

BEFORE THE KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: Shri. T.M. Manoharan, Chairman
Shri. S. Venugopal, Member
Shri. K.Vikraman Nair, Member

File No.1184/ADL/2016/KSERC Order dated 07.02.2017

In the matter of : Petition under Section 86 (1) (f) of the Electricity Act, 2003-
Maintainability of the petition.

BETWEEN,

Kerala State Electricity Board Limited,
Vydyuthi Bhavanam, Pattom, Petitioner
Thiruvananthapuram.

AND

Lanco Kondapalli Power Limited,
Lanco House, Plot No.4, Respondent
Software Unit Layout,
HITEC City, Hyderabad.

1. KSEB Ltd filed a petition before the Commission for adjudication of a disputes between Lanco Kondapalli Power Limited and KSEB Ltd regarding default in supply of 210 MW RTC power by the respondent during August and September 2015, for which PPA had been entered into.
2. KSEB Ltd in their petition submitted that they had entered into a PPA with M/s LANCO, Kondappally Power Ltd (LKPL), one of the successful bidders under the Scheme for Utilization of Gas Based Power Generating Capacity for the financial years 2015-16 and 2016-17 proposed by Ministry of Power, Government of India, on 12.6.2015 for the purchase of 210MW RTC power during August 2015 & September 2015@ Rs 4.70/kWh.
3. M/s LKPL had not supplied any power to KSEB Ltd as per the said PPA. KSEB Ltd vide letters dated 19.08.2015 and 31.08.2015, requested M/s LKPL to supply

power as per the contract. But M/s. LKPL vide its reply dated 03.09.2015 communicated that the failure to supply the e-bid RLNG by M/s.GAIL is not within their control and it is to be treated as a force majeure condition under clause 7(d) of the PPA. KSEB Ltd took up the matter with the nodal agency, Ministry of Power, Government of India. KSEB Ltd, vide letter dated 30.09.2015 had once again approached the Ministry of Power (MoP) to take necessary action to compensate extra expenditure incurred by KSEB Limited by way of arranging costly power in place of contracted power from M/s. LKPL, from the PSDF performance security furnished by M/s. LKPL by invoking appropriate clause in the PSDF support agreement. KSEB Ltd assessed and intimated MoP that a loss of Rs. 52,31,40,619/- was sustained by way of scheduling costly power. In reply to the demand, the Ministry of Power (MoP), Gol informed KSEB Ltd that the matters relating to PPA has to be settled by the contracting parties as per provisions of PPA.

4. An admissibility hearing on the petition was conducted at 11 AM on 28.9.2016 at the court room, KSERC, Thiruvananthapuram. Adv Sakthidharan Nair, Counsel for the petitioner submitted his arguments on the admissibility of the petition. He submitted that;

As per Section 86 (1) (b) & (f) of the Electricity Act 2003, the state Commission has the following functions w.r.t power purchase

86. (1) The State Commission shall discharge the following functions, namely:

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....

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

.....

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

He therefore stated that the State Commission has the exclusive jurisdiction on the adjudication of disputes between a distribution licensee in the state and a generator.

5. Adv Sakthidharan Nair, relied on the order of APTEL dated 23.2.2011 in Appeal No 200 of 2009 for his arguments on the admissibility of the petition. He argued that the disputes between distribution licensee and generating company are to be adjudicated by the State Commission and that Central Commission has no

jurisdiction on the same. He stated that the powers of the Central Commission to adjudicate upon dispute is limited to the adjudication upon disputes involving generating companies in regard to matters connected with clauses(a) to (d) 79 (1) and no such limitation is provided under Section 86 (1) (f) and hence State Commission can adjudicate all disputes other than the disputes under Section 79(1) (a) to (d).

6. Sri Rakesh K Gupta, Chief Operating Officer, LANCO Kondappally Power Ltd, submitted that he has not received the copy of the notice or petition and he came to know about the hearing when he arrived at Trivandrum for a discussion with KSEB Ltd on another proposal for sale of power to them.
7. The Commission directed the petitioner to provide copies of the petition and other documents to Chief Operating Officer, LANCO by hand. The Commission allowed time upto 21.10.2016 to file the written submission on the admissibility of the petition as requested by the respondent. It was also ordered that the admissibility of the petition will be decided after receipt of the submission from LANCO Kondappally.
8. The respondent in its reply dated 03.11.2016, objected to the maintainability of the petition and jurisdiction of this Commission to entertain the petition. The LKPL raised preliminary objection that the petition is not maintainable as this Commission has no jurisdiction to try and adjudicate the disputes raised by the petitioner in the aforementioned petition. According to the respondent, the petition can be filed only before the Central Electricity Regulatory Commission under Section 79 (1) (f) of the Electricity Act. According to the respondent the issue has been settled by a Full Bench of the Hon'ble APTEL in Uttar Haryana Bijili Vitaran Nigam Ltd Vs. Central Electricity Regulatory Commission and therefore the present issue is within the exclusive jurisdiction of the Hon'ble Central Electricity Regulatory Commission. Hence it is requested to dismiss the petition as not maintainable. The respondent mainly relied on the following statutory provisions and legal positions regarding the maintainability of the petition.

(1) Section 79 (1) (f) of the Electricity Act, 2003.

(2) Judgment of the Hon'ble APTEL in Uttar Haryana Bijili Vitaran Nigan Limited & Ors. Vs. Central Electricity Regulatory Commission & Ors. (Appeal No.100/2013)

(3) Judgment of the Hon'ble APTEL in Maithon Power Limited Vs. Delhi ERC (Appeal No. 306/2013).

Analysis of the Commission

9. Regarding the arguments of the petitioner on the maintainability of the petition the Commission observes as under;

The enabling provisions of the Electricity Act, 2003, which confer jurisdiction on the Commission to adjudicate upon the disputes between the licensees and generating companies is Section 86 (1) (f) which is quoted below.

86 (1)(f) –adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration.

10. As per the above provision of the Electricity Act, 2003, it is the statutory function of the State Electricity Regulatory Commission to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. The Hon'ble Supreme Court of India in the case cited by the petitioner (Gujarat Urjavikas Vigam Ltd., Vs. Essar Power Limited), has also upheld this position. The Hon'ble Apex Court has made it clear that, under Section 86(1) (f) of the Act, the State Commission is the authority to adjudicate disputes between the distribution licensees and the generating companies.
11. In the case of Pune Power Development Private Limited Vs. Karnataka Electricity Regulatory Commission, cited by the petitioner, the challenge was with respect to the jurisdiction of Karnataka State Electricity Regulatory Commission under Section 86(1)(f). In the above case, the question raised for consideration of the APTEL was whether the State Commission has got jurisdiction over a dispute between a licensee within its State and a licensee who had not been granted a licence by the State Commission under Section 86(1)(f) of the Act. The Hon'ble APTEL after examining the matter in details held that, the scope of Section 86 (1) (f) is very wide as it covers all disputes with the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86 (1) (f) regarding the nature of the license. Thus all disputes relating to the regulatory jurisdiction of the State Commission which involves the distribution licensee or trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission.
12. It has further been held that, the Commission will have jurisdiction to entertain the dispute and adjudicate the same so long as a part of the cause of action arose within its statutory jurisdiction. In the said case the APTEL has also found that the transaction has taken place within the jurisdiction of Karnataka State Commission, the negotiations were held in Karnataka, the letter of intent had been issued from Mangalore, the power had been delivered at the periphery of Karnataka and the power supplied has been returned at Karnataka periphery. Thus all actions under the contract had taken place within the territorial jurisdiction of the State Commission and

hence the State Commission has got ample jurisdiction to entertain the petition under Section 86 (1) (f) of the Electricity Act.

13. In the above said judgment the Hon'ble APTEL has also examined the scope of Section 79 (1) (f) of the Electricity Act, 2003. Section 79(1)(f) is quoted below,-

79(1)(f)- to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clause (a) to (d) above and refer any dispute for arbitration.

As per the above section, the Central Commission has only the jurisdiction to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) of Section 79 (1). The said clauses are quoted below,-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government.

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

(c) to regulate interstate transmission of electricity.

(d) to determine tariff for interstate transmission of electricity.

14. The above provisions refer to the tariff of central generating companies and generating companies other than those owned or controlled by the Central Government if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one state. A close reading of this section would make it clear that the jurisdiction conferred on the Central Commission is restricted to the aspects which are specified under clause (a) to (d) aforesaid. However, in the jurisdiction of the State Commission conferred under Section 86 (1) (f), of the Act there is no such restrictions. In other words all disputes between the generating companies and licences which do not fall under Section 79 (1) (a) to (d) are within the jurisdiction of the State Commission.

15. Further it has been held that, there is no restriction on the location of the trading licensee to determine the jurisdiction of the State Commission under Section 86 (1) (f). So long as the Distribution Licensee's procurement of power is involved in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute.

16. Similar views have also been taken by the Hon'ble APTEL in, PTC India Ltd. Vs. Uttarakhand Electricity Regulatory Commission and PTC India Ltd Vs. Punjab State Electricity Regulatory Commission.
17. Regarding the objections raised by the respondents against the jurisdiction of this Commission to entertain the present petition the Commission observes as under.
18. As per clause (f) of Section 79 (1), the Central Commission is empowered only to adjudicate upon the disputes in regard to matters connected with clauses (a) to (d) of the said section and to refer any disputes for arbitration. On a conjoint reading of Section 79 (1) (f) and 86 (1) (f), it can be seen that, the adjudicatory power of the Central Electricity Regulatory Commission is restricted to the disputes under clauses (a) to (d) of Section 79 (1), whereas no such restriction has been imposed on the State Electricity Regulatory Commission under Section 86(1)(f). But the State Commission has to exercise its adjudicatory jurisdiction only on matters which are not coming under clauses (a) to (d) of Section 79 (1) of the Act. Thus in all such matters, Central Commission is the competent authority. But the matter now under the consideration of the Commission is only with respect to a compensatory claim preferred by KSEBL against the respondent for non-compliance of contractual obligation and thereby to compensate the loss sustained to them. Hence it is a clear case, which exclusively comes under the statutory functions of the State Electricity Regulatory Commission under Section 86 (1) (f) of the Act.
19. The respondent mainly relies upon the full bench decision of the Hon'ble APTEL dated 14.07.2016 in Uttar Haryana Bijili Vitaran Nigam Limited & Ors. Vs. Central Electricity Regulatory Commission & Ors. On a close reading of the above decision it can be seen that, the matter considered by the APTEL in that case and the present matter before the State Commission are different.
20. As per the above findings, the issue under the consideration of the APTEL was an issue which is definitely coming under the scope of Section 79 (1)(b) of the Act and hence the Central Commission is the appropriate authority to adjudicate upon such dispute under Section 79 (1) (f). The prayer therein was to grant compensatory tariff to cover the increased cost of generation. CERC has the function to regulate the tariff of the generating company having a composite scheme of generation and sale of electricity in more than one State. In other matters which are beyond the scope of Section 79(1)(a) to (d) of the Act, the State Commission alone will have jurisdiction to adjudicate upon the disputes arising on such matters.

21. Another decision cited by the respondent in M/s. Maithon Power Limited Vs Delhi Electricity Regulatory Commission and others is also not different from the facts involved in the above full bench decision. In that case the matter under dispute was purely within the ambit of Section 79(1)(b) of the Act and hence the CERC has the jurisdiction to adjudicate upon such disputes. In the instant case the claim of the petitioner is for compensation due to commercial losses incurred by them due to the non-supply of power agreed to by the respondent. The facts involved in the present case are not comparable to the facts involved in the cases cited by the respondent.
22. On the issue of jurisdiction, the Commission finds that the objections raised by the respondent are not maintainable and hence liable to be rejected.

Order

23. In the light of the above observations, the Commission over rule the objections raised by the respondent on the question of jurisdiction of the Commission and holds that the petition filed before the Commission is maintainable.
24. Posted the matter for further hearing on 14/03/2017. In the meanwhile the respondent may file its objection on merits so that the matter can be decided expeditiously.

Sd/-
S. Venugopal
Member (F)

Sd/-
K. Vikraman Nair
Member (E)

Sd/-
T.M. Manoharan
Chairman

Approved for issue,

Santhosh Kumar.K.B
SECRETARY