

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: 7 September, 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. Rajiv Yadav (Adv.)
: Mr. Abhishek Adke (Adv.)
: Ms. Aparajeeta Sharma (Rep.)
For Authorized Consumer Representative : Dr. Ashok Pendse, TBIA

DAILY ORDER

Heard the Advocates of the Petitioner and Respondent.

1. Advocate of SARFPL stated that:

a) The matter pertains to an Energy Purchase Agreement (EPA) dated 20 September, 2010 entered into by SARFPL, being a Wind Generator of 12.85 MW, with GEPL, then an intra-State Trading Licensee. The dispute pertains to two main amounts; the principal claim is for Rs. 1,37,82,778.36, which has been admitted and acknowledged by GEPL and recovered by it from its consumers already.

b) The other amounts are the claims which are on account of defaults on the part of GEPL, viz; (i) an amount of Rs. 3,78,98,322 on account of interest pending till date on the principal outstanding amount, (ii) an amount of Rs.1,24,32,437.10 on account of non-reinstatement of Letter of Credit and (iii) an amount of Rs. 77,09,899 on account of differential between sale of power by SARFPL on Power Exchange vis-a-vis the agreed

‘Base Rate’. All these claims are in line with the EPA between it and GEPL.

c) During the last hearing, GEPL relied on the amendments to the Arbitration and Conciliation Act, 1996 (ACA, 1996) in 2015, and has filed an Application u/s 8 of the ACA, 1996 before the Commission to refer the matter to arbitration and for appointment of an arbitrator under the provisions of that Act. In GEPL’s opinion, the amendments in the ACA, 1996 have taken away the powers of the Commission u/s 86 (1) (f) of the Electricity Act, 2003 (EA, 2003) as well as the ruling of Supreme Court in Gujarat Urja Vikas Nigam Ltd (GUVNL) vs. Essar Power Ltd dated 13 March, 2008.

d) GEPL’s case is that both parties have agreed to refer disputes to arbitration in terms of the ACA,1996 under clause 13.2 of the EPA, and that both are bound by this arbitration provision and, more so in view of the amendments in the ACA, 1996 in 2015 , which has taken away the powers of the Commission u/s 86 (1) (f) of the EA, 2003 and the Commission cannot adjudicate the present matter. GEPL has only filed an Application u/s 8 of the ACA, 1996 but not its substantive Reply to the Petition in compliance of the specific directions given by the Commission in the Daily Order dated 27 July, 2017.

e) On 9 August, 2017, SARFPL has submitted the following without prejudice to one another:

(i) Reply to the Application filed by GEPL under Section 8 of the ACA, 1996 as amended.

(ii) Application/request under Section 9 of the ACA, 1996 as amended, read with Section 94 (2) of the EA, 2003.

(iii) Rejoinder to the reply filed by GEPL.

f) With respect to the Arbitration issues, the ACA, 1996 is a general Act whereas the EA, 2003 is a special Act and the powers conferred upon the Commission under Section 86(1) (f) of EA, 2003 are absolute. Even if the Commission decides to refer a dispute to arbitration, the Applicant has to necessarily demonstrate the reasons why such dispute can only be referred to arbitration. However, GEPL’s Application under Section 8 of the ACA, 1996 does not contain the reasons for referring the matter for arbitration. If such dispute is referred to arbitration then, since every EPA contains an arbitration clause, in an event of dispute, every matter may have to be referred to arbitration, which is contrary to the intent of the EA,2003, which is the basic Statute. The Commission is a special body

constituted for adjudicating such kind of dispute under the special Act (EA, 2003).

g) Without prejudice to the above, even in the event that the Commission holds that the Application under Section 8 of the ACA, 1996 filed by the GEPL is maintainable, the Commission may also adjudicate the Application under Section 9 of the ACA, 1996, as amended, read with Section 94 (2) of the EA, 2003 and allow SARFPL interim relief/protection for the admitted amount as mentioned in its first prayer.

2. Advocate of GEPL stated that:

a) In its Application under Section 86 (1) (f) of the EA, 2003 read with Section 8 of the ACA, 1996 for referring the matter for arbitration, nowhere has GEPL stated that the amendment in the ACA, 1996 has taken away the ruling of the Supreme Court in GUVNL vs. Essar Power Ltd dated 13 March, 2008. In fact, the ruling in that Case is binding. It states that Application u/s 11 of the ACA, 1996 before the High Court is not maintainable if a dispute is between a Licensee and a Generating Company because Section 86 (1) (f) of the EA, 2003 confers special powers vis-à-vis these disputes on the State Commissions. The ruling in the GUVNL Judgment does not speak about when the State Commission will decide a dispute itself and when the dispute is to be referred to arbitration. However, a subsequent Judgment of Supreme Court dated 4 April, 2014 in Civil Appeal No.4126 of 2013 (T.N. Generation and Distribution Corp.Ltd. v/s PPN Power Generation Co.(P) Ltd.) (2014)11 Supreme Court Cases 53), touches on this issue.

b) At Paras 49,54,55,59 and 63 the Supreme Court Judgment dated 4 April, 2014, relief was denied but the Court stated that the Appellant had initially submitted itself to the jurisdiction of the State Commission and sought only subsequently that it should be referred to arbitration. Hence, the moment GEPL files a Reply to the present Petition on merits, then Section 8 of the ACA, 1996 would bar it from referring the matter for arbitration. GEPL is not denying to deal with the Petition on merits but, as the law mandates, the Commission may first decide its Application filed under Section 86 (1) (f) of the EA, 2003 read with Section 8 of the ACA, 1996 for referring the matter for arbitration. The Supreme Court's Judgment also states that, while the Commission had the discretion u/s 86(1)(f) to adjudicate a dispute itself or refer it to arbitration, such adjudication ought generally not be conducted without a judicial Member.

3. The Commission observed that Section 86 (1) (f) of the EA, 2003 provides that the State Commission shall adjudicate upon the disputes between the Licensees and Generating Companies and may refer any dispute for arbitration; and that, as per the Supreme Court

Judgment in the GUVNL Case, all adjudication of disputes between Licensees and Generating Companies under Section 86 (1) (f) of the EA, 2003 can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. Since Section 86 (1) (f) of the EA, 2003 is self-contained and provides the option of arbitration also, instead of filing a separate Application under Section 8 of the ACA, 1996, GEPL could have applied under Section 86 (1) (f) of the EA, 2003 alone seeking that the Commission refer the present dispute by appointing an arbitrator. Thus, GEPL, in order to protect its interest, would be free to maintain its claim before the Commission for referring the matter for arbitration while also addressing the issues raised in the Petition.

4. Advocate of GEPL stated that the Supreme Court in the GUVNL Case has only held that Section 86 (1) (f) of the EA, 2003 will override Section 11 of ACA, 1996 (Appointment of arbitrator) and not Section 8 of that Act. Recourse to Section 8 of ACA, 1996 is available to party whenever a dispute is brought before any Judicial Authority including the Commission. Reference to Section 86 (1) (f) of the EA, 2003 might have been sufficient, but by way of abundant caution GEPL has invoked that provision read with Section 8 of the ACA, 1996 in its Application for referring the matter for arbitration. The Commission may first decide and issue directions/Order on its Application. GEPL would make a written submission if required. The Commission directed it to do so within a week.
5. The Commission observed that GEPL could file its reply to the Petition without prejudice to its other stand, since now it has already made its Application under Section 86 (1) (f) of the EA, 2003 read with Section 8 of the ACA, 1996 for referring the matter for arbitration.
6. Referring to Para 19 of the Supreme Court Judgment in Civil Appeal Nos 141-143 of 1999 dated 13 January, 1999(Sundaram Finance Ltd. v/s NEPC India Ltd. [(1999) 2 Supreme Court Cases 479]), Advocate of GEPL stated that Section 9 of the ACA, 1996 has been wrongly invoked by SARFPL for interim relief since it is opposing arbitration. Moreover, the matter of interim relief under Section 9 can be taken up, if at all, only after a decision on its S.8 Application. Further Section 9 can only be invoked before a Civil Court of original jurisdiction as defined under Section 2 of the ACA, 1996. Advocate of SARFPL responded that its reference to that provision was made expressly without prejudice to its substantive contentions. The Supreme Court Judgment in the Lanco Case also deals with the authority of the Commission as a Civil Court.

7. The Commission asked Advocate of GEPL whether he is aware of any precedents in similar Cases before the Central Electricity Regulatory Commission or other State Commissions. He stated that he is not aware of any such precedents.
8. Advocate of SARFPL stated the conduct of GEPL may be gauged from the fact that it had not paid for the power supplied. Instead, after 3 years, it had raised a counter-claim of Rs.1/- per unit against SARFPL, even though it was fully aware that private arbitration proceedings between a Generator and a Licensee was barred in view of Section 86 (1) (f) of the EA, 2003 and the principle laid down by the Supreme Court in the GUVNL Case. GEPL has been defrauding small and ignorant Generators by including a provision in their EPAs and pressing them to resort to private arbitration. A similar approach was also adopted by GEPL to induce SARFPL for private arbitration, which it has refused. Referring to Para 50 of the Supreme Court Judgment dated 4 April, 2014 in Civil Appeal No.4126 of 2013 also, he stated that a dispute between Licensees and Generating Companies can only be adjudicated upon by the State Commission either by itself or through the arbitrator to whom it refers the dispute. Further, at Para 30 of the GUVNL Judgment, while dealing with Section 11 of the ACA, 1996, the Supreme Court has recorded that there may be various reasons why the State Commission may decide not to adjudicate the dispute itself and may refer it for arbitration to an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide the dispute itself, or the dispute may involve some highly technical point which the State Commission may not have the expertise to decide. However, GEPL's application under Section 8 of the ACA, 1996 does not cite any such reason for referring the matter for arbitration. Section 8(1) of the ACA, 1996 does not prohibit the Applicant from filing its reply on the substance of the dispute.

The Case is reserved for Orders.

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

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