

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 143 of 2016

Date: 13 June, 2017

**CORAM:Shri. Azeez M. Khan, Member
Shri. Deepak Lad, Member**

Petition filed by Maharashtra State Electricity Distribution Company Limited (MSEDCL) under Section 86(1)(f) and (1)(k) and other applicable provisions of the Electricity Act, 2003 read with Clause 6 of the Order/Contract dated 13th February 2006 and in connection with the dispute and differences arising under the Order/Contract dated 13th February, 2006 entered into between MSEDCL and Adani Enterprise Ltd.

Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) ...Petitioner

V/s.

Adani Enterprise Limited (AEL). ...Respondent 1

Western Regional Load Dispatch Center (WRLDC) ...Respondent 2

Eastern Regional Load Dispatch Center (ERLDC) ...Respondent 3

Maharashtra State Electricity Transmission Company Ltd. (MSETCL) ...Respondent 4

Representative for the Petitioner: Shri. Harinder Toor (Adv.)

Representative for the Respondent No. 1: Shri. V. S. Nankani (Adv.)

Daily Order

1. Heard the Advocates of the Petitioner and Respondent No. 1.
2. Advocate for MSEDCL stated that

- a) In pursuance to tender floated by MSEDCL on 1 February, 2006 for purchase of off-peak power for the months of March to June 2006, AEL submitted its offer on 7 February, 2006, with trading margin of 4 paise per unit as per CERC Regulations with a condition that they are intending to file a petition before the Central Commission/Tribunal to review its decision and that, in the event that the trading margin is revised, it would be claimed accordingly. MSEDCL, vide letter dated 13 February 2006, made a counter offer on MSEDCL's own terms and conditions, which does not mentions any trading margin conditionality.
- b) AEL accepted the terms and conditions stipulated in MSEDCL's letter dated 13 February, 2006 and accordingly supplied the power, thus accepting the counter offer.
- c) The Commission enquired whether it was its conditional offer or the counter offer of MSEDCL that was accepted by AEL. Referring to Sections 7, 8 and 9 of the Contract Act, 1872, Advocate of MSEDCL stated that performance of the conditions of proposal, acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is tantamount to acceptance of the proposal. AEL accepted the counter offer and performed the contract by supplying the power.
- d) On 3 April 2006, AEL informed MSEDCL of its decision to increase the price of power from Rs. 4.19 to 4.35 per unit citing Gujarat High Court Judgment dated 30 March, 2006, which stayed the Order of CERC regulating and putting a ceiling on the trading margin. In that letter, reference is also made to letter dated 13 February, 2006, as being the letter of award by MSEDCL. On 4 April, 2006, MSEDCL requested to forward the copy of the High Court Order as to take further necessary action.
- e) MSEDCL was not a party in the Gujarat High Court Case, and referred to the Judgment. AEL's statement regarding the quoted trading margin of 4 paisa being provisional and subject to the outcome of the Petition filed before the High Court is an afterthought. MSEDCL was not a party to the proceeding before the High Court and its contract was not subject to those proceedings.
- f) On 6 April, 2006, AEL asked MSEDCL to accept the revised price of Rs. 4.35/kWh in respect of LoA No.311 for supply of 200 MW 18 hrs off-peak power in view of the Gujarat High Court Judgment.
- g) On 10 April, 2006, AEL once again requested MSEDCL to confirm acceptance of the revised price of Rs. 4.35 per unit so as to enable it to continue the power supply. AEL stated that it will presume that MSEDCL is not interested in therevised rate, if not confirmed by 11 April, 2006, and that it would stop supplying power from 12 April, 2006. The letter was written by AEL because it knew that it had accepted the MSEDCL proposal.
- h) Vide its letter dated 13 April, 2006, the MSLDC, informed MSEDCL that AEL is not supplying 40 MW RTC through Sikkim since 7 April, 2006 and DVC 200 MW from 11 April, 2006, on account of lower availability.

- i) AEL unilaterally reduced the agreed STOA from 200 MW to 100 MW for the months of April to June 2006.
- j) On 21 April, 2006, MSEDCL informed AEL that trading margin will be paid subject to approval of CERC/APTEL. MSEDCL was paying at an agreed rate which was inclusive of trading margin. As AEL supplied power without any written acceptance/rejection of MSEDCL's counter proposal, it has to be considered as a deemed acceptance.
- k) AEL had applied to WRLDC for STOA, which was approved by WRLDC and all Open Access charges were paid by MSEDCL. On 17 April, 2006, AEL unilaterally surrendered Open Access for 100 MW w.e.f 16 April, 2006. From the Regional Energy Account of Eastern Regional Electricity Board, it is seen that AEL has diverted this power to Chhattisgarh State Electricity Board.
- l) On 21 April, 2006, MSEDCL conveyed to AEL that, in the month of April, 2006, the power supplied was less than the contracted quantum and the act of surrendering the power of 100 MW is regretted. MSEDCL would not hesitate to levy penalty on account of short supply as per Clause 6 of the order dated 13 February, 2006.
- m) Vide letter dated 27 April, 2006, AEL stated that the trading margin of 4 paisa quoted was merely provisional and subject to the outcome of the Petition filed before the High Court.
- n) On 12 May, 2006, MSEDCL informed AEL that it has requested supply of 200 MW as per the order, and otherwise MSEDCL would levy penalty as per the order.
- o) Vide letter dated 26 May, 2006, AEL informed MSEDCL that, since concurrence of MSEDCL to the revised price was not forthcoming although AEL was being assured telephonically, AEL was within its right to terminate the contract and stop supply of power. AEL partially reduced supply to MSEDCL. However, MSEDCL stated that oral agreements are not valid in its case.
- p) Through letter dated 10 August, 2006, AEL stated that MSEDCL had conveyed its acceptance to its offer through its LoI dated 13 February, 2006. Since no mention was found contrary to AEL's right to revise the sale price based on the decision of appropriate authority on the fixation of trading margin, it presumed that AEL's request had been accepted.
- q) Vide letter dated 12 May, 2006 MSEDCL claimed compensation as per Clause 6 of the order dated 13 February, 2006.

- r) MSEDCL has procured power at a higher cost from Tata Power and other sources, and consequently suffered loss due to short supply by AEL.
- s) MSEDCL submitted claims against compensation and damages totaling Rs. 9,63,13,956, along with interest of 18% per annum from the date of filing of the Suit till the date of payment or realization.
- t) In March 2008, MSEDCL filed a Suit before the High Court. As regards, limitation for filing of this Petition, it stated that the cause of action first arose on 11 April, 2006 and MSEDCL immediately filed a Suit before the Bombay High Court (No. 1074 of 2008) within a year. APML filed the Notice of Motion (No.1520 of 2015) for rejection of the Plaint under Order VII rule 11 of the Civil Procedure Code, 1908, which was allowed by the Bombay High Court on 28 March, 2016. In view of the above Suit, MSEDCL's claim is well within the limitation period.
- u) There is no estoppel against the statute, and there is a process to be followed for giving instructions by any officer of the MSEDCL and oral commitments could not be considered during any claims.
- v) The letter dated 31 May, 2006 referred to by AEL in its Reply showing MSEDCL's inability to schedule the contracted power due to breakdown of various transmission lines and categorizing it as force majeure is a new ground and cannot be considered in the present matter.

3. Advocate for AEL stated that

- a) The present matter is a fit case for arbitration under Section 86 (1) (f) of the Electricity Act, 2003 as it is purely a contractual dispute between the parties. The facts relied upon are the proposal from AEL and the counter proposal by MSEDCL. This requires evidence to be led and verified and cross examination, which is possible only through arbitration.
- b) According to Sections 7 and 8 of the Contract Act, 1872, compensation is not to be given for remote and indirect loss or damage. Reasons for breach and actual damage or loss caused have to be proved. The compensation should be reasonable and not exceed the amount of the penalty stipulated. The alleged acceptance by performance of MSEDCL's counter proposal needs evidence, and it has to be examined.
- c) Sections 73 and 74 of the Contract Act, 1872 have to be followed. The party may claim compensation for loss or damage caused by breach of contract, but has to

establish a causal link between the unavailability of power due to short supply of AEL and purchase of power at a higher rate to meet the requirement. MSEDCL has not produced any details of the power purchased due to unavailability of power contracted with AEL. MSEDCL has to show the price, actual purchase, etc for mitigating its demand and needs to justify the losses claimed to be suffered by it.

- d) The objective of the compensation in the LoI is to safeguard the procurer in a situation of non-supply of power, which is in the nature of damages.

- e) MSEDCL has claimed two amounts, Rs. 6.50 crore under Clause 6 of the LoI as Liquidated Damages under Section 74 of the Contract Act, 1872, and Rs. 3.47 crore is the loss claimed under Section 73. For the claim over and above the LD, the burden of proof that it is entitled to more than the Liquidated Damage is on MSEDCL. Claims under these provisions have to be decided on the basis of evidence. Clause 6 of the LoI is for the compensation for default in scheduling, which is in the nature of Liquidity Damages.

The Commission directed AEL to address the reasoning for not supplying 200 MW power in its further submission. AEL may also submit its further say on referring the matter to arbitration, to which MSEDCL may respond.

The Commission directed MSEDCL and Respondent No. 1 to file their submissions within two weeks.

The next date of hearing will be communicated by the Secretariat of the Commission.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M. Khan)
Member