COURT-I

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 88 OF 2018
& IA NO. 300 OF 2018

Dated: 29th June, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

M/s Sukhbir Agro Energy Ltd. .... Appellant(s)

Versus

Uttar Pradesh Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel for the Appellant(s) : Ms. Suparna Srivastava

Counsel for the Respondent(s) : Mr. C. K. Rai for R-1

Mr. Rajiv Srivastava for R-2

ORDER

This Appeal is filed by the Appellant against the impugned order dated 21.11.2017 passed by 1st Respondent-Uttar Pradesh Electricity Regulatory Commission (for short **"UPERC/Commission"**) in Petition No. 1110 of 2016.

The tariff, according to the Appellant, was discovered through competitive bidding process for setting up grid connected solar power plants in the State of Uttar Pradesh. When a Petition came to be filed for adoption of tariff discovered through competitive bidding process for 3 solar power projects of the Appellant for a period of 12 years, the bid tariff of Rs.8.43 per kWh, Rs.8.23 per kWh, Rs.8.60 per kWh respectively for the 3 solar projects of the Appellant was reduced to Rs.7.02 per kWh, and further, the Commission directed the parties to modify the tariff discovered as per the approved/reduced tariff.

Aggrieved by this, the Appellant has approached this Tribunal contending that the impugned order is arbitrary and beyond the authority of the Commission, since the tariff discovered in a competitive bidding process as envisaged under Section 63 of the Electricity Act, 2003 (for short referred to as **"the Act"**) cannot be meddled with, so also the Respondent-Commission only has to see while adopting the tariff as to whether the principles governing the competitive bidding process were violated or not and whether the process was transparent.

The Respondents have replied to this Appeal and even rejoinder is placed on record.

The 2nd Respondent contends that the impugned order of the Commission came to be challenged by the Appellant after entering into a modified PPA dated 07.12.2017 incorporating the tariff at Rs.7.02 per unit; therefore, the Appeal itself is not maintainable. They further contend that the Appellant has introduced a case of coercion as the Appellant was not paid the tariff as per the bills raised quoting the tariff rate in terms of the discovered tariff. Therefore, the very fact of entering into a modified PPA on 07.12.2017 would amount to waiver of the Appellant's claim; therefore, the Appeal has to be dismissed. That apart, they also contend that the appropriate Commission does not act as a mere post office.

Having gone through the pleadings of parties, this Tribunal is of the opinion that this is a fit case where parties could thrash out their differences sitting across the table over a dialogue.

Though this Tribunal is not bound to follow all provisions of Civil Procedure Code (in short "**CPC**") in letter and spirit, but it is well settled that this Tribunal can take clue/guidance from the provisions of CPC while adopting its own procedure. This power is vested with the Tribunal in terms of provisions of the Electricity Act.

One should be practical and cannot close eyes to the fact that conclusion of litigation right from the institution of petition before the Commission till it gets finalised, would take considerable time. One cannot overlook the reality that even after reaching finality on the disputed issue, the reality of enjoying the benefit accrued to a party (especially in terms of money) becomes a tough journey. It could be a generator not getting the legally determined dues or it could be a Discom with huge financial burden which has to pay the determined tariff plus surcharge for a considerable period. Therefore, we felt that why we should not resort to provisions of Section 89 of the Code of Civil Procedure, which refers to different modes of getting the disputed/contested issues resolved without adopting the normal procedure of approaching different forums for conclusion of litigation.

Section 89 of CPC reads as under:

> *"89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:--*

(a) arbitration;
(b) conciliation;
(c) judicial settlement including settlement through Lok Adalat: or
(d) mediation.

(2) Were a dispute has been referred--

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Hon'ble Supreme Court had an occasion to consider in depth all facets of Section 89 of CPC in the case of ***Afcons Infrastructure Ltd. & Anr. vs. Cherian Varkey Construction Co. (P) Ltd. & Ors. (SLP (C) No. 760 of 2007).*** At Para 17 of the Judgement, while discussing whether reference to Alternative Dispute Resolution (for short "**ADR**") process is mandatory or not, Their Lordships proceeded to lay down principles, which are the categories of cases that can be normally considered to be not suitable for ADR process and cases of civil nature which are normally suitable for ADR process.

Paras 17, 18 and 19 of the Judgment read as under:

" 17. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized

excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature :

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including

- *disputes arising out of contracts (including all money claims);*
- *disputes relating to specific performance;*
- *disputes between suppliers and customers;*
- *disputes between bankers and customers;*
- *disputes between developers/builders and customers;*
- *disputes between landlords and tenants/licensor and licensees;*
- *disputes between insurer and insured;*

(ii) All cases arising from strained or soured relationships, including

- *disputes relating to matrimonial causes, maintenance, custody of children;*
- *disputes relating to partition/division among family members/co-parceners/co-owners; and*
- *disputes relating to partnership among partners.*

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- *disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);*
- *disputes between employers and employees;*
- *disputes among members of societies/associations/ Apartment owners Associations;*

(iv) All cases relating to tortious liability including

- *claims for compensation in motor accidents/other accidents; and*

(v) All consumer disputes including

- *disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.*

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its

jurisdiction/discretion in referring a dispute/case to an ADR process."

Their Lordships further opined that Section 89 vests the choice of reference to the Court. They refer ADR process of Lok Adalat, Mediation, and Judicial Settlement in Para 26, which reads as under:

'26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution."

To assure that ADR process does not make a case go out of the stream of the court if settlement is not reached, Their Lordships opined in detail pertaining to ADR process at Paras 27 and 28, which read as under:

> *"27. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.*
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> *28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before*

the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party (`mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the

settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective Summation."

At Para 31, Their Lordships summarise the procedure to be adopted by a court under Section 89 of the Code, which read as under:

"31. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR

processes to the parties to enable them to exercise their option.

d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeble for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes :

(a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

g) *If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.*

h) *If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.*

i) *If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many*

settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability."

At Para 32, their Lordships also caution how courts should bear in mind consequential aspects while giving effect to Section 89 of the Code, which reads as under:

"32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean

that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary."

At Para 33, Their Lordships further declare that the above Paragraphs 31 and 32 are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to special facts and circumstances of a case. They had found that Section 89 has been a non-starter with many courts.

From reading the above Judgment, we are of the opinion that having regard to the nature of the contested issue, there is element of settlement existing in the matter. Therefore, we are of the opinion, it is a fit case for mediation.

Parties are directed to suggest names of two mediators.

Pronounced in the Virtual Court through Video Conferencing on this the **29th day of June, 2020**.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

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