

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
(Appellate Jurisdiction)

**APPEAL No. 309 of 2019**

Dated : 28.08.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon'ble Mr. Virender Bhat, Judicial Member

**In the matter of:**

**Madhya Pradesh Power Management Company Ltd.**

Through its Officer-In-Charge,  
General Manager (Commercial)  
Having its office at,  
Block no. 11, Shakti Bhawan, Rampur  
Jabalpur – 482008,  
Madhya Pradesh

...Appellant

*Versus*

**1. Damodar Valley Corporation**

DVC Towers, VIP Road,  
Kolkata – 700054,  
West-Bengal  
Through its – Chief Engineer (Commercial)

**2. Central Electricity Regulatory Commission**

4<sup>th</sup> Floor, Chanderlok Building, Janpath,  
New Delhi – 110001  
Through its - Secretary

...Respondents

Counsel for the Appellant(s) : G. Umapathy, Ld. Sr. Counsel  
Aashish Anand Bernard  
Paramhans Sahani for App. 1

Counsel for the Respondent(s) : M.G. Ramachandran, Ld. Sr. Counsel  
Ranjitha Ramachandran  
Anushree Bardhan  
Poorva Saigal  
Shubham Arya  
Arvind Kumar Dubey for Res. 1

## **JUDGMENT**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. In this Appeal, we are confronted with the issue with regards to the arbitrability of the dispute between a Generating Company and a Distribution Company as well as applicability of Section 8 of the Arbitration and Conciliation Act, 1996 to the petition under Section 79(1)(f) of the Electricity, Act, 2003 filed before the Central Electricity Regulatory Commission (herein after referred to as "Central Commission").

2. The Appellant, Madhya Pradesh Power Management Company Ltd. ("MPPMCL" in short) is the holding company of the three Distribution Licensees operating in the State of Madhya Pradesh and is procuring power to meet the entire power requirements of the three Discoms in the State from various sources such as thermal, hydro and non-conventional. The Appellant then sells the power to the three Distribution Licensees for supply to the consumers in the State of Madhya Pradesh.

3. The 1<sup>st</sup> Respondent – Damodar Valley Corporation (“DVC” in short) is a statutory body established by the Central Government under Damodar Valley Corporation Act, 1948 for the development of Damodar Valley with the three participating Governments namely the Central Government, the Government of West Bengal and the Government of Jharkhand.

4. The Appellant entered into the PPA dated 3<sup>rd</sup> March, 2006 with the first Respondent for sale of 400 MW power from Mejia TPS and Chandrapur TPS (200 MW each). Subsequently, another PPA dated 14<sup>th</sup> May, 2007 was entered into between the Appellant and the first Respondent for sale of 100 MW from Durgapur TPS of the 1<sup>st</sup> Respondent for a period of 25 years. Accordingly, the first Respondent commenced supply of electricity to the Appellant w.e.f. July, 2012.

5. Both these PPAs contained a fore-closure clause entitling either of the parties to fore-close the PPA by giving one year prior notice to the other party. Clause (D) of the PPA dated 3<sup>rd</sup> March, 2006 (fore-closure clause) reads as under :-

“D) *Either party may fore close the Agreement by giving one year prior notice before expiry of each 5 years block, without any liability on either side. However, both the parties have to*

*perform their respective obligation/liabilities prior to said fore closure.”*

6. Similarly clause (B) in the PPA dated 14<sup>th</sup> May, 2007 is the fore-closure clause and reads as under :-

“B) *The duration of above agreement will be for 25 years from date of commercial operation of the respective power stations and may be extended based on mutually agreed terms and conditions. However, either party will be at liberty to review the Agreement after a span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions.”*

7. The Appellant issued two notices dated 28<sup>th</sup> February, 2017 and 2<sup>nd</sup> May, 2017 thereby terminating the PPAs dated 3<sup>rd</sup> March, 2006 and 14<sup>th</sup> May, 2007 respectively in terms of the termination/fore-closure clauses contained in the two PPAs. The first Respondent did not accept the termination of the PPAs and informed the Appellant about the same vide communications dated 12<sup>th</sup> May, 2017 and 30<sup>th</sup> May, 2017.

8. Subsequently, the first Respondent filed two separate petitions under Section 79(1)(f) of the Electricity Act, 2003 before the 2<sup>nd</sup> Respondent – Central Electricity Regulatory Commission. The petitions were numbered as 236/MP/2017 and 78/MP/2018. The prayer clause in petition No. 236/2017 reads as under :-

*“(a) Declare that MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 3.3.2006 read with the Regulations and Orders of this Commission;*

(b) *Declare that MPPMCL shall not be entitled to treat the PPA having been terminated from February, 2018 contrary to the terms of the PPA dated 3.3.2006;*

(c) *Hold that the Respondent MPPMCL liable to pay tariff to DVC namely the fixed charges and Energy Charges for the quantum of electricity scheduled by MPPMCL and deemed fixed charges for the quantum of electricity declared available by DVC but not scheduled by the Respondent, MPPMCL;*

(d) *Direct the Respondent MPPMCL to pay the amount of Rs 437.32 crore due and outstanding to DVC as on 1.2.2018;*

(e) *Award the cost of proceedings; and*

(f) *Pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

9. Similarly, the prayer clause in Petition No. 78/2018 reads as under :-

*"(a) declare that the Respondent – MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 3.3.2006 read with the Regulations and Orders of this Hon'ble Commission;*

*(b) declare that MPPMCL shall not be entitled to treat the PPA having been terminated from February 2018 contrary to the terms of the PPA dated 3.3.2006;*

*(c) hold that the Respondent – MPPMCL liable to pay the Tariff to the DVC namely the fixed charges and Energy charges for the quantum of electricity scheduled by MPPMCL and deemed fixed charges for the quantum of electricity declared available by the DVC but not scheduled by the Respondent – MPPMCL;*

*(d) Direct that the Respondent – MPPMCL to pay the amount of Rs 437.32 crores due and outstanding to the DVC as on 01.02.2018;*

*(e) Award the cost of proceedings*

*(f) Pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

10. Invoking the arbitration clause contained in the two PPAs, the Appellant filed statement of objections in both the petitions, purportedly under Section 8 of the Arbitration & Conciliation Act, 1996, thereby objecting to the maintainability of the petitions and seeking a direction to the parties to get the dispute adjudicated through arbitration in accordance with the arbitration clause of the PPAs.

11. Vide common order dated 23<sup>rd</sup> July, 2019 passed by the Commission in both the petitions, it held the petitions maintainable and ruled out the applicability of Section 8(1) of the Arbitration and Conciliation Act, 1996 (“A&C Act, 1996” in short) to the petitions before it. According to the Commission, the disputes forming subject matter of the two petitions fell within the realm of Section 79(1)(a) of the Electricity Act, 2003, and, therefore, is not arbitrable. The Commission has based its findings upon the judgments of the Hon’ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited (2008) 4 SCC 755 and Review Petition Nos. 2629-2630 of 2018 titled Emaar MGF Land Ltd. Vs. Aftab Singh & Anr. decided on 13<sup>th</sup> February, 2018.

12. The said order dated 23<sup>rd</sup> July, 2019 of the Central Commission has been assailed by the Appellant in this Appeal.

13. Before dealing with the rival submissions of the Learned Counsels, we may note that both the PPAs contain an arbitration clause which, though, have been numbered differently but are identical to each other. Clause 6 of the PPA dated 3<sup>rd</sup> March, 2006 is as under :-

*“6. DISPUTE RESOLUTION MECHANISM :*

- 6.1 All differences or disputes between the parties arising out of or in connection with these presents, save any question or matter of dispute which falls within the scope and purview of the statutory arbitration under the provisions of the Electricity Act, 2003 as amended shall be settled through arbitration as provided herein.*
- 6.2 In the event of such differences between the parties and failing settlement of the same through mutual discussions amongst parties concerned, if the disputes are not settled within three months, any party may by a written notice of 30 (thirty) days to the other party or parties request for appointment of a Sole Arbitrator, to be decided mutually by parties concerned and in case of disagreement, shall be guided by the provisions of the Arbitration Act, 1996 and any statutory modification thereto. The Sole Arbitrator shall give a speaking and reasoned award. The decision of the Sole Arbitrator shall be final and binding on the parties. The venue of the arbitration and meetings shall be at Kolkata. The Sole Arbitrator shall decide his fees with the consent of the parties and it will be shared equally.*
- 6.3 Notwithstanding the existence of any disputes and differences referred to arbitration, the parties hereto shall continue to perform their respective obligations under this Agreement and 95% payment must be made for the disputed amount within specified time frame as mentioned in this Agreement under Clause 5.2.*
- 6.4 The court of Kolkata shall be the jurisdiction in all matters relating to this Agreement between DVC and MPSEB.”*

14. Similarly, clause 7 of the PPA dated 14<sup>th</sup> May, 2007 is reproduced hereunder :-

*“7. DISPUTE RESOLUTION MECHANISM :*

*7.1 All differences or disputes between the parties arising out of or in connection with these presents save any question or matter of dispute which falls within the scope and purview of the statutory arbitration under the provisions of the Electricity Act, 2003 as amended shall be settled through arbitration as provided herein.*

*7.2 In the event of such differences between the parties and failing settlement of the same through mutual discussions amongst parties concerned, if the disputes are not settled within three months, any party may by a written notice of 30 (thirty) days to the other party or parties request for appointment of a Sole Arbitrator, to be decided mutually by parties concerned and in case of disagreement, shall be guided by the provisions of the Arbitration Act, 1996 and any statutory modification thereto. The Sole Arbitrator shall give a speaking and reasoned award. The decision of the Sole Arbitrator shall be final and binding on the parties. The venue of the arbitration and meeting shall be at Kolkata. The Sole Arbitrator shall decide his fees with the consent of the parties and it will be shared equally.*

*7.3 In the event that MP TRADECO or its successor entity disputes any bill or part thereof as raised by DVC, it shall pay 95% of the disputed amount forthwith and refer the dispute for Arbitration in accordance with Law. The amount exceeding/beneath the said 95% that is finally awarded shall be paid/adjusted with interest @ 15% per annum, to be calculated from the date on which the amount in dispute was payable/refundable.*

*7.4 The court of Kolkata shall be the jurisdiction in all matters relating to this Agreement between DVC and MP TRADECO.”*

15. Learned Senior Counsel for the Appellant vehemently argued that the Commission has erroneously held that non-obstante clause in Section 8(1) of A&C Act, 1996 (as amended in the year 2015) will



have no application to the petitions before it and regulatory jurisdiction under the Electricity Act, 2003 will have an overriding effect and would govern the resolution of disputes between the parties including the issue of termination of the PPAs. He would submit that the termination of PPAs is a purely contractual matter/money claim and does not fall within the scope of Section 79(1)(a) to (d) of the Electricity Act, 2003. According to the Learned Counsel, the Commission in exercise of powers under Section 158 of the Electricity Act, 2003 read with Section 8 of A&C Act, 1996 ought to have relegated the parties to arbitration. It is argued that in case the PPA contains an arbitration clause for resolution of disputes between the parties, the Commission being a judicial authority is mandated to refer the disputes to the arbitration in terms of the said arbitration clause and the findings of the Commission that A&C, Act, 1996 does not apply to disputes between the parties herein is totally misplaced and incorrect. In order to buttress his submissions, the Learned Counsel has cited judgement of Delhi High Court in MB Power (Madhya Pradesh) Limited Vs. State Bank of India & Ors. – 2023/DHC/000227 and judgement of this Tribunal in Southern Power Distribution Company of AP Limited Vs. APERC & Anr.

16. Per Contra, Learned Senior Counsel appearing for 1<sup>st</sup> Respondent emphatically argued that there is no legal infirmity in the impugned order of the Commission. He would submit that the ratio of the judgement of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited case squarely applies to the instant case also for the reason that the ratio of that judgement is based on the scheme of the Electricity Act, 2003 which being a special law of Electricity has a superseding effect as compared to the general law i.e. Arbitration & Conciliation Act, 1996. It is also submitted that the ratio of the said judgement applies to the petitions filed under both the Sections 86(1)(f) as well as Section 79(1)(f) of the Electricity Act, 2003. He argued that the Section 86(1)(f) and Section 79(1)(f) occupy the same field of providing for an adjudicatory process under the statute, i.e. Electricity Act, 2003 and it will be anomalous to say that in the case of Section 86 of the Electricity Act, 2003, all disputes will go to the State Commission but in case of Section 79 (1)(f) of the Electricity Act, 2003, only certain disputes will go to the Central Commission. He argued that adjudicatory provision of Section 79(1)(f) of the Electricity Act, 2003 would cover any purported unilateral termination of the PPAs by the Appellant also. The reliance is placed in this regard on

the judgement of this Tribunal in **Appeal Nos. 94/95 of 2012 in BSES Rajdhani Power Limited -v- Delhi Electricity Regulatory Commission and Ors.** It is further argued by the Learned Senior Counsel that Clauses (a) to (d) of sub-Section (1) of Section 79 of the Electricity Act, 2003 do not deal with only determination of tariff but with regulation of tariff, which is a wider concept and has been held so in a number of judgements by the Hon'ble Supreme Court.

17. We have considered the rival submissions of the Learned Senior Counsels appearing for Appellant and 1<sup>st</sup> Respondent and have also considered written Submissions filed on behalf of the parties and the judgements cited at the bar.

18. At the outset, we find Sections 2(3) and 8(1) of the Arbitration and Conciliation Act, 1996 material for deciding the issue under consideration and the same is extracted herein below :-

**Section 2(3)**

*"This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."*

**Section 8. Power to refer parties to arbitration where there is an arbitration agreement.-**

*"(1), A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, **notwithstanding, any judgment, decree or order of the Supreme Court or any Court,** refer the*

*parties to arbitration unless it finds that prima facie no valid arbitration agreement exists”.*

19. It is not in dispute that the Commission, be it Central Commission or State Commission, while adjudicating the disputes under Sections 79 & 86 of the Electricity Act, 2003, as the case may be, perform an adjudicatory role and thus come within the purview of "Judicial Authority" referred to Section 8 of the A&C Act, 1996. It needs to be seen that whether there is any provision in the Electricity Act, 2003 by virtue of which Section 8(1) of A&C Act, 1996 has no applicability to the petitions under Sections 79 & 86 of the Electricity Act, 2003 brought before the Commission and the disputes involved therein cannot be submitted to arbitration.

20. Since in this appeal, we are dealing with an order passed by the Central Commission in a petition under Section 79 of the Electricity Act, 2003, we find it pertinent to quote the said Section hereunder :-

***“Section 79. (Functions of Central Commission): ---***

*(1) The Central Commission shall discharge the following functions, namely:-*

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a*

*composite scheme for generation and sale of electricity in more than one State;*

*(c) to regulate the inter-State transmission of electricity ;*

*(d) to determine tariff for inter-State transmission of electricity;*

*(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

*(g) to levy fees for the purposes of this Act;*

*(h) to specify Grid Code having regard to Grid Standards;*

*(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*

*(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*

*(k) to discharge such other functions as may be assigned under this Act.*

*(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-*

*(i) formulation of National electricity Policy and tariff policy;*

*(ii) promotion of competition, efficiency and economy in activities of the electricity industry;*

*(iii) promotion of investment in electricity industry;*

*(iv) any other matter referred to the Central Commission by that Government.*

*(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.*

*(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and*

*tariff policy published under section 3.*

21. Bare perusal of Section 79 of the Electricity Act, 2003 would reveal that clause (f) of its sub-section (1) empowers the Central Commission to adjudicate upon disputes involving generating companies and distribution licensees with regards to the matters connected with clauses (a) to (d) of sub-section (1) i.e. matters connected to regulation of tariff of the generating companies as well as inter-state transmission of electricity and to determine tariff for inter-state transmission of electricity. It also gives discretion to the Commission to refer any such dispute for arbitration. In this regard, we also find Section 158 of Electricity Act, 2003 relevant and the same is extracted herein below :-

***“Section 158. (Arbitration):***

*Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.”*

22. Thus, it is seen that the concept of arbitration is not alien to the disputes arising under various provisions of Electricity Act, 2003 and

in appropriate cases, where a valid arbitration agreement exists between the parties and the dispute does not concern the regulatory functions of the Commission, the Commission would be not only justified but also bound to refer the dispute for arbitration.

23. In the instant case, undisputedly both the PPAs dated 3<sup>rd</sup> March, 2006 and 14<sup>th</sup> May, 2007 contain the arbitration clause. These arbitration clauses have already been reproduced herein above. The PPAs also provide for fore-closure by any of the parties by giving one year prior notice to the other party. The relevant clauses of the PPAs in this regard have also been quoted already herein above.

24. In terms of the fore-closure clauses contained in the PPAs, the Appellant has issued notices dated 28<sup>th</sup> February, 2017 and 2<sup>nd</sup> May, 2017 notifying the 1<sup>st</sup> Respondent about fore-closure of the PPAs. The notices have duly been received by the 1<sup>st</sup> Respondent and vide communications dated 12<sup>th</sup> May, 2017 and 30<sup>th</sup> May, 2017, it has rejected the termination of PPAs by the Appellant.

25. At this juncture, we would again revert to Section 79(1) of the Electricity Act, 2003. Section 79(1) empowers the Commission to adjudicate upon the disputes relating to regulation of tariff for the generating companies as well as inter-state transmission of Electricity

and to determine tariff inter-state transmission of electricity as provided under clause (1) to (d) therein. We wonder how the dispute relating to termination of PPAs would be regarded as a dispute relating to tariff or regulation of tariff of the generating companies, as held by the Commission in the impugned order. To understand this aspect, it is necessary to determine what constitutes tariff and non-tariff disputes. In our considered opinion, all the matters which would have a bearing upon the tariff for a generating company would constitute "tariff disputes" namely disputes related to Change in Law, delayed completion of projects, invocation of Force Majeure events etc. Such matters impact the tariff for a generating company directly and, therefore, fall solely within the jurisdiction of the Central Commission under Section 79(1) of the Electricity Act, 2003. However, the disputes related to termination or breach of contract which do not impact the tariff either directly or indirectly, can be considered as non-tariff related disputes referable to arbitration.

26. Perusal of the prayer clauses in the two petitions filed before the Commission reveals that primary and main relief sought by 1<sup>st</sup> Respondent is the declaration that Appellant shall not be entitled to treat the PPAs having been terminated. All other reliefs are ancillary



or consequential in nature. Thus the main issue would be whether or not have been the PPAs legally and validly terminated. Essentially, the dispute relating to termination of a PPA is confined to the legality and validity of the termination of PPA and does not relate to tariff or regulation of tariff. Our view in this regard is fortified by recent judgement of Delhi High Court in MB Power (Madhya Pradesh) Limited Vs. State Bank of India & Ors. – 2023/DHC/000227, the relevant portion of which is quoted herein below :-

*“64. Suffice to state, in view of my finding above that the dispute raised in the plaint is not covered by the provision of Section 79 (1) (b), the CERC has no jurisdiction to entertain the same. The suit filed by the plaintiff shall be maintainable. The plea that the right of plaintiff to seek relief squarely entails adjudication of the rights and obligations under the PPA, and can only be done by the commission is also not appealing in the facts of this case when the PPA has not commenced which governs tariff. It is not to be construed that the dispute with regard to tariff relatable to the period when the PPA was in operation before termination, the commission shall not have jurisdiction. In other words, a dispute relatable to tariff for the period when PPA was in operation before termination, surely can be decided by the commission as the same falls within the ambit of Section 79 (1) (b) of the Act.*

*69. At the risk of repetition, I state the termination of PPA is not relatable to the issue of tariff, in order to attract the provisions contained in sub-clauses (b) or (f) of Section 79 (1) of the Electricity Act. The present application is liable to be dismissed. It is ordered accordingly.”*

*(Emphasis supplied)*

27. We find that the reliance placed by the Commission upon the judgement of the Hon’ble Supreme Court in Gujarat Urja Vikas Nigam

Limited and Emmar MGF Land Limited totally mis-placed. In Gujarat Urja Vikas Nigam Limited case, the apex court was dealing with the petition filed under Section 11 of the A&C Act, 1996 seeking reference to the disputes to arbitration. The Court found glaring inconsistency between Section 11 of the A&C Act, 1996 as well as 86(1)(f) of the Electricity Act, 2003 in so far as Section 11 of the A&C Act, 1996 empowers only the High Court to refer to the disputes to an arbitrator appointed by it whereas Section 86(1)(f) of the Electricity Act, 2003 empowers the State Commission to appoint an arbitrator to adjudicate upon the disputes between a licensee and a generating company. Upon noticing such conflict between the provisions of the two statutes, the Hon'ble Supreme Court held that the provisions of the Electricity Act, 2003 would prevail and therefore, the arbitrator cannot be appointed by the High Court. It would be advantageous to quote the relevant portion of the said judgement of the Hon'ble Supreme Court here under:-

*“56. Hence we have to add the aforementioned words at the end of Section 175 otherwise there will be an irreconcilable conflict between Section 174 and Section 175.*

*57. In our opinion the principle laid down in Section 174 of the Electricity Act, 2003 is the principal or primary whereas the principle laid down in Section 175 is the accessory or subordinate to*

the principal. Hence Section 174 will prevail over Section 175 in matters where there is any conflict (but no further).

58. In our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilizing the Samanjasya, 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 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.)”

(Emphasis supplied)

28. The ratio which can be clearly deduced from this judgement is that in case of any conflict (express or implied) between the provisions of the Electricity Act and any other statute, the provisions of the Electricity Act would prevail but where there is no such conflict, both the statutes are to be read together.

29. In paragraph 61 of the report, the Hon'ble Supreme Court has clarified as under :-

*“61. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.”*

30. We do not see any conflict or inconsistency between Section 8(1) of A&C Act, 1996 and Section 79(1) of the Electricity Act, 2003. Section 8(1) of the A&C Act, 1996 makes it mandatory for a judicial authority to refer the parties for arbitration where it finds that a valid arbitration agreement exists between the parties and a party to the arbitration agreement so applies. Section 79(1)(f) of the Electricity Act, 2003 also empowers to the Central Commission to refer to any dispute for arbitration apart from adjudicating the disputes involving in generating companies or transmission licensees etc. In this regard, we have already clarified that in view of provisions of Clauses (a) to

(d) of Section 79(1) of the Electricity Act, 2003, only non-tariff disputes can be referred to arbitration.

31. In the case of Emmar MGF Land Limited, the Hon'ble Supreme Court was concerned with the import of the expression "*notwithstanding any judgement, decree or order of the Supreme Court or any Court*" which was added to Section 8(1) of A&C Act, 1996 by way of an amendment in the year 2015 and it was held that:-

*"The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void.*

*The words added in Section 8 cannot be meant for any other meaning."*

32. It is true that the scheme of Electricity Act, 2003 shows that it is a self-contained comprehensive legislation which not only regulates generation, transmission and distribution of electricity by public bodies and encourages public sector participation in the process but also ensures creation of special adjudicatory mechanism to deal with the grievances of any person aggrieved by any order made by an adjudicating officer under the Act. However, at the same time, the expression "*and to refer any dispute for arbitration*" used at the end

of clause (f) of both the Sections 79(1) and 86(1) of the Electricity Act, 2003 definitely leave scope for some disputes to be referred for arbitration. This view is further strengthened by Section 158 of the Act which provides that arbitration directed by the Commission shall be subject to the provisions of A&C Act, 1996.

33. In case it is to be held that all the disputes brought before the Commission are to be adjudicated upon by it and the Commission does not have power to refer any dispute for arbitration even though it finds a valid arbitration agreement existing between the parties, it would render the above noted expressions used in Section 79(1) and 86(1) of the Electricity Act, 2003 as well as its Section 158 totally redundant. It is manifest that the Parliament while passing the Electricity Act, 2003 did not intend to completely rule out the applicability of provisions of A&C Act, 1996 to the disputes under the Electricity Act, 2003. Had it been intention of the Parliament to make all the disputes under the Electricity Act immune to Arbitration, it would have made a specific provision in this regard in the Act like Section 145 which totally bars the jurisdiction of Civil Courts to entertain any suit or proceedings of any matter which is to be decided by an assessing officer or an appellate authority or the adjudicating

officer appointed under the Act.

34. Learned Senior Counsel for the 1st Respondent had also placed reliance upon another judgement of Hon'ble Supreme Court in Jaipur Vidyut Vitran Nigam Limited and Ors. -v- MB Power (Madhya Pradesh) Limited and Ors 2024 SCC OnLine SC 26 in support of his submissions but we find that it also does not advance the case of the 1<sup>st</sup> Respondent. In that case, the dispute between a distribution licensee and a generating company was entertained by the High Court of Judicature for Rajasthan in a writ petition and in these circumstances, the Hon'ble Supreme Court held that the High Court erred in directly entertaining the writ petition and writ petitioner had an alternate remedy of approaching the State Electricity Regulatory Commission.

35. We have consciously not discussed the judgement of this Tribunal in Southern Power Distribution Company case, even though it completely supports the Appellant's case, as we were informed that it has been stayed by the Hon'ble Supreme Court vide order dated 16<sup>th</sup> January, 2023 in Civil Appeal No(s). 86-87 of 2023.

36. Thus, in view of the above discussion, we are unable to uphold the findings of the Commission in the impugned order. We make it

clear that non-tariff disputes involving a generating company or a distribution licensee do not fall within the ambit of clause (f) of Section 79(1) of the Electricity Act, 2003 and are thus, arbitrable.

37. In the instance case, there is undisputedly a valid and subsisting arbitration clause contained in the PPAs. We have already held that the dispute between the parties primarily relates to the termination of the PPAs which is a non-tariff dispute and thus, referable to arbitration.

38. Hence, we find the impugned order of the Commission unsustainable in the eyes of law. Same is hereby set aside. The appeal stands allowed.

39. The Commission, shall within one month from this order, appoint an arbitrator and refer the dispute to him for adjudication as per law.

Pronounced in the open court on this the 28<sup>th</sup> day of August, 2024.

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

*js*