

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION, SHIMLA

In the matter of-

M/s Manikaran Power Ltd.,
D-21, Corporate Park, Sector-21,
Dwarka, New Delhi-110075

.....Petitioner

Versus

M/s Jaiparkash Power Ventures Ltd.,
Sector-128, Noida-201304,
Utter Pradesh

.....Respondent

Petition No. 55 of 2015
(Decided on **31st August, 2015**)

CORAM

Subhash C. Negi
CHAIRMAN

Counsels:-

for the petitioner
for the Respondent

Sh. Maturgupta Mishra, Advocate
Sh. Vishal Gupta, Advocate

ORDER

(Last heard on 14th August, 2015 and orders reserved).

M/s Manikaran Power Ltd. D-21, Corporate Park, Sector-21, Dwarka, New Delhi (hereinafter referred as “the M.P. Ltd.,” or “the petitioner”) claiming to be a company is a category-II inter-State trading licensee, having been granted the trading license by the Central Electricity Regulatory Commission (in brevity the CERC) . The petitioner entered into a power procurement agreement (the PPA) with M/s Jaiparkash Power Ventures Ltd. (hereinafter referred as ‘JPVL’ or “the respondent”), for short term purchase of power generated from the JPVL’s Karcham Wangtoo Plant located in the State of Himachal Pradesh on day ahead basis, and the petitioner also entered into a Short Term Power Supply Agreement (the PSA) with the Noida Power Company

Limited (hereinafter referred to as “NPCL”) for supply of power to the NPCL during the period from 01.07.2014 till 30.09.2014.

2. The petitioner M.P. Ltd. alleges that on account of the failure of the JPVL to supply the contracted quantum of power, the M.P. Ltd. was unable to provide the contracted power to the NPCL and on account of that the NPCL has charged the MP Ltd. a sum of Rs. 1, 24, 05, 947.19 (Rupees One Crore Twenty Four Lacs Five Thousand Nine Hundred and Forty Seven and Nineteen paise only) as compensation for failing to supply the contracted power. The petitioner further claims that the respondent is liable to make payment of Rs. 5,35,06,066 (Rupees Five Crore Thirty Five Lacs Six Thousand and Sixty Six only) towards compensation, alongwith 18% interest per annum and surcharge, for its failure to supply contracted quantum of power to the petitioner i.e. the MP Ltd.

3. The present petition has been moved, under Section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred as “the Act”), by M/s M.P. Ltd., holding Inter-State Trading License from the CERC, for adjudicating the dispute arisen out of the Power Purchase Agreement executed by it with M/s Jaiprakash Power Ventures Ltd. (JPVL) for short term purchase power on day ahead basis for further supply to the NPCL for the period 1.7.2014 till 30.9.2014.

4. At the admission stage, Sh. Vishal Gupta, the learned Advocate, appearing for the respondent JPVL, has strenuously opposed the maintainability of this petition by raising the preliminary issue i.e., to say lack of jurisdiction of this Commission to deal with this petition.

5. Sh. Matrugupta, the learned Advocate, representing the petitioner, has cited, in his support, the decision of Hon’ble APTEL rendered in **Pune Power Development Private Ltd. V/s Karnataka Electricity Regulatory Commission and others (reported as 2011 ELR (APTEL) 303; and the Apex Court decision taken in Gujarat Urja Vikas Nigam Ltd. V/s Essar Power Ltd. AIR 2008 SC 1921.**

6. Per contra Sh. Vishal Gupta, asserts that the APTEL decision, relied upon by the petitioner, being based on distinct fact, is not applicable to the instant case.

7. On the limited issue of maintainability of the petition and the jurisdiction of this Commission to deal with this petition, the learned Counsels were requested to file written submissions which they have filed.

8. Sh. Matrugupta Misra, the learned Advocate, for the petitioner, argues that in this case source of power, being supplied by the respondent to the petitioner, was M/s Jaypee's Karcham Wangtoo Plant which is located in the State of Himachal Pradesh and the supply of power by the respondent to the petitioner also falls within the territorial jurisdiction of the Himachal Pradesh Electricity Regulatory Commission. The petitioner company is also holding the Inter-State Trading License granted by the CERC. According to him, the Hon'ble APTEL, per its verdict given in **Pune Power Development Pvt. Ltd. V/s Karnataka Electricity Regulatory Commission case (supra)**, has held that there is no distinction between the licenses issued by the Commission, whether the Central or State. The State Commissions have the jurisdiction to adjudicate the dispute, so long as the part of the cause of action arises within the statutory jurisdiction to adjudicate of the State Commission. He by putting reliance on the verdict of the **Hon'ble Apex Court in Alchemist Ltd. V/s State Bank of Sikkam (2007) 11 SCC 355**, asserts that even if a small part of the cause of action arises within the jurisdiction of the Commission, the Commission would have territorial jurisdiction to entertain the suit or petition.

9. Shri Matrugupta Misra Advocate also maintains that any dispute between the distribution licensee and the inter-State licensee is excluded from section 79(1)(f) of the Act, which read as under:-

Section 79(1)(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;"

Clauses (a) to (d) refer to the tariff of the central generating companies and tariff relating to composite scheme and inter-State transmission. A 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 clauses (a) to (d) aforesaid. However, if the jurisdiction of the State Commission conferred under Section 86(1)(f)

of the Act is looked into, it would be clear that no such restrictions are placed on its jurisdiction. In other words, all disputes between the licensees which do not fall under Section 79(1)(a) to (d) are within the jurisdiction of the State Commission. Thus, accordingly to him, only this State Commission has the power to adjudicate or to refer for adjudication by an arbitrator, the disputes arisen between the licensees, be it a distribution licensee or a trading licensee, and a generating company.

10. Sh. Vishal Gupta, the learned Advocate, appearing on behalf of the respondent “JPVL”, emphatically stressed that the State Commission lacks jurisdiction to entertain the present petition stating that in the instant case the petitioner is holding the inter-State Trading licence granted by the Central Electricity Regulatory Commission; the supply to the petitioner under the PPA is not for the consumption in the State of Himachal Pradesh, it is a pure dispute between a trading licensee and a generating company, having no nexus with the distribution licensee or consumers of the State. The acts/ agreements of the parties cannot be the basis for determination of jurisdiction of the Commission and jurisdiction can be established only under the statutes. The location of the selling party is irrelevant. The PPA was signed between the parties in Delhi i.e outside the State of Himachal Pradesh and there is no sale of power from the respondent under the PPA to the distribution licensee and the delivery point of the power from the respondent is also outside the State of Himachal Pradesh. No cause of action has arisen in the State of Himachal Pradesh. According to him only for the reason that the generating plant of the respondent is located within the State of Himachal Pradesh, this Commission will not have jurisdiction to adjudicate the dispute as no cause of action has arisen within the State of Himachal Pradesh as alleged.

11. Sh. Vishal Gupta, the learned Counsel for the respondent further submits that in order to justify the jurisdiction of this Commission in the instant case, the petitioner, in its submissions before this Commission, has erroneously relied upon the judgment of the Hon’ble APTEL in “**Pune Power Development Pvt. Ltd. V/s Karnataka Electricity Regulatory Commission (Supra)**”, as that case is entirely different from the present case. In that case the dispute involved was between the Distribution Licensee of Karnataka and the inter-State trading licensee, who was selling power to the distribution licensee in the State of Karnataka, thereby having direct nexus with the State of Karnataka, and the supply was to the Karnataka Distribution Licensee. The power procurement by the Distribution Licensee from the trading licensee, fell within

the regulatory jurisdiction of the State Commission under section 86(1)(b) of the Act and the procurement of power was for the distribution and retail supply in the State of Karnataka. The Karnataka Commission had got the jurisdiction because the nexus between the parties had been established. In that case dispute arose was between an inter-State trading Licensee and a Distribution Licensee of Karnataka State. The Distribution Licensee has been granted Licence by the Karnataka Electricity Regulatory Commission, and the dispute which was with the Distribution Licensee of Karnataka Commission, was clearly covered u/s 86(1)(f) of hat Act.

12. In his support Sh. Vishal Gupta, the learned Counsel for the respondent 'JPVL', has cited the judgment dated 06.08.2009 rendered by the Hon'ble Appellate Tribunal in Appeal No. 7 of 2009- **Lanco Amar Katak Power Pvt. Ltd. V/s Madhya Pradesh Electricity Regulatory Commission reported as 2010 ELR (APTEL) 0161** and the judgment dated 20th July, 2012 rendered in Appeal No. 130 of 2011- **M/s Jaiprakash Power Ventures Ltd V/s Haryana Electricity Regulatory Commission & Ors.**

13. While wrapping up the discussion on this issue, Sh. Hemant Singh learned, Advocate, appearing vice Sh. Matrugupta Misra, Advocate for the petitioner, submits that all the verdicts, of the Hon'ble APTEL relied upon by the respondent, are not applicable in the instant case, because in all these cases the location of the source of power was outside the territorial jurisdiction of the State Commission. Nevertheless this Commission shall have to take into consideration the principle of *ubi jus ibi remedium*, which means when there is a right there is a remedy. Since the petitioner herein is aggrieved and it has a right to recover the amount, to which it is entitled to under the contract, it cannot be remediless. Further part of the cause of action has arisen in the State of Himachal Pradesh and the generation plant is also located within the territorial jurisdiction of this Commission, the present petition is maintainable before this Commission.

14. The Commission has heard the learned Counsels for both the parties and has carefully considered their respective submissions. Now the Commission proceeds to deal with the issue pertaining to the jurisdiction of the Commission to entertain the petition, under section 86 (1)(f) of the Act, moved by the M/s Manikaran Power Ltd.

15. The Commission thinks it appropriate and worthwhile to point out at the very outset that under the 2003 Act, the generation of electricity is delicensed activity and the generating companies exercise freedom in respect of choice of site, the investment of generation unit and choice of country wide consumers. The 2003 Act permits the generating company to supply electricity directly to a trader or to a consumer.

16. It is settled law that the judgment is a precedent for what it decides and should be understood in the factual background of the case. In the **Lanco Amarkantak Power Pvt. Ltd. Hyderabad V/s Madhya Pradesh Electricity Regulatory Commission, Bhopal & Ors. 2010 ELR (APTEL) 0161** the question before the Hon'ble APTEL, was whether the Madhya Pradesh State Commission has got a jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside the State of Madhya Pradesh and the P.T.C. which had not been granted licence by the Madhya Pradesh State Commission. In that case, the Hon'ble APTEL held that section 86(1)(f) is to be construed to mean such licensee who has been granted a trading licence by the particular State Commission seeking to assume jurisdiction over the dispute. The State Commission can assume jurisdiction in respect of disputes arising between a generating company and electricity trading operating under a trading licence granted by it. As per regulations framed by MPSERC in 2004, it can only deal with the dispute relating to the licensees that operate under a trading licence granted by the Madhya Pradesh State Commission. Admitted facts of that case clearly show that the PPA, as also the rights and objections arising thereunder, bear no nexus with the State of Madhya Pradesh so as to confer any jurisdiction upon the Madhya Pradesh State Commission to adjudicate upon the disputes arising out of the said agreement.

17. In **Pune Power Development Pvt. Ltd. V/s Karnataka Electricity Regulatory Commission and Anr. 2011 ELR (APTEL) 0303** the dispute was between the Distribution Licensee of the Karnataka and an Inter-State Trading Licensee. The trading licensee was selling the power to the Distribution licensee in the State of Karnataka, there-by having a nexus with the State. Since the procurement of power by the Distribution licensee from the trading licensee was being done in the State of Karnataka, the matter was considered to have taken to be within the jurisdiction of the State Commission under section 86(1)(b) of the Act. The

procurement of power had a direct nexus with State of Karnataka as the supply was to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licenses to determine the jurisdiction of the Commission. The supply of electricity, namely, the Appellant being at different place does not oust the jurisdiction of the State Commission under section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, it was held that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have jurisdiction upon the dispute.

18. **The Hon'ble APTEL In Appeal No.130 of 2011-Jaiprakash Power Ventures Ltd. V/s Haryana Electricity Regulatory Commission & Ors** vide its verdict dated 20th July, 2012 has held that the State Commission will have jurisdiction to adjudicate upon the PPA between the generating company and the inter-State Trader only if nexus or privity is established between the PPA and the PSA between the inter-State Trader and the Distribution Licensee. In that case the Hon'ble Tribunal found no nexus between the PPA entered into between the Appellant and the PTC and PSA entered into between PTC and Haryana Power Generation Company Ltd. In that case the State Commission therefore, had no jurisdiction to go into the dispute in question.

19. The location of the selling party is irrelevant. In this context, it would be worthwhile to refer to a decision rendered by the Hon'ble APTEL in the case of **Lanco Kondapalli Power Ltd., V/s Haryana Electricity Regulatory Commission** reputed in **2010 ELR (APTEL) 36**. In that case, the Hon'ble Tribunal has upheld the jurisdiction of the Haryana State Commission to adjudicate upon the dispute under section 86(1)(f) between the Distribution Licensee in Haryana and generating companies in the State of Orissa.

20. Having benefitted by enlightenments derived from the above quoted citations' and after having carefully considered the submissions made by the both the parties, this Commission finds that the generation of electricity is delicensed activity and the generating companies exercise freedom in respect of choice of country wide consumers. The 2003 Act permits the generating company to supply electricity directly to a trader or to a consumer. The Commission will have jurisdiction to adjudicate upon the PPA between the generating company and the Inter-State Traders only, if the power

purchase or procurement within its territorial jurisdiction is involved or if nexus with the distribution licensee or the consumers of the State is established. In the instant case, the PPA and PSA, also the rights and obligations arising there under, bear no nexus with State of Himachal Pradesh and no power procurement within the State is involved. Intra-State Trader is not selling the power to the distribution licensee for distribution or retail supply within the State or to any consumer in the State. The dispute is not with the distribution licensee and section 86(1)(b) is not attracted. A person cannot be called to be trading licensee to invoke the jurisdiction of the Commission merely it has been granted trading licence by the CERC. It is pure dispute between the trading licensee and a generating company having no nexus with the distribution licensee or the consumers in the State of Himachal Pradesh. The PPA was signed between the parties in Delhi i.e., outside the State of Himachal Pradesh and there is no sale by the respondent JPVL under the PPA to the distribution licensee and the delivery point of the power from the respondent to the petitioner NPL is outside the territorial jurisdiction of the State of Himachal Pradesh. The location of the selling party is irrelevant. Only for the reason the generating plant is located in the State of Himachal Pradesh, this Commission will not have jurisdiction, and no cause of action has arisen within the State of Himachal Pradesh. Hence, this State Commission has no jurisdiction to deal with this dispute.

It is not within the purview of this Commission to decide where the remedy would lie in the matter. Thus this Commission is not inclined to give its findings whether the Central Commission has got the jurisdiction to adjudicate upon the dispute in question.

In light of the above reasoning, this Commission is unable to accept the submissions of the petitioner M/s M.P. Ltd., and concludes that this Commission lacks jurisdiction to deal with this petition.

The petition is disposed of accordingly.

It so ordered.

(Subhash C. Negi)
Chairman