

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 119/MP/2021**

Subject : Petition under section 79 (1) (f) of the Electricity Act, 2003 read with article 12 of the power purchase agreement dated 23.03.2011 seeking reference of disputes to the arbitration.

Petitioner : Tata Power Delhi Distribution Ltd

Respondent : THDC India Ltd

Date of Hearing : **5.8.2022**

Coram : Shri I.S Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member

Parties present : Shri Venkatesh, Advocate, TPDDL  
Shri Ashutosh K. Srivastava, Advocate, TPDDL  
Shri Bharath Gangadharan, Advocate, TPDDL  
Shri Jayan Bajaj, Advocate, TPDDL  
Shri Anurag Bansal, TPDDL  
Ms. Anushree Bardhan, Advocate, THDC  
Ms. Tanya Sareen, Advocate, THDC  
Shri Rajesh Sharma, THDC  
Shri Mukesh Kumar Verma, THDC  
Shri Ajay Vaish, THDC  
Shri Rakesh Singh, THDC

**Record of Proceedings**

Case was called out for virtual hearing on 'maintainability'.

2. During the hearing, the learned counsel for the Petitioner made detailed oral submissions, on 'maintainability', as under:

- (a) The supply of power to the Petitioner from the 1000 MW Tehri Pumped Storage Plant (in short 'the project') of the Respondent has not yet been commissioned, though the scheduled COD of the project is 31.12.2014.
- (b) The inordinate and unexplained delay in the commissioning of the project has caused adverse financial implications to the Petitioner and, therefore, the Petitioner vide letter dated 12.1.2021 terminated the PPA, which has been opposed by the Respondent vide its letter dated 29.1.2021. Accordingly, a dispute has arisen between the parties.
- (b) Article 12 of the Power Purchase Agreement (PPA) dated 23.3.2011 provides for appointment of Arbitrator in terms of the Dispute Resolution mechanism (*even if the dispute arises out of the PPA*). This is not a question of non-arbitration of dispute.



- (d) The duration of the PPA is 35 years and substantial portion of the time (about 8 years) has passed without the project being commissioned and supply of power to Petitioner. Since time is the essence of the contract, in terms of Section 55 of the Indian Contract Act, 1972, the Petitioner cannot wait indefinitely and has the right to terminate the PPA.
- (e) The Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v Essar Power Ltd has interpreted Section 79(1)(f) of the Electricity Act, 2003 (the Act), and therefore, the Commission has the jurisdiction to adjudicate or refer the dispute for arbitration. In terms of the said judgment, the power under Section 11 of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator, has been given to the Commission.
- (f) Chapter-III of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 also empowers the Commission to grant the relief sought by the Petitioner.
- (g) The petition is therefore 'admissible', on the ground that the Commission has the jurisdiction under Section 79(1)(f) of the Act and that the petition filed by the Petitioner, discloses the cause of action (*judgment of Hon'ble Supreme Court in Dahiben v Arvindbhai & Ors (2020) 7 SCC 366 was referred to*).
- (h) After the amendment to Section 8 of the Arbitration and Conciliation Act, 1996, in 2015, the Hon'ble Supreme Court in Emaar MGF Land Ltd v Aftab Singh (2019) 12 SCC 751, has clarified that if a party chooses to go for arbitration, then the Commission has to approve the same.

3. The learned counsel for Respondent THDC circulated short note of arguments, and mainly submitted as under:

- (a) The PPA contains no provision for pre-mature termination due to delay in the commissioning of the project. The Petitioner, in the petition, has not raised any disputes, but has only prayed simpliciter, for appointment of Arbitrator for resolution of the disputes under Section 79(1)(f) of the Act. The prayer is therefore not maintainable.
- (b) As the power from the project was allocated by the Ministry of Power (MOP, GOI), the Petitioner has to first approach the MOP, GOI for re-allocation of the power, and only thereafter, the option to exit the PPA is available. The Petitioner is attempting to by pass the earlier orders of this Commission and the stand taken by MOP, GOI, in Petition No. 223/MP/2015.
- (c) The Respondent is a government entity and investments are made keeping in view the long-term arrangement between the parties. Release of the procurer (Petitioner) from PPA obligations can be done, only if the MOP, GOI re-allocates the power to another procurer. (order in Petition No. 301/MP/2015 was referred to)
- (d) The plenary power under Section 79(1)(f) lies with the Commission to decide, in the given facts and circumstances of the case, as to whether to adjudicate the matter itself or to refer the same to arbitrator.
- (e) The Hon'ble Supreme Court judgment dated 4.4.2014 in the matter of TANGEDCO v PPN Power Generation Company Pvt Ltd, has held that just because a request has been made to refer the matter for arbitration, the



Commission is not obligated to make the reference. The Commission is required to exercise its discretion reasonably.

- (f) The reference made by the Petitioner to (i) MPERC order dated 4.1.2021 in Petition No. 52/2018 and (ii) judgment of APTEL in HVPNL v HERC & anr (2016 SCC online APTEL 72), in support of its contention to refer the dispute to arbitration, show that it is for the Commission to decide as to whether the dispute is to be referred to arbitration or not. The Petitioner ought to file a substantive petition on merits for adjudication by this Commission in terms of Section 79(1)(f) of the Act.
- (g) Since special statutes prevail over general laws, the Electricity Act 2003 (which is a special law) will prevail over the Arbitration & Conciliation Act, 1996. Therefore, the reliance placed by the Petitioner on Section 8 of the Arbitration and Conciliation Act (as amended), is misplaced.

4. In response to the above, the learned counsel for the Petitioner made rejoinder submissions as under:

- (a) While the Respondent, on the one hand, has argued that the Petitioner cannot seek the appointment of arbitrator until a substantive petition raising disputes on merits is filed, it has, on the other hand, submitted that the Petitioner has to first approach the MOP, GOI seeking the re-allocation of power from the project. These submissions, if accepted, would render the Section 79(1)(f) and Section 158 of the Act, Section 11 of the Arbitration and Conciliation Act, 1996 and clause 12 of the PPA, meaningless.
- (b) The power of the Commission to appoint an arbitrator is unquestioned, if it has the jurisdiction over the matter and if the petition discloses the cause of action. This has been satisfied by the Petitioner. The submission of the Respondent that a substantive petition for resolution of disputes is required to be filed by the Petitioner is not in accordance with the judgment of the Hon'ble Supreme Court in *GUVNL v Essar* case.
- (c) The Commission's order dated 18.4.2017 in Petition No. 223/MP/2015 (filed by Petitioner) is not applicable to the present case, as the prayer in the said petition, was not for termination of the PPA, but for necessary guidance to MOP, GOI to re-allocate the power.
- (d) Statutory provisions cannot be rendered nugatory by the Respondent (*judgment of the Hon'ble Supreme Court in MV Javali V Mahajan Borewell & Co. and ors (1997) 8 SCC 72 was referred to*)
- (e) The judgment of the Hon'ble Supreme Court in *TANGEDCO v PPN Power Generation Company Pvt Ltd.*, cannot be relied upon, as the same was passed in 2014, i.e prior to the amendment of Section 8 of the Arbitration & Conciliation Act, 1996 in 2015.
- (f) By virtue of the amendment to Section 8 of the Arbitration and Conciliation Act, 1996 in 2015, as examined by the Hon'ble Supreme Court in *Emaar* case in 2019, the present petition seeking the appointment of arbitrator is maintainable.



(g) The terms of the judgment of APTEL in BRPL case, the terms and conditions of tariff and all ancillary aspects would be squarely covered under Section 79(1)(f) of the Act.

(h) The matter may be decided in finality, as the learned counsel for the Respondent has argued the matter on merits.

5. At the request of the learned counsel for the parties, the Petitioner and the Respondent has been granted time till **26.8.2022**, to file their written submissions (not exceeding three pages), after serving copy to the other.

6. Subject to the above, order in the petition was reserved.

**By order of the Commission**

**Sd/-**  
(B. Sreekumar)  
Joint Chief (Law)

