

Sub : In the matter of adjudication of disputes between MP Power Trading Co. Ltd. and M/s Karamchand Thapar & Bros (C.S.) Ltd.

ORDERSHEET

(Date of hearing 26th December, 2011)

(Date of ordersheet 6th January, 2012)

M/s M.P.Power Trading Co. Ltd., - Petitioner
Shakti Bhawan, Rampur, Jabalpur.

V/s

M/s Karamchand Thapar & Bros (C.S.) Ltd. - Respondent
“Thapar House”, 25, Brabourne Road,
Kolkata – 700001.

Shri A.B.Bajpai, CGM (Comm.) and Shri Manoj Dubey, Advisor(Law) appeared on behalf of the Petitioner.

Shri Harish Malhotra, Sr. Advocate and Shri Ajay Gupta, Advocate appeared on behalf of the Respondent.

2. M/s M.P. Power Trading Co. Ltd., Jabalpur has filed present petition under affidavit on 16.5.2011, in the matter of adjudication of dispute between them and Respondent (M/s. Karamchand Thapar & Bros. Ltd.) arising out of agreement entered into between the parties for sale of surplus power.

3. The present dispute is between two trading Licensees namely M/s MP Power Trading Co. Ltd. and M/s Karamchand Thapar & Bros. (C.S.) Ltd., Kolkata. Petitioner, M.P. Power Trading Co. Ltd. a State Government Company engaged in business of procuring power and trading on behalf of distribution licensee in the State of MP. Respondent (Karamchand Thapar & Bros Ltd.) is an inter–state trading Licensee.

4. Petitioner invited tenders for sale of power, for the period from 16.07.2009 to 30.09.2009. In response to the aforesaid enquiry, an offer was made by Respondent vide letter dated 21.04.2009. Thereafter, Letter of Intent was issued in favour of Respondent on 27.04.2009. The said Letter of Intent, dated 27.04.2009, was

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duly received by Respondent. Consequently, Respondent vide letter dated 30.04.2009, assured Petitioner that on the basis of Letter of Intent, it is making all sincere and rigorous efforts for sale of surplus power.

5. Petitioner vide letter dated 7.5.2009, requested Respondent to explore all the possibilities for scheduling of contracted power and to initiate an early action for obtaining advance booking of transmission corridor. Subsequently, several reminder letters were also sent to Respondent. In pursuance to the said letters, Respondent vide letter dated 23.5.2009, intimated Petitioner that, since there is no probable buyer available, to purchase the said power, Petitioner may look for alternative arrangements for sale of power. Later, Respondent vide letter dated 25.05.2009 informed Petitioner that it is participating in tender enquiry of Maharashtra State Electricity Distribution Company Limited and is also making sincere efforts for sale of power in pursuance of LoI dated 27.4.2009. Petitioner vide its letter dated 20.07.2009, requested Respondent to open weekly revolving Letter of Credit (LoC). However, Respondent failed to open the LoC.

6. Petitioner has averred that Respondent has not even applied to the Nodal agency for obtaining open access for scheduling of power. Upon failure to fulfil the contractual obligation, an invoice dated 06.10.2009 was issued, directing Respondent to pay a compensation of Rs. 36,60,00,000.00, for breach of agreement. In pursuance to the said notice Respondent raised objection that compensation bill has wrongly been raised and the same is not payable by it. Subsequently, Petitioner issued a legal notice to Respondent to pay compensation and surcharge thereon amounting to Rs. 46,20,00,000.00 for the entire period of the contract alongwith surcharge @ 1.25% p.m. till date of actual payment. In response, Respondent vide letter dated 06.02.2010, has refused to pay the said compensation on the ground that there is no concluded contract between the parties. Respondent in the said letter has stated that as per the tender enquiry the execution of a Power Purchase Agreement (PPA) was a pre-condition to the sale of power.

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7. Aggrieved by the conduct of Respondent, the Petitioner has approached the Commission under Section 86(1)(f) for adjudication of dispute.

8. In light of the above submissions, Petitioner has prayed as under:

- (a) To hold that Respondent is liable to pay an amount of Rs. 46,20,00,000.00 as compensation for non off-take of power during the period from 16.07.2009 to 30.09.2009 in terms of the LoI dated 27.4.2009 issued by MP Tradeco.
- (b) To direct Respondent to pay an amount of Rs. 46,20,00,000.00 alongwith surcharge at the rate of 1.25% per month till the date of actual payment.
- (c) To direct Respondent to pay the costs and expenses of the present proceedings to Petitioner.

9. Petitioner has submitted that the present dispute falls within the jurisdiction of the Commission under Section 86(1) (f) of the Electricity Act, 2003. In *support* of this contention, Petitioner *has relied* on the judgment delivered in *Pune Development Pvt. Ltd. V/s Karnataka Electricity Regulatory Commission in Appeal No. 200/2009*, dated 23.02.2011, wherein, Hon'ble APTEL has opined that Section 86(1) (f) of Act is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. Further Petitioner has referred to the case of *Grid Corporation of Orissa Limited V/s Gajendra Haldea and others*, (2008) 13 SCC 414, wherein, the Hon'ble Supreme Court has held that when the delivery of electricity is within a State, the transaction would amount to only intra-state sale of electricity and would not amount to inter-state sale involving the territories of two or more States.

10. Relying on the above dictum, Petitioner has contended that in the present case also the cause of action arose within the jurisdiction of this Commission. Petitioner has averred that it is a trading licensee in the State of Madhya Pradesh. The Letter of Intent was issued from Jabalpur, Madhya Pradesh. The delivery point for sale of power by MP Tradeco. is within the periphery of the Madhya Pradesh. Hence, the State Commission has got powers to adjudicate the dispute under Section 86(1) (f) of the Act.

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11. The case was listed for motion hearing on 21.06.2011. During the motion hearing, the representative of Petitioner submitted that the petition is filed under Section 86(1)(f) of the Electricity Act, 2003 and requested to admit the petition for further arguments. Petitioner during the hearing mentioned various judgments wherein jurisdiction of State Commissions was upheld in adjudication of disputes between Licensees and generating companies.

12. On hearing the representative of Petitioner, the Commission admitted the petition and directed to issue notice to Respondent to submit reply. The case was listed for hearing on 26.07.2011 which was adjourned to 20.09.2011 on the request of Respondent.

13. During the hearing on 20.09.2011, the representative of Respondent requested for adjournment of hearing on the ground that the Senior Advocate was busy attending cases in other courts. The representative of Respondent also requested to allow filing a rejoinder in the matter. The Commission considered the request of Respondent and directed to fix next date of hearing. The case was listed for hearing on 12.10.2011 which was adjourned from time to time on the request of Petitioner and finally listed on 26.12.2011.

14. During hearing on 26.12.2011, the representative of Respondent submitted that no concluded agreement exists between Respondent and Petitioner. He has further submitted that Petitioner had circulated an enquiry on 16.04.2009 for selling of power. Respondent vide letter dated 21.04.2009 submitted an offer letter. Petitioner vide letter dated 27.04.2009 placed LoI for sale of power under some terms and conditions which were at variance to those offered by Respondent in its offer letter dated 21.04.2009. It was pointed out that the said LoI was in the nature of a counter offer and specifically required as under :-

“Your acceptance may please be sent through fax within three days failing which M.P.Tradeco will be free to take appropriate action as deemed fit in the matter. Subsequently, an agreement for sale of power shall be executed.”

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15. Respondent contended that neither LoI's acceptance conveyed by them nor any power sale agreement executed amongst them and Petitioner as required in the aforesaid LoI. It has been mentioned that LoI materially deviated from offered terms in case of terms of payment security-Letter of Credit-coverage. It also additionally claimed a right of Petitioner for termination of contract in event of payment default. Respondent vide letter dated 30.04.2009 had not conveyed his acceptance. Respondent vide letter dated 23.05.2009 followed by letters dated 25.05.2009 and 01.06.2009 also informed Petitioner that it would look for alternate arrangements for sale of aforesaid surplus power as no buyer was available to Respondent. He had also submitted that Petitioner was deficit in power at that time and hence was not in a position to supply. He submitted some paper cuttings also. He therefore contended that no loss was sustained by Petitioner on account of Respondent not taking power. He has also submitted that as per Indian Contract Act, the acceptance must be absolute. He has then submitted various judgements issued by Hon'ble Supreme Court and submitted a copy of the tender enquiry dated 16.12.2011 wherein following clause is included;

“24. Agreement:- The LoI issued to the successful bidder itself shall be deemed as having entered in to an agreement for purchase of contracted power for the duration/period as mentioned in the LoI and in the event of any commercial/operational dispute arises, the said LoI shall be treated as a legal document in the court of law. As such no separate agreement will be executed.”

It is also mentioned in the aforesaid tender enquiry that “The acceptance conveyed by M.P. Tradeco through fax, shall be final and will be treated as LoI for all purposes.”

16. During the hearing on 26.12.2011, the representative of Petitioner requested for adjournment of hearing on the ground that the Senior Advocate was busy attending cases in other courts.

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17. On hearing Petitioner and Respondent, the Commission directed to fix next date of hearing.

18. The next date of hearing is fixed on 19.01.2012.

(C.S.Sharma)
Member (Eco.)

(Rakesh Sahni)
Chairman