
**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 86(1)(f) read with Section 86(1)(e) of the Electricity Act, 2003 along with the applicable rules made therein for non-payment towards invoices raised by the petitioner.

Petition No. 52/2018

ORDER

Hearing through video conferencing
(Date of order: 04th January' 2021)

M/s. Green Infra Wind Energy Limited
Door No. 515 & 514, Tolstoy House,
New Delhi – 110 001

- **Petitioner**

Vs.

The Managing Director
M.P. Power Management Co. Ltd.,
Block No. 11, 3rd Floor, Shakti Bhawan,
Rampur, Jabalpur- 482008

- **Respondent**

Shri Buddy Ranganathan, Advocate appeared on behalf of the petitioner.

Shri Aashish Anand Bernard, Advocate appeared on behalf of the respondent.

The petitioner has installed and operating 2x30 MW wind power project at Shajapur in M.P. The petitioner is supplying power to MP Power Management Co. Ltd., under Power Purchase Agreements dated 07.12.2015 and 30.05.2016, respectively.

2. The subject petition is filed under Section 86(1)(f) read with Section 86(1)(e) of the Electricity Act, 2003 along with the applicable rules made therein seeking directions to the Respondent to clear outstanding dues with the late payment surcharge in terms of the Power Purchase Agreements (PPAs) executed between the parties. The petitioner is also seeking directions to the Respondent to pay carrying cost for the energy supplied to the Respondent.

3. At the hearing held on 05.11.2019, the petitioner mentioned that there had been several communications between the parties for settlement of dispute during pendency of this petition. In view of aforesaid position, the parties were advised to sit together for resolving the dispute in this matter within a month's time and file the outcome of the meeting/(s) with the Commission before 6th December'2019. At the next hearing held on 06th December'2019, it was stated by the petitioner that both the parties were in the process of convening meeting for resolving dispute. Accordingly, the parties were given further opportunities in subsequent hearings to sit together for resolving the dispute in the subject matter.

4. At the hearing held on 06.10.2020, Ld. Counsel for the petitioner submitted the following:

- (a) The settlement on the issues in subject matter has failed between the parties.
- (b) Several payments have been made by the Respondent to the petitioner during proceedings in this matter. He submitted that the late payment surcharge for the period of July'2018 to February'2019 has been settled under an agreement between both the parties in this matter.
- (c) While mentioning the period upto which the principal amount has been received by the petitioner from the Respondent, he stated that non-payment of late payment surcharge (LPS) by the petitioner is the larger issue in the subject petition.

5. At the same hearing held on 06.10.2020, Ld. Counsel of the Respondent while mentioning provisions under Section 86(1) (f), Section 58 of the Electricity Act'2003 and citing Judgments of Hon'ble Supreme Court, argued for settlement of dispute in the subject matter through arbitration in terms of Article 14.3.2 of the PPA between the parties in the subject matter. He emphasized that the applicability of Article 14.3.1 for adjudication or Article 14.3.2 for dispute resolution through arbitration in terms of Section 86(1)(f) of the Electricity Act'2003 be first decided by the Commission. In response to the aforesaid contention of the Respondent, Ld. Counsel for the petitioner while citing Judgment dated 04.09.2012 passed by Hon'ble Appellate Tribunal for Electricity in Appeal No. 94 of 2012 stated that this Commission has jurisdiction for adjudication of dispute in terms of Article 14 of the PPA executed between the parties in the subject matter.

6. In view of the above, vide Commission's order dated 13th October' 2020, the parties were directed to file their written submissions with regard to applicability of Article 14.3.1 or Article 14.3.2 of the PPA and whether they have obtained approval of the PPA in the subject matter. At the next hearing held on 09.11.2020, the petitioner and Respondent sought some more time to file aforesaid written submissions

7. Considering the request, the parties were allowed to file written submission within two days with regard to applicability of Article 14.3.1 or Article 14.3.2 of the PPA in the subject matter. They were also asked to inform whether the approval of the subject PPA has been obtained by them. It was mentioned in the aforesaid order that the Commission shall decide further course of action in this matter based on the written replies filed by the parties.

8. The petitioner and the Respondent have filed hard copies of their written submissions on 11.11.2020 and 10.12.2020 respectively. The petitioner broadly submitted the following in its written submission:

- "1. MPERC has exemplary powers to adjudicate on all disputes between the licensee and generating company*
- 1.1 The Respondent, a licensee is an entity regulated under the Electricity Act. This Hon'ble MPERC has complete jurisdiction over the Respondent. A combined reading of Section 86(1)(f) read with Section 86(1)(e) of the Electricity Act reveals that the state commission has the power to ' 'adjudicate upon the disputes between the licensees and generating companies". In case of any issue of non-performance of obligations, a generating company or a licensee has a statutory right to invoke the jurisdiction of the State Commission to resolve an issue of non-performance of the contract. Notably, Section 86(1)(f) of the Electricity Act is the only statutory provision to adjudicate a dispute between generating company and distribution licensee.*
- 1.2 Further, as per the Tariff Order dated 26.03.2013 (applicable under the Power Purchase Agreements) the bills favouring the Respondent shall be submitted to the concerned distribution licensee. Under Clause 12.15, the distribution licensee shall verify the bills and send the same within 7 days of receipt of bills to the Respondent for making payment to the developer. The Respondent in turn, would raise the bills on the distribution licensees on the basis of allocation. In case any dispute arises on the bills for payment then the M.P. Power Management Co. Ltd. is required to make the payment of such bill in full within the stipulated time and then refer the dispute to the Commission. Thus, any dispute in relation to the bills raised by the Petitioner ought to be adjudicated by this Hon'ble MPERC.*
- 1.3 The present dispute raised by the Petitioner also concerns delayed payment/non-payment of invoices by the Respondent. The power purchase agreement of the Petitioner has been adopted by the Hon'ble Commission under section 86.1.(b) of the Electricity Act, 2003 and the cost of electricity emanating therefrom has been allowed in as retail tariff of electricity to consumers of Madhya Pradesh in terms of Section 62 of Electricity Act. Despite the same, the Respondent has illegitimately withheld the undisputed dues payable to the Petitioner under the Power Purchase Agreements. Thus, the present issue falls exclusively within the jurisdiction of this Hon'ble MPERC for all necessary directions of release of payment against the Respondent.*
- 1.4 In the case of Gujarat Urja Vikas Nigam vs. Essar Power Limited (2008) 4 SCC 755 (Para 60), the Hon'ble Supreme Court while dealing with the wide scope of powers of state commission, held there was no restriction on the nature of the disputes under Section 86(1)(f). Therefore, all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies were within the jurisdiction of adjudication by the state commission. It is further pertinent here*

to mention that the Hon'ble Commission has wide regulatory power to enforce the contract approved by itself, more so when it has been allowed in the retail tariff of consumers by the commission itself.

2. *Respondent is unilaterally attempting to change the fixed applicable tariff under the PPAs*

Respondent's actions as raised under the Petition, are contrary to the terms of the PPAs and tantamount to "change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff" as stipulated under Article 14.3.1 of the PPA.

2.1 *The Petitioner has commissioned the Power Plants and is supplying energy to the Respondents in terms of the Power Purchase Agreements ("PPA"/s). The terms of the PPAs are in consonance with all regulations and orders of this Hon'ble MPERC and have been duly approved by it. The Petitioner has adhered to all its obligations under the PPA/s and/or otherwise.*

2.2 *Under Article 8.1.1 r/w 8.1.3 of the PPAs, the tariff price for energy is fixed at INR 5.92/kWh under the PPA. This tariff price shall be firm for the life of the project.*

2.3 *The Petitioner has been raising monthly invoices towards the energy supplied to the Respondent. However, Respondent has miserably failed to adhere to its payment obligations under Article 8.6.1 of the PPA and has defaulted in making timely payments towards energy charges without any reasonable cause.*

2.4 *The Petitioner wrote several letters dated 12.08.2017, 31.10.2017, 01.12.2017, 11.12.2017 and 15.01.2018 to the Respondent requesting for timely payments of energy charges and the dues towards the late payment surcharge as well but has been to no avail.*

2.5 *Instead, the Respondent is attempting to unilaterally change the applicable tariff under the PPA in the following manner:*

(a) ***Payment of Principal Amount:*** *Respondent vide its email dated January 05, 2018 has asked for rebate of 1% on principal amount as a precondition to release of pending dues. Respondent's conduct would result in change in the fixed applicable tariff under the PPAs.*

(b) ***Payment of arbitrary deductions made:*** *Respondent has made arbitrary deductions totalling to INR 2,40,40,504/- from the invoices of the Petitioner for the period of supply of energy from 31.03.15 to 01.10.2015. Respondent's conduct in making such arbitrary deductions essentially amounts to Respondent's unilateral action of change in applicable tariff for the period of supply of energy from the Commercial Operation Date of 31.03.15 to complete*

operationalizing of project on 02.10.2015. As per the Respondent, no payments are to be made by it for the energy supplied by the Petitioner from 31.03.15 to 02.10.2015 i.e. until complete operationalization of the Project. This would result in change in the fixed applicable tariff under the PPAs.

- (c) **Payment of LPS:** Under Article 8.6.3 LPS @ 2% p.a. (over and above the short term lending rate of the State Bank of India) is applicable in case of delay in payment of invoices by the Respondent. The Respondent vide email dated September 16, 2016 and September 21, 2017 as well as during the meeting between the parties, has asked for waiver of LPS as a pre-condition to release of pending dues. Because of late payment of principal amount on which LPS is charged, a waiver of LPS would mean that the net present value of payments received from the Respondent would be lower than the tariff and payments determined under the PPA.
3. The present Petition concerns the applicable tariff and/ or matter related to tariff and thus the same can only be adjudicated by this Hon'ble Commission
- 3.1 Article 14.3.1 of the PPA categorically provides that a dispute shall be referred for adjudication by the Hon'ble MPERC "Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or relates to any matter agreed to be referred to MPERC." As stated, aforesaid, the present dispute is in relation to non-payment of dues by the Respondent and its attempt to change the applicable tariff as agreed under the PPAs. Thus, the Petitioner has rightly approached the Hon'ble Commission for adjudication of dispute.
- 3.2 In the case of BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission (APTEL Appeal No. 94 of 2012) (Para 32, 33, 69) it was held that the terms and conditions of 'Tariff include all the aspects concerning with generation and sale of electricity including the billing, payment, rebate, delayed payment, late payment surcharge, regulation of power supply etc.. Thus, all these aspects would fall within the jurisdiction of the Central/ State Commission as the case may be.
- 3.3 Similarly, the present Petition also deals with determination and terms and conditions of tariff, inasmuch as issues of non-payment/delayed payment and demand for rebate and waiver of late payment surcharge have been raised against the Respondent. Thus, the present Petition concerning determination of tariff falls within the jurisdiction of the Hon'ble MPERC under Article 14.3.1 and has to be adjudicated by it.
4. Parties do not have the authority to submit the dispute for arbitration
- 4.1 Under Section 86 (f) read with Section 86 (e) and Section 158 of the Electricity Act, a special exclusion has been carved out for appointment of arbitrators in

electricity sector disputes wherein, a dispute can be referred for arbitration. However, such a dispute can be referred for arbitration only: (1) If the same is agreed to be referred to arbitration under the PPA (which is not the case in the present case); (2) Upon the direction of the State Commission as it deems fit and not unilaterally by the parties to the dispute.

- 4.2 *In the case of Gujarat Urja Vikas Nigam vs. Essar Power Limited (Supra) (Para 59-61), the Supreme Court has held that since the Electricity Act is a special enactment, it overrides certain provisions of the Arbitration and Conciliation Act, 1996. This view has also been adopted by the Hon'ble Appellate Tribunal for Electricity in the case of Global Energy Private Limited vs. Karnataka Electricity Regulatory Commission & Anr. 2014 ELR (APTEL) 539 wherein the Hon'ble Appellate Tribunal for Electricity held that the parties to a dispute cannot appoint, an arbitrator by mutual consent for disputes arising under the Electricity Act and that such disputes must be submitted before the concerned regulator for further directions and adjudication.*
- 4.3 *The present dispute cannot be referred for arbitration since as per Clause 14.3.2 of the PPA, a dispute can be referred to arbitration, only if the same is not covered within the ambit of resolution of dispute by the Hon'ble MPERC under Clause 14.3.1. Since the present dispute falls within the jurisdiction of Hon'ble MPERC, the same cannot be referred to arbitration.*
- 4.4 *In the case of T.N. Generation & Distribution Corporation vs. PPNPower Gen. Company Private Limited (Civil Appeal No. 4126 of 2013) (Para 54), the Hon'ble Supreme Court was seized of a matter concerning exercise of jurisdiction and grant of interest on late payments by the state commission (and subsequently confirmed by APTEL). The Hon'ble Supreme Court while dealing with the challenge, held that state commissions have wide powers to adjudicate upon disputes under Section 86(1)(f) of the Electricity Act. The Hon'ble Supreme Court observed that a state commission is required to exercise its discretion reasonably and not arbitrarily while exercising jurisdiction to adjudicate upon a dispute. Accordingly, while dismissing the Appeal, the Supreme Court upheld the commission's exercise of jurisdiction and refused to refer the matter for arbitration as sought by the Appellant.*
5. *Reference to arbitration would frustrate and delay resolution of dispute in the matter*
- 5.1 *The present matter has been pending before the Hon'ble MPERC for almost two years. Pleadings in the matter stand complete. Parties have made several attempts towards amicable resolution of dispute as per directions of this Hon'ble MPERC but has been of no avail. Final arguments on behalf of both parties have already commenced. Therefore, referring the matter to arbitration at this belated stage is only going to further frustrate and delay the legitimate claims raised by the Petitioner, which ought not be allowed by this Hon'ble*
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MPERC.

6. *In similar matters related to non-payment of invoices, the Commission in numerous cases has exercised jurisdiction and, passed orders in favor of the generating company*

It is clear from the above that this Hon'ble Commission has jurisdiction to adjudicate upon this matter and that it cannot be referred to arbitration. It is thus humbly prayed that this Hon'ble Commission passes appropriate directions accordingly."

9. The Respondent broadly submitted the following in its written submission:

- "1. *It is most respectfully submitted that the petitioner has filed the instant petition seeking the relief as prayed for in the writ petition wherein the petitioner is seeking certain directions from this Hon'ble Commission to the respondent with respect to the payment to be made under the contract (Power Purchase Agreement).*
2. *In this regard, it is most respectfully submitted that the answering respondents has filed its reply wherein it has taken preliminary objection that the instant petition can be adjudicated by reference to arbitration in accordance with the provisions of Section 86(1)(f) of the Electricity Act. In this regard, a perusal of **Article 14** of the Power Purchase Agreement is necessary as the same pertains to "Governing Law and Dispute Resolution". A perusal of Governing Law and Dispute Resolution (@ page 66 of the petition) highlights that where any dispute arises from a claim made by any party for any change in or determination of tariff or any matter related to tariff then such matter shall be submitted for adjudication to this Hon'ble Commission. In this regard, it is the submission of the answering respondents that under Section 86(1)(f) of the Electricity Act, it is clearly noted as under:-*

"adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration."

3. *A perusal of the same highlights that when a dispute between a generating company and a licensee is submitted to the Hon'ble Commission for its adjudication, the Commission under Section 86(1)(f) has the discretion to either adjudicate the same by itself or refer the same for arbitration.*
4. *In this regard, the perusal of Section 158 of the Act is also necessary which pertains to dispute resolution which is quoted as under: -*

"Arbitration- Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is

otherwise expressly provided in the license of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

5. *A perusal of the same highlights that once the Hon'ble Commission decides that the matter is to be adjudicated through arbitration then it is for the Hon'ble Commission to nominate the arbitrators on an application by either party.*
6. *It is most respectfully submitted that the instant dispute is primarily a contractual dispute and several provisions of the contract have to be examined in detail along with the detail facts of the case and as also the payments made over time by the respondent. Further, the averments and allegations of the petitioner and the reply of the respondents shall have to be looked in detail and thereafter adjudicated.*
7. *It is the respectful submission of the answering respondent that the instant dispute can be effectively adjudicated through the arbitration mechanism by a reference to the arbitrators U/s 86(1)(f), and this Hon'ble Commission is not required to go into in detail the various averments and allegations raised by the parties with respect to their various claims.*
8. *In this regard, the answering respondents seeks to refer and rely on the judgment of the Hon'ble Supreme Court reported in **2008 (4) SCC 755 namely Gujrat Urja Vikas Nigam Ltd. Vs. ESSAR Power Ltd. (Annexure-A/1)** in which the Hon'ble Supreme Court while analyzing and examining the provision of Section 86(1)(f) in para 26 to 35 onwards held as under.....
"26.*
9. *A perusal of the judgments of the Hon'ble Supreme Court highlights as under:-*
 - (i) *That the dispute between generating company and the licensee can only be adjudicated by the appropriate commission U/s 86(1)(f) of the Act.*
 - (ii) *The appropriate commission under Section 86(1)(f) of the Act has a discretion to either adjudicate the dispute by itself or refer the dispute for arbitration.*
 - (iii) *The decision to refer to arbitration is the sole discretion of the appropriate commission and is not based on the agreement between the parties.*
10. *It is therefore most respectfully submitted that in view of the submissions made hereinabove the instant dispute being a purely contractual dispute is suitable to be adjudicated through arbitration and may kindly be referred for the Arbitration*

Dispute Resolution Mechanism.

10. The Commission has observed the following in the subject matter:

(i) The subject petition has been filed under Section 86(1)(f) of the Electricity Act, 2003 which provides as under:

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

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(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

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(ii) Several payments have been made by the Respondent to the petitioner during proceedings in this matter and the late payment surcharge for the period of July’2018 to February’2019 has been settled under an agreement between both the parties. As stated by the petitioner, non-payment of late payment surcharge (LPS) by the petitioner is the larger issue in the subject petition.

(iii) Article 14.3.1 and Article 14.3.2 of the PPA provides as under:

“14.3.1 Dispute Resolution by MPERC

(a) Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or relates to any matter agreed to be referred to MPERC, such Dispute shall be submitted to adjudication by MPERC.

(b) The Procurer shall be entitled to co-opt the lenders (if any) as a supporting party in such proceedings before MPERC.

10.3.2 Dispute Resolution through Arbitration

If the Dispute arises out of or in connection with any claims not covered in Article 14.3.1(a), such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as under provided not settled amicably as per Article 14.2.1.”

- (iv) During the proceedings Commission had asked both the parties to inform whether the Commission's approval on the subject PPAs in terms of MPERC (Power Purchase and Procurement Process) Revision-1, 2006 (RG-19(I)) Regulations, has been obtained by them. However, nothing has been produced by them in this regard so far. In its written submission received on 11.11.2020, at para 1.3, the Petitioner has stated that the said Power Purchase Agreement has been adopted by the Commission under section 86(1)(b) of the Electricity Act 2003 and the cost of electricity emanating therefrom has been allowed in retail tariff of electricity to consumers of Madhya Pradesh in terms of section 62 of the Electricity Act 2003. This version of the Petitioner is not legally tenable as the Commission adopts tariff under section 63 of the Electricity Act, 2003 only if such tariff has been determined through transparent process of bidding in accordance with guidelines issued by the Central Government. This is not the position with regard to the subject matter PPAs. Under section 86(1)(b) also Commission does not adopt the tariff.
- (v) Both the parties have commonly referred the Judgment of Hon'ble Supreme Court 2008 (4) SCC 755 namely Gujrat Urja Vikas Nigam Ltd. Vs. ESSAR Power Ltd. Some paras in the aforesaid Judgment of Hon'ble Supreme Court, which are relevant to the issue to be decided by the Commission, are reproduced below:

- 26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word 'and' in Section 86(1)(f) between the words 'generating companies' and 'to refer any dispute for arbitration' means 'or'. It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and' (vide G.P. Singh's 'Principle of Statutory Interpretation' 9th Edition, 2004 page 404.)**
- 27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word 'and' between the words 'generating companies' and the words 'refer any dispute' means 'or', otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence the word 'and' in Section 86(1)(f) means 'or'.**
- 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.

29. *This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted above. We may clarify that the agreement dated 30.5.1996 is not a part of the licence of the licensee. An agreement is something prior to the issuance of a licence. Hence any provision for arbitration in the agreement cannot be deemed to be a provision for arbitration in the licence. Hence also it is the State Commission which alone has power to arbitrate/adjudicate the dispute either itself or by appointing an arbitrator.*
30. *Shri Jayant Bhushan, learned counsel for one of the parties in the connected case submitted that Section 86(1)(f) is violative of Article 14 of the Constitution of India because it does not specify when the State Commission shall itself decide a dispute and when it will refer the matter to arbitration by some arbitrator. In our opinion there is no violation of Article 14 at all. It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator. Some leeway has to be given to the legislature in such matters and there has to be judicial restraint in the matter of judicial review of constitutionality of a statute vide Government of Andhra Pradesh & Ors. vs. Smt. P. Laxmi Devi JT 2008(2) 8 SC 639.*
31. *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. Alternatively, 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. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India.*
32. *We may now deal with the submission of Mr. Fali S. Nariman that in view of Section 175 of the Electricity Act, 2003, Section*

11 of the Arbitration and Conciliation Act, 1996 is also available for arbitrating disputes between licensees and generating companies.

- 33.** *Section 175 of the Electricity Act, 2003 states that the provisions of the Act are in addition to and not in derogation of any other law. This would apparently imply that the Arbitration and Conciliation Act, 1996 will also apply to disputes such as the one with which we are concerned. However, in our opinion Section 175 has to be read along with Section 174 and not in isolation.*
- 34.** *Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes.*
- 35.** *It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha vs. Mahavir Prasad, AIR 1999 SC 3558 (para 12), Dhananjaya Reddy vs. State of Karnataka, AIR 2001 SC 1512 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.”.....*
- “59.** *In the present case we have already noted that there 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.)

60. *In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.*

61. *We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section*

86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.

- (vi) The following has been held in the above Judgment:
- (a) The word “and” in Section 86(1)(f) of the Electricity Act’ 2003 means “or”. Section 86(1)(f) of the Electricity Act, 2003 is a special provision for adjudication of disputes between the licensee and generating companies and such disputes can be adjudicated up on either by the State Commission or person/ persons to whom it is referred for arbitration.
- (b) It is the State Commission which alone has the power to arbitrate/ adjudicate the disputes either itself or by appointing arbitrator. The appropriate commission under Section 86(1)(f) of the Act has a discretion to either adjudicate the dispute by itself or refer the dispute for arbitration.
- (c) In Para 31 of the aforesaid Judgment, applicability of provisions under Section 86(1)(f) has been elaborated. The same is reproduced below:

31. “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. Alternatively, 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. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India.”

11. The matter is therefore to be examined in the light of facts of the case and the order of Hon’ble Supreme Court in the matter of Gujarat Urja Vikas Nigam Ltd. Vs. ESSAR Power Ltd. referred above.
12. A perusal of record available with the Commission indicates that ample opportunities were provided to both the parties by the Commission to amicably settle the dispute

regarding payment in terms of the provisions of the PPA. It has also come to notice that during pendency of the subject petition, Respondent has made payment of principal amount for certain period. Late payment surcharge for the period from July 2018 to February 2019 has also been settled between them. For the remaining period, request is now being made for adjudication by the Commission.

13. A perusal of the order of the Hon'ble Supreme Court in the matter referred above conveys that decision under Section 86(1)(f) of the Electricity Act'2003 to either adjudicate or to refer the matter for arbitration has to be taken by the Commission and such a decision will depend on the circumstances of a case. Here is a matter where contractual obligations involving financial/contractual/commercial issues shall require detailed examination which will involve substantial amount of time and due diligence. Moreover, requisite expertise will have to be brought in to deliberate and appreciate the issues involved before taking an informed decision. Needless to say that an expert with requisite knowledge and sufficient time at his disposal will have to be involved.
14. Therefore, given the history of this case where both the parties have been involved in negotiation in past and nature of issues being such as would require expert advise and guidance over substantial amount of time, the Commission is of the view that this is a fit case for referring it for arbitration under Section 86(1)(f) of the Electricity Act'2003. Accordingly, in terms of the provisions under MPERC (Conduct of Business) (Revision-I) Regulations, 2016, both the parties are directed to proceed with the arbitration process in this matter as per law. The parties shall intimate the name(s) of the Arbitrator(s) within 30 days from the date of issue of this order for consideration and nomination by the Commission.

With the aforesaid observation and direction, the subject petition is disposed of.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman