

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 230 of 2017**

**Dated : 31<sup>st</sup> OCTOBER, 2018**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF :**

**K.S.K. Mahanadi Power Company Limited**  
8-2-293/82/A, Road No.22  
Jubilee Hills  
Hyderabad – 500033.

.... **APPELLANT**

**VERSUS**

- 1. Andhra Pradesh Electricity Regulatory Commission,**  
Through its Secretary,  
4<sup>th</sup> Floor, Singareni Bhavan,  
Red Hills, Hyderabad – 500043.
- 2. Eastern Power Distribution Company of Andhra Pradesh Limited,**  
Through its Managing Director,  
P&T Colony, Seethammadhara,  
Visakhapatnam – 530013.
- 3. Southern Power Distribution Company of Andhra Pradesh Limited,**  
Through its Managing Director,  
D. No. 19-13-65/A, Srinivasapuram,  
Tiruchanoor Road,  
Tirupati – 517503.

.... **RESPONDENTS**

- Counsel for the Appellant(s)** : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Parichita Chowdhury  
Mr. Ashwin Ramanathan  
Ms. Rhea Luthra  
Mr. Sandeep Rajpurohit  
Ms. Neha Garg  
Ms. Saloni Sacheti
- Counsel for the Respondent(s)** : Mr. K. V. Mohan  
Mr. K. V. Balakrishnan  
Mr. R. K. Sharma for R-1
- Ms. Perna Singh  
Mr. Prashant Mathur  
Mr. Gautam Prabhakar for R-3

## **J U D G M E N T**

### **PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

1. The present appeal is filed challenging the order dated 28-9-2016 passed by Andhra Pradesh Electricity Regulatory Commission in OP No. 46 of 2014.
2. In brief, the facts that led to the filing of the present appeal are as under:
  - 2.1 The Appellant entered into a Power Purchase Agreement on 31-7-2012 with the distribution licensees in the undivided State of Andhra Pradesh; thereby it was a collective procurement of 400 MW power from the generating station of the Appellant. The generating station of the Appellant is situated within the State of Chattisgarh.

Subsequent to the bifurcation of the State of Andhra Pradesh, the PPA was divided between the distribution licensees of the new States of Andhra Pradesh and Telengana. Appellant also has PPAs with the distribution licensees of Tamil Nadu, Uttar Pradesh and Chattisgarh.

- 2.2 On 28-3-2014, the Appellant company issued a notice under Article 10.4 of PPA bringing to the notice of the Respondents the consequences of change in law on account of various events that had taken place, thereby seeking compensation in lieu of the cost borne by the Appellant. However, Respondents did not accept the said request of the Appellant.
- 2.3 On 31-5-2014, the Appellant approached Andhra Pradesh Electricity Regulatory Commission in OP No. 46 of 2014 in consonance with the legal position prevailing in terms of decisions of this Tribunal at that point of time. In the said petition, Appellant sought adjudication of disputes and differences under the PPA that arose between the Appellant and distribution licensees of the erstwhile undivided State of Andhra Pradesh. In the month of June 2014, the new Regulatory Commission for the States of Andhra Pradesh and Telengana came to be constituted as envisaged in the Andhra Pradesh

Reorganization Act of 2014. Matter pertaining to Telengana licensees, the appeal was amended and OP No. 68 of 2015 was assigned to the new Regulatory Commission for Telengana. Earlier OP No. 46 of 2014 on the file of Andhra Pradesh State Regulatory Commission remained with the Commission which related to eastern and southern power distribution companies of Andhra Pradesh.

- 2.4 After conclusion of the arguments, the matter was reserved for decision by the State Commission. On 7-4-2016, this Tribunal by its full bench decision reversed legal position and held that in a case where a generating company supplies electricity to two or more States, all disputes fall within the purview of Central Electricity Regulatory Commission. In view of this, Appellant preferred Petition No. 169/MP/2016 and 176/MP/2016 before Central Commission submitting that it would withdraw the petitions from the State Commissions of Andhra Pradesh and Telengana. However, on 28-9-2016, the State Commission of Andhra Pradesh passed the impugned order in OP No. 46 of 2016 opining that it has jurisdiction over the matter, notwithstanding the fact of supply of power to two or more States. Aggrieved by the same, the present appeal came to be filed.

3. *Per Contra*, the third Respondent, one of the distribution companies of Andhra Pradesh filed reply wherein it categorically stated that APERC has jurisdiction to adjudicate upon all disputes pending before the erstwhile APERC prior to the bifurcation of erstwhile State of Andhra Pradesh. In support of their contention, the third Respondent further stated that in respect of cases pending prior to bifurcation of State of Andhra Pradesh, APERC has passed common orders on 28-9-2016 in various petitions holding that it has jurisdiction to adjudicate upon all disputes pending before the erstwhile APERC. Aggrieved by the said common order, certain generators like GVK Gauthami, GMR Vemagiri and others have filed Writ Petitions before the High Court of Judicature of Hyderabad. The said Writ Petitions are still pending before the High Court of Judicature of Hyderabad. Therefore, this Tribunal has no jurisdiction to deal with the present appeal since High Court of Judicature at Hyderabad is seized of the matter.

3.1 The present Appellant participated in the competitive bidding process issued by four DISCOMs in the un-bifurcated State of Andhra Pradesh wherein the Appellant was selected as a seller for the sale and supply of electricity to the erstwhile AP DISCOMs. Supply of power is under medium term open access for a period of

three years. On 18-6-2013 in OP No. 38 of 2013, APERC has adopted the tariff under Section 63 of the Electricity Act, so far as Appellant generating company, at Rs.4.2509 per unit. Though generating station is at Chattisgarh and Appellant was supplying power to more than one State, the PPA was submitted to the then APERC for its approval besides adopting tariff. Therefore, at this stage, after entering into fresh PPAs and subsequent bifurcation of State of Andhra Pradesh, it is not open to the Appellant to question the jurisdiction of the State Regulatory Commission. In OP No. 3 of 2015, fresh PPAs came to be executed between two APDISCOMs. The two PPAs entered between the Appellant and the two DISCOMs came to be approved. The Appellant sought compensation for additional expenses on account of purchase of coal at market price under the clause Change in Law of PPA before the very same Commission.

3.2 Questioning the illegal invocation of Letter of Credit by the Appellant herein, the dispute was also pending before the Telengana Commission between the Appellant and erstwhile APCPDCL now known as TSSPDCL. The impugned order is justified under the above circumstances. The Respondent Nos. 2 & 3 did challenge the jurisdiction of CERC to entertain petitions, before the High Court of

Judicature of Hyderabad wherein these two Respondents had contended that decision of the Tribunal in Appeal No. 100 of 2013 dated 7-4-2016 is not correct position in law since the said decision has not attained finality as the parties to the said appeal have approached the Hon'ble Apex Court challenging the full bench judgment of the Tribunal. Therefore, according to Respondent No. 3, there is no finality to the decision of the Tribunal in Appeal No. 100 of 2013. Similarly since Respondents have challenged the jurisdiction of CERC before the High Court contending that CERC has no jurisdiction to decide the matters. They further contend that judgment of the Hon'ble Supreme Court in ***Energy Watchdog Vs. Central Electricity Regulatory Commission***<sup>1</sup> will not be applicable since Electricity Act 2003 empowers the State Commission which has approved the PPA to fix the tariff to have jurisdiction over the disputes arising there from. Since these appeals were pending prior to passing of the judgment in the ***Energy Watchdog*** case, the law laid down in the said judgment will have to be applied prospectively and not retrospectively. With these submissions, they have sought for dismissal of the appeal.

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<sup>1</sup> (2017) 14 SCC, Page 80

4. On the basis of the above pleadings, the questions of law that arise for Tribunal's considerations are as under:
  - A. Whether State Commission was justified in opining that it has jurisdiction to entertain OP No. 46 of 2014 in the light of Appellant generator supply power to more than two States?
  - B. Whether the impugned order is justified in the light of judgment of the Hon'ble Apex Court in the case of **Energy Watchdog?**
5. We heard both learned counsel appearing for the parties at length. It is not in dispute that the impugned order came to be passed prior to the decision of the Hon'ble Supreme Court in the case of **Energy Watdog Vs. Central Electricity Regulatory Commission**, but subsequent to the full bench decision of the Tribunal in Appeal No. 100 of 2013 dated 7-4-2016 in the case of **Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Central Electricity Regulatory Commission & Ors.** So far as Appellant entering into PPA in the year 2012 with four distribution licensees in the erstwhile undivided State of Andhra Pradesh, there is no dispute. There is no dispute that the generating station of the Appellant is situated in Chattisgarh. It is also not in dispute that Appellant generating company is supplying power not only to the licensees in Andhra Pradesh but



also to licensees in the State of Telengana apart from supplying power to the licensees of Tamil Nadu, Uttar Pradesh, and Chattisgarh. It is also not in dispute that pursuant to the law applicable on the question of jurisdiction, Appellant did file petitions raising disputes with the Respondents herein before the Regulatory Commission meant for undivided State of Andhra Pradesh. Apparently, the full bench of the Tribunal in the case of ***Uttar Haryana Bijli Vitran Nigam Ltd. Vs. Central Electricity Regulatory Commission & Ors.*** in Appeal No. 100 of 2013 dated 7-4-2016 opined that the mere sale of electricity by a generator to two or more States would mean it is a composite scheme attracting the provisions of Section 79(1)(b), and therefore, it would be within the exclusive jurisdiction of the Central Commission to adjudicate disputes between the parties to PPA.

- 5.1 At Para 24 of ***Energy Watchdog*** case, the Hon'ble Supreme Court while interpreting what would be a composite scheme and who under what circumstances would get jurisdiction to entertain disputes, whether Central Commission or State Commission, opined that in the case of inter-State sale, it would be a composite scheme for the exclusive jurisdiction of the Central Commission.

5.2 According to learned counsel for Appellant, both the opinions expressed, i.e. in full bench decision of this Tribunal in **Uttar Haryana Bijli Vitran Nigam Ltd.** as well as **Energy Watchdog**, the position would not change i.e. to say that Central Commission alone has jurisdiction to adjudicate the disputes arising between the parties. Though there is no question of composite scheme involved in the present appeal, according to Smt. Swapna Seshadri, counsel arguing for the Appellant, the law laid down by the Supreme Court, while interpreting Section 79(1)(b), where generating station is situated in one State and supply of power to other states, it would be Central Commission and not the State Commission who would have jurisdiction to entertain the disputes. She further reiterated that even if it were to be undivided State of Andhra Pradesh, since generating company was supplying power to not only to the undivided State of Andhra Pradesh but also to Tamil Nadu, Uttar Pradesh, and Chattisgarh; still it would amount to inter-State sale therefore, subject to the exclusive jurisdiction of Central Commission. Therefore, viewed from any angle, according to counsel for Appellant, the impugned order deserves to be set aside by allowing the appeal.

5.3 As against this in reply arguments to the Appellant counsel, Respondent counsel contends that since PPA was approved by the

undivided Andhra Pradesh State Commission and even adjudicated upon certain disputes at that time and OP No. 46 of 2014 was filed in terms of settled law as on that date, the State Commission alone has jurisdiction to entertain the matter; therefore, neither decision of full bench of this Tribunal nor the law laid down in the **Energy Watchdog** case would apply to the facts of the present appeal. Hence appeal deserves to be dismissed.

- 5.4 Apparently, the impugned order is dated 28-9-2016. As on the date of impugned order, full bench decision of this Tribunal in Appeal No. 100 of 2013 was already pronounced on 7-4-2016. It is needless to say that the opinion of this Tribunal has binding force on the State Commission when it passed the impugned order. In the full bench decision, the Tribunal opined that where generating companies are supplying electricity to two or more States of disputes, cases would fall within the purview of Central Electricity Regulatory Commission. If one were to ask why in the first place the petitions were filed before the Commission, the answer is very simple and straight. As on the date of filing of the two petitions in question, the law was different which came to be reversed by full bench decision of this Tribunal on 7-4-2016. The impugned order alleged to have been pronounced after a long time of conclusion of arguments. Aggrieved

by the said impugned order, the present appeal is filed. Meanwhile, the judgment in ***Energy Watchdog Vs. Central Electricity Regulatory Commission***<sup>2</sup> came to be pronounced and the relevant paragraphs of the said judgment are at para 24, 25 and 29 which read as under:

*“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither*

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<sup>2</sup> (2017) 14 SCC

*Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.*

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**26.** *Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.*

.....

**29.** *That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the*

*licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”*

5.5 Several issues cropped up for consideration before the Hon'ble Supreme Court and one of the controversy was with regard to composite scheme. If generation and sale of electricity is done by same entity, it would be a composite scheme whereby Central Commission had the necessary jurisdiction to embark upon the disputes. While analyzing Sections 79, 86 and 65, Their Lordship, while interpreting composite scheme opined that the State Commission has jurisdiction only where generation and supply takes place within the State (intra-State). But in a case where the generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. In the present case, the generation of electricity is in the State of Chattisgarh and sale of electricity is not restricted to either State of Chattisgarh or State of Andhra Pradesh. The Appellant generating company supplies electricity to other States as well, i.e. Tamil Nadu, Uttar Pradesh and Telengana apart from Andhra Pradesh and Chattisgarh.

5.6 In the light of such factual situation and by applying the law laid down by the Hon'ble Apex Court in the ***Energy Watchdog*** decision, as reproduced above, we are of the opinion, the questions of law raised in this appeal have to be held in favour of Appellant generating company, thereby the impugned order deserves to be set aside. Accordingly, **we are of the considered opinion, the impugned order fails and the same is set aside. Accordingly, the appeal is allowed.**

5.7 **Parties to bear their own costs.**

5.8 Pronounced in the Open Court on this 31<sup>st</sup> day of October, 2018.

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

✓  
**REPORTABLE / NON-REPORTABLE**

*tpd*