

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

In the matter of:-

M/s Om Hydropower Ltd.
thro' its Authorised Signatory
Mr. Dinesh Kumar,
Village Bundla, Post Office Nachhir, Palampur
Distt. Kangra, Himachal Pradesh-176061

....**Petitioner**

Versus

1. The HP State Electricity Board Ltd. thro' its,
Chief Engineer (System Operation)
Kumar House, Shimla-171004

....**Respondent No.1**

2. The Principal Secretary
Multipurpose Projects and Power Deptt.
Govt. of Himachal Pradesh, Secretariat,
Chotta Shimla-171002

....**Respondent No.2**

Petition No. 56 of 2019

(Passed on 29th May, 2019)

CORAM

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsels: -

for Petitioner:

Shri Ankur Gupta, Advocate
vice Sh. Tarun Johri, Advocate

for Respondent No.1 :

Sh. Surinder Saklani, (Standing Counsel)

for Respondent No.2 :

Sh. Rajinder Chauhan, DDA
a/w Sh. Rajan Sharma, SE (DOE)

ORDER

The above cited petition has been moved by M/s Om Hydropower Limited for appointment of an Arbitrator in pursuance of the directions issued by the Hon'ble High Court of HP vide its Order dated 29.03.2019 in Arbitration Case No. 59 of 2018 and has

prayed for appointment of the Arbitrator, preferably a Retired Judge of the Hon'ble High Court of Himachal Pradesh.

2. According to the petitioner the dispute which has arisen between the parties is : -
 - (a) that since the project has been commissioned by the petitioner within the Scheduled Commercial Operation Date, as provided in S.I.A, therefore, the recovery of 15% free power instead of 12% free power of deliverable energy generated from the project is in complete violation of provisions of the IA(s) entered between the parties. The Respondents, therefore, are not entitled to deduct or recover any additional supply of free power than what was originally envisaged in the I.A. executed between the parties, in as much as the petitioner is entitled to an extension in commissioning of the project for a period of 39 months, as envisaged under the Force Majeure clause forming part of the Power Purchase Agreement (PPA) dated 27.10.2006 as well as the S.I.A. dated 27.01.2006;
 - (b) that, further the recovery of Rs. 27,00,000/- from the petitioner, in the form of Liquidated Damages(LD) imposed and retained by the Respondent No. 1 is completely illegal and unreasonable, since it has been clearly held by this Commission that the delay in achieving the Commercial Operation Date of the project is beyond the reasonable control of the petitioner. The delay in commissioning of the project, therefore, is covered within the meaning of Force Majeure provisions as provided under the PPA and the petitioner is not liable to pay any Liquidated damages to the Respondents.

3. On the Arbitration Petition i.e. Case No. 59 of 2018 moved by the petitioner, the Hon'ble High Court has ordered that-

“Having heard learned Counsel for the parties and in the light of the above stated provisions read with the cited decision, the instant petition is disposed of with liberty to the petitioner to approach the ‘State Commission’ within four weeks, whereupon the State Commission is directed to invoke its power under sub-Clause (f) of Section 86(1) of the Electricity Act, 2003 and refer the dispute for arbitration within four weeks from the date of receipt of reference from the petitioner. The Arbitrator, so appointed, is directed to decide the dispute expeditiously and preferably within three months from the date of entrustment.”

4. The procedure for appointment of the Arbitrators is laid down under Chapter IX of the Conduct of Business Regulations, 2005, whereunder the Commission, after hearing the parties, is to satisfy itself that if no reason or cause has been shown against the arbitration request and after taking into the nature of the dispute and value involved matter needs to be referred for adjudication by arbitration and further whether a sole Arbitrator is to be

appointed or where the parties do not agree on the name of the Sole Arbitrator to be designated by the Commission, the Commission is to appoint three persons Arbitral Tribunal, wherein one Arbitrator is to be nominated by each of the parties to the dispute and the third Arbitrator by the Commission.

5. On receipt of this petition, this Commission issued notice to the parties and informed them that per directions of the Hon'ble High Court vide Order dated 29.03.2019 in Arbitration Case No. 59 of 2018, the petition is required to be disposed of by this Commission within four weeks from the date of receipt of the reference from the petitioner i.e. w.e.f. 29.04.2019 and they were also directed to file their response to the arbitration request made by the petitioner in this petition. The matter was listed for hearing on 13.05.2015, and subsequently again on 25.05.2019.

6. In response to the petition, the Respondent No.1, i.e. the HPSEBL, submits that so far as the dispute relating to the charging of additional 3% free power, under Clause 6.3 of the SIA is concerned, it is the dispute between the State Govt. and project developer and the Respondent No.1, i.e. HPSEBL is neither being the party to it nor the terms of the said Agreement/ SIA are binding upon it. The Respondent No.1 is only concerned with the second part of the dispute relating to the Liquidated damages charged by it under Clause 16.2 of the Power Purchase Agreement. Hence, the dispute qua the sustainability of the Liquidated Damages to the tune of Rs. 27 lacs is under the domain of this Commission and the same may be adjudicated by the Commission, taking the note of record available to it, so that the public money could be saved by avoiding the appointment of the Arbitrator in this small issue of liquidated damages amounting only to Rs. 27 lacs. In its support it cites para 29 of the Judgment of Hon'ble Apex Court delivered in **Gujarat Urja Vikas Nigam Ltd. versus Esser Power Ltd.**, 2008 ELR (SC)0001; (2008)4SCC755 which reads as under:-

“29. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternately, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator.”

7. The Respondent No. 2 i.e. the Principal Secretary, Multipurpose Projects and Power (MPP & Power) Department, the Government of Himachal Pradesh has not responded to the

petition. However, the Registry of the Commission placed before us the e-mail copy of letter dated 22.05.2019 from S.E.-cum- Nodal Officer (Legal matters) Director of Energy, Govt. of HP, Shimla addressed to the Secretary of this Commission, with the endorsement to the Respondent No. 1 and the petitioner in this case, wherein the Secretary of this Commission has been requested to apprise this Commission on hearing scheduled to be held on 25/05/2019 that the Respondent No. 2 has approved the panel of arbitrators as under:-

1. Shri Subhash Negi (Retd. IAS)
2. Shri D.S. Khenal (Retd. District & Sessions Judge HP).
3. Shri B.L. Soni (Retd. District & Sessions Judge HP).

8. It would be apt to point out that in the present petition the replies/submissions to be given/made by the State Government, being a party to the proceedings, in pursuance of the Orders, passed by the Commission, are required to be duly signed, verified, filed and supported with an Affidavit of the Officer competent to file the plaints/ pleadings on behalf of the State Government, as contemplated under sub-regulation (3) of regulation 17 of the HPERC (Conduct of Business) Regulations, 2005. Thus the communications, not addressed by the competent Officer/authority in the prescribed manner and in accordance with the specified procedure, cannot be taken into consideration and placed on the case file. We, therefore, do not take cognizance of the email letter dated 22.05.2019 received from the DoE.

9. During the hearing held on 25.05.2019, Shri Rajinder Chauhan, Deputy District Attorney, appearing on behalf of the Respondent No. 2 i.e. the State Government, has prayed for the liberty to withdraw letter issued on 22.05.2019 by the S.E., DOE and undertakes to file response on behalf of the State Government within one week. Sh. Rajinder Chauhan has also apprised this Commission that Respondent No. 2 i.e. the State Govt. is ready to settle the matter amicably. We keeping in view the fact that the petition is required to be disposed of within the time lines specified by the Hon'ble High Court, permitted the Respondent No. 2 to withdraw the aforesaid letter dated 22.05.2019 and directed the Respondent No. 2 to file its response positively by the 27th May, 2019 to enable us to pass the appropriate order on the petition.

10. During the hearing held on 25.05.2019, Shri Ankur Gupta, Advocate appearing on behalf of the petitioner, argued that both the disputes have arisen on account of delay of the commissioning of the project and should not be bifurcated as proposed by the Respondent

No. 1 i.e. HPSEBL and be adjudicated by the arbitrator as it would mitigate the possible multiplicity of litigation. Furthermore, in this case the Hon'ble High Court of Himachal Pradesh has passed the direction to appoint the arbitrator under section 11(5) of the Arbitration and Conciliation Act, 1996 which reads as under:-

“(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.”

Sh. Ankur Gupta Advocate purposes that issue should be referred for adjudication and settlement to the sole arbitrator and suggests the name of Hon'ble Justice Mr. Kuldeep Singh, Retired Judge of the Himachal Pradesh High Court, as he has consented to adjudicate the dispute in issue.

11. To the contrary the Respondent No. 1 reiterates its stand that this dispute qua the sustainability of the claim concerning Liquidated damages should be adjudicated by the Commission itself under section 86(1)(f) of the Electricity Act, 2003 stating-

- (a) that the moot issue in the present petition is that as to whether this Commission has the power to adjudicate the issue inter se generating company and the Government of Himachal Pradesh who has entered into the memorandum of understanding (MoU) and the Implementation Agreement /SIAs with the IPP and the dispute between the distribution licensee and the generating company arising out of the contractual obligations in terms of the Power Purchase Agreement (PPA);
- (b) that section 86 (1)(f) of the Act, (ibid) clearly indicates that the disputes between the licensee and generating company can only be adjudicated by the State Commission either itself or by an arbitrator to whom the Commission refers the dispute. Further there are two different issues involve in the present petition as under :
 - i. Enhancement of Free power from @ 12% to @ of 15%
 - ii. Liquidated Damages (LD) charges to the tune of Rs. 27 lac imposed by Respondent No.1.
- (c) that in relation to free power it is submitted that the free power @ 15% was mutually agreed between the Government of Himachal Pradesh and the petitioner in the Implementation Agreement/SIA, wherein it has been clearly mentioned that if the petitioner fails to achieve the CoD of the project on the agreed date, then the rate of the free power shall be enhanced from @12 % to @15 %. The Respondent No.1 has already put its stand in the reply filed by it to the petition and for the sake of brevity, same is not repeated. The issue of free power is purely in between the GoHP and the Generating Company i.e. the petitioner and the Respondent No.1 do not have any role to play and as submitted in its reply filed by the Respondent No.1, the HPSEBL

has only performed its part as a delegated agency on behalf of the Government of H.P. to collect the free power;

- (d) that so, as far as the issue No.2 is concerned, section 86(1)(f) of the Act (ibid) confers power to the State Commission to adjudicate the same or refer for the arbitration. This Commission may take the note of the fact that there were several occasions when this Commission has adjudicated the disputes pertaining to LD charges. Since the reply already stands filed in detail, this issue i.e. LD charges to the tune of Rs. 27 Lac may also be decided by this Commission itself;
- (e) that since the Electricity Act, 2003 provides the special statute and having the overriding effect on the application of the Arbitration and Conciliation Act, 1996 as such would not take place unless and until the this Commission refers the disputes in terms of the section 86 (1) (f) and this issue is not *res integra* and the law on the point has been settled by the Hon'ble Supreme Court in the **Gujarat Urja Vikas Nigam Ltd. Versus ESSAR Power Ltd. (Supra)**, the Respondent No.1 reiterates its stand qua sustainability of the claim concerning liquidated damages, should be adjudicated by this Commission itself under section 86(1)(f) of the Act.

12. Even though at the request of Shri Rajinder Chauhan, appearing on behalf the Respondent No. 2 an opportunity has been given to the State Government to file their response and to offer their comments on the proposal of the petitioner to appoint Hon'ble Mr. Justice Kuldeep Singh, Retired Judge of High Court of Himachal Pradesh for this purpose, the Respondent No.2 has neither filed any response to the petition nor has expressed its agreement with the proposal of the petitioner for designating the Mr. Justice Kuldeep Singh as the Sole Arbitrator.

13. For better understanding of the issue involved, it would be necessary to draw the attention to para 1 of the High Court Order dated 29.03.2019(Supra) which reads as under:-

“The petitioner is a Power Generation Company to whom licence has been granted under the Electricity Act, 2003. A dispute has arisen between the petitioner and the Himachal Pradesh Electricity Board Limited. Though the Bilateral Agreement also contains Clause 19 which provides adjudication of such dispute through arbitration, but learned Counsel for the parties have referred to Section 86(1)(f) of the Electricity Act, 2003, whereunder one of the statutory function assigned to the State Commission is to “adjudicate upon the disputes between the licensee and the generation companies and to refer any dispute for arbitration.” The above stated clause has been interpreted by the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd. Versus Essar Power Ltd; reported in (2008) 4 SCC 755 and as per the dictum, aforementioned provision shall prevail upon Section 11 of the Arbitration and Conciliation Act, 1996. Though, in the event of appointment

of an Arbitrator by this Commission, the arbitration procedure as contemplated under the 1996 Act shall be followed.”

14. In light of the above the Hon’ble High Court, vide its Order dated 29.03.2019, makes its abundantly clear that this Commission is to invoke the provisions of section 86(1)(f) the Act (ibid) within four weeks from the date of receipt of reference from the petitioner and to refer the same for adjudication/ settlement through arbitration process, expeditiously and preferably within three months from the date of entrustment. .

15. In our opinion both the parts of the disputes i.e. the enhancement of free power @ 12% to 15% of deliverable energy generation from the project under clause 6.3 of th SIA dated 27th January, 2006 executed by the petitioner company with the Government of HP and imposition of Liquidated damages by the HPSEBL under clause 16.2 of the PPA executed 27th October, 2006 with the generating company i.e. petitioner, are interlinked and are based on the one fact of delay in achieving the commercial operation date of the project, are inseparable.

16. This Commission is entrusted with the statutory function to regulate electricity purchase and procurement process of the distribution licensee under Clause (b) of Sub-section (1) section 86 of the Electricity Act, 2003 and if we read it with Clause (f) of Section 86(1), any dispute arising out or relating to the Power Procurement Agreement and related issues requires to be adjudicated by this Commission or to be referred for adjudication/settlement through arbitration. Moreover, such reference in pursuant to the orders of the Hon’ble High Court would be within four corners of Section 86(1)(f) and Section 158 of the Electricity Act, 2003.

17. Keeping in view the foregoing discussion, and the direction made by the Hon’ble High Court and other averments made by the parties and taking note of the fact that disputes asking the respondents to file their objections, they have not objected the proposal of the petitioner to designate Mr. Justice Kuldeep Singh, retired Judge as arbitrator in this matter. We deem fit to refer this whole dispute raised by the petitioner i.e. M/s Om Hydropower Ltd to Mr. Justice Kuldeep Singh, retired Judge of the High Court of Himachal Pradesh, as Sole Arbitrator to adjudicate and settle the dispute within the timelines specified by the Hon’ble High Court in its Order dated 29.03.2019.

18. The Arbitrator appointed by the Commission will start the arbitration process and may follow such procedure, as he may consider appropriate, consistent with the principles of natural justice and fair opportunity to be given to the parties to the arbitration. The Arbitrator shall pass an award giving reasons for the decision on all the issues arising from adjudication and furnish the award with relevant documents to the Commission within the time line specified by the Hon'ble High Court of HP in its order dated 29.03.2019. The award made by the Arbitrator shall be the award under the Arbitration and Conciliation Act, 1996 (26 of 1996).

19. The Commission further orders the parties to make their submission before the above named arbitrator appointed by this Commission. Further the Respondent shall ensure that all the facilities and co-operation, as may be stipulated in the terms of reference, are made available to the said Arbitrator. The Respondent shall also produce or cause to be produced, all documents/records required during the course of arbitration proceedings.

20. It is made clear that this Commission has not expressed any opinion on the merits of the Petitioner's claim. Nothing said by us in this Order should be treated as expression of our opinion on the merits of the petitioner's case. The Arbitrator may pass the order or make an award independently and in accordance with law.

It is so ordered accordingly.

Sd/-

(Bhanu Pratap Singh)
Member

Sd/-

(S.K.B.S.Negi)
Chairman