

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No.83 of 2017
M.A. 16 of 2017 in Case No 83 of 2017

Date: 27 July, 2017

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

Petition of Siddhayu Ayurvedic Research Foundation Pvt. Ltd. against Global Energy Pvt. Ltd. for adjudication of dispute w.r.t. payments of amounts due and payable under the Energy Purchase Agreement.

Siddhayu Ayurvedic Research Foundation Pvt. Ltd.(SARFPL)Petitioner

V/s.

Global Energy Pvt. Ltd.(GEPL)Respondent

Appearance:

For the Petitioner: : Mr. Ashish Singh (Adv.)
: Mr. Rahul Joshi (Rep.)

For the Respondent: : Mr. Abhishek Adke (Adv.)
: Ms. Aparajeeta Sharma (Rep.)

Daily Order

Heard the Advocates of the Petitioner and Respondent.

1. Advocate of SARFPL stated that:

- (i) SARFPL is a Wind Generator with an installed capacity of 12.85 MW at Chakla, Taluka & District – Nandurbar, Maharashtra. It has entered into an Energy Purchase Agreement (EPA) dated 20 September, 2010 for 10 years with GEPL which was an intra-State Trading Licensee as on the date of the EPA. The intra-State Trading Licence was granted to GEPL by the Commission for a period of five years w.e.f. 28 September, 2007.
- (ii) SARFPL has two main claims, viz.
 - (a) The principal claim raised by SARFPL at payer (1) is for the energy which has been used, accounted, sold, appropriated and recovered by GEPL for the period

from November, 2010 to March, 2014 amounting to Rs. 1,37,82,778.36. Though this claim of SARFPL has also been admitted and acknowledged by GEPL, it has not yet been paid despite various communications.

- (b) The rest of the claims relate to prayer (2) regarding an amount of Rs. 3,78,98,322 on account of interest pending till date on the principal outstanding amount due and payable to it by GEPL, prayer (3) regarding an amount of Rs.1,24,32,437.10 on account of non-reinstatement of Letter of Credit payable to it by GEPL under article 8 of EPA ('Payment Security Mechanism') and prayer (4) regarding an amount of Rs. 77,09,899 on account of differential amount towards sale of power on Power Exchange vis a vis the agreed 'Base Rate' as per the EPA. All these claims are in line with the agreed terms and conditions of the EPA between it and GEPL.
- (iii) Referring to emails dated 11 March, 11 April and 7 May, 2014, SARFPL stated that its claim in prayer (1) is an admitted claim by GEPL. However, the claim, which is pending since 2013, has not yet been paid to SARFPL despite the assurance been given by GEPL on various occasions.
- (iv) SARFPL has received a copy of Application u/s 8 of the Arbitration and Conciliation Act, 1996 filed before the Commission wherein GEPL has sought to refer the matter to arbitration and appointment of an arbitrator under the provisions of that Act. However, this request of GEPL is not at all maintainable in the light of the provisions of Section 86 (1) (f) of the EA, 2003 which provides that the State Commission shall adjudicate disputes between the Licensees and Generating companies and may refer any dispute for arbitration to its nominated arbitrator. GEPL has not set out in its Application the need for referring this matter to arbitration. Moreover, Clause 13.2 ('Dispute Resolution') of the EPA referred to by GEPL in its Application is void ab initio because the Supreme Court in 2008 had held that the adjudication of disputes between Licensees and Generating Companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it and not by private arbitration.
- (v) SARFPL stated that GEPL is in the habit of raising false and frivolous claims as an attempt to pressurise small Generators to forgo their rightful claims. GEPL has raised a counter claim on SARFPL only in February, 2017 by a debit note of approximately Rs. 11 Crores claiming loss of GEPL's business for the remaining period of six years

due to early termination of EPA by SARFPL. Recently, the Commission in its Order concerning Western Precicast Pvt. Ltd in Case No. 83 of 2016 has held that rejection of STOA, on the grounds of premature termination of the EPA, is untenable. Further, referring to the Delhi High Court Judgment in Numero Uno International Ltd. v/s Prasar Bharati, SARFPL stated that, once the claims are admitted, there is no question denial of such claims. In view of this position, SARFPL had not made any prayer for interim relief before this Commission.

- (vi) The basis for GEPL's counter claim on SARFPL in February, 2017 of approximately Rs. 11 Crores claiming loss of GEPL's business and at the rate of Rs. 1 per unit is also not known. Therefore, the Commission may fix trading margins for intra-State trading of electricity in Maharashtra. GEPL has also communicated to SARFPL the name of its Arbitrator, to which SARFPL is not agreed; instead GEPL could have very well approached this Commission for such arbitration under the relevant provisions of EA, 2003.
 - (vii) SARFPL stated that the conduct and modus-operandi of GEPL would be clear after a thorough enquiry is conducted by the Commission under the provisions of Regulation 32 of the Conduct of Business Regulations, 2004, as 20-25 similarly placed Generators like SARFPL have also been cheated on false, frivolous and identical grounds and not been duly paid. In the light of the above, interim relief may be given for its principal claim amounting to Rs. 1,37,82,778.36 although it had not claimed such relief in its Petition.
2. Advocate of GEPL stated that it has filed a separate Application for referring the present matter to Arbitration as required under Section 8 of the Arbitration and Conciliation Act, 1996, which requires it to file its prior Application for Arbitration before filing its statement of defence or reply.
 3. The Commission observed that GEPL could have filed its Reply to the Petition without prejudice to its other stand. Before filing its Application for referring the matter to arbitration, GEPL should have holistically considered the relevant provisions of the EA, 2003, including Section 86 (1) (f) and provisions of the Arbitration and Conciliation Act, 1996 and the relevant Judgments of the Supreme Court on the issue of such arbitration.

4. The Commission directs GEPL to file its Reply within a week with a copy to SARFPL, who may file its Rejoinder within a week thereafter.

Next date of hearing will be communicated by the Secretariat of the Commission.

**Sd/-
(Deepak Lad)
Member**

**Sd/-
(Azeez M. Khan)
Member**