

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 68 of 2010**

**Dated: 19<sup>th</sup> April 2010**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. H.L. Bajaj, Technical Member**

**In the matter of:**

**Balkrishna Industries Ltd.  
S.P.-923, RICCO Industrial Area (Phase-II)  
Bhiwadi-301 019  
District Alwar (Rajasthan)**

**... Appellant(s)**

**Versus**

- 1. Rajasthan Electricity Regulatory Commission  
Shed No. 5, Vidyut Bhawan, Jyoti Nagar  
Near Vidhan Sabha,  
Jaipur-302 005** **... Respondent-1**
- 2. Haryana Vidyut Prasaran Nigam Ltd.  
Shakti Bhawan, Sector-6  
Panchkula-134 109 (Haryana)** **... Respondent-2**
- 3. Jaipur Vidyut Vigtran Nigam Ltd.  
Near Vidhan Sabha  
Jaipur-302 005** **... Respondent-3**

**Counsel for the Appellant(s) Mr. P.N. Bhandari**

**Counsel for the Respondent(s)**

**JUDGMENT**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON**

1. Balkrishna Industries Limited is the Appellant herein.
  
2. The Appellant filed a petition before the Rajasthan Electricity Regulatory Commission (State Commission) seeking for a direction for appointment of an Arbitrator under clause 11(1) of the Wheeling and Banking Agreement for deciding the pending disputes. This petition was dismissed by the State Commission by the order dated 23.12.2009. Challenging the same this Appeal has been filed.
  
3. The facts of the case are simple.
  
4. The Appellant is a HT consumer of the respondent distribution company. The Wheeling & Banking Agreement between the Appellant and the Respondent was signed on 21.09.2004. The Respondent was wrongly adjusting the wind energy power generated by the Appellant. From time to time,

the Appellant requested the Respondent to rectify the mistake but all in vain. Seeking relief for the rectification of the mistake, the Appellant filed a petition on 13.4.2006 before the State Commission about wrong adjustment methodology. The State Commission ultimately passed the order in favour of the Appellant and declared that the methodology adopted by the Respondent was faulty leading to free flow of energy to the distribution company.

5. Aggrieved by this order, the Respondent distribution company filed an Appeal before the Appellate Tribunal and the same was dismissed on 13.11.2007. Thereupon the Appellant sent a reminder to the distribution company for rectifying the wrong methodology as held by the State Commission. There was no response. Therefore on 03.11.2009 the Appellant filed a petition before the State Commission for appointment of an arbitrator under clause 11(1) of the Wheeling and Banking Agreement for deciding the said dispute.

6. The Learned Counsel for the Petitioner was permitted to argue at length before the State Commission. Written Submissions were also filed after arguments were over. Ultimately by the order dated 23.12.2009 the State Commission dismissed the petition filed by the Appellant on the ground that the dispute in question was adjudicated and decided by the State Commission in favour of the Appellant and therefore, there was no necessity for referring the same to the Arbitrator as per clause 11(1) of the Wheeling and Banking Agreement.

7. Challenging this order, the Learned Counsel for the Appellant submitted that the dispute which has arisen now was not adjudicated earlier. Even assuming that the said dispute had been adjudicated, the State Commission was bound to obey the mandate given in the Wheeling & Banking Agreement as a routine by referring the matter to the Arbitrator as per clause 11(1) of the Wheeling & Banking Agreement and it has no discretion to reject the same. It is also argued by the Learned Counsel for the Appellant, that when the order regarding the

appointment of arbitrator is passed by the High Court under the Arbitration & Conciliation Act, 1996 as a routine, the State Commission has simply rejected the petition for appointment of arbitrator merely because the dispute has already been adjudicated and decided by the State Commission. The above argument of the Learned Counsel for the Appellant has to be rejected on the following two grounds:

- (i) On perusal of the petition filed by the petitioner Appellant before the State Commission it is clear that it was filed under section 86(1)(f) of the Electricity Act, 2003 praying for appointment of an arbitrator under clause 11(1) of the Wheeling and Banking Agreement. Section 86(1)(f) empowers the State Commission to adjudicate upon the disputes between the licensee and the generating company and if it is not resolved, it may be referred for arbitration. It is preposterous on the part of the Counsel for the Appellant to contend that the dispute was not earlier adjudicated and even assuming that

dispute has already been adjudicated upon, under section 86(1)(f) the State Commission is bound to appoint an arbitrator as per clause 11(1) of the Wheeling and Banking Agreement, as a routine as the State Commission has no jurisdiction to reject the said prayer. It is to be pointed out that the State Commission has got power for the appointment of arbitrator only under Section 86(1)(f) of the Act and not under any other sections. Merely because there is a clause referred in the agreement that the dispute may be resolved by such person as may be nominated by the State Commission, it would not confer the powers to the State Commission to appoint an arbitrator as a routine on the application filed by one of the parties. Therefore, the conclusions arrived at by the State Commission to the effect that the dispute which has been already decided by the State Commission and confirmed by this Tribunal in favour of the Appellant, cannot be referred to

arbitrator, that too under clause 11(1) of the Wheeling and Banking Agreement, is correct.

- (ii) Yet another strange submission was made by the Learned Counsel for the Appellant that the State Commission has to appoint an arbitrator without going into the necessity for such an appointment like the High Court which appoints the Arbitrator under the Arbitration & Conciliation Act, 1996. In this case, it would be better to refer to the relevant clause in the Wheeling and Banking Agreement, which is as follows:

**“Settlement of Dispute** –Except where expressly stated to the contrary in the Agreement, any matter of dispute or difference of whatever nature howsoever arising under, out of or in connection with the Agreement (collectively called “Disputes”) between the Parties shall be resolved by mutual agreement. If the matter is not resolved within 30 days or such extended period mutually

agreed, it will be resolved by such person or persons as the RERC 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.”

8. The reading of the above clause would make it clear that the party may approach the State Commission under this clause or the High Court under the provisions of the Arbitration and Conciliation Act, 1996. In this case the subject which is in dispute, as held by the State Commission, has already been dealt with and decision had been arrived in favour of the Appellant. This decision was confirmed by this Tribunal. If that decision or direction given in favour of the Appellant has not been followed by the Respondent, the other remedy is available to him, as against the Respondent who was said to have disobeyed the direction. Further, this clause also provides a remedy for him to approach the High Court to file a petition before the Chief Justice of the High Court under the Arbitration and Conciliation



Act, 1996. Without availing this remedy, the petitioner has again approached the State Commission seeking for referring to arbitration the very same dispute, without any valid reasons. The State Commission can not be compelled to refer to Arbitrator by mere agreement between the parties, as the clauses of agreement can not confer powers to State Commission that too without any scrutiny. Therefore, we do not find any merit in the Appeal. As such the Appeal is dismissed at the admission stage itself.

**(H.L. Bajaj)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**