

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.145 of 2013

Dated: 26th November , 2013

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

**M/s. Global Energy Pvt. Ltd.,
1st Floor, Shangri-La's Eros Corporate Plaza,
Ashoka Road,
Connaught Place
New Delhi-110 001**

... Appellant

Versus

**1. Karnataka Electricity Regulatory Commission,
Through Secretary,
6th & 7th Floors, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore-560 001**

**2. Karnataka Power Transmission Corporation Ltd.,
Through Chairman & Managing Director,
Kaveri Bhawan, K.G. Road,
Bangalore-560 009**

...Respondents

Counsel for the Appellant(s): Mr. Sanjay Sen, Sr. Adv.,
Mr. Rajiv Yadav
Mr. Suraj Das Guru

Counsel for the Respondent(s): Mr. S. Sriranga for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The question raised in this Appeal is whether the Karnataka Electricity Regulatory Commission has erred in not appointing a substitute arbitrator in an ongoing arbitration proceeding on the request of the appellant instead of invoking its jurisdiction under Section 86(1)(f) of the Electricity Act, 2003.

2. M/s. Global Energy Private Ltd. is the appellant. The appellant is a generating company which owns and operates a 5 MW bagasse based power plant in Karnataka. It is also a licensed electricity trader. The Appellant has challenged order dated 2.5.2013 passed by Karnataka Electricity Regulatory Commission wherein the appellant's petition under Section 86(1)(f)

of the 2003 Act seeking appointment of a substitute arbitrator has been dismissed.

3. Karnataka Electricity Regulatory Commission (“State Commission”) is the first respondent.

Karnataka Power Transmission Corporation Ltd. is the second respondent.

4. The brief facts of the case are as under:

(A) The appellant had entered into a Power Purchase Agreement (PPA) on 2.1.1997 with Karnataka Electricity Board, the predecessor entity of the respondent no. 2, regarding supply of power from the biomass based power plant being set up by the appellant. Subsequently, certain terms of the PPA were amended by way of a Supplemental Agreement dated 27.12.1999 executed between the Electricity Board and the appellant. According to the

Supplemental Agreement the appellant had to achieve commercial operation of the first unit of 5 MW at the Delivery Point of the facility within 18 months from the date of signing the Supplemental Agreement or within 12 months from the date of obtaining the necessary clearances, whichever is earlier.

(B) Owing to certain reasons, the Power Project could not be completed within the agreed time frame. The respondent no. 2 vide letter dated 7.9.2001 condoned the delay in implementation of the first phase of the project and extended the time period for completion of the first phase of the project by eight months from the scheduled date as agreed in the Supplemental Agreement dated 27.12.1999.

(C) The respondent no. 2 vide letter dated 13.11.2001 asked the appellant to deposit a sum of

Rs. 76,97,000/- being the cost of construction of the evacuation scheme for transmission of power generated from the appellant's power project. The appellant remitted the required sum to the respondent no. 2. However, the respondent no. 2 vide letter dated 19.3.2002 addressed to the appellant stated that the appellant should undertake the construction of the transmission line through a contract agency to be appointed by the appellant. Further, the respondent no. 2 stated that a sum of Rs. 7,69,700/- being 10% of the above amount was being retained by it as its supervision charges and the balance 90% amount would be refunded to the appellant. The appellant then undertook the construction of the transmission system through its contractor.

(D) The respondent vide letter dated 13.11.2003 terminated the PPA ostensibly on the ground of the

appellant's failure to adhere to the implementation schedule of the power project. Subsequently, the appellant impugned the termination of its PPA by way of a Writ Petition before the High Court of Karnataka. The High Court vide its interim order dated 18.12.2003 stayed the termination of PPA by the respondent no. 2.

(E) Subsequently, the parties appointed Hon'ble Mr. Justice K. Shivashankar Bhat (Retd.) as the sole arbitrator in accordance with terms of the PPA for adjudication of dispute between the appellant and the respondent no. 2.

(F) Several arbitration proceedings were held from 22.10.2005 onwards. In the hearing fixed on 24.7.2010 for cross examination of the claimant's witness, the respondent no. 2 moved a memo

questioning the jurisdiction of the Sole Arbitrator on the basis of the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. (2008) 4 SCC 755. The Sole Arbitrator decided to withdraw from the arbitration proceedings and terminated the same vide order dated 24.7.2010.

(G) Thereafter, the appellant vide letter dated 29.11.2010 addressed to the respondent no. 2 proposed the names of two arbitrators for approval of one of the names of the Sole Arbitrator. However, respondent no. 2 did not respond to the request of the appellant.

(H) Subsequently, the appellant filed a petition before the Karnataka High Court seeking appointment of an arbitrator under the Arbitration and Conciliation Act, 1996. The appellant, however, withdrew the said

petition with liberty to file a petition before the State Commission which was granted by the High Court.

(I) Finally, the Appellant filed a petition before the State Commission being no. 45/2011 under Section 86(1)(f) praying for appointment of a substitute arbitrator. The State Commission vide the impugned order dated 2.5.2013 dismissed the appellant's petition. Aggrieved by the impugned order dated 2.5.2013 of the State Commission, the appellant has filed this Appeal.

5. The appellant has made following submissions:

(A) The State Commission has mechanically applied the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. (2008) 4 SCC 755 for rejecting the appellant's petition seeking appointment of a substitute arbitrator. The

judgment of Gujarat Urja cannot be interpreted as rendering all ongoing arbitration of disputes, initiated without State Commission's intervention as null and void.

(B) Gujarat Urja judgment does not rule out that arbitration matters, initiated under the Arbitration and Conciliation Act, 1996 should be discontinued and the subject dispute be re-agitated in *de novo* proceedings before the Appropriate Commission or an arbitral tribunal appointed by it. This judgment does not require parties to an ongoing arbitration to submit themselves to the jurisdiction of the Appropriate Commission under Section 79(1)(f) or 86(1)(f) of the Electricity Act, 2003 .

(C) The State Commission has failed to notice the effect of Section 158 of the 2003 Act, which expressly

provides that apart from nomination of 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. Even in Gujarat Urja, the Hon'ble Supreme Court has observed that "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" . Since the present petition before the State Commission was filed only for appointment of a substitute arbitrator, and not for a reference of the dispute to arbitration, Section 158 would require that Section 15(2) of the Arbitration and Conciliation Act, 1996 which provides for appointment of a substitute arbitrator, shall be applicable.

(D) The appellant had approached the State Commission with limited dispute arising out of the failure of the respondent no. 2 to adhere to the settlement mechanism documented in the PPA between the parties. Such dispute has to be decided by the State Commission in terms of the PPA.

6. According to the reply submitted by the respondent no. 2, the present dispute between the parties due to termination of the PPA entered into between a generating company (appellant) and a licensee (respondent no. 2) comes within the purview of Section 86(1)(f) of the Electricity Act, 2003 and is covered by the ratio decided by the Hon'ble Supreme Court in Gujarat Urja case. The prayer of the appellant for appointment of a substitute arbitrator is unsustainable. Therefore, the State Commission has correctly rejected the petition of the appellant. Further

according to the respondent no. 2, Section 158 of the 2003 Act applies only to cases referred by or under this act to be adjudicated by arbitration and has no application to the process of appointment of an Arbitrator.

7. On the above subject, we have heard Mr. Sanjay Sen, Sr. Advocate representing the appellant and Mr. Sriranga, learned counsel for the respondent no. 2.

8. The questions that arise for our consideration are:

- i) Whether the State Commission has erred in rejecting the petition of the appellant for appointment of a substitute arbitrator in a pending dispute relating to the PPA entered into between the appellant's, the generating company and respondent no.2, a licensee?

- ii) Whether the ratio decided by the Hon'ble Supreme Court in Gujarat Urja case would apply to pending dispute between the appellant and the respondent no. 2.

9. Since both the issues are inter-related, we shall be dealing with them together.

10. Let us first examine the impugned order dated 2.5.2013. The findings of the State Commission in the impugned order are summarized as under:

- i) The dispute regarding termination of PPA, the appointment of the sole arbitrator and the commitment of arbitral proceedings have all started subsequent to the coming into force of the Electricity Act, 2003.
- ii) From the judgment of the Hon'ble Supreme Court in Gujarat Urja case, it is clear that

after 10.6.2003 when the Electricity Act, 2003 came into force, there can be no adjudication of dispute between licensees and generating companies by any one other than the State Commission or the arbitrator or arbitrators nominated by it. The exclusive jurisdiction for adjudicating a dispute or refer it for arbitration lies with the State Commission and no other Court or Tribunal has the authority to entertain such disputes.

- iii) Since in the present case the reference of the dispute to the sole arbitrator was made after coming into force of Electricity Act, 2003, therefore, the reference of the dispute to arbitration by consent of parties is illegal and invalid.

- iv) It clearly follows from the decision in Gujarat Urja that if any party has approached any other Court or Tribunal, such proceedings are null and void. There is no merit in the contention that 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 the parties of an arbitrator itself was illegal and invalid.
- v) In the absence of express exception made in the judgment in Gujarat Urja case with regard to not disturbing the pending arbitration proceedings, we conclude that any invalid proceedings, though in an advanced stage, are not saved and they are a nullity.
- vi) In view of above, the petition is dismissed.

11. We find that according to Section 86(1)(f) of the Electricity Act, 2003, the State Commission has jurisdiction to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. The State Commission could either itself adjudicate upon the disputes between the licensees and generating companies or may refer the dispute for arbitration. Admittedly, the present dispute between the appellant and the respondent no. 2 is a dispute between a generating company and a licensee. Therefore, the dispute in the present case falls within the jurisdiction of the State Commission under Section 86(1)(f) of the Electricity Act, 2003.

12. Let us now refer to the findings of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. reported as (2008)4 SCC 755.

13. The question that arose before the Hon'ble Supreme Court in Gujarat Urja case was whether an application for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 for adjudication of disputes between the licensee and the generating companies after failure of the machinery provided for in the agreement is maintainable in view of the statutory specific provisions contained in the Electricity Act, 2003. In this case the High Court had appointed a sole arbitrator for deciding certain disputes between a licensee and a generating company under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996. In the PPA entered into between the parties before the enactment of the Electricity Act, 2003 it was agreed that in the event of any dispute and the failure to resolve the same by amicable settlement, the

dispute be submitted to arbitration. The generating company wanted to refer the dispute for arbitration to a sole arbitrator. However, the licensee approached the State Commission for adjudication of the dispute under Section 86(1)(f) of the Electricity Act, 2003. The generating company approached the Gujarat High Court by filing an application under Section 11(5) and (6) of the Arbitration & Conciliation Act, 1996 and by the impugned order the High Court appointed a sole arbitrator for resolving the disputes. Aggrieved by the appointment of a Sole Arbitrator by the High Court, the licensee filed an appeal before the Hon'ble Supreme Court.

14. Hon'ble Supreme Court in Gujarat Urja case held as under:

“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 Edition, 2004 page 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.”

“35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, [vide Chandra Kishore Jha vs. Mahavir Prasad, (1999) 8 SCC 266: AIR 1999 SC 3558 (para 12), Dhananjaya Reddy vs. State of Karnataka,(2001) 4 SCC 9: 2001 State Commission(Cri) 652: AIR 2001 SC 1512 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.

“59. In the present case we have already noted that there 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.)

60. 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 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 (a) 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.”

15. We feel that the ratio decided in the Gujarat Urja case will squarely apply to the present case.

16. In the present case the matter was referred for arbitration to the sole arbitrator by mutual agreement by the parties in September 2005 as per the terms of the PPA dated 2.1.1997. However, during the proceedings the sole arbitrator decided to withdraw from the arbitration proceedings and terminated the same vide order dated 24.7.2010.

17. In the first place, the dispute should have been referred to the State Commission for adjudication under Section 86(1)(f) of the 2003 Act as the dispute arose and was referred to the sole arbitrator only after the enactment of the Electricity Act, 2003. Even if it is assumed that due to non-clarity of the position of law before the passing of the judgment in Gujarat Urja

case, the matter by mutual consent of the parties was referred for arbitration as per the provision of the PPA, now the proceedings before the Sole Arbitrator have been terminated by the Sole Arbitrator vide his order dated 24.7.2010 before adjudicating upon the dispute. The case before us is not that the Sole Arbitrator has given its award and it is to be decided by us whether the award is legal or not. In this case the arbitration proceedings were terminated before the examination of the witnesses of the appellant. In view of ratio in Gujarat Urja case, the dispute has to be adjudicated upon by the State Commission according to Section 86(1)(f) of the Electricity Act. Thus, the State Commission has correctly rejected the petition of the appellant for appointment of a substitute arbitrator in the dispute before the appellant and the respondent no. 2.

18. The appellant has to, therefore, file a petition before the State Commission for adjudication of the dispute under Section 86(1)(f) of the 2003 Act. It is open for the State Commission to either itself adjudicate upon the matter or refer the same to an arbitrator appointed by it.

19. Accordingly, the appellant is at liberty to approach the State Commission for adjudication of dispute under Section 86(1)(f) of the Act. In case the appellant files a petition for adjudication of the dispute under Section 86(1)(f) of the Electricity Act, 2003, the State Commission shall consider the same and decide the matter according to law.

20. **Summary of our findings:**

i) The dispute in question is a dispute between a generating company and a licensee and lies under the jurisdiction of the State Commission under Section 86(1)(f) of the Electricity Act, 2003.

ii) The ratio decided by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam vs. Essar Power Ltd. (2008) 4 SCC 755 will squarely apply to the present case.

iii) In case the appellant files a petition before the State Commission for adjudication of the dispute under Section 86(1)(f) of the Electricity Act, 2003, the State Commission shall consider the same and decide the matter as per law.

21. The appeal is dismissed as devoid of merit with no order as to costs.

22. Pronounced in the open court on this **day of 26th November, 2013.**

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE
Vs