Karnataka Electricity Board, the predecessor-in-title of the Respondent, and the Petitioner, which is a generating company, entered into a Power Purchase Agreement (PPA) on 2.1.1997 (Annexure-P1). Under this PPA, the Petitioner agreed to supply electricity to the Respondent on the terms stated therein. The parties also entered into a Supplemental Agreement (SA) dated 27.12.1999 (Annexure-P2). Article 10.3 of the PPA provided for arbitration as the sole adjudicatory mechanism for any dispute that may arise in connection with the PPA. The said Article 10.3 reads as follows :

"10.3 Arbitration: All disputes arising in connection with the Agreement, shall be finally settled under the provisions of Arbitration and Conciliation Act 1996. The place of arbitration shall be Bangalore, India. The arbitrator(s) shall determine the matters in dispute in accordance with the laws of India. The English language shall be used throughout the arbitration proceedings."

- (b) Certain disputes arose between the parties, and the Respondent, vide letter dated 13.11.2003 (Annexure-P9), terminated the PPA and the SA. The termination of the PPA was disputed by the Petitioner, which resulted in the parties subjecting themselves to the process of adjudication of their disputes through arbitration by a sole arbitrator. By consent of the parties, in September, 2005, Mr. Justice K. Shivashankar (Retd.) was appointed as the sole arbitrator. The arbitration proceedings commenced on 22.10.2005. When the arbitration proceedings were in progress, the learned sole arbitrator withdrew from the office of sole arbitrator and thereby the arbitration proceedings were terminated on 24.7.2010.
- (c) The Petitioner, vide letter dated 29.11.2010 (Anexure-P18), addressed to the Respondent, proposed the names of former Chief Justices of India, and requested the Respondent to choose either of them as sole arbitrator within a period of 30 days from the date of receipt of the said notice. The Respondent, though received the said notice on 30.11.2010, did not respond to the request of the Petitioner for appointment of a sole arbitrator to continue with the arbitration proceedings.
- (d) Then, the Petitioner approached the Hon'ble High Court of Karnataka, praying to appoint a substitute arbitrator and subsequently withdrew the proceedings before the Hon'ble High Court of Karnataka, with liberty to approach this Commission. Consequently, the Petitioner has filed the present Petition for appointment of a substitute arbitrator.

- 4) **The Respondent countered in its submissions as under :**
- (a) The Electricity Act, 2003 has come into force with effect from 10.6.2003, and after this date, adjudication of all disputes between the licensee and the generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. This should be so even in cases where the arbitration agreement concerned had been entered into before coming into force of the Electricity Act, 2003. For the said contention, the Respondent has relied upon the decision of the Hon'ble Supreme Court of India in the case of *Gujarat Urja Vikas Nigam Limited – Vs- Essar Power Limited*, reported in (2008) 4 SCC 755, decided on 13.3.2008 (hereinafter referred to as the *Gujarat Urja* case). The Respondent has further contended that the Petitioner has not brought any dispute before this Commission, thereby the Petitioner is not entitled to seek for appointment of as a substitute arbitrator.
- (b) The Respondent had also opposed the continuation of the arbitration proceedings pending before Mr.Justice K. Shivashankar Bhat (Retd.), the learned sole arbitrator, on the same ground. However, the learned sole arbitrator kept open that question and terminated the arbitration proceedings on some other ground.
- 5) The Petitioner filed a Rejoinder, contending that:
- (a) the *Gujarat Urja* case is not applicable to the facts of the present case, as there is nothing in the said Judgment which renders ongoing arbitrations

- between the licensees and generating companies null and void, and the said Judgment does not rule that the arbitration matters initiated under the Arbitration and Conciliation Act, 1996 be discontinued, and the subject disputes be agitated upon before the Appropriate Commission or an Arbitral Tribunal appointed by it;
- (b) In the *Gujarat Urja* case, the Hon'ble Supreme Court has deliberately chosen not to disturb the pending arbitration proceedings between the licensees and generating companies, as it would have necessarily resulted in considerable wastage of time, efforts and resources that may have already been expended by the parties and the arbitrators prior to the passing of the Judgment in the *Gujarat Urja* case;
- (c) Section 158 of the Electricity Act, 2003 expressly provides that apart from nomination of an Arbitral Tribunal by the Appropriate Commission, the arbitration shall in all other respects be subject to the provisions of the Arbitration and Conciliation Act, 1996. Since the present Petition has been filed only for appointment of a substitute arbitrator, and not for a reference of the dispute to arbitration, Section 158 requires that Section 15(2) of the Arbitration and Conciliation Act, 1996, which provides for appointment of a substitute arbitrator, shall be applicable. In the absence of anything to the contrary, the Judgment in the *Gujarat Urja* case ought to be seen as governing only future arbitration of disputes between the licensees and generating companies;

(d) The Order dated 14.10.2011 passed by the Hon'ble High Court in W.P.No.35589/2010 (Anexure-R1 to Respondent's Statement of Objections) itself contemplates appointment of a substitute arbitrator and in fact the Hon'ble High Court has specifically directed that, "the succeeding arbitrator need not be guided by the remarks made by the previous arbitrator", and the above Order was passed by the Hon'ble High Court in the presence of the counsel for both the parties and therefore the parties were in agreement that they shall seek adjudication of their disputes through the process of arbitration.

Therefore, the Petitioner contends that the objections raised by the Respondent are not tenable.

6) We have considered the averments made in the Petition, and the contentions raised in the Statement of Objections and the Rejoinder, and also the oral submissions made by the learned Counsel for the parties, and all the documents placed on record.

7) From the rival contentions, the following Issues arise for our consideration and decision :

(1) Whether there are any validly instituted arbitration proceedings between the parties?

- (2) Whether the decision in the *Gujarat Urja* case is inapplicable for any of the reasons urged in the Rejoinder of the Petitioner?
- (3) What Order?

ISSUE No.1 : Whether there are any validly instituted arbitration proceedings between the parties?

8) At the outset, it may be noted that the Petitioner has confined the present proceedings to the limited issue of appointment of a substitute arbitrator under Section 15(2) of the Arbitration and Conciliation Act, 1996. It is made clear by the learned counsel for the Petitioner that the Petitioner has not brought the merits of the dispute regarding the termination of the PPA for decision of this Commission. In his written submissions filed on 23.1.2013, the learned counsel for the Petitioner has stated that:

"...this Hon'ble Commission has been approached by the Petitioner to decide the limited dispute arising out of the Respondent's failure to adhere to the settlement mechanism documented in the PPA between the parties."

Thus, the dispute regarding termination of the PPA between the generator and the licensee is not before the Commission for adjudication. We, therefore, need to consider only whether a substitute arbitrator needs to be appointed in the facts and circumstances of the present case.

9) The PPA was entered into between the parties on 2.1.1997 (Annexure-P1), which contained an Arbitration Clause for resolution of the disputes between the parties. The Respondent terminated the PPA, by its letter dated 13.11.2003 (Annexure-P9). The said termination is disputed by the Petitioner. The Electricity Act, 2003 came into force on 10.6.2003, i.e., earlier to the termination of the PPA by the Respondent. As per Article 10.3 of the PPA, in September, 2005, Mr. Justice K. Shivashankar Bhat (Retd.) was appointed as the sole arbitrator with the consent of both the parties. The arbitration proceedings started on 22.10.2005. Therefore, it can be seen that the dispute regarding termination of the PPA, the subsequent appointment of the sole arbitrator and the commencement of the arbitral proceedings have all started subsequent to the coming into force of the Electricity Act, 2003.

10) Paragraph-60 of 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, decided on 13.3.2008, reads as follows :

"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 licensees and

generating companies by anyone other than the 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 Clauses (j) 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."

11) From the above 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. In the present case, the parties referred their dispute before the sole arbitrator after coming into force of the Electricity Act, 2003. Therefore, it is clear that the reference of the dispute to arbitration by consent of parties through an arbitrator, is illegal and invalid. Such arbitrator has no jurisdiction to proceed with the arbitration proceedings. Therefore, we are of the considered opinion that in the present case, the arbitration proceedings instituted by the parties were invalid, as they were instituted under Section 11 of the Arbitration and Conciliation Act, 1996 by mutual consent between parties and not under Section 86(1)(f) of the Electricity Act, 2003 by this Commission. We, however, do not dispute the position of law that after coming into force of the Electricity Act, 2003, the State Commission could appoint an arbitrator under

Section 15(2) of the Arbitration and Conciliation Act, 1996 in a validly instituted pending Arbitration proceedings, whenever such an occasion arises. Accordingly, we answer Issue No.1 in the negative.

ISSUE No.2 : Whether the decision in the *Gujarat Urja* case is inapplicable for any of the reasons urged in the Rejoinder of the Petitioner?

12) The learned counsel for the Petitioner contended that the *Gujarat Urja* case does not rule that arbitration proceedings initiated under the Arbitration and Conciliation Act, 1996 should be discontinued and the said disputes should be re-agitated before the Appropriate Commission or an Arbitral Tribunal appointed by it. It is true that such a declaration has not been made specifically in the said decision. But, the clear statement of the ratio of that decision is that, after 10.6.2003, there can be no adjudication of disputes between the licensees and the generating companies by anyone other than the State Commission or an arbitrator (or arbitrators) nominated by it. It clearly follows from the said decision that if any party has approached any other Court or Tribunal, such proceedings are null and void. In view of the clear dicta of the Hon'ble Supreme Court, the contention of the learned counsel for the Petitioner cannot be accepted.

13) The contention of the learned counsel for the Petitioner that the *Gujarat Urja* case does not require the parties in an ongoing arbitration to submit themselves to the jurisdiction of the Appropriate Commission and therefore the ongoing arbitration can be continued by appointing a substitute arbitrator, in

case such a contingency arises, also does not hold water. Such a contention would have been appreciated if there were validly instituted arbitration proceedings in terms of an Arbitration Clause in the Agreement. That contingency could arise only if the arbitration proceedings had started prior to coming into force of the Electricity Act, 2003. In such cases, if for any reason the arbitrator withdraws and terminates the proceedings, any party can approach the Commission for appointment of a substitute arbitrator. There is no merit in the contention that the arbitration proceedings, started invalidly, has to be continued for appointment of a substitute arbitrator, while the appointment in the first instance – by mutual consent of parties – of an arbitrator itself was illegal and invalid.

14) The learned counsel for the Petitioner submitted that the Hon'ble Supreme Court has deliberately chosen not to disturb the pending arbitration proceedings, which are in advanced stage, between the generating companies and the licensees, as it would have necessarily resulted in considerable wastage of time, efforts and resources that may have already been expended by the parties and the arbitrators. Such contention has no basis and one can say that if that was the intention of the Hon'ble Supreme Court, it would have specifically saved such proceedings, by making express exceptions in its Judgment. In the absence of such express exception made in the Judgment of the Hon'ble Supreme Court, one concludes that any invalid proceedings, though in an advanced stage, are not saved and they are a nullity.

15) The observations relied upon by the Petitioner, made in the Order dated 14.10.2011 passed by the Hon'ble High Court of Karnataka in W.P.No.35589/2010, also do not advance the case of the Petitioner. The Hon'ble High Court has not decided the controversy, 'whether in the present case, arbitration proceedings were validly instituted or not', and that question was not in issue in that Writ proceedings. The said Writ was filed to expunge certain remarks made by the arbitrator in the Arbitration proceedings. The Writ Petition was dismissed on the question of maintainability. Accordingly, we answer Issue No.2 in the negative.

ISSUE No.3 : What Order?

16) In view of our findings on Issue Nos.1 and 2 above, we pass the following:

ORDER

The Petitioner's prayer does not survive and therefore the Petition is dismissed.

Sd/-

(M. R. SREENIVASSA MURTHY)
CHAIRMAN

Sd/-

(K. SRINIVASA RAO)
MEMBER