

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 236MP/2017

and

Petition No. 78/MP/2018

Coram:

Shri P. K. Pujari, Chairperson

Dr. M. K. Iyer, Member

Date of Order: 23rd July, 2019

In the matter of

Petition No. 236/MP/2017

Petition under Section 79(1)(f) of the Electricity Act, 2003 against unilateral surrender of 100 MW power from Durgapur Steel Thermal Power Station in violation of the provisions of the PPA dated 14.5.2007 between DVC and MPPMCL

And

In the matter of

Petition No. 78/MP/2018

Petition under Section 79(1)(f) of the Electricity Act, 2003 against unilateral surrender of 400 MW power from Mejia Thermal Power Station, Units 5 & 6 and Chandrapura Thermal Power Station, Units 7 & 8 in violation of the provisions of the PPA dated 3.3.2006 between DVC and MPPMCL

And

In the matter of

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata - 700 054

.....Petitioner

Vs

Madhya Pradesh Power Management Company Limited
Block No.11, Shakti Bhawan, Rampur,
Jabalpur-482 008

.....Respondent

Parties Present:

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



ORDER

This Petition has been filed by the Petitioner, Damodar Valley Corporation Limited (DVC) seeking the following reliefs:

“(a) Declare that MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 14.5.2007 read with the Regulations and Orders of this Commission for the entire duration of the PPA and declare that MPPMCL shall not be entitled to treat the PPA having been terminated;

(b) Declare that DVC shall be entitled to interest for the delayed payment at the rate of 1.5% per month as provided in the Tariff Regulations of this Commission;

(c) Direct MPPMCL to pay the outstanding amount due as on the date together with interest at the rate of 1.5% per month and further pay all recurring amounts due to MPPMCL in future;

(d) Pass interim orders in terms of the prayer (c) above; and

(e) Pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.”

Background

2. The Petitioner is a statutory body established by the Central Government under the Damodar Valley Corporation Act, 1948 (hereinafter referred to as the 'DVC Act') for the development of the Damodar Valley, with three participating Governments, namely, the Central Government, the Government of West Bengal and the Government of Jharkhand.

3. The generating stations namely, the Durgapur Steel Thermal Power Station, Units 1&2 ('DSTPS'), Mejia Thermal Power Station, Units 5&6 ('MTPS') and Chandrapura Thermal Power Station, Units 7&8 ('CTPS') ('collectively referred to as 'the generating stations') have been established by the Petitioner wherefrom the quantum of electricity contracted under the PPA was agreed to be sold and purchased. The COD of the aforesaid generating stations are as under:

Stations	Units	COD
DSTPS	Unit-1	15.5.2012
	Unit-2	5.3.2013
MTPS	Unit-5	29.2.2008



	Unit-6	24.9.2008
CTPS	Unit-7	2.11.2011
	Unit-8	15.7.2011

4. The Petitioner has entered into Power Purchase Agreement (PPA) with the Respondent, MP Power Management Company Ltd (*erstwhile MP Power Trading Company Ltd*) on 14.5.2007 for generation and sale of 100 MW of power from DSTPS and the Petitioner had commenced the supply of power from Unit-I from July, 2012. Similarly, the Petitioner has entered into PPA with Respondent MPPMCL on 3.3.2006 for supply of 400 MW (200 MW each from MTPS and CTPS) and the Petitioner had commenced the supply of power from MTPS in February, 2008 and from CTPS with effect from November, 2011. The Commission vide its orders had determined the tariff of the generating stations from COD of its units till 31.3.2014 and for the period 2014-19 in terms of the Tariff Regulations applicable for the respective periods.

Petition No. 236/MP/2017

5. The Petitioner has submitted that the disputes with regard to PPA dated 14.5.2007 with Respondent MPPMCL in respect of DSTPS is subject to adjudication of this Commission in terms of Section 79(1)(f) of Electricity Act, 2003 ('the 2003 Act'). Accordingly, the Petitioner in this Petition has made the following submissions:

- (a) DVC entered into PPA with MPPMCL on 14.5.2007 for generation and sale of 100 MW from the generating station on the terms and conditions contained in the PPA. In terms of the PPA, DVC has agreed to sell and MPPMCL agreed to purchase for a period of 25 years from the COD of Unit-I (15.5.2012) which period may be extended based on mutual terms and agreement between the parties. The agreement also provides that either party shall have the liberty



to review the agreement after a span of 5 year block from the date of commencement of supply on mutually agreed terms and conditions.

(b) In terms of Recital-B of the PPA, unless the parties mutually agree, the agreement will be valid for duration of 25 years from the date of commercial operation i.e. from 15.5.2012 till May, 2037. Except for the above, there is no provision in the PPA giving a right to either party to terminate the PPA by giving any specified notice or otherwise.

(c) There has been no mutual agreement between DVC and MPPMCL for an earlier termination of the agreement. There has been no notice from MPPMCL proposing any mutual discussion between the parties in regard to review of the agreement after a span of 5 year time block as mentioned in Recital-B of the agreement.

(d) MPPMCL is legally bound to purchase 100 MW of electricity from DSTPS and the failure to do so on the part of MPPMCL is a breach of the PPA dated 14.5.2007. In case MPPMCL does not take the quantum of electricity declared available by DVC, MPPMCL is required to pay the deemed fixed charges i.e. capacity charges to DVC. Thus, in the event of DVC declaring available the capacity from the generating station and MPPMCL is scheduling the power, DVC is entitled to capacity/fixed charges for such quantum as determined by this Commission for DSTPS.

(e) Despite the above clear provision, MPPMCL vide its letter dated 2.5.2017 has purported to terminate the agreement dated 14.5.2007 on the alleged basis that Recital 'B' to the agreement empowers MPPMCL to effect such termination. The reason for such termination given by MPPMCL is that in the State of Madhya Pradesh, there is surplus electricity available.

(f) After the issue of the above letter, there were discussions between DVC and MPPMCL with regard to claim of MPPMCL to terminate the agreement to purchase power from DSTPS under PPA dated 14.5.2007. The discussions did not lead to any amicable solution. DVC had refuted the claim of MPPMCL that it had agreed to termination of the PPA and maintained that the terms of the



PPA continues to be applicable with the obligation on the part of the MPPMCL to purchase the contracted quantum during the period of the PPA.

(g) In the facts and circumstances mentioned above, the Respondent MPPMCL is bound to purchase and fulfil its obligation to purchase the contracted quantum of power from DSTPS in terms of the PPA dated 14.5.2007 for the entire duration of 25 years from COD. The agreement is not terminable unilaterally by MPPMCL.

(h) The stand taken by MPPMCL that it is entitled to terminate the PPA at any time prior to May, 2037 unilaterally and even in the absence of consent by DVC is wrong and is contrary to the terms and conditions contained in the PPA dated 14.5.2007. MPPMCL is, therefore, bound to purchase 100 MW electricity and is required to pay the capacity charges/ fixed charges for the power made available by DVC but not taken by MPPMCL in accordance with the provisions of the PPA dated 14.5.2007 read with the applicable regulations and tariff orders of the Commission. MPPMCL cannot at this stage wriggle out of its obligation assumed under the PPA.

(i) In view of the above, DVC is entitled to a declaration in the present proceedings that the PPA dated 14.5.2007 is subsisting and continue to subsist with each of the parties bound by the rights and obligations provided under the PPA for the entire duration of 25 years and MPPMCL is not entitled to unilaterally terminate the PPA either after the expiry of any 5 year time block or otherwise. The Commission may further declare that MPPMCL shall be liable to pay tariff for the quantum of electricity made available by DVC towards the contracted capacity of 100 MW from DSTPS.

(j) MPPMCL has not paid for the quantum of 100 MW contracted capacity which DVC has offered with due availability declaration for supply to MPPMCL from 15.5.2017. As on 31.8.2017 an amount of ₹29.14 crore has become due and payable by MPPMCL to DVC towards fixed charges/ capacity charges related to the period till 31.8.2017. Similar such amounts will be due and payable for the period from 1.9.2017 onwards in accordance with the bills that are raised by DVC on monthly basis. Since there has been a delay on the part of MPPMCL



to pay the said amount on the due dates, MPPMCL is liable to pay the Late Payment Surcharge at the rate of 1.5% per month as specified in the regulations notified by the Commission. Despite repeated requests and reminders by and on behalf of DVC, MPPMCL has failed to pay the said amount and interest thereon.

(k) In view of the above, the dispute is required to be adjudicated by this Commission. The arbitration clause provided under the PPA for dispute resolution under the bilateral arbitration in terms of the Arbitration and Conciliation Act, 1996 is not to be given effect to in view of the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited V Essar Power Limited (2008) 4 SCC 755

(l) The total amount due to DVC from MPPMCL as on the date of filing the petition is ₹306.21 crore (more than 60 days) inclusive of Late Payment Surcharge. Even if MPPMCL does not take the quantum of electricity made available by DVC on a day to day basis, MPPMCL will be required to pay the deemed fixed charges to DVC. Thus, a recurring amount of ₹9.44 crore per month towards principal will be due and payable by MPPMCL to DVC and recovery for the entire period of agreement dated 14.5.2007 till May, 2037.

In the above background, the Petitioner has filed this Petition and has claimed the reliefs as stated in para 1 above.

6. The Petition was admitted on 22.2.2018 and the Commission directed the Respondent, MPPMCL to file its reply in the matter. In compliance with the directions of the Commission, the Respondent MPPMCL in its reply affidavit dated 3.7.2018 has raised preliminary objection to the 'maintainability' of the Petition. The Petitioner vide its affidavit dated 13.7.2018 has filed its rejoinder to the preliminary objections of the Respondent. The Respondent vide its affidavit dated 15.10.2018 has filed its *sur-rejoinder* to the said reply filed by the Petitioner.



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7. During the pendency of Petition No. 236/MP/2017, the Petitioner has filed this Petition 78/MP/2018 and has submitted that the disputes with regard to PPA dated 3.3.2006 with Respondent MPPMCL in respect of MTPS & CTPS is subject to adjudication of this Commission in terms of Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the 2003 Act). The Petitioner in this Petition has submitted that the PPA provides that either party shall have the liberty to review the agreement after a span of 5 years block each from the date of commencement of supply on mutually agreed terms and conditions. It has also submitted that in terms of Recital B of the PPA either party can foreclose and terminate the PPA earlier to 25 years duration in the matter provided in Recital D and in terms of Recital D, either party can foreclose the PPA after the expiry of five year block in the manner provided in the said Recital. The submissions of the Petitioner in this Petition are similar to its submissions made in Petition No. 236/MP/2017 (as referred in para 5 above) and the following reliefs have been sought in this Petition:

“(a) Declare that MPPMCL shall have the obligation to pay for the contracted capacity in terms of the provisions of the PPA dated 3.3.2006 read with the Regulations and Orders of this Commission;

(b) Declare that MPPMCL shall not be entitled to treat the PPA having been terminated from February, 2018 contrary to the terms of the PPA dated 3.3.2006;

(c) Hold that the Respondent MPPMCL liable to pay tariff to DVC namely the fixed charges and Energy Charges for the quantum of electricity scheduled by MPPMCL and deemed fixed charges for the quantum of electricity declared available by DVC but not scheduled by the Respondent, MPPMCL;

(d) Direct the Respondent MPPMCL to pay the amount of Rs 437.32 crore due and outstanding to DVC as on 1.2.2018;

(e) Award the cost of proceedings; and

(f) Pass such further order or orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”



8. This Petition was admitted on 29.5.2018 and the Commission directed the Respondent, MPPMCL to file its reply in the matter. In compliance with the directions of the Commission, the Respondent MPPMCL in its reply affidavit dated 30.7.2018 has raised preliminary objection to the 'maintainability' of the Petition. During the hearing of the Petition on 21.8.2018, the learned counsel for the Petitioner submitted that the rejoinder affidavit dated 13.7.2018 filed in Petition No. 236/MP/2017 shall be adopted in this Petition. Thereafter, this Petition along with Petition No. 236/MP/2017 was heard in detail on 11.12.2018 and the Commission after directing the parties to file their written submissions on the issue of 'maintainability' reserved its order in the Petition. In compliance with the directions of the Commission, the Petitioner and the Respondent MPPMCL have filed their written submissions. The submissions of the parties on the issue of 'maintainability' are common for both the Petitions and are as stated below.

Preliminary objections of the Respondent, MPPMCL

9. The Respondent MPPMCL vide its reply affidavit has raised preliminary objection as to the 'maintainability' of the Petition and has submitted the following:

- (a) MPPMCL is the holding company of all the three distribution licensees in the State of Madhya Pradesh and has been mandated for procuring all power from various contracted sources in the State of Madhya Pradesh which it in turn sells to the three distribution licenses for supply to the consumers in the State of Madhya Pradesh.
- (b) As per Article 7 of the PPA dated 14.5.2007 and Article 6 of the PPA dated 3.3.2006, this Petition is not maintainable as the present dispute has to be adjudicated/ referred to an Arbitration Tribunal as per the Arbitration



agreement entered into between the parties and the issues are to be adjudicated by a Sole Arbitrator and the venue of Arbitration is in Kolkata.

(c) As per Section 8 of the Arbitration & Conciliation Act, 1996, as amended, a judicial authority (CERC) has to refer the parties to Arbitration notwithstanding any judgment or order or decree passed by Supreme Court or High Court etc. As per Section 5 of the said Act, it is clearly mentioned that notwithstanding anything contained in any law for the time being in force, no judicial authority shall intervene in the matter governed by the Arbitration & Conciliation Act, 1996, as amended, except where so provided under the Arbitration Act.

(d) The reliance made by the Petitioner to the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited V Essar Power Limited with regard to jurisdiction of this Commission to adjudicate the dispute is not applicable to the facts and circumstances of the case, as the said judgment was given prior to the amendment undertaken in the Arbitration & Conciliation Act in 2015.

(e) On a bare reading of Sections 5 and 8 Arbitration & Conciliation Act, 1996 the legislative intent is clear wherein it is expressly stated that notwithstanding any judgment of Supreme Court or any Court, if parties have an arbitration agreement then the judicial authority shall refer them to arbitration.

(f) In AIR 1996 SC 1963 (Smt. Kalliani Amma & ors V K.Devi & ors), the Hon'ble Supreme Court has explained the meaning of 'non-obstante' or 'Notwithstanding' clause and has stated that it has an 'overriding effect'. MPERC in its order dated 8.12.2016 in Petition No. 12/2016 has directed the parties to adjudicate their disputes through arbitration as the petition was held to be not maintainable.

(g) The present petition is not maintainable for adjudication before this Commission and the Commission may refer the matter for Arbitration Tribunal in accordance with Article 7 of the PPA dated 14.5.2007 and Article



6 of the PPA dated 3.3.2006 read with Sections 5 & 8 of the Arbitration & Conciliation Act, 1996, as amended in 2015.

Accordingly, the Respondent MPPMCL has submitted that the Petitions may be rejected as 'not maintainable' and the parties may be directed to adjudicate the disputes through arbitration in accordance with Article 7 of the PPA dated 14.5.2007 and Article 6 of the PPA dated 3.3.2006.

Rejoinder of the Petitioner to the Preliminary objections

10. The Petitioner has filed its rejoinder on the preliminary objections on maintainability of Petition as under:

(a) The Respondent is adopting dilatory tactics in regard to its obligation to pay the amount due to the Petitioner. The Respondent has raised frivolous issues on the maintainability of the Petition in order to achieve the objective.

(b) The Commission has the jurisdiction in these matters in terms of the provisions of section 79(1)(f) of the 2003 Act read with the various orders of the Hon'ble Courts interpreting the provisions of the said Act.

(c) It is well settled that in regard to matters covered under the provisions of the 2003 Act, there has to be a statutory adjudication by the Appropriate Commission constituted under the said Act and to that extent the arbitration agreement which is a bilateral contractual matter stands superseded. In view of the authoritative decisions of the Hon'ble Supreme Court in *GUVNL V Essar Power Ltd* (2008 4 SCC 755) and *PTC India Limited V JVL* (2012) 140 DRJ 351 on the scope of the provisions of the 2003 Act superseding the provisions of the Arbitration agreement, there cannot be any issue whatsoever on the jurisdiction of the Commission to adjudicate the present dispute. The provisions of the Arbitration & Conciliation Act, 1996 has no application in the present case.

(d) The amended section 8 of the Arbitration & Conciliation Act, 1996 will have application only if the provisions of the Arbitration & Conciliation Act,



1996 are applicable. In view of the 2003 Act as laid down by the Hon'ble Supreme Court in GUVNL case, there exists no Arbitration agreement between the parties. This issue has already been settled in a matter decided by the National Consumer Disputes Redressal Commission (NCDRC) on 13.7.2017 in the matter of Aftab Singh V Emaar MGF Land Ltd passed in Consumer Case No. 701/2015 & batch. Subsequently, in the proceedings before the Hon'ble Delhi High Court (395/2017) as well as in Civil Appeal No. 23512-23513/2017 & batch filed before the Hon'ble Supreme Court, the decision of NCDRC dated 13.7.2017 has been upheld.

(e) The law laid down by the Hon'ble Supreme Court in GUVNL case to the effect that in view of the statutory provisions of the 2003 Act, the bilateral arbitration clause or the agreement stands superseded, continues to be valid law notwithstanding the above amendment. Section 2(3) of the Arbitration & Conciliation Act, 1996 which specifically provides that the arbitration process under the said Act shall not affect any law for the time being in force by virtue of which the dispute between a generating company and a licensee under the 2003 Act cannot be referred to arbitration.

(f) The reliance made by the respondent to the judgment of the Hon'ble Supreme Court in AIR 1996 SC 1963 has no application to the present case. The amendment to the Arbitration & Conciliation Act, 1996 does not vest the adjudicatory powers in an arbitrator to override the provisions of the 2003 Act. The decision of the MPERC dated 8.12.2016 has no application to the present case and the same is also not binding on this Commission.

Accordingly, the Petitioner has prayed that the objections of the Respondent with regard to the 'maintainability' of the Petition are liable to be dismissed.

Sur-rejoinder of the Respondent, MPPMCL

11. The Respondent in its *sur-rejoinder* to the aforesaid rejoinder of the Petitioner has mainly reiterated its submissions made in the preliminary objections. It has stated that the judgments in GUVNL case and PTC case have no application in view



of the amendments to the Arbitration & Conciliation Act, 1996. It has also stated that the Petitioners reliance to the judgments of NCDRC are of no avail as the Consumer Protection Act override the provisions of the 2003 Act and that the facts of the case therein are completely different from the issues raised in the present Petition and hence distinguishable. Accordingly, the Respondent has contended that the Commission does not have jurisdiction to adjudicate the issues in the present Petition.

Written Submissions of the Petitioner

12. The Petitioner in its written submissions dated 24.12.2018 on 'maintainability' has submitted the following:

(a) The scope and provisions of the Electricity Act, 2003 viz-a-viz the PPAs providing for an arbitration clause for resolution of disputes as per Arbitration & Conciliation Act, 1996 has been dealt with by the Hon'ble Supreme Court in *GUVNL V Essar Power Ltd* (2008) 4 SCC 755 and by the Hon'ble Delhi High Court in *PTC India Ltd V Jaiprakash Ventures Ltd* (2012) 130 DRJ 351. It has been held in these cases that the adjudication provisions provided under the 2003 Act supersede the bilateral arbitration provisions contained in the PPA and therefore notwithstanding the existence of an arbitration clause in the agreement, the dispute between the parties referred to in Section 79(1)(f) and Section 86(1)(f) need to be adjudicated by the Appropriate Commission or by an arbitrator to be appointed by the Appropriate Commission. The bilateral arbitration clause will have no effect.

(b) The basis for the above decision is provided in Section 2(3) of the Arbitration & Conciliation Act, 1996. Sections 79(1)(f) and 86(1)(f) of the 2003 Act having provided for the adjudicatory mechanism and that the provisions of the 2003 Act having a superseding effect over the Arbitration & Conciliation Act, 1996, the adjudicatory provision of the Electricity Act, 2003 will govern the resolution of the disputes between the generating company and a licensee.



(c) Section 79(1)(f) uses the expression 'to adjudicate upon the dispute involving a generating company' and the scope of such provision is wider. This term has been interpreted by the Hon'ble Supreme Court in *Renusagar Power Co. Ltd V General Electric Co* (1984) 4 SCC 679.

(d) So long as the dispute involving DVC as a generating company whose tariff is regulated by the Central Commission under section 79(1)(a), the adjudication of the disputes of DVC with any licensee shall be within the scope of the jurisdiction of the Central Commission. This would include all matters not necessarily matters relating to determination of tariff. Accordingly, all and every dispute involving DVC and MPPMCL shall be subject to adjudication by this Commission.

(f) The amendment to section 8 of the Arbitration & Conciliation Act, 1996 presupposes the existence of a valid arbitration agreement between the parties under which the disputes are intended to be resolved. If the arbitration under the arbitral clause in an agreement itself is not valid in view of the superseding provision of the 2003 Act read with section 2(3) of the Arbitration & Conciliation Act, 1996, the provisions of section 8 will have no application. Accordingly section 8(1) cannot be invoked to contend that this Commission as a 'Judicial authority' is required to refer the matter to arbitration.

(g) Section 2(3) provides that the provisions of Part-I of the Arbitration & Conciliation Act, 1996 which includes section 8 will not have any application in a case where under any other law the disputes are to be adjudicated. It has already been held by the Hon'ble Supreme Court in *GUVNL* case that the provisions of the 2003 Act supersede the Arbitration & Conciliation Act, 1996. Reference is made to Sections 173 and 174 of the 2003 Act.

(h) Section 8 of the Arbitration & Conciliation Act, 1996 as amended is not a provision which decides on the issue of whether there exists a valid arbitration agreement or not. It deals with the requirement to act in accordance with the arbitration agreement if there exists a valid arbitration agreement.



(i) As per the decision of the Hon'ble Supreme Court in GUVNL case, the authority to adjudicate the dispute is the Appropriate Commission constituted under the 2003 Act and is not required to refer the matter to arbitration in terms of section 8 of the Arbitration & Conciliation Act, 1996. The above aspect of inter-play of section 8 as amended and the implication of the same to the provisions of the Consumer protection Act had been considered by the national Consumer Disputes Redressal Forum in Aftab Singh and ors V Emaar MGF Land Limited vide order dated 13.7.2017 in Consumer Case No.701/2015. The reasoning and rationale given in the said decision are squarely applicable to the present case.

(j) A provision relating to the function of the judicial authority to refer the matter to arbitration if there exists an arbitration agreement cannot be read as a substantive provision overriding the adjudicatory provisions under the 2003 Act as interpreted and laid down by the Hon'ble Supreme Court.

(k) MPPMCL has been defaulting in the payment of the amount due to DVC. The present objection has been filed by MPPMCL to delay the discharge of the liability to pay the outstanding amount. DVC has been put to financial loss on account of such practice adopted by MPPMCL.

Written Submissions of the Respondent MPPMCL

13. The Respondent in its written submissions dated 27.12.2018 has submitted the following:

(a) The issue is with respect to jurisdiction of the Commission to adjudicate the matter under Section 79(1)(f) of the 2003 Act, in view of the fact that there is an arbitration agreement between the parties and the present dispute is purely a contractual matter. The arbitration clause has been mentioned in Clause 7 of the PPA dated 14.5.2007 and Clause 6 of the PPA dated 3.3.2006 executed between the parties.

(b) The present dispute is a contractual dispute not related to the issue of tariff. In view of Sections 5 & 8 of the Arbitration & Conciliation Act, 1996, as amended in 2015, any dispute which is a subject matter in arbitration



agreement shall be referred to arbitration '*notwithstanding any judgment or decree of the Hon'ble Supreme Court*'.

(c) The judgment of the Hon'ble Supreme Court in GUVNL case pertains to the year 2008, while in the year 2015 substantial amendments to the Arbitration & Conciliation Act, 1996 has been carried out. Admittedly, in the present case, there is (i) arbitration agreement between the parties, (ii) action has been brought before judicial authority which is subject matter of arbitration agreement (iii) dispute is purely a contractual matter/ money claim and (iv) the amendment to Section 8 overrules the judgment in GUVNL case.

(d) The interpretation of the term 'notwithstanding' by the Hon'ble Supreme Court in AIR 1984 SC 1022, 1986 4 SCC 447 and AIR 1996 SC 1963 shows that the said term has been employed to give overriding effect to other provisions or items in case of a conflict. The legislature in its wisdom has sought to override the judgment, decree or order of the Supreme Court which did not give primacy to adjudication of dispute through arbitration agreements and is therefore by virtue of the amendment in Section 8 given a legislative command to a judicial authority to refer the matter to arbitration. Therefore, the legislative command has specifically overridden the judgment in GUVNL case.

(e) The Supreme Court in its judgment reported in (2017) 9 SCC 729, while interpreting the 'notwithstanding' clause after inclusion of Section 11(6A) of the Arbitration & Conciliation Act, 1996 has held that after the amendment 'all the Courts need to see is whether arbitration agreement exists, nothing more nothing less' as the legislative policy is to minimise the Court involvement at the stage of appointment of arbitrator.

(f) The Supreme Court noted a conflict between Section 86(1)(f) of the 2003 Act and Section 11(6) of Arbitration & Conciliation Act, 1996 and to resolve the conflict harmoniously interpreted the two sections and held that the regulatory Commission functioning under the 2003 Act shall adjudicate the dispute in GUVNL case. This has been overruled after amendment to Sections 5 & 8 to Arbitration & Conciliation Act, 1996.



(g) The present dispute is purely a contractual dispute which does not fall within any of the matters mentioned in Section 79(1) (a) to (d) of the 2003 Act and therefore not covered under Section 79(1)(f) of the said Act. In view of this, the provisions of Section 2(3) of Arbitration & Conciliation Act, 1996 do not get attracted as the provisions of Section 79(1)(f) for adjudication of disputes are not attracted as it does not relate to tariff.

(h) The judgment of NCDRC relied upon by the Petitioner are not relevant for adjudication for the reason that (i) the provisions of the Consumer Protection Act are different from the 2003 Act and (ii) under Section 173 of the 2003 Act, the Consumer Protection Act has been given overriding effect over the 2003 Act.

(i) In terms of the judgments of the Hon'ble Supreme Court in (2011) 5 SCC 532, AIR 2010 SC 488 and (2003) 6 SCC 503, a purely commercial matter is capable of adjudication by arbitration and in view of Section 8 of the Arbitration & Conciliation Act, 1996, as amended, the Petitioner ought to be directed to undertake arbitration for resolution of dispute.

Issue of Maintainability

14. Since the issue of 'maintainability' raised by the Respondent is common to both the Petitions (referred to as 'the Petition') we deem it fit to dispose of the same by a common order. Based on the submissions of the parties, the issues which emerge for consideration with regard to the 'maintainability' of the Petition are:

Issue (A): Whether the dispute raised by the Petitioner is a purely contractual matter/money claim?

Issue (B): Whether the Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of the Electricity Act, 2003 or refer the parties to Arbitration in terms of Section 8(1) of the Arbitration and Conciliation Act, 1996, as amended.

Issue (A): Whether the dispute raised by the Petitioner is a purely contractual matter/money claim?

15. The Petitioner has submitted that adjudication of dispute involving the Petitioner DVC as a generating company fall within the scope and jurisdiction of



the Central Commission under Section 79(1)(a) read with Section 79(1)(f) of the 2003 Act. It has also submitted that all disputes between the Petitioner and the Respondent MPPMCL including disputes relating to the determination of tariff shall be subject to the adjudication by this Commission. *Per contra*, the Respondent MPPMCL has argued that the disputes raised in this Petition are purely contractual matter/ money dispute and does not fall within the scope of any of the matters mentioned in section 79(1)(a) to (d) of the 2003 Act. It has contended that the dispute being purely contractual matter not connected to tariff, the same is amenable to adjudication by arbitration and cannot fall within the jurisdiction of this Commission under Section 79(1)(f) of the Act.

Analysis & decision

16. We have examined the submissions. Section 79(1) of the 2003 Act is extracted hereunder for reference:

“79. (1) The Central Commission shall discharge the following functions, namely:-

(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 the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration”

17. The Petitioner is a generating company as defined under sub-section (28) of Section 2 of the 2003 Act and is controlled by the Central Government by virtue of the provisions of the Damodar Valley Corporation Act, 1948. The power to



determine the tariff of the generating stations of the Petitioner by the Central Commission can be traced to clause (a) of sub-section (1) of Section 79 of the 2003 Act, according to which the regulation of tariff of the Petitioner is within the jurisdiction of the Central Commission. Section 79(1)(f) of the Act is concerned about adjudication of disputes involving generating company or transmission licensee in respect of clauses (a) to (d) of the said section. On a plain reading of this provision, it emerges that the dispute must concern the regulation and determination of generation tariff of the generating stations owned or controlled by the Central Government or those having a composite scheme for generation and supply to more than one State, determination of tariff for inter-State transmission of electricity and regulation of inter-State transmission of electricity. As regards the term 'regulate' under Section 79(1)(a), the Appellate Tribunal for Electricity (APTEL) in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC V BRPL & ors) had held as under:

“18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term ‘regulate’ as contained in Section 79(1)(a) is a broader term as compared to the term ‘determined’ as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term ‘regulation’ has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513.”

18. In the present case, the Petitioner has signed PPAs with MP Power Trading Company Ltd (MPPTCL) on 3.3.2006 and 14.5.2007 for sale of power from its generating stations and by operation of law, the PPAs stood assigned to the Respondent MPPMCL. As per clause 4.1 of the PPAs, the tariff for sale of power by the Petitioner to the Respondent is required to be determined by the Central



Commission in accordance with the regulations of this Commission. Clause 4.1 of the PPAs is extracted under:

“4. Tariff at delivery point

4.1.Tariff for such sale of power by DVC to MPTRADECO at DVC Periphery will be determined by CERC from time to time in accordance with the CERC regulations on terms and conditions of tariff including capital cost.”

19. Accordingly, the Central Commission by its various orders had determined the tariff of ‘the generating stations’, ostensibly under Section 79(1)(a) of the 2003 Act. The Petitioner in this Petition has sought, amongst others, the recovery of capacity charges and energy charges from the Respondent. Hence, the dispute involved in this Petition relate to the recovery of tariff fixed by this Commission under Section 79(1)(a) of the 2003 Act. Therefore, the adjudication of the dispute is within the jurisdiction of this Commission under clause (f) of sub-section (1) of Section 79 of the 2003 Act. Merely because the adjudication of the dispute involves the consideration of termination of PPAs on account of which the issue of non-payment of tariff has arisen, does not in any manner, affect the jurisdiction of this Commission. In fact, Section 79 (1)(f) of the 2003 Act has got a wider scope and is not merely confined to the determination of tariff. It would also involve the terms and conditions of tariff including termination of supply and payments etc. This has been decided by APTEL in its judgment dated 4.9.2012 in Appeal No. 94 & 95/2012 (BRPL-V-DERC & ors) as under:

“32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or



suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing but terms and conditions of supply.

34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.”

20. Accordingly, the submission of the Respondent MPPMCL that the subject matter of the dispute is a purely contractual matter/ money claim and that the same does not fall within the scope of Section 79(1)(a) to (d) of the 2003 Act deserve no merit for consideration and is, therefore, rejected. The Petition is therefore ‘maintainable’ and the Commission has the jurisdiction to adjudicate the dispute in terms of Section 79(1)(f) read with Section 79(1)(a) of the 2003 Act. Issue (A) is disposed of accordingly.

Issue (B): Whether the Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of the Electricity Act, 2003 or refer the parties to arbitration in terms of Section 8(1) of the Arbitration and Conciliation Act, 1996, as amended?

(a) Arbitration clause in the PPAs

21. The Petitioner has submitted that in terms of the decision of the Hon’ble Supreme Court in Gujarat Urja Vikas Nigam Ltd V Essar Power Ltd (2008) 4 SCC 755 and the Hon’ble Delhi High Court in PTC V JPVL (2012) 130 DRJ 351, the adjudicatory provisions under the 2003 Act supersede the bilateral arbitration agreement contained in the PPA and, therefore, notwithstanding the existence of an arbitration clause in the agreement, the dispute between the parties need to be adjudicated by this Commission or by an arbitrator to be appointed by the Commission in terms of Section 79(1)(f) of the 2003 Act. *Per contra*, the Respondent MPPMCL has submitted that as per Clause 6 (6.1 & 6.2 of PPA dated 3.3.2006) and Clause 7 (7.1 & 7.2 of PPA dated 14.5.2007) of the PPAs, an



arbitration agreement exists between the parties and, therefore, the present dispute has to be adjudicated/ referred to an arbitration tribunal in accordance with the provisions of the Arbitration & Conciliation Act, 1996, as amended. It has also pointed out that in view of the amendments carried out to Section 5 and 8 of the Arbitration & Conciliation Act, 1996 on 23.10.2015, any dispute which is the subject matter in arbitration agreement shall be referred to arbitration '*notwithstanding any judgment or decree of the Hon'ble Supreme Court*'. The Respondent has submitted that the term '*notwithstanding*' in Section 8 has overridden the judgment in GUVNL case and in case the dispute is arbitrable, as the present case is, then all that the judicial authority needs to do is to refer the matter for arbitration in accordance with the provisions of the Arbitration & Conciliation Act, 1996.

Analysis and decision

22. The provisions of Clauses 6 and 7 in both the PPAs are the same. Accordingly, the provisions of clause 6 of the PPA dated 3.3.2006 are extracted under:

“6. Dispute Resolution Mechanism

6.1 All differences or disputes between the parties arising out of or in connection with these presents save any question or matter of dispute which falls within the scope and purview of the statutory arbitration under the provisions of the Electricity Act, 2003, as amended shall be settled through arbitration as provided herein

6.2 In the event of such differences between the parties and failing settlement of the same through mutual discussions amongst parties concerned, if the disputes are not settled within three months, any party may by a written notice of 30 (thirty) days to the other party or parties request for appointment of a Sole Arbitrator, to be decided mutually by parties concerned and in case of disagreement, shall be guided by the provisions of the Arbitration Act, 1996 and any statutory modification thereto. The Sole Arbitrator shall give a speaking and reasoned award. The decision of the Sole Arbitrator shall be final and binding on the parties. The venue of the arbitration and meetings shall be at Kolkata. The Sole Arbitrator shall decide his fees with the consent of the parties and it will be shared equally.

XXXX

XXXX



23. It is noticed from Clause 6.1 above that all differences and disputes between the parties arising out of or in connection with the agreement, save any question or matter of dispute which falls within the scope and purview of the statutory arbitration under the provisions of the 2003 Act is required to be settled by the parties through arbitration as provided therein. In other words, except for matters of dispute which fall within the scope and purview of the 2003 Act, all other disputes are required to be settled through arbitration between the parties. As already stated, the Petitioner, amongst other reliefs, has sought the recovery of capacity charges & energy charges from the Respondent MPPMCL in terms of the regulations and orders of this Commission. Since, the issues with regard to termination of PPAs, payment of capacity & energy charges etc., are all related to the terms and conditions of tariff, the dispute in respect of the same fall within the scope and purview of Section 79(1)(f) read with Section 79(1)(a) of the 2003 Act. Accordingly, this Commission is the Appropriate Commission to resolve the dispute raised by the Petitioner. The Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited [(2008) 4 SCC 755] (hereinafter referred to as 'GUVNL case') on harmonious construction of the provisions of the 2003 Act and the Arbitration and Conciliation Act, 1996 has held that whenever there is a dispute between a licensee and generating company, only the State Commission or the Central Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. Relevant portion of the judgment is extracted as under:

"58. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on



harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)”

24. As stated earlier, the dispute raised by the Petitioner relates to the terms and conditions of tariff and the same can be either be adjudicated by this Commission or the Commission may refer the dispute to arbitration in terms of Section 79(1)(f) of the 2003 Act.

(b) Section 8(1) of the Arbitration & Conciliation Act, 1996

25. The Petitioner has submitted that the provisions of Section 8(1) of the Arbitration & Conciliation Act, 1996, as amended in 2015 will have no application in the matter and cannot be invoked to refer the matter to arbitration. It has submitted that in view of the superseding provision of the 2003 Act read with Section 2(3) of the Arbitration & Conciliation Act, the arbitral clause in the PPA is not valid and the provisions of Section 8(1) will have no application. Referring to the decision of the National Consumer Disputes Redressal Forum (NCDRC) dated 13.7.2017 in Consumer Case No. 701/2015 (Aftab Singh & ors V Emaar MGF Land Ltd), wherein the implication of the amended Section 8(1) of the Arbitration & Conciliation Act, 1996 to the provisions of Consumer Protection Act has been considered, the Petitioner has stated that the reasoning and rationale given in the said order of NCDRC is applicable to the present case. *Per contra*, the Respondent MPPMCL has contended that with the inclusion of the terms *‘notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties*



to arbitration...” in Section 8 (1) of the Arbitration & Conciliation Act, 1996, the judgment of the Hon’ble Supreme Court in ‘GUVNL case’ has been specifically overridden and an action brought before the judicial authority is a subject of an arbitration agreement. It has submitted that the term ‘notwithstanding’ as interpreted by the Hon’ble Supreme Court in its judgments in AIR 1984 SC 1022, (1986) 4 SCC 447 and AIR 1996 SC 1963 and employed in Section 8(1) of the Arbitration & Conciliation Act, 1996, gives overriding effect to other provisions or terms in case of conflict. The Respondent has added that the judgment of NCDRC relied upon by the Petitioner is not relevant for adjudication of the issue for the reason that the (i) provisions of the Consumer Protection Act is different from the 2003 Act and (ii) the Consumer Protection Act has been given an overriding effect over the 2003 Act. According to the Respondent, Section 8(1) is a legislative command given to the judicial authority to refer the matter to arbitration, where the subject matter forms part of the arbitration agreement and hence the matter shall be referred to arbitration in terms of Clauses 6 and 7 of the PPAs.

Analysis and decision

26. The provisions of Section 2(3) and the amended Section 8(1) of the Arbitration & Conciliation Act, 1996 are extracted hereunder:

Section 2(3)

“This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.”

Section 8. Power to refer parties to arbitration where there is an arbitration agreement.-

“(1), A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding, any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists”.



27. The question which begs for consideration from the above submission is whether the terms '*notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration...*' in Section 8(1) of the Arbitration & Conciliation Act, 1996 has altered the applicability of the judgment of the Hon'ble Supreme Court in 'GUVNL case' which give supremacy to the provisions of the 2003 Act and whether the dispute, if arbitrable, is required to be referred to arbitration in terms of the said Act. In this connection, it is pertinent to mention that the words '*notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration...*' in Section 8(1) of the Arbitration & Conciliation Act, 1996 and its interplay with the provisions of the Consumer Protection Act, 1986 came up for consideration before the Larger Bench of NCDRC in Consumer Case No. 701/2015 (Aftab Singh & ors V Emaar MGF Land Ltd) and by order dated 13.7.2017, the NCDRC had decided the following:

"55. In view of the afore-going discussion, we arrive at the following conclusions:

(i) the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable;

(ii) there are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution;

(iii) the subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court;

(iv) Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make disputes non-arbitrable; and

(iv) In light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."



28. Against the above order of NCDRC, Emaar MGF Land Ltd filed F.A.O. No. 395 of 2017 in the Hon'ble Delhi High Court and the Court refused to entertain the appeals and on 7.11.2017 returned to be presented before the appropriate appellate Court. Subsequently, Emaar MGF Land Ltd filed Civil Appeals (C.A.No. 23512-23513 of 2017) before the Hon'ble Supreme Court challenging the judgment of larger Bench of NCDRC dated 13.7.2017 and the same were dismissed on 13.2.2018 thereby affirming the order of NCDRC. Against the said order, Emaar MGF Land Ltd filed review petitions [Review Petition (C) Nos. 2629-2630 of 2018] before the Hon'ble Supreme Court. One such issue which arose for consideration of the Hon'ble Supreme Court in the said review petition was the following:

“(iv) Whether by the insertion of words “notwithstanding any judgment, decree or order of the Supreme Court or any Court” under Section 8(1) by the (Amendment) Act, 2015 legislature intended to do away with the decision of judgments of Supreme Court laying down that Consumer Protection Act being special remedy can be initiated and continued despite there being any arbitration agreement between the parties?”

29. The Hon'ble Supreme Court after examining the objects of the Consumer Protection Act and the Arbitration & Conciliation Act, 1996 and also the position before and after the amendments to the Arbitration and Conciliation Act, 1996 in 2015, by its order dated 10.12.2018 rejected the said review petitions, thereby upholding the order of NCDRC dated 13.7.2017. Some of the observations of the Hon'ble Court in its order dated 10.12.2018 are extracted hereunder for reference:

“46....The words notwithstanding any judgment, decree or order of the Supreme Court or any Court added by amendment in Section 8 were with intent to minimise the intervention of judicial authority in the context of arbitration agreement

“49...Amendments under Section 8, thus, were aimed to minimise the scope of judicial authority to refuse reference to arbitration and only ground on which reference could have been refused was that it prima facie finds that no valid arbitration agreement exists. Notwithstanding any prior judicial precedents referred to under Section 8(1) relates to those judicial precedents, which explained the discretion and power of judicial authority to examine various aspects while exercising power under Section 8.



50. The Legislative intent and object were confined to only above aspects and was not on those aspects, where certain disputes were not required to be referred to arbitration. Can it be said that after amendment under Section 8(1), the law laid down by this Court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has been reversed or set at naught. Neither any such Legislature intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed.

51. While carrying out amendment under Section 8(1) of Act, 1996, the statutes providing additional remedies/special remedies were not in contemplation. The legislative intent is clear that judicial authority's discretion to refuse arbitration was minimise in respect of jurisdiction exercise by judicial authority in reference to Section 8. The amendment was also aimed to do away with special or additional remedies is not decipherable from any material.

The Law Commission 246th Report, the Statement and Objects of Bill and the notes on clauses do not indicate that amendments were made for overriding special/additional remedies provided under different statutes. In the event, the interpretation as put by the learned counsel for the petitioner is accepted, Section 8 has to be read to override the law laid down by this Court in reference to various special/additional jurisdictions as has been adverted to and noted in judgment of this Court in Booz Allen and Hamilton Inc.(supra) which was never the intent of amendment in Section 8.

52. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corporation Limited(supra) is no more a good law cannot be accepted.

The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void.

The words added in Section 8 cannot be meant for any other meaning.

54. This Court held that disputes within the trust, trustees and beneficiaries are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. This Court held that the remedy provided under the Arbitration Act for deciding such disputes is barred by implication. The ratio laid down in the above case is fully applicable with regard to disputes raised in consumer fora.

55. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

56. We, thus, do not find that any error has been committed by the NCDRC in rejecting the application filed by the appellant under Section 8. No exception can be



taken to the dismissal of the appeals by this Court against the judgment of NCDRC. No ground is made out to review the order dated 13.02.2018. The review petitions are dismissed.”

30. It is evidently clear from the above observations of the Hon’ble Supreme Court that the term ‘*notwithstanding any judgment, decree or order of the Supreme Court or any Court*’, employed in Section 8(1) of the Arbitration & Conciliation Act, 1996, is only with an intent to minimise the intervention of the judicial authority which earlier had the discretion and power to examine various aspects while exercising power under Section 8. The Hon’ble Supreme Court in the said judgment dated 10.12.2018 has pointed out that the 246th Report of the Law Commission, the Statement and Objects of Bill and the notes on clauses do not indicate that the amendments to Section 8 of the Arbitration & Conciliation Act, 1996 were made for overriding the special/ additional remedies provided under different statutes. It has also observed that the amendment to Section 8(1) cannot be given such expansive meaning and intent so as to inundate the entire regime of special legislations where such disputes were held to be not arbitrable. The Hon’ble Court further added that in case where specific/special remedies are provided for in the statute and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

31. The Petitioner has submitted that the reasoning and rationale in the aforesaid decisions are applicable to the present case. We find force in the submissions of the Petitioner. As observed by the Hon’ble Supreme Court, Section 8(1) cannot be given such expansive meaning and intent so as to inundate the entire regime of special legislations namely the Electricity Act, 2003. Like the Consumer Protection Act, the Electricity Act, 2003 is an exhaustive code on all matters concerning electricity which contain elaborate provisions for protection of



interests of consumers. The said Act has, in furtherance of the policy envisaged under the Electricity Regulatory Commission Act, 1998, mandated the establishment of an independent and transparent regulatory mechanism and has entrusted wide ranging responsibilities to the Regulatory Commissions. Under Section 79 of the 2003 Act, the Central Commission has been entrusted, amongst others, to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses 79(1) (a) to (d) and to refer any dispute for arbitration. That the 2003 Act is a special Act is evident from the observations of the Hon'ble Supreme Court in its judgment in Chhattisgarh State Electricity Board V Central Electricity Regulatory Commission & ors [(2010) 5 SCC 23], wherein the Hon'ble Court observed as under:

“23. The brief analysis of the scheme of the Electricity Act shows that it is a self-contained comprehensive legislation, which not only regulates generation, transmission and distribution of electricity by public bodies and encourages public sector participation in the process but also ensures creation of special adjudicatory mechanism to deal with the grievance of any person aggrieved by an order made by an adjudicating officer under the Act.....

26. The object underlying establishment of a special adjudicatory forum i.e., the Tribunal to deal with the grievance of any person who may be aggrieved by an order of an adjudicating officer or by an appropriate commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes emanating from the operation and implementation of different provisions of the Electricity Act are expeditiously decided by an expert body and no court, except this Court, may entertain challenge to the decision or order of the Tribunal. The exclusion of the jurisdiction of the civil courts (Section 145) qua an order made by an adjudicating officer is also a pointer in that direction.”

32. Thus, the 2003 Act being a special legislation on all matters concerning electricity including adjudicatory provisions for resolution of disputes, the authority mandated to adjudicate the dispute is the Appropriate Commission and in the present case, the Central Commission. In this background, the decision of NCDRC dated 13.7.2017 as affirmed by the Hon'ble Supreme Court vide its judgment dated 10.12.2018 is squarely applicable to the present case. The



adjudicatory provisions in the 2003 Act therefore supersedes the bilateral arbitration provisions contained in the PPAs and notwithstanding the existence of the arbitration clause, the dispute between the parties need to be adjudicated by the Commission. Section 8(1) of the Arbitration & Conciliation Act, 1996, cannot be construed as a mandate to the Commission, constituted under the 2003 Act, to refer the parties to arbitration in terms of the arbitral clause in the PPAs. Therefore, the submission of the Respondent that Section 8(1) is a legislative command to the judicial authority (CERC) to refer the matter to arbitration is misconceived and is accordingly rejected.

33. The Petitioner has relied upon the judgment of the Hon'ble Supreme Court in 'GUVNL case' read with Section 2(3) of the Arbitration & Conciliation Act, 1996 to contend that the provisions of Section 8 will have no application and cannot be invoked to refer the matter to arbitration. We notice that Section 2(3) of the Arbitration & Conciliation Act, 1996 specifically provides that Part-I will not have any application where under any other law, the disputes are to be submitted to arbitration. Part-I of the Arbitration & Conciliation Act, 1996 also includes Section 8(1) and therefore this section will not have any application since the adjudicatory provision [Section 79(1)(f)] of the 2003 Act, which is in force, will govern the resolution of disputes between the generating company and the distribution licensee. Thus, Section 2(3) of the Arbitration & Conciliation Act, 1996 recognizes the mechanism under other legislations that make the disputes non-arbitrable. This view also gets strengthened from the provisions of Section 173 and 174 of the 2003 Act, wherein except for the provisions of the Consumer Protection Act, 1986, the Atomic Energy Act, 1962 and the Railways Act, 1989, the provisions of the 2003 Act has been given overriding effect over the provisions of other laws. It is



pertinent to mention that the Hon'ble Supreme Court in 'GUVNL case' while interpreting Section 2(3) of the Arbitration & Conciliation Act, 1996 had considered the proposition that 'special law' overrides the 'general law' and had held that the provisions of the 2003 Act will prevail over the provisions of the Arbitration & Conciliation Act, 1996. The relevant portions are extracted hereunder:

“28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/ arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.”

34. As the 2003 Act is a special legislation, the notwithstanding clause used in Section 8 (1) does not in our view, oust the adjudicatory provisions of the 2003 Act. The submissions of the Respondent MPPMCL are, therefore, rejected. The adjudicatory provisions of the 2003 Act have a superseding effect over the Arbitration & Conciliation Act, 1996 and will govern the resolution of disputes between the generating company and the distribution licensee. In this premise, we hold that the Commission has the jurisdiction to adjudicate the dispute in terms of Section 79(1)(f) reads with Section 79(1)(a) of the 2003 Act. Issue (B) is disposed of accordingly.

Applicability of Section 11(6A) of the Arbitration & Conciliation Act, 1996

35. The Respondent has relied upon the judgment of the Hon'ble Supreme Court in Dura Felguera, S.A V Gangavaram Port Limited (2017 9 SCC 729) and has argued that after amendment and inclusion of Section 11(6A) in the Arbitration & Conciliation Act, 1996, all that the courts need to see is whether arbitration agreement exists; nothing more nothing less, as the legislative policy is to



minimize the courts involvement at the stage of appointment of arbitrator. Section 11(6A) provides as under:

“11. Appointment of arbitrators.-

xxxxx

(6A). The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

36. Section 11(6A), in our view, will have no application to the present case as the same relates to the appointment of Arbitrators by Courts and is in the context as to whether such power was an administrative or a judicial power. We have in this order decided that the dispute in the present case relate to the terms and conditions of tariff and the Commission has the jurisdiction to adjudicate the same in terms of Section 79(1)(f) read with Section 79(1)(a) of the 2003 Act. As in the case of Section 8(1) of the Arbitration & Conciliation Act, 1996, the words ‘*notwithstanding any judgment, decree or order of any Court*’ employed in Section 11 (6A) also cannot supersede or restrict the adjudicatory provisions of the 2003 Act. Therefore, the submissions of the Respondent MPPMCL to refer the parties to arbitration in accordance with Section 11 (6A) of the Arbitration & Conciliation Act, 1996, merit no consideration.

37. The Respondent has also relied on the judgments of the Hon’ble Supreme Court in 2011 (5) SCC, AIR 2010 SC 488, 2006 (7) SCC 275 and 2003 (6) SCC 503 to contend that the present dispute being a purely commercial matter is capable of arbitration and, therefore, in view of Section 8(1) of the Arbitration & Conciliation Act, 1996, the Petition ought to be dismissed and the parties be directed to undertake arbitration for resolution of dispute. This argument of the Respondent is not acceptable. We have in this order rejected the contentions of the Respondent



that the dispute is a purely contractual money matter and have held that the dispute relates to the terms and conditions of tariff falling within the scope and purview of Section 79(1)(a) read with Section 79(1)(f) of the 2003 Act. Accordingly, the submissions of the Respondent in terms of the aforesaid judgments cannot be made applicable to the present case.

Decision

38. Based on the above discussions, we hold that the present Petition is 'maintainable' and this Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of Section 79 (1)(f) read with Section 79(1)(a) of the 2003 Act.

39. The Respondent MPPMCL is directed to file its reply on merits by **9.8.2019** with advance copy to the Petitioner, who shall file its rejoinder, if any, on or before **20.8.2019**. These Petitions shall be listed for hearing on 'merits', during the last week of August, 2019 for which separate notice shall be issued to parties.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(P. K. Pujari)
Chairperson

