

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

**Appeal No. 93 of 2020**

**&**

**Appeal No. 94 of 2020**

**Dated: 08.10.2024**

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

**In the matters of:**

Madhya Pradesh Power Management Company Ltd.,  
Through its Officer-In-Charge,  
Having its office at  
Block No.11, Shakti Bhawan, Rampur,  
Jabalpur – 482008,  
Madhya Pradesh.

**...Appellant(s)**

**Vs.**

1. Damodar Valley Corporation,  
DVC Towers, VIP Road,  
Kolkatta – 700054,  
West Bengal,  
Through its Chief Engineer (Commercial)
2. Central Electricity Regulatory Commission  
4<sup>th</sup> Floor, Chanderlok Building, Janpath,  
New Delhi-110011.  
Through the Secretary,

**...Respondent(s)**

Counsel for the Appellant(s) : Mr. G. Umapathy, Sr. Adv.  
Mr. Aashish Anand Bernard  
Mr. Paramhans Sahani  
Mr. Rajiv Shankar Dvivedi

Counsel for the Respondent(s) : Mr. M. G. Ramachandran, Sr. Adv.  
Mr. Shri Venkatesh  
Mr. Shryeshth Ramesh Sharma  
Mr. Ashutosh Kumar Srivastava  
Mr. Bharath Gangadharan  
Mr. Nihal Bhardwaj  
Mr. Siddharth Nigotia  
Mr. Shivam Kumar  
Mr. Kartikay Trivedi  
Mr. Mohit Gupta  
Mr. Manu Tiwari  
Mr. Aashwyn Singh  
Mr. Harsh Vardhan  
Mr. Suhael Buttan  
Ms. Priya Dhankar  
Mr. Anant Singh  
Mr. Vineet Kumar  
Mr. Nikunj Bhatnagar  
Mr. Kunal Veer Chopra  
Mr. Vedant Choudhary  
Mr. Akash Lamba  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardhan  
Mr. Shubham Arya  
Mr. Arvind Kumar Dubey  
Ms. Tanya Sareen for R-1

## **JUDGEMENT**

### **PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER**

1. The batch of appeals has a common issue of whether the matter should be referred to arbitration under the relevant clause of Arbitration in the PPA. In identical case in Appeal No.309 of 2019, this tribunal recorded as under:-

“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. Further, this Court vide the said judgment dated 28.08.2024 in said Appeal No. 309 of 2019 has observed as under:-

“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.”

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<sup>ble</sup> 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.”*

3. Finally, this tribunal has held as under:-

*“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”.*

4. It may be seen from there that this Tribunal has remanded the matter to the Commission for an appointment of the arbitrator.

5. The same judgment of this Tribunal was challenged by DVC, the respondent herein, before the Hon'ble Supreme Court vide CA No.10480 of 2024 which was dismissed vide order dated 23.09.2024 while holding as under:-

*“We do not find any good ground and reason to interfere with the impugned judgment in view of the difference of language in Section 79(1)(f) of the Electricity Act, 2003, from Section 86(1)(f) of the 2003 Act. The power of the Central Electricity Regulatory Commission under 79(1)(f) is different from the discretion exercised by the State Electricity Regulatory Commission under Section 86(1)(f) of the 2003 Act.*

*The appeal is accordingly dismissed.*

*In view of the dismissal of the present appeal and with the consent of the learned counsel appearing for the parties who have requested the Court to nominate an Arbitrator, Mr. Justice K.M. Joseph, former Judge of this Court, is appointed as the sole Arbitrator to adjudicate upon the disputes inter se the parties and in terms of the impugned order dated 28.08.2024. The learned Arbitrator will make a declaration in terms of Section 12(5) of the Arbitration and Conciliation Act, 1996. Fourth Schedule to the 1996 Act shall apply.*

*Pending application(s), if any, shall stand disposed of”.*

6. Identically in the present batch of appeals, *inter se* party, the Commission recorded the objections of MPPMCL (appellant herein), on maintainability of the petition and decided that the Commission has the jurisdiction in the matter. The relevant extracts is quoted as under:-

*“7. MPPMCL vide its affidavit dated 3.7.2018 filed preliminary objection to the maintainability of the petition on the ground that as per Clause 7 of the PPA dated 14.5.2007, there is an Arbitration Agreement between DVC and MPPMCL and therefore, the dispute has to be adjudicated/referred to an Arbitration Tribunal as per the Arbitration Agreement entered between the parties. MPPMCL in this connection relied upon amended provisions of Section 8 of the Arbitration and Conciliation Act, 1996 and submitted that as per said provision, the Commission has to refer the parties to arbitration notwithstanding*



*any judgment or order or decree passed by the Supreme Court or the High Court etc..*

8. *The Commission after hearing both the parties on the maintainability of the petition decided vide a combined order dated 26.7.2018 in Petition Nos. 236/MP/2017 and 78/MP/2018 that the petition are maintainable and the Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of Section 79(1)(f) read with Section 79(1)(a) of the Act. The Respondent was directed to file its reply on merit”.*

7. It thus can be seen that the issue herein is identical to the issue raised in Appeal No.309 of 2019 regarding maintainability of the petition before the Commission with reference to the clause pertaining to reference to arbitration under the PPA.

8. Considering that the Hon'ble Supreme Court has already settled the law with reference to arbitration vide judgment dated 23.9.2024 as quoted above, the appeals found to have merit and are allowed. The order of the Commission is set aside with the direction to the Commission to appoint an Arbitrator within one month from date of this Judgement and refer the disputes involved in these two appeals to him for adjudication.

The appeals are disposed of accordingly.

**PRONOUNCED IN THE OPEN COURT ON THIS 8<sup>th</sup> DAY OF OCTOBER, 2024.**

**(Virender Bhat)  
Judicial Member**

**(Sandesh Kumar Sharma)  
Technical Member**

*pr/mkj*