

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 78/MP/2018

Subject : Petition for unilateral surrender of 400 MW power by MPPMCL from MTPS & CTPS of DVC in violation of provision of PPA.

Petition No. 236/MP/2017

Subject : Petition against the decision of MPPMCL for Unilateral surrender of 100 MW from DSTPS in violation of provision of PPA between DVC & MPPMCL

Date of Hearing: **11.12.2018**

Coram: Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member

Petitioner: Damodar Valley Corporation (DVC)

Respondents: Madhya Pradesh Power Management Company Limited (MPPMCL)

Parties present Shri M.G. Ramachandran, Advocate, DVC
Ms. Ranjitha Ramachandran, Advocate, DVC
Ms. Poorva Saigal, Advocate, DVC
Shri Paramhans, Advocate, MPPMCL
Shri Ashish Anand Bernard, Advocate, MPPMCL

Record of Proceedings

These Petitions were taken up for hearing today.

2. The learned counsel for the Respondent made submissions on the issue of maintainability of these Petitions and mainly submitted the following:

(a) As per Clause 7 of the PPA, the dispute between the parties are required to be adjudicated / referred to an Arbitration Tribunal in terms of the Arbitration agreement entered into between the parties.

(b) Sections 5 & 8 of the Arbitration & Conciliation Act, 1996 as amended in 2015 makes legislative intent clear wherein it expressly provides that notwithstanding any judgment of the Supreme Court or any Court, if parties have an arbitration agreement, then the judicial authority shall refer them to arbitration.



(c) The present dispute between the parties is purely a contractual dispute not related to the determination of tariff.

(d) The Commission has got no jurisdiction to adjudicate the present dispute. The judgment of the Hon'ble Supreme Court in GUVNL vs Essar Power Ltd. and the judgment of Hon'ble High Court in PTC vs Jaiprakash cannot be made applicable in the present case, as these judgments were given prior to the amendment of the Arbitration Act in 2015. Moreover, the PPA dated 14.5.2007 contains an arbitration agreement clause for which the parties have agreed for adjudication by arbitration.

(e) The Hon'ble Supreme Court in Smt. Kalliani Amma & ors . Vs. K. Devi & ors (AIR 1996 SC 1963) has dealt with and explained the meaning of "non-obstante or notwithstanding" clause and its effect on the interpretation of the section and has clearly mentioned that a non-obstante clause has an overriding effect. Also, the MPERC in its order dated 8.12.2016 in Petition No. 12/2016 had directed the parties to adjudicate the disputes through arbitration as the Petition filed was held not maintainable.

(f) The reliance of the Petitioner in the judgment dated 13.7.2017 of the National Consumer Dispute Redressal Commission in Aftab Singh vs Emar MGF land Ltd. is of no avail as the facts in those cases are different from the issues raised in the Petition. Moreover, section 173 of the Electricity Act, 2003 makes the Consumer Protection Act overrides the provisions of Electricity Act.

(g) In GUVNL case, the Hon'ble Supreme Court had examined the provisions of section 11 of the Arbitration Act vis-à-vis section 86(1)(f) of the 2003 Act. This has now been put to rest after amendment of Arbitration Act in 2015.

(h) The scope and extent of power of High Court and Supreme Court under sections 11(6) and 11(6-A) of the Arbitration Act has been examined by the Hon'ble Supreme Court in Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729]. It has been observed by the Hon'ble Court that after the amendment, all that the Court needs to see where an arbitration agreement exists, nothing more- nothing less. It has also observed that the legislative policy and purpose to minimise the Court's intervention at the stage of appointing arbitrator and this intention is incorporated in section 11(6-A).

3. The learned counsel for the respondent furnished copies of the above judgments and submitted that the Commission may grant time to file its reply on merits.

4. In response, the learned counsel for the Petitioner pointed out that the Commission has jurisdiction in the matter and mainly submitted the following:

(a) It has been settled in GUVNL case that in regard to matters covered under the provisions of the Electricity Act, there has to be a statutory



adjudication by the Appropriate Commission and to that extent, the Arbitration agreement, which is a bilateral contractual matter, stand superseded. Accordingly, the provisions of the Arbitration & Conciliation Act, 1996 will have no application to the present dispute to be adjudicated in the terms of section 79(1)(f) of the 2003 Act.

(b) The amended part of section 8 of the Arbitration & Conciliation Act, 1996 to the effect that a judicial authority shall refer the matter to arbitration notwithstanding any judgment, decree or order of Hon'ble Supreme Court or any Court, will have application only if the provisions of the Arbitration & Conciliation Act, 1996 are applicable.

(c) The decision of the Hon'ble Supreme Court in Smt. Kalliani Amma & ors Vs. K. Devi & ors (AIR 1996 SC 1963) and the decision of MPERC dated 8.12.2016 has no application to the present case. The amendment to the Arbitration & Conciliation Act, 1996 does not vest the adjudicatory powers in an arbitrator overriding the provisions of the Electricity Act, 2003.

(d) In view of the enactment of the provisions of the Electricity Act, 2003 as laid down by the decision in the GUVNL case, there exists no arbitration agreement between the parties. This issue has already been settled by the NCDRC on 13.7.2017 in the matter of Aftab Singh vs Emmar MGF land Ltd. Subsequently, in the proceedings before the Delhi High Court as well as in the Civil appeals before the Hon'ble Supreme Court, the decision of the NCDRC dated 13.7.2017 has been upheld.

5. The learned counsel for the Respondent objected to the above and reiterated its submissions made with regard to maintainability. He however prayed that the Respondent may be permitted to file written submissions in the matter.

6. At the request of the parties, the Commission granted liberty to the parties to file their written submissions on the issue of 'maintainability'. Subject to this, order on 'maintainability' in the Petition was reserved.

By order of the Commission

Sd/-
(T. Rout)
Chief (Law)

